SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. PART 48

Justice

Index Number : 653103/2012
TE FOOD HALL, LLC
vs.
ELAD US HOLDING, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 is

"This motion is decided in [illegible]

"This motion is decided in accordance with the annexed decision and order of the Court."

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

Dated: 8/28/13

JEFFREY K. OING, J.S.C.

JEFFREY K. OING
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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TE FOOD HALL, LLC and BRIAN CRAWFORD,

Plaintiffs,

-against-

EL AD U.S. HOLDING, INC., PLAZA FOOD HALL LLC, PLAZA ACCESSORY OWNER, L.P., and YITZHAK TSHUVA

Defendants.

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Index No.: 653103/12

Mtn Seq. No. 001

DECISION AND ORDER

JEFFREY K. OING, J.:

Defendants, El Ad U.S. Holding, Inc., Plaza Food Hall LLC , Plaza Accessory Owner, L.P., and Yitzhak Tshuva, move, pursuant to CPLR 3211, to dismiss the amended complaint.

Facts

Plaintiff, Brian Crawford ("Crawford"), is the sole owner of co-plaintiff, TE Food Hall, LLC ("TE Food") (Crawford and TE Food collectively referred to as "plaintiffs"). On July 30, 2009, TE Food entered into a Food & Beverage Management Agreement (the "FBMA") with defendant, Plaza Accessory Owner L.P., ("Plaza Accessory") to manage the Todd English Food Hall (the "Food Hall") at the Plaza Hotel, which was associated with celebrity chef Todd English ("English"). At the time, TE Food was not formally organized.

The FBMA was for a term of ten years. As part of its compensation, TE Food received a 4% base fee of the Food Hall's

yearly gross revenue. Plaza Accessory had the right to terminate the FBMA at its convenience any time after the fifth year of the term (FBMA, Moving Papers, Ex. A, at § 9.2).

At some point afterwards, defendant, El Ad US Holdings, Inc. ("El Ad"), sold the Plaza Hotel to the Sahara Group. Plaintiffs allege that El Ad sought early termination of the FBMA. On March 30, 2012, TE Food and Plaza Accessory entered into a Termination Agreement & Final Release (the "Termination Agreement").

Pursuant to the Termination Agreement, Plaza Accessory agreed to pay TE Food a buy-out, defined in the agreement as 80% of the base fee paid to TE Food for the year prior to termination. The agreed upon buy-out in the Termination Agreement was $100,000, split equally between plaintiff Crawford and English (Termination Agreement, Moving Papers, Ex. C, ¶¶ 3-4).

The Termination Agreement also requires plaintiff Crawford and English to turn over all operating documents related to the restaurant, including, inter alia, profit and loss statements, budgets, and contracts (Id. at ¶ 6). Further, Crawford and TE Food are required to execute settlement and release documents relating to any pending actions involving the restaurant within five days of the date of the agreement (Id. at ¶ 7). If the documents are not timely delivered, Plaza Accessory's expenses in

resolving any such dispute will be deducted from the base fee owed, and no base fee or additional fee will be paid until the documents are delivered (Id.). The parties also mutually released each other from "all actions, causes of action ... and demands whatsoever, in law, admiralty, or equity ... arising from the [agreement], the Operations of the Food Hall, or any other cause or thing whatsoever" (Id. at ¶¶ 10-11). Plaza Accessory's release of plaintiffs is conditioned on their compliance with the Termination Agreement (Id. at ¶ 11).

Plaintiffs allege that they have complied with all conditions of the Termination Agreement. Crawford alleges that at the time he signed the Termination Agreement defendants understood that he was still owed management fees (Crawford Aff., ¶ 4). In addition, Crawford alleges that there is an ongoing dispute involving outside vendors. Defendants have allegedly failed to remove Crawford as a contact person for the restaurant, and he continues to receive angry phone calls and threats of litigation from vendors who have not been paid (Id. at ¶ 9). Further, while it took Crawford some time to get the executed papers to Plaza Accessory, such that they were delivered after the five day specified period, Plaza Accessory never took issue with that fact (Id. at ¶ 10). Lastly, Crawford also contends

that there are no conditions precedent in the Termination Agreement (Id.).

Procedural Posture

TE Food commenced this action solely against El Ad on July 30, 2012. On November 5, 2012, El Ad moved to dismiss the complaint based on documentary evidence (CPLR 3211(a)[1]), lack of capacity to sue (CPLR 3211(a)[3]), failure to state a cause of action (CPLR 3211(a)[7]), and failure to join an indispensable party (CPLR 3211(a)[10])..

In response, on November 20, 2012, plaintiffs filed an Amended Complaint, and added as defendants, Plaza Accessory, Yitzhak Tshuva, and Plaza Food Hall LLC. Three days later, plaintiffs filed opposition to the motion, asserting, inter alia, that their service of an amended complaint rendered the dismissal motion moot.

Preliminary Issues

Plaintiffs argue that defendants' pre-answer dismissal motion must be denied without prejudice because an amended complaint has been filed, and because defendants failed to attach a copy of the amended complaint.

Contrary to plaintiffs' argument, the service of an amended pleading does not moot a pending motion to dismiss (Fownes Bros. & Co., Inc. v. JPMorgan Chase & Co., 92 AD3d 582, 582-83 [1st

Dept 2012]). When the plaintiff chooses to amend rather than defend the original complaint, the Court may direct that the pending motion be directed to the amended pleading (DiPasquale v. Security Mutual Life Insurance Co., et al., 293 AD2d 394 [1st Dept 2002]).

Here, with the exception of the newly added defendants and newly interposed cause of action, the amended complaint is virtually identical to the original complaint. More importantly, defendants seek to have their pending motion to dismiss applied to the amended complaint. Indeed, they address the newly added cause of action in their reply papers.

As for failing to annexed a copy of the amended complaint, that deficiency is cured by plaintiffs' submission of the amended complaint. Under these circumstances, the necessary pleadings are present for this Court to consider the instant motion.

Turning to that branch of defendants' motion to dismiss, pursuant to CPLR 3211(a)[10], for failure to join an indispensable party, it is rendered moot by the joinder of Plaza Accessory, and the other defendants, in the amended complaint. Accordingly, that branch of the motion to dismiss pursuant to CPLR 3211(a)[10] is denied as moot.

Defendants next argue that TE Food cannot sue based on the events and contracts described in the amended complaint because

TE Food did not legally exist at the time (CPLR 3211(a)[3]). In that regard, defendants point to the fact that TE Food complied with the requirements of Limited Liability Company Law on August 17, 2012, approximately three weeks after the original complaint was filed. Defendants' argument is unavailing.

In Boslow Family Ltd. Partnership v. Glickenhaus & Co., 7 NY3d 664 (2006), the parties entered into an agreement for the defendant to provide investment advice and management services. The plaintiff had signed the initial certification documents to form a limited partnership prior to entering into the contract, but the documents were never filed. After maintaining an account with the defendant for three years, the plaintiff closed the account and sued defendant for breach of contract and negligence. The defendant argued that because the plaintiff failed to file the certification documents it had no capacity to sue on the contract.

The Court of Appeals applied the doctrine of corporation by estoppel, and reinstated the complaint. The Court of Appeals held that because "[d]efendant has conceded that the services it provided plaintiff were not dependent on plaintiff's limited partnership status, or lack thereof," it should not be allowed to challenge the plaintiff's corporate capacity as a "sword to escape liability after it benefitted from its contract with

plaintiff" (Id. at 668-69). Although factually distinguishable in that the facts there addressed corporations, for the reasons that follow, there is no legal basis for not applying this doctrine to the present situation covering a limited liability corporation, which, like a corporation, is a statutory creature.

Here, defendants do not argue that the agreement and Termination Agreement they signed with TE Food was dependent on TE Food's status as an existing LLC. Indeed, Plaza Accessory accepted the benefits of Crawford's work as manager for the restaurant for almost three years after execution of the agreement. Under these circumstances, application of the doctrine of corporation by estoppel is warranted.

Accordingly, that branch of defendants' motion to dismiss the amended complaint pursuant to CPLR 3211(a)[3] is denied.

Discussion

I. Breach of Contract Against All Defendants

Defendants argue that plaintiffs cannot not allege a breach of contract claim because the five day deadline set forth in the Termination Agreement is a strict condition precedent that must be satisfied in order for plaintiffs to receive any money that defendants may still owe them. The relevant provision provides:

> Crawford must provide the fully executed settlement and release documents for any pending actions related to the Food Hall within five (5) business days from the date

> of this agreement. If Crawford fails to timely provide the aforementioned documents evidencing that there are no open disputes related to the Operations of the Food Hall, any out-of-pocket expense paid for by Owner to cover and/or resolve such dispute shall be deducted from any Base Fee which may still be owed under the FBMA. The Manager[-TE, Todd English, and Crawford collectively-]agrees that no Base Fee or Additional Fee, whether disputed or undisputed, shall be paid by Owner to Manager until Crawford has delivered the aforementioned documents to Owner.

(Termination Agreement, Defendants' Moving Papers, Ex. C, ¶ 7). Contrary to defendants' assertion, a reading of this provision demonstrates that the only penalty for failing to provide timely settlement documents is that plaintiffs must bear the cost of litigating or settling any outstanding actions out of money owed by defendants. There is no contractual language that indicates that said failure would bar plaintiffs from receiving any money. Further, and more importantly, defendants accepted the late documents without complaint (Crawford Aff., ¶ 10).

Next, defendants argue that the release included in the Termination Agreement bars any claims based on the FBMA or the operation of the Food Hall, which includes plaintiffs' claim regarding unpaid fees. The argument is unavailing.

Here, although section 10 of the Termination Agreement ostensibly provides for a broad, general release, section 7 of that agreement clearly contemplates that additional fees may be

due and owing, and that such disputes may need to be resolved. Thus, although reading these two sections in isolation of each other may support defendants' argument, when read together, the parties clearly contemplated that further fees might be paid after plaintiffs turned over the settlement documents required by the Termination Agreement while also contemplating that other claims would be released by all parties.

Accordingly, that branch of defendants' motion to dismiss plaintiffs' breach of contract claim is denied.

II. Unjust Enrichment Against Defendant El Ad

In order to plead a claim of unjust enrichment, there must be an allegation that a defendant was enriched, at the plaintiff's expense, and that equity and good conscience preclude a defendant from retaining the benefit received (Mandarin Trading Ltd. v. Wildenstein, 16 NY3d 173, 182 [2011]).

Plaintiffs allege this cause of action solely against El Ad, but there is no allegation in the complaint that El Ad ever received money from Plaintiffs. The only defendant who was a party to either contract was Plaza Accessory, and the complaint does not allege that any other entity received anything from plaintiffs. Indeed, plaintiffs merely allege in conclusory fashion that El Ad is one and the same as Plaza Accessory and the other defendants, but do not set forth any allegations in support

of that premise. Instead, plaintiffs allege that defendant Tshuva is the principal for all three companies and they receive service of process at the same location (Amended Complaint ¶ 11). Such an allegation, standing alone, is insufficient for pleading purposes to demonstrate jural relationship among the defendants.

Accordingly, that branch of defendants' motion to dismiss plaintiffs' unjust enrichment claim is granted, and that claim is dismissed.

III. Misrepresentation and Fraud Against All Defendants

To plead sufficiently a claim for fraud, plaintiffs must allege: (1) defendants made a material false representation, (2) defendants intended to defraud plaintiffs thereby, (3) plaintiffs reasonably relied upon the representation, and (4) plaintiffs suffered damage as a result of their reliance (Swersky v Dreyer and Traub, 219 AD2d 321, 326 [1st Dept 1996]). When the fraud arises out of the same facts as the breach of contract claim, however, the fraud claim must be dismissed as duplicative (Fairway Prime Estate Mgt, LLC v First American International Bank, 99 AD3d 554 [1st Dept 2012]). In other words, a cause of action alleging breach of contract may not be converted to one for fraud merely with an allegation that the contracting party did not intend to meet its contractual obligations.

Here, plaintiffs allege that defendants misrepresented their intent to compensate TE and Crawford based on the restaurant's profits, and to transfer the accounts and guarantees set up by Crawford so that he would no longer be personally liable. The only fraud plaintiffs' allege is defendants' intent to avoid their contractual obligations. Such an allegation is insufficient to plead facts collateral to the Termination Agreement so as to state a claim for fraud.

Accordingly, that branch of defendants' motion to dismiss plaintiffs' fraud claim is granted, and that claim is dismissed.

IV. Bad Faith Against All Defendants

Plaintiffs allege that they are entitled to costs and fees for this action due to defendants' "bad faith actions in failing to properly, adequately, and legally adhere to the contracts made with the Plaintiffs" (Amended Complaint, ¶ 43). Essentially, plaintiffs are asserting a claim for breach of the implied covenant of good faith and fair dealing.

Implicit in every contract is a covenant of good faith and fair dealing (Dalton v. Educational Testing Serv., 87 NY2d 384 [1995]). However, the implied covenant exists only "in aid and furtherance of other terms of the agreement of the parties" (Murphy v Am. Home Products Corp., 58 NY2d 293, 304 [1983]). Accordingly, where the facts underlying the claim for breach of

the implied covenant are the same as those underlying the breach of contract claim, the claim for breach of the implied covenant should be dismissed as duplicative (Baker v. 16 Sutton Place Apartment Corp., 2 AD3d 119, 121 [1st Dept 2003]).

Here, the claimed damages arise entirely out of defendants' alleged breach of the FBMA and Termination Agreement. As such, this cause of action is duplicative of the cause of action for breach of contract.

Accordingly, that branch of defendants' motion to dismiss plaintiffs' claim for bad faith is granted, and that claim is dismissed.

V. Negligence Against All Defendants

A breach of contract may not be remade into a tort claim unless a legal duty independent of the contract, such as one arising out of circumstances extraneous to, and not constituting elements of, the contract itself, has been violated (Brown v Brown, 12 AD3d 176 [1st Dept 2004]). In other words, a negligence claim cannot be based on breach of a contractual duty (Calisch Assoc., Inc. v Manufacturers Hanover Trust Co., 151 AD2d 446, 447 [1st Dept 1989]).

Here, plaintiffs allege that defendants negligently failed to transfer "all guarantees and accounts from the name of Mr. Crawford and [TE] to the names of ... corporations who are

properly liable for such billing and accounts", and that defendants are liable for negligence due to their "failure to perform under the contract" (Amended Complaint, ¶¶ 45-46). These allegations are virtually identical to the allegations set forth in plaintiffs' breach of contract claim (see Amended Complaint ¶ 26 ("Defendants materially and intentionally breached the Agreement with Plaintiffs by ... failing to transfer all accounts from the name of Mr. Crawford and his company into [their] own name[s]"). Under these circumstances, plaintiffs have failed to allege a breach of a duty independent of the contract.

Accordingly, that branch of defendants' motion to dismiss plaintiffs' negligence claim is granted, and that claim is dismissed.

VI. Fraudulent Inducement Against All Defendants

Plaintiffs reiterate their allegations that defendants have not paid them according to the Termination Agreement, and that they only entered into the Termination Agreement based on defendants promises of payment, essentially duplicating their fraud claim. Rather than damages, plaintiffs seek rescission of the contract as relief for this cause of action.

Rescission is available as a remedy when "there is lacking a complete and adequate remedy at law and where the status quo may be substantially restored" (Sokolow, Dunaud, Mercadier & Carreras

LLP v Lacher, 299 AD2d 64, 71 [1st Dept 2002]). Rescission is not available where restoration of the status quo is made impracticable due to the nature of the transaction to be rescinded (Id.). Nor is it available when the plaintiff has an adequate damages remedy (MBIA Ins. Corp. v. Merrill Lynch, 81 AD3d 419, 420 [1st Dept 2011]).

Here, plaintiffs seek rescission of the Termination Agreement. They do not allege, however, that the damages from their breach of contract claim would not make them whole. Further, to rescind the Termination Agreement would essentially force plaintiffs and defendants back into business with each other after both parties agreed to terminate that arrangement.

Accordingly, that branch of defendants' motion to dismiss plaintiffs' fraudulent inducement claim is granted, and that claim is dismissed.

VII. Piercing the Corporate Veil Against Defendant Tshuva

Plaintiffs alleges that defendant Tshuva has "complete control and dominion" over El Ad, Plaza Accessory, and Plaza Food Hall, LLC, and that he uses his various corporations as a shield for his wrongful conduct (Amended Complaint ¶¶ 55-57).

The principle is well settled that New York does not recognize corporate veil-piercing as a separate cause of action (9 E. 38th St. Assoc., L.P. v George Feher Assoc., Inc., 226 AD2d

167, 168 [1st Dept 1996] ("a separate cause of action to pierce the corporate veil does not exist independent from the claims asserted against the corporation"]).

Accordingly, that branch of defendants' motion to dismiss plaintiffs' corporate veil-piercing claim is granted, and that claim is dismissed.

It is therefore,

ORDERED, that branch of defendants' motion to dismiss for lack of capacity to sue pursuant to CPLR 3211(a)(3) is denied; and it is further

ORDERED, that branch of defendants' motion to dismiss for failure to join an indispensable party pursuant to CPLR 3211(a)(10) is denied; and it is further

ORDERED, that branch of defendants' motion to dismiss the first cause of action for breach of contract is denied; and it is further;

ORDERED, that branch of defendants' motion to dismiss the second cause of action for unjust enrichment, the third cause of action for fraud, the fourth cause of action for bad faith, the fifth cause of action for negligence, the sixth cause of action for fraudulent inducement, and the seventh cause of action for piercing the corporate veil is granted, and those claims are dismissed; and it is further

ORDERED, that defendants' shall serve and file an answer to the remainder of the complaint within ten (10) days of entry of this decision and order; and it is further

ORDERED, that counsel shall telephone the Clerk of Part 48 to 646-386-3265 to schedule a preliminary conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/28/13

HON. JEFFREY K. OING, J.S.C.