

Grand Food Serv. LLC v Grand Gifts & Cafe Inc.

2013 NY Slip Op 31500(U)

July 3, 2013

Sup Ct, New York County

Docket Number: 654139/2012

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

GRAND FOOD SERVICE LLC, et al

INDEX NO. 654139/2012

-v-

GRAND GIFTS + CAFÉ INC., et al

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~to~~ *to dismiss the complaint*
is DENIED per the attached
Decision and Order.

A Preliminary Conference is scheduled for
8-23-13 at 11AM at 26 Broadway-
10th Floor

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: July 3, 2013

Melvin L. Schweitzer

MELVIN L. SCHWEITZER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

During the term of the license, Prepis and Tsiattalos entered into a management agreement, dated January 1, 2004 (the Agreement). According to the Agreement, Tsiattalos was appointed manager of the company's business affairs (Manager), Prepis was entitled to \$7,000 per month, and Tsiattalos was to receive the remaining profits. By its terms, the parties agreed that the Agreement was automatically renewable and would terminate upon: (1) Tsiattalos providing Prepis with a 45-day written notice, before the end of the then-current term, that Tsiattalos does not want to renew it; or (2) upon termination or expiration of the concession.

Furthermore, the Agreement set forth the Manager's responsibilities as: "Tsiattalos is hereby appointed Manager of the Company's business affairs with full power and authority. Manager shall make any necessary decisions and take any actions on behalf of the company to carry out its operations" (Aff of Capetanakis, Exhibit A, ¶ 1).

From 2004 to 2012, Tsiattalos was the Manager of Grand Food. By letter dated July 16, 2012, Tsiattalos notified Prepis that he wanted to terminate the management agreement.

In 2000, Tsiattalos formed Grand Gifts, Inc. Further, according to the complaint, Tsiattalos formed a new company in 2012, defendant Grand Gifts and Café, while he was still the Manager of Grand Food.¹

As alleged in the complaint, Tsiattalos never told Prepis about this new company. Both Tsiattalos and Prepis knew that Grand Food's license would expire August 31, 2012 and, the complaint alleges that, as Manager, Tsiattalos was supposed to renegotiate that license on behalf of Grand Food in good faith, but instead he negotiated a license between his new company and

¹In their memorandum of law, defendants state that they formed Grand Gifts & Café on or about June 27, 2012.

the Hospital, and, as a result, the new company, Grand Gifts and Café, got the license to operate a concession in the location where Grand Food had been operating.

In the complaint, plaintiffs allege that Tsiattalos deliberately chose a company name that was similar to "Grand Food" in order to confuse the Hospital. Plaintiffs allege that the Hospital believed that Tsiattalos was negotiating on behalf of Grand Food, and not on behalf of the new company, when it entered into discussions for the license agreement.

According to the complaint, when the Hospital seeks services in excess of \$25,000, it has to administer a competitive bidding process, which it does not engage in when it is simply renewing a contract with an existing vendor. Plaintiffs observe that the Hospital did not engage in a bidding process in this instance, and speculate that the Hospital believed it was renewing its license agreement with Grand Food.

Tsiattalos is 100% owner of the new company, which, as of September 1, 2012, is operating in the space where Grand Food was operating, and it is using the same employees who worked for Grand Food, as well as using Grand Food's equipment, inventory, and Grand Food's good will. According to a letter sent by counsel for Prepis to counsel for Tsiattalos, Grand Food dissolved on August 31, 2012.

Plaintiffs filed the complaint on November 27, 2012, alleging that Tsiattalos acted in violation of his fiduciary duty as Manager of Grand Food and its majority owner, and that he and Grand Gifts & Café took the business opportunity and property which belonged to Grand Food. In the complaint, plaintiffs allege three causes of action: (1) Tsiattalos breached his fiduciary duty to the plaintiffs, as plaintiffs trusted Tsiattalos to perform his obligations as Manager pursuant to the Agreement; (2) by applying for and entering into the license agreement with the

Hospital for the subject location, defendants usurped a business opportunity; and (3) defendants are liable for conversion in that they are using Grand Food's inventory and equipment to operate the new concession.

Defendants now move to dismiss the complaint, pursuant to CPLR 3211 (a) (7).

Defendants assert that the complaint must be dismissed, because: (1) the allegations in the complaint intermingle individual and derivative causes of action, which must be pled separately, so that it is impossible to discern which claims are pled for Prepis and which for Grand Foods; (2) it fails to allege breach of fiduciary duty with the requisite particularity mandated by CPLR 3016 (b); (3) in the second cause of action, plaintiffs fail to demonstrate that they had a tangible expectation of renewal of the license agreement with the Hospital; and (4) the second cause of action is derivative and therefore cannot be brought by Prepis.

Discussion

Standard for Motion to Dismiss

On a motion to dismiss, the "court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]; *see also Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Thus, the court must determine whether a cognizable cause of action can be discerned from the complaint, and not whether it has been properly stated (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but [may] only . . . determine if, assuming the truth of the facts alleged, the complaint states the elements of

a legally cognizable cause of action” (*Skillgames, LLC*, 1 AD3d at 250, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

“However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames, LLC*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]). Under CPLR 3211 (a) (1), where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Intermingling Derivative and Individual Claims

Defendants argue in a very general way that the complaint should be dismissed, because all of the causes of action intermingle derivative claims on behalf of Grand Food and individual claims on behalf of Prepis. It is, therefore, according to the motion, impossible to tell which are pled for Grand Food and which for Prepis. Defendants contend that confusing these distinct causes of action mandates dismissal.

“[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually” (*Abrams v Donati*, 66 NY2d 951, 953 [1985]). When a plaintiff seeks to recover for injury to the company, the plaintiff is asserting a derivative claim; if the plaintiff seeks damages for him or herself individually, this is a direct claim (*Yudell v Gilbert*, 99 AD3d 108, 113 [1st Dept 2012]). A claim that alleges breach of a fiduciary duty is

derivative where the resulting pecuniary loss is harm to the company (*id.* at 114). Complaints which contain allegations that confuse the shareholders' derivative rights with individual rights are dismissable (*Jobson v Progno*, 100 AD3d 1407, 1408 [4th Dept 2012]).

Here, the allegations in the complaint seek compensation for wrongs committed against Grand Food. There are no allegations in the complaint that seek redress for injury to Prepis individually. In the complaint, plaintiffs state that Tsiattalos, the Manager of Grand Food, misused his authority as Manager when he negotiated the licensing agreement with the Hospital for the benefit of Grand Gifts and Café, rather than on behalf of Grand Food. It is this act, according to the complaint, that injured Grand Food, as it undermined its existence at the subject location.

Specifically, in the complaint, plaintiffs allege that Tsiattalos breached his fiduciary obligations to the corporation, undermined a corporate opportunity due the corporation, and converted tangible property that belonged to the corporation. These allegations, addressing mismanagement of the corporation, and seeking damages on behalf of the corporation, are appropriately derivative claims. There are no additional claims set forth on behalf of Prepis individually. He articulates no injuries to himself and seeks no damages for himself. In their motion, defendants do not identify any claims that belong to Prepis individually. The complaint therefore does not convey any confusion on this ground.

Breach of Fiduciary Duty and CPLR 3016 (b)

Defendants argue that plaintiffs have not pled Tsiattalos's breach of fiduciary duty with the requisite particularity. Defendants note that the complaint alleges that "Tsiattalos used the information and knowledge he had gained as Grand Food's Manager and minority owner to

negotiate a new license agreement between [Grand Gifts & Café] and the Hospital, all to the detriment of Plaintiffs” (defendants’ Memorandum of Law, at 7 quoting Aff of Capetanakis, Exhibit A, ¶ 35). Defendants then argue that this allegation fails to identify what information or knowledge Tsiattalos gained as Grand Food’s Manager and how Tsiattalos used that information to negotiate the agreement between Grand Gifts & Café and the Hospital.

“To state a claim for breach of fiduciary duty, the plaintiffs must allege that (1) the defendant owed them a fiduciary duty; (2) the defendant committed misconduct; and (3) they suffered damages as a result of the misconduct” (*Bitter v Renzo*, 39 Misc 3d 1208 [A] *10, 2012 NY Slip Op 52455[U] [Sup Court, NY County], *affd* 101 AD3d 465 [1st Dept 2012]). Pursuant to 3016 (b), a cause of action for breach of fiduciary duty must be pled with particularity.

Where claims are based on “misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail” CPLR 3016 (b). The Court of Appeals has amplified what is required of a plaintiff with regard to such detail:

“[t]he purpose of section 3016 (b)’s pleading requirement is to inform a defendant with respect to the incidents complained of,” thus, “[w]e have cautioned that section 3016 (b) should not be so strictly interpreted ‘as to prevent an otherwise valid cause of action in situations where it may be “impossible to state in detail the circumstances constituting a fraud””

(*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 [2008], quoting *Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). According to the Court of Appeals, it is critical to this pleading requirement, that the complaint allege the basic facts consistent with the cause of action to permit a reasonable inference of the alleged conduct (*Pludeman*, 10 NY3d at 492).

Here, the complaint alleges that Tsiattalos managed the affairs of Grand Food according to the Agreement and that, in accordance with the Agreement, for eight years, Tsiattalos made the decisions for Grand Food, and Prepis relied upon those decisions. The complaint further alleges that Grand Food held a license from the Hospital to operate its business at the Hospital and without that license, Grand Food could not operate at that location. Moreover, according to the complaint, Tsiattalos negotiated with the Hospital, unbeknownst to Prepis and to the detriment of Grand Food, on behalf of Grand Gifts & Café for the license to the subject location. Grand Food subsequently dissolved. The lack of detail that might ultimately support this claim, including precisely how those negotiations took place and what Tsiattalos told the Hospital, does not undermine the validity of this cause of action. Plaintiffs have not stated this claim in a conclusory fashion. The facts set forth in the complaint to support this claim are ample to provide notice to the defendants of the contours of plaintiffs' claim for breach of fiduciary duty.

Misappropriation of Corporate Opportunity

In their motion, defendants argue that, because the plaintiffs are unable to allege that the defendants pursued any tangible "business opportunity" that belonged to Grand Food, plaintiffs' cause of action for usurpation of corporate opportunity must be dismissed.

"Various tests have been utilized to determine whether a venture should be considered a 'corporate opportunity.' One such method, and the one frequently employed in this jurisdiction, is whether the corporation has an 'interest' or 'tangible expectancy' in the opportunity. An 'interest' or 'tangible expectancy' has been explained as something 'much less tenable than ownership', but, on the other hand, more certain than a 'desire' or 'hope'"

(Alexander & Alexander of NY v Fritzen, 147 AD2d 241, 247-248

[1st Dept 1989][internal citation omitted]).

Under this test, the doctrine “should not be used to bar corporate directors from purchasing any property which might be useful to the corporation, but only to prevent their acquisition of property which the corporation needs or is seeking, or which they are otherwise under a duty to the corporation to acquire for it” (*id.* at 248[citation omitted]); *see Adirondack Capital Mgt., Inc. v Ruberti, Girvin & Ferlazzo, P.C.*, 43 AD3d 1211, 1215-1216 [2007]; *Coastal Sheet Metal Corp. v Vassallo*, 75 AD3d 422, 423 [1st Dept 2010].

The second test contemplates whether the opportunity is “necessary” for or “essential” to “the line of business of the corporation” (*Alexander & Alexander of N.Y.*, 147 AD2d at 248). In the application of this test, the court considers whether the loss of the opportunity would be “so severe as to threaten the viability of the enterprise...” (*id.* at 248). A third assessment examines whether, at the start of the employment or fiduciary relationship, the parties understood that the employee, officer or director “would simultaneously pursue other interests, even one related to or in direct competition with the business of the corporation” (*id.* at 248). Furthermore, even if the corporation is unable, for financial or other reasons, to take advantage of the subject opportunity, this is not an excuse for the officer to undertake it individually (*Owen v Hamilton*, 44 AD3d 452, 454 [1st Dept 2007]). “Despite the corporation’s inability or refusal to act it is entitled to the officer’s undivided loyalty” (*id.* at 454).

Here, plaintiffs allege that Tsiattalos, as the sole Manager of Grand Food, negotiated an agreement with the Hospital to provide the license, which Grand Food had been relying on to operate its business in the Hospital, to his company, Grand Gifts and Café. According to this allegation, Grand Food was then unable to operate in that location. At this stage in the litigation, it is certainly reasonable for the court to find that the license in question was necessary and

essential to Grand Food's operation of business at the Hospital. Furthermore, it is reasonable at this point to find that it was Tsiattalos who was in the position to seek this opportunity, the license, for Grand Food and there is no indication whether he had done so. Moreover, there is no indication in the parties' submissions that there was any agreement permitting Tsiattalos to pursue interests in competition with Grand Food.

Defendants' motion does not argue for dismissal of the third cause of action for conversion of Grand Food's equipment and inventory, and, therefore, the court will not address the viability of this claim.

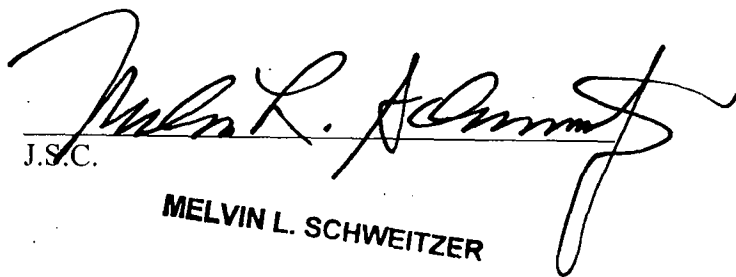
Accordingly, it is

ORDERED that the motion of defendants Grand Gifts & Café Inc. and Savas Tsiattalos to dismiss the complaint pursuant to CPLR 3211 (a) (7), is denied in its entirety; and it is further

ORDERED that defendants are directed to file an answer within 20 days of service of this order with notice of entry.

Dated: July **3**, 2013

ENTER:


J.S.C.
MELVIN L. SCHWEITZER