

**Larsen v Ciolli**

2014 NY Slip Op 31990(U)

June 25, 2014

Sup Ct, Richmond County

Docket Number: 150771/20113

Judge: Charles M. Troia

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

\_\_\_\_\_ X  
**ROBERT LARSEN,**

**Plaintiff,**

**-against-**

**FRANK CIOLLI, d/b/a GRIMALDI'S PIZZERIA,  
JOSEPH A. CIOLLI and GINA PELUSO,**

**Defendants.**

\_\_\_\_\_ X

**DCM PART 1**

**Present:**

**HON. CHARLES M. TROIA**

**DECISION AND ORDER**

**Index No. 150771/13**

**Motion Nos. 4775-001  
615-002**

The following papers numbered 1 to 8 were fully submitted on the 14th day of  
March, 2014.

Papers  
Numbered

|                                                                                                                                                                          |   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| Notice of Motion by Defendants Frank Ciolli and Gina Peluso<br>for Dismissal of the Complaint for Failure to State a Cause<br>of Action<br>(dated December 6, 2013)..... | 1 |
| Memorandum of Law in Support of Defendants Motion<br>to Dismiss<br>(dated December 6, 2013).....                                                                         | 2 |
| Affirmation in Opposition to Motion to Dismiss<br>(dated February 7, 2014).....                                                                                          | 3 |
| Plaintiff's Memorandum of Law in Opposition to<br>Defendants' Motion to Dismiss<br>(dated February 7, 2014).....                                                         | 4 |
| Cross Motion by Defendant Joseph Ciolli for Dismissal<br>of the Complaint for Failure to State a Cause of Action,<br>with Exhibit<br>(dated February 14, 2014).....      | 5 |
| Memorandum of Law by Defendant Joseph Ciolli<br>in Support of Motion to Dismiss the Complaint<br>(dated February 14, 2014).....                                          | 6 |

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|                                                                                                      | Papers<br>Numbered |
|------------------------------------------------------------------------------------------------------|--------------------|
| Reply Memorandum of Law in Further Support of Motion<br>to Dismiss<br>(dated February 19, 2014)..... | 7                  |
| Reply Affirmation by Defendant Joseph Ciolli,<br>with Exhibits<br>(dated March 10, 2014).....        | 8                  |

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Upon the foregoing papers defendant, Joseph Ciolla's motion( No. 615-002) for an order dismissing the complaint, in its entirety, as to him is granted. Similarly, that portion of the motion (No. 4775-001) seeking dismissal of the third cause of action for breach of contract against defendant Gina Peluso is granted.

In considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the facts pleaded are presumed to be true, and the Court must afford those allegations every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v Martinez, 84 NY2d 83, 87-88; Dickinson v Igoni, 76 AD3d 943, 945). Accepting the facts as alleged in the complaint as true, and according the plaintiff the benefit of every possible favorable inference (see Leon v Martinez, 84 NY2d 83), here the complaint fails to state a cause of action against the defendant Joseph Ciolla (see CPLR 3211 [a] [7]). The plaintiff's allegations regarding Joseph Ciolla are vague and conclusory and even if true fail to plead any cognizable cause of action against Joseph Ciolla for either fraud, conversion, misappropriation or breach of contract (see Stoianoff v Gahona, 248 AD2d 525).

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Likewise plaintiff has failed to state a cause of action against Gina Peluso who, according to her affidavit submitted in support of the dismissal, is neither alleged to be a party to any oral contract nor is alleged to have represented, promised or agreed to any terms with plaintiff prior to any alleged contract being entered into. Since it is uncontroverted that this defendant was not a party to any contract, the cause of action against Gina Peluso is dismissed (see Pevensey Press, Ltd. v Prentice-Hall, Inc., 161 A.D.2d 500).

However, with respect to Frank Ciolli, the Court finds that dismissal of the causes of action for breach of contract and fraud pursuant to CPLR 3211(a)(7) is unwarranted at this time. (see Foster v Kovner, 44 AD3d 23).

In conjunction with above cited factors, when evaluating the success of a motion to dismiss a cause of action pursuant to CPLR 3211(a)(7), a basic criterion is whether the proponent of the pleading has a cause of action, not whether he or she has stated one (see Richmond Shop Smart, Inc. v Kenbar Dev. Ctr., LLC, 32 AD3d 423). Here, plaintiff alleges that defendant breached an oral agreement to purchase mozzarella cheese for their pizza stores from plaintiff. Plaintiff states that in reliance he spent approximately \$250,000.00 converting a facility to a manufacturing plant after which defendant allegedly negotiated an agreement with another cheese producer. Here, accepting the fact as presented as true and according the plaintiff every favorable inference this Court finds that plaintiff has sufficiently pleaded a cause of action sounding in breach of contract (see Guggenheimer v Ginzburg, 43 NY2d 268, 275).

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Contrary to the defendant's contention, the complaint also stated a cause of action to recover damages for fraud. "In an action to recover damages for fraud, the plaintiff must prove a representation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (Lama Holding Co. v Smith Barney, 88 NY2d 413, 421). Here, plaintiff adequately alleged these elements by setting forth factually-based claims that based upon the assurances of defendant he invested in and attempted to open four pizza stores in New Jersey. Plaintiff claims that after two of the locations were damaged due to heavy flooding defendant not only failed to provide the promised financial support to reopen the stores, but blocked plaintiff from getting any outside investors. Plaintiff alleges that due to defendant Frank Ciolla's inducements he invested over \$600,000.00, which he will lose due to the fraudulent activity of defendant. Necessarily, then, plaintiff has alleged facts sufficient to permit a reasonable inference of the alleged conduct (see Scott v Fields, 92 AD3d 666). Additionally the Court notes that the fraud cause of action is not duplicative of the breach of contract claim and is not subject to dismissal on that basis (see Yenrab, Inc. v 794 Linden Realty, LLC, 68 AD3d 755).

Plaintiff's second cause of action alleging both misappropriation and conversion is dismissed. Even assuming the truth of the facts alleged, plaintiff fails to state any elements sufficient to maintain a legally cognizable cause of action" (see Rovello v Orofino Realty Co., 40 NY2d 633, 634).

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Accordingly it is hereby

**ORDERED** that the complaint is dismissed in its entirety as against Joseph Ciolla and Gina Peluso; and it is further

**ORDERED** that the second cause of action is dismissed as to Frank Ciolla; and it is further

**ORDERED** that the Clerk enter judgment accordingly.

ENTER,



J.S.C.

Dated: *June 25, 2014*  
gl

Hon. Charles M. Troia  
Justice of the Supreme Court

GRANTED  
JUN 26 2014  
*Stephen J. Troia*