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SHORT FORM ORDER

INDEX No. 3576/13

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/6/13
ADJ. DATES 7/26/13
Mot. Seq. # 001 - MG
Mot. Seq. #002 - XMOTD
CDISP Y___ N x
Preliminary Conf. 10/4/13

EDWARD SEJUT, as Shareholder of CANYON OF HEROES SPORTS BAR & GRILL, and in the right of "Canyon of heroes Sports Bar & Grill, Inc."

Plaintiff,

-against-

STEPHANIE S. MARINO, THOMAS A. MARINO: CANYON OF HEROES SPORTS BAR & GRILL, INC.,

Defendants.

KERT & KERT, PLLC
Attys. For Plaintiff
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Garden City, NY 11530

PAUL R. ADES, PLLC
Atty. for Defendants
181 W. Main St.
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Upon the following papers numbered 1 to 10 read on this motion and cross motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-6; Answering Affidavits and supporting papers 7-8; Replying Affidavits and supporting papers 9-10; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff to dismiss the defendants' counterclaims on the ground of legal insufficiency is considered under CPLR 3211(a)(7) and is granted; and it is further

ORDERED that the cross motion (#002) by the defendants to dismiss the complaint pursuant to CPLR 3211(a)(5) and 3211(a)(7) is considered thereunder and is granted only to the extent set forth below; and it is further

ORDERED that a preliminary conference shall be held on **October 4, 2013**, at 9:30 a.m. in Part 45, at the courthouse located at 1 Court Street - Annex, Riverhead, New York, 11901.

The plaintiff commenced this action to recover damages from the defendants by reason of their purported tortious and other actionable conduct. According to the plaintiff, the individual parties were social acquaintances who lived nearby to one another. In 2012, the plaintiff allegedly advanced monies and/or provided services by arranging work from third parties to the defendants who were engaged in the renovation and/or start-up of a restaurant/bar in Lindenhurst, New York. Plaintiff alleges that it was "understood and agreed" by him and the individual defendants "that a one-half interest in the defendant corporation would be established for the benefit of the plaintiff"(*see* ¶11 of the complaint).

In May of 2012, the individual defendants formed the defendant corporation and issued stock only to themselves in purported violation of the understanding of the parties. The plaintiff nevertheless claims to have been employed as a chef by the corporate defendant following its incorporation. In October of 2012, the plaintiff allegedly discovered that only the individual defendants were stockholders, whereupon, the plaintiff demanded the return of his capital, or in the alternative, that the defendants "convey" to him his one-half interest in the defendant corporation (*see* ¶ 17 of the complaint).

The defendants' conduct is alleged to be actionable in tort under several theories including breaches of fiduciary duties owing to the plaintiff from the defendants which warrant the imposition of various remedies including a constructive trust upon a one-half interest in the defendant corporation, money damages, an accounting. The plaintiff also sues for recovery of wages due him by reason of his employment with the defendant corporation which it allegedly failed to pay or paid to the individual defendants, who failed to pay such wages over to the plaintiff. The plaintiff also seeks the recovery of monies payable by the corporate defendant due to its purported violations Article 6 of the Labor Law which governs the payment of certain wages to employees. Also advanced in the complaint is an equitable claim for unjust enrichment and one for declaratory relief in which the plaintiff seeks a determination that he is entitled to a "one-half" interest in the corporate defendant. Finally, the plaintiff, as a purported shareholder of the corporate defendant, advances four derivative causes of action for the recovery of money damages on behalf of the corporate defendant from individual defendants and a final claim for dissolution of the corporate defendant together with ancillary relief such as an accounting and distribution of its assets.

Issue was joined by service of the defendants' answer in March of 2013. It contains eleven affirmative defenses, including the statute of frauds (CPLR 3211[a][5]) and failure to state a claim due to legal insufficiency (CPLR 3211[a][7]). In addition, the following four counterclaims were advanced in the defendants' answer: (1) damages due to the plaintiff's interruption of the corporate defendant's business; (2) damages incurred by reason the plaintiff's breach of his agreement to provide cooking services; 3) damages due to plaintiff's conversion of goods belonging to third-party vendors in breach of the plaintiff's express or implied agreement to return such goods to said vendors and/or conversion of monies derived therefrom; and 4) damages due to the plaintiff's abandonment of the business of the defendant corporation.

The plaintiff now moves (#001) for an order dismissing the defendants' counterclaims pursuant to CPLR 3211(a)(7), while the defendants cross move (#002) to dismiss the complaint pursuant to

CPLR 3211(a)(5) and (a)(7). For the reasons stated, the plaintiff's motion is granted and the defendants' cross motion is granted to the extent set forth below.

The legal standard to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) is whether "the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist College v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], *quoting* ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). On such a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.,*** 98 NY2d at 314, 326, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). However, bare legal conclusions and factual averments flatly contradicted by the record are not presumed to be true (*see* ***Simkin v Blank***, 19 NY3d 46, 945 NYS2d 222 [2012]); ***Minovici v Belkin BV***, ___ AD3d___, 2013 WL 4082700 [2d Dept 2013]; ***Khan v MMCA Lease, Ltd.***, 100 AD3d 833, 954 NYS2d 595 [2d Dept 2012]; ***U.S. Fire Ins. Co. v Raia***, 94 AD3d 749, 942 NYS2d 543 [2d Dept 2012]; ***Parola, Gross & Marino, P.C. v Susskind***, 43 AD3d 1020, 843 NYS2d 104 [2d Dept 2007]).

The test to be applied is thus "whether the complaint gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (***Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC***, 107 AD3d 788, 967 NYS2d 119 [2d Dept 2013]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of a that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009], *aff'd* 16 NY3d 775, 919 NYS2d 496 [2011]). Allegations that are vague and conclusory are insufficient (*see* ***V. Groppa Pools, Inc. v Massello***, 106 AD3d 722, 964 NYS2d 563 [2D Dept 2013]; ***Phillips v Trommel Constr.***, 101 A.D.3d 1097, 957 NYS2d 359 [2d Dept 2012]). Like a claim for fraud, a "cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b)" (***Palmetto Partners, L.P. v AJW Qualified Partners, LLC***, 83 AD3d 804, 808, 921 NYS2d 260 [2d Dept 2011]).

Here, the moving papers of the plaintiff demonstrated that none of the counterclaims advanced in the answer of the defendants state legally sufficient claims upon which relief may be granted. The factual allegations are both vague and conclusory and do not contain sufficient allegations as to each of elements of claims sounding in the recovery of damages from the plaintiff under theories of contract law (*see* ***Cobble Hill Nursing Home v Henry & Warren Corp.***, 74 NY2d 475, 482, 548 NYS2d 920 [1989]; ***Kausal v Educational Prods. Info. Exch.***, 105 AD3d 909, 964 NYS2d 550 [2d Dept2013]; ***Cerciello v Admiral Ins. Brokerage Corp.***, 90 AD3d 967, 936 NYS2d 224 [2d Dept 2011]). Nor do the allegations advanced by the defendants include factual allegations from which the court may discern cognizable claims for the defendants' recovery of damages under tort law theories such as conversion, negligence, private nuisance or prima facie tort (*see* ***Nissan Motor Acceptance Corp. v Scialpi***, 94

AD3d 1067, 944 NYS2d 160 [2d Dept 2012]); ***532 Madison Ave. Gourmet Foods, Inc. v Finlandia***, 96 NY2d 280, 727 NYS2d 49 [2001]; ***Berenger v 261 West LLC***, 93 AD3d 175, 940 NYS2d 4 [1st Dept 2012]; ***Smallwood v Lupoli***, 107 AD3d 782, 968 NYS2d 515 [2d Dept 2013]). The plaintiff's motion to dismiss the counterclaims asserted in the defendants' answer are thus dismissed. The defendants' demand for leave to replead is denied since no noticed motion was made therefor and no proposed pleading was attached to their requests for such relief that are advanced in their reply papers (*see* ***Abakporo v Daily News***, 102 AD3d 815, 958 NYS2d 445 [2d Dept 2013]; ***Janssen v Incorporated Vil. of Rockville Ctr.***, 59 AD3d 15, 27, 869 NYS2d 572 [2d Dept 2008]). Such denial is without prejudice to the defendants' interposition of a motion pursuant to CPLR 3025(b) to amend their answer (*see* ***Hendrickson v Philbor Motors, Inc.***, 102 AD3d 251, 955 NYS2d 384 [2d Dept 2012]).

Left for consideration is the defendants' cross motion (#002) for dismissal of the plaintiff's complaint. Therein, the defendants seek such dismissal under CPLR 3211(a)(5) and/or 3211(a)(7). The plaintiff opposes on both procedural and substantive grounds.

The plaintiff's procedural challenges to the defendants' demands for relief pursuant to CPLR 3211(a)(5) are sustained due to the defendants' interposition of this motion after the service of its answer. It is now well settled that "[A]ll motions under CPLR 3211 are to be made [a]t any time before service of the responsive pleading" (CPLR 3211[e]), except that CPLR 3211 motions may be made after service of the party's answer in three circumstances: when the motion is based upon subdivision (a)(2) subject matter jurisdiction; (a)(7) failure to state a cause of action; or (a)(10) nonjoinder of a necessary party (*see* CPLR 3211[e]" (***Hendrickson v Philbor Motors, Inc.***, 102 AD3d 251, *supra*). The plaintiff's challenges are, however, rejected with respect to the remaining portions of the defendants' motion wherein they seek dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(7), as this ground for relief may be raised "at any time" irrespective of whether an answer has first been filed or not (*see* CPLR 3211[e] (*id.*).

A review of the complaint, liberally construed, reveals that no legally sufficient claims for a constructive trust, breach of fiduciary duties or an accounting against any of the defendants are advanced by the plaintiff. It is well established that a necessary element of each of these claims is the existence of a confidential or fiduciary relationship between the plaintiff and one or more of the defendants (*see* ***Poupis v Brown***, 90 AD3d 881, 882, 935 NYS2d 127 [2d Dept 2011]; ***Guarino v North Country Mtge. Banking Corp.***, 79 AD3d 805, 915 NYS2d 84 [2d Dept 2010]; ***Center for Rehabilitation and Nursing at Birchwood, LLC v S&L Birchwood, LLC***, 92 AD3d 711, 939 NYS2d 78 [2d Dept 2012]). No such relationship is decipherable from the allegations of fact advanced in the complaint served in this action. All that is alleged is that the plaintiff and defendants were near by social acquaintances who exchanged information about their finances and business prospects. The vague and conclusory allegations of the existence of a confidential, fiduciary or other like relationship are flatly contradicted by the record and thus are not presumed to be true. The First, Second and Third causes or action are thus dismissed.

Also dismissed is the Fifth cause of action for declaratory relief conferring upon the plaintiff a one-half ownership interest in the defendant corporation. A motion to dismiss a declaratory judgment

action presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration (see ***North Shore Towers Apts., Inc. v Three Towers***, 104 AD3d 825, 961 NYS2d 504 [2d Dept 2013]). However, to avoid dismissal of such a claim, the allegations must be sufficient to invoke the court's power to render a declaratory judgment as to the rights and other legal relations of the parties to a justiciable controversy (*see* ***DGiorgio v 1109–1113 Manhattan Ave. Partners, LLC***, 102 AD3d 725, 958 NYS2d 417 [2d Dept 2013]). Here, the court finds plaintiff's claim to be legally insufficient in that it is premised upon the vague and conclusory allegation of a belief on the part of the plaintiff that he would receive a one-half interest in the defendant corporation. In addition, this cause of action appears to be a mere recasting of the plaintiff's First cause of action for the imposition of constructive trust in his favor over that same one-half interest in the defendant corporation, which itself is legally insufficient for want of confidential or fiduciary relationship between the parties. The Fifth cause of action is thus dismissed.

In the Sixth cause of action the plaintiff charges the corporate defendant with failing to pay the plaintiff wages on a weekly basis for his services as a chef for the corporate defendant, while in the Seventh cause of action the individual defendants are charged with the conversion of such wages, by their receipt of same and their failure to turn them over to the plaintiff. The elements of an effective employment contract consist of an identity of the parties, the terms of employment, which include the commencement date, the duration of the contract and the salary (*see* ***Kausal v Educational Prods. Info. Exch.***, 105 AD3d 909, *supra*; ***Monheit v Petrocelli Elec. Co., Inc.***, 73 AD3d 714, 900 NYS2d 412 [2d Dept 2010]). Claims for breach thereof are dependent upon a showing of the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and resulting damages (*see* ***Kausal v Educational Prods. Info. Exch.***, 105 AD3d 909, *supra*). A cause of action to recover damages for conversion is dependent upon a showing of the plaintiff's legal ownership or an immediate superior right of possession to a specific identifiable thing and that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights (*see* ***Smallwood v Lupoli***, 107 AD3d 782, 968 NYS2d 515 [2d Dept 2013]; ***Nissan Motor Acceptance Corp. v Scialpi***, 94 AD3d 1067, 944 NYS2d 160 [2d Dept 2012]). Upon a liberal reading of the complaint, the court finds that the allegations underlying the Sixth and Seventh causes are legally sufficient to state a claim against the corporate defendant for breach of its agreement to pay the plaintiff wages and an alternate claim against the individual defendants for conversion of the plaintiff's wages paid to them by the corporate defendant.

In contrast, the court finds that the Eighth, Ninth, Tenth and Eleventh causes of action, all of which are premised upon the corporate defendant's purported violations of the Article 6 of the Labor Law, are subject to dismissal for legal insufficiency. Missing are factual allegations of the plaintiff's employment as one within the statute and allegations of conduct on the part of the corporate defendant which allegedly constitute violations of duties imposed upon it thereunder (*see* ***Ullmann v Norma Kamali, Inc***, 207 AD2d 691, 616 NYS2d 583 [1st Dept 1994]; ***Myers v Hertz Corp***., 624 F3d 537 [2d Cir. 2010]; ***Jara v Strong Steel Door, Inc***., 20 Misc.3d 1135(A), 872 NYS2d 691 [Sup Ct. New York County 2008]; *see also* ***Bhanti v Brookhaven Mem. Hosp. Med. Ctr., Inc***., 260 AD2d 334, 687 NYS2d 667 [2d Dept. 1999]). Accordingly, the Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh causes of action advanced in the complaint are dismissed for legal insufficiency.

The Twelfth, Thirteenth, Fourteenth and Fifteenth causes of action are all brought derivatively by the plaintiff as a "shareholder" of the corporate defendant for the recovery of damages it allegedly incurred due to the waste of its corporate assets by reasons of purported wrongful conduct on the part of the individual defendants. The factual allegations underlying such claims do not, however, state claims for the recovery of the derivative relief demanded by the plaintiff on behalf of the corporate defendant since they do not include allegations that the plaintiff was a shareholder at the time of the commencement of the action and at the time of the transgressions about which he complains, both which are necessary elements of these statutory claims (*see* BCL § 626; ***Zentz v International Foreign Exch. Concepts, L.P.***, 106 AD3d 904, 965 NYS2d 180 [2d Dept 2013]). The plaintiff's Sixteenth cause of action wherein he demands an accounting and dissolution of the corporate defendant are legally likewise insufficient (*see* BCL 1104-a; ***In re Iceland Inc.***, 97 AD3d 579, 948 NYS2d 329 [2d Dept 2012]). The Twelfth through Sixteenth causes of action are thus dismissed.

Left for consideration is the plaintiff's Fourth cause of action sounding in unjust enrichment. A cause of action alleging unjust enrichment is a quasi-contract claim and to succeed thereon the claimant "must show that: (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (***Old Republic Natl. Title Ins. Co v Luft,*** 52 AD3d 491, 859 NYS2d 261 [2d Dept 2008]). Here, the elements of a claim for unjust enrichment is discernable from the factual allegations advanced in the complaint inasmuch as the plaintiff has alleged that he provided money and services to the individual defendants who are alleged to have been enriched thereby at the expense of the plaintiff. The Fourth cause of action is thus legally sufficient and not subject to dismissal pursuant to CLR 3211(a)(7).

In view of the foregoing, the plaintiff's motion (#001) to dismiss the defendants' counterclaims is granted pursuant to CPLR 33211(a)(7) as set forth above. The defendants' cross motion (#002) to dismiss the plaintiff's complaint is granted to the extent that all causes of action, except the Fourth, Sixth and Seventh, are dismissed pursuant to CPLR 3211(a)(7).

A preliminary conference shall be held on **October 4, 2013**, as indicated above and counsel are directed appear thereat ready for such conference.

DATED: 8/16/13

THOMAS F. WHELAN, J.S.C.