Dumann Realty LLC v Faust
2014 NY Slip Op 32105(U)
July 18, 2014
Sup Ct, New York County
Docket Number: 650324/2013
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X INDEX NO. 650324/2013

DUMANN REALTY LLC

Plaintiff,

-- against --

FREDERICK FAUST,

Defendant.

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JOAN A. MADDEN, J.:

In this action arising out of a dispute between a limited liability company and a former member of the company, defendant Frederick Faust ("Faust") moves to dismiss the complaint against him. Plaintiff Dumann Realty, LLC ("Dumann") opposes the motion, which is granted in part and denied in part.

Background

Unless otherwise noted, the following facts are based on the allegations in the complaint and the documentary evidence submitted in connection with the motion.

In 2003, Faust was approached by nonparty Richard Du ("Du") about creating a commercial real estate company with him and Chein Yu Luk a.k.a. Mac Luk ("Mac Luk"). Faust agreed to participate in the business venture, which resulted in the formation of Dumann, a limited liability company, on or about May 1, 2004, in which Faust, Du and Mac Luk were each members. In connection with the formation of Dumann, the three partners entered into an Operating Agreement, with Faust allegedly designated as a Managing Member of Dumann. Pursuant to Article V, § 13 of the Operating Agreement, each member has a one-third interest in Dumann.

After its formation, Dumann borrowed $390,000 from Mac Luk and $1,800,000 from Profitechnik Capital Limited ("Profitechnik") and its owner Lawrence Luk ("Lawrence Luk"),

who is Mac Luk's father. In 2009, Faust sought to withdraw from Dumann. Under Article III, § 10 of the Operating Agreement, a member seeking to withdraw is required to obtain approval from two-thirds of the members or provide six months written notice. In an effort to obtain approval for his departure, on or about March 12, 2009, Faust met with the other members of Dumann. At the meeting, Faust allegedly promised to pay $600,000 and to execute an Agreement and Promissory Note. The terms stipulated a payment of $50,000 in 2009, and $110,000 each year from 2010 through 2014, for a total of $600,000, and was intended "to remedy the fiscal harm [Faust's] departure would cause Dumann and to help Dumann pay off its debts to Mac Luk and Lawrence Luk." (Complaint, ¶ 18). Based on this agreement, a Settlement Agreement with the above payment plan was memorialized, but Faust "repudiated the Agreement and refused to execute it." (*Id.*, ¶ 19).

On March 18, 2009, Faust withdrew from Dumann, without obtaining approval from two-thirds of the members or providing six months notice as required under Article III, § 10 of the Operating Agreement. Under section 10, a member who withdraws in violation of the section "may be liable for damages as a result thereof," and the complaint alleges that as a result of Faust's premature departure, he was not able to earn that money for Dumann, causing estimated consequential damages of $400,000 to Dumann.[1]

In addition, it is alleged that Faust breached Article III, § 5 of the Operating Agreement

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[1] The complaint also cites Article V, § 7 of the Operating Agreement, which provides, *inter alia*, that "profits and losses of Dumann are to be allocated among the members based on the ratio of the monetary value of the member...[and that] [a]ll distributions to a member of [Dumann] shall be offset by any amounts owing to the company." However, since the complaint does not seek to offset any distributions made to Faust, or seek to recover based on this provision, its relevance is unclear.

which makes each member personally responsible for the payment of his capital contribution, and that Dumann's books for the fiscal year 2009 demonstrate that Faust has not made a capital contribution to plaintiff and that he owes an amount of $494,986.98.

The complaint also alleges that as a result of his premature departure, Faust has "financially damaged Dumann and compromised Dumann's ability to repay the [$1.8 million] loan [to Lawrence Luk and Profitechnik], with the result that Dumann is now exposed to a collection suit from [Profitechnik] and Lawrence Luk for a total of $1,800,000," and that as a result, Faust owes one-third of $1,800,000 or $600,000. (Complaint ¶'s 26, 27). It further alleged that Faust's conduct compromised Dumann's ability to repay a loan of $390,000 to Mac Luk and that Faust is liable for one-third of that amount of $130,000 (*Id.*, ¶ 28,29).

The complaint also seeks to recover from Faust an unearned commission payment of $7,500. In this connection, the complaint alleges that on or about February 20, 2009, Faust requested an advancement of $7,500 from Mac Luk, who wrote him a check drawn on a Dumann account at Chase Bank. Du, after learning about the check, asked Faust not to negotiate it, and Faust assured Du that he would not negotiate the check. However, according to the complaint, on or about October 29, 2009, Faust negotiated the check.

In this action, Dumann asserts causes of action for: (1) breach of contract; (2) breach of promise; (3) lack of capital contribution; (4) unjust enrichment; (5) lack of good faith and fair dealing; (6) detrimental reliance; (7) failure to perform fiduciary duty; (8) abandonment of work duties; (9) use of unearned commission payment.[2]

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[2] Plaintiff originally brought this action in United States District Court-Southern District of New York; however, it was dismissed based on the lack of complete diversity among the parties.

Faust now moves to dismiss the complaint on various grounds including that as a member of a limited liability company, he cannot be held personally liable for loans made by Mac Luk and Profitechnik to Dumann. In support of his position, Faust notes that Article III, § 5 of the Operating Agreement provides that "no member shall be personally liable for any debts, obligations, or liabilities of [Dumann] or of any other member, solely by reason of being a member of [Dumann], which such debt arose in contract, tort or otherwise." Faust also argues that an oral promise to pay for the debt of the corporation or that incurred by the other members is barred by the New York Statute of Frauds. See General Obligation Law § 5-701(a)(2)(providing that an agreement that is "a special promise to answer for the debt... of another person" is void unless in writing and subscribed by the party charged).

In further support of his motion, Faust submits his affidavit in which he states that throughout the time he was a member of Dumann he executed only three documents regarding business loans to Dumann. He states that "in each case the loans were to Dumann and not me personally [and that] he did not receive Dumann's loan funds personally." (Id, ¶ 13). He attaches each of the three documents which are (1) a promissory note on behalf of Dumann in the amount of $70,000; (2) a promissory note providing for the payment of Profitechnik $70,000 plus 6.25% interest, and (3) a Rider to Article V of the Operating Agreement in which each member of Dumann acknowledged that a $150,000 loan was made by Mac Luk to Dumann and provided that the individual members would be liable if they withdrew prior to May 31, 2005. Faust states that it is "his understanding that the $150,000 was paid in full on or before May 31, 2005 as no member of Dumann ever discussed the outstanding loan balance." (Id, ¶ 18). He attaches a

document in which the three members acknowledged that $240,000 was loaned to Dumann by Mac Luk, which was repayable in four installments, which Dumann was obligated to pay back. As for this loan he states that it is "his understanding that the $240,000 was paid in full on or before February 15, 2006, because no member of Dumann ever discussed the outstanding loan balance, and, I was aware that through my sales efforts Dumann had generated revenues sufficient to meet.this loan obligation." (Id, ¶ 20).

Faust also states that while he "devoted one hundred percent of [his] efforts to Dumann's core business [i.e. commercial real estate brokerage]," Du and Mac Luk diverted their efforts to other business ventures. (Id., ¶ 22, 32). As a result, Dumann never reported a profit since "notwithstanding the revenues [he] generated, due to (Du's and Mac Luk's) ancillary investments in Dumann's name we operated at a loss after expenses." (Id, ¶ 51). According to Faust, he decided to resign in March 2009 since "he had spent nearly five years working tirelessly to promote [Dumann], and I earned little or no money for my work, while my personal responsibilities increased" (Id., ¶ 60). He states that at his time of resignation he requested that Du and Mac Luk "discuss with me Dumann's payout to me of one third share of assets of Dumann, including but not limited to the fair market value of various office equipment, my book of business, as well as payouts of commission on the business I had generated, which Dumann previously failed to pay me," but that they never responded to his request and he has not yet received the payout from Dumann (Id, ¶'s 63, 64).

According to Faust, at the time of his resignation, Du and Mac Luk informed him through counsel that he personally owed a one-third share of Dumann's loans. (Id, ¶ 67). In a letter dated May 13, 2009, Dumann's attorney wrote that at a meeting on March 12, 2009, the members all

agreed to pay $600,000 each of a $1.8 million debt owed by Dumann. The letter also referred to Article V of the Operating Agreement under which provides for a personal loan of $150,000 by Mac Luk to Dumann and states that Faust is liable for 33 1/3 % of such loan or $50,000 and that he also personally guaranteed 33 1/3% of a loan of $240,000 at an interest rate of 6,25% or $80,000 plus interest. According to the letter, "these loans are included in the $600,000 you agreed to be liable to Dumann." In a letter dated July 14, 2009, Dumann's attorney wrote to Faust that "[y]ou are in violation of the original operating agreement and to date you have not responded to the May 13, 2009 demand letter. Please be advised that...you are personally responsible for one-third of the outstanding unpaid debts, which total $1,800,000, with your one-third share set at $600,000."

Faust also argues that Mac Luk, Profitechnik and Lawrence Luk are necessary and indispensable parties to the action as he would face a potential lawsuit from these parties if they were not joined.[3] Faust alternatively contends that complaint fails to state a cause of action.

In its opposition, Dumann argues that it is not seeking to recover from Faust for the loans made to it by Mac Luk, Profitechnik, and Lawrence Luk. Instead, Dumann argues that the complaint seeks to recover damages arising from Faust's breach of the provisions of the Operating Agreement related to premature withdrawing of his membership, his failure to pay his capital contribution, his breach of an oral agreement to pay $600,000 to Dumann to compensate for his premature departure from the company, and his use of an unearned commission. Under these circumstances, Dumann asserts that, contrary to Faust's position, Mac Luk, Profitechnik,

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[3] In support of this argument, Faust asserts that the federal court found that they were necessary parties; however, the decision on the federal court submitted by Faust does not support his assertion.

and Lawrence Luk are not necessary or indispensable parties. In any event, Dumann notes that the complaint alleges that Mac Luk, who resides in Taiwan, and Laurence Luk, have assigned all rights in the matter to Dumann, and copies of the assignments are annexed to the complaint.

Dumann also submits the affidavit of Du who states that Faust never made his required capital contribution. He also states that on or about March 12, 2009, the members met to discuss the impact of Faust's premature departure from the company and that at the meeting Faust "promised to pay $600,000 to repair the damage caused by his premature departure [and] Faust has not made any payment on that promise." (Du Aff. ¶'s 13. 14).

In reply, Faust maintains that complaint must be dismissed as it seeks to hold him personally liable for loans made to Dumann by Mac Luk and Profitechnik, and that under these circumstances Mac Luk and Profitechnik are necessary and indispensable parties.

Discussion

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be interpreted in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 N.Y.2d 268 (1977); Morone v. Morone, 50 N.Y.2d 481 (1980). At the same time, "'[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference'" Morgenthow & Latham v. Bank of New York Company, Inc., 305 A.D.2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dept 1999), aff'd, 94 N.Y.2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" Id., quoting, Guggenheimer v. Ginzburg, 43 N.Y.2d at 275. A dismissal based on

documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.'" Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 N.Y.2d at 275.

"To be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity." Fontanetta v. Doe , 73 A.D.3d 78, 86 (2nd Dept 2010), *citing,* Siegel's Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, at 21-22, CPLR 3211(a)(1), C3211:10; see also Tsimerman v. Janoff, 40 A.D.3d 242 (1st Dep't 2007). Thus, affidavits, emails and letters are not considered documentary evidence. Fontanetta v. Doe , 73 A.D.3d at 86.

The first cause of action for breach of contract alleges that Faust breached the Operating Agreement and seeks damages (1) in the amount of $494,986.98, based on his failure to pay his capital contribution, (2) in the amount of $400,000 for the loss of revenue resulting from his premature departure from the company. It is further alleged that Faust breached his departure agreement resulting in $600,000 in damages; and that he owes $7,500 for repayment of the unearned commission. It is further alleged that Faust owes a debt to Profitechnik and its agent Lawrence Luk in the amount of $600,000 and to Mac Luk $130,000, based on a "failure to make a loan repayment" (Complaint, ¶39(a)(b)).

Under New York law, "a member of a limited liability company, [or] a manager of a limited liability company..." is not liable "for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager." N.Y. Lim. Liability Co. L. § 609(a). Similarly, Article III, § 5 of

the Operating Agreement provides that "no member shall be personally liable for any debts, obligations, or liabilities of [Dumann] or of any other member, solely by reason of being a member of [Dumann], which such debt arose in contract, tort or otherwise." See also, Retropolis, Inc. v. 14th St. Dev. LLC, 17 A.D.3d 209, 210 (1st Dept 2005)(member of limited liability company "cannot be held liable for the company's obligations by virtue of his status as a member thereof ").[4]

Accordingly, Faust cannot be held liable for the loan repayment to Profitecnik and its agent Lawrence Luk or to Mac Luk, and paragraph 39(1)(a)(b) of the first cause of action for breach of contract, which seeks such relief, must be stricken.

However, the remainder of the breach of contract claim survives, as it seeks to recover, not based on the loans made to Dumann, but in connection with Faust's alleged breach of provisions of the Operating Agreement related to his resignation from the company, his failure to pay capital contribution, his breach of an oral agreement to pay $600,000 for damages to Dumann, and for his use of an unearned commission. These allegations which, for the purpose of this motion must be accepted as true, are sufficient to state a claim for breach of contract. See generally, Furia v. Furia, 116 A.D.2d 694, 695 (2d Dept 1986).

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[4] At oral argument, Dumann conceded that plaintiff was not responsible for the debt of the LLC. Applehead Pictures LLC v. Perelman, 2009 NY Slip Op. 33084U (Sup Ct NY Co. 2009), on which Dumann relies does not require a different result. Although the court in that case held that a member was liable for breach of the provisions of limited liability company's operating agreement requiring him to make capital contributions, it did not find that the member was liable for the debts of the limited liability company. In addition,as Delaware law applied to the interpretation of the operating agreement at issue, the case is not relevant here in any event.

Next, while the letters from Dumann's counsel and Faust's affidavit arguably support Faust's assertion that the $600,000 sought in connection with the alleged oral agreement are based on the loans made to Dumann, such evidence does not qualify as documentary evidence and therefore cannot be used as a basis for dismissal of the complaint. In addition, to the extent the complaint does not allege that the money owed by Faust was to repay the debts of Dumann, at this juncture, the Statute of Frauds defense cannot be said to be applicable.

The second cause of action, for "breach of promise," is based on allegations that defendant orally promised remaining members of Dumann that he would pay $600,000 to the company to remedy the fiscal harm his departure was causing Dumann. As the plaintiff seeks the same relief in connection with the breach of contract cause of action, this cause of action must be dismissed as duplicative. Likewise, the third cause of action "for lack of capital contribution" must be dismissed as it seeks the same relief as the breach of contract action.

The fourth cause of action, for unjust enrichment, is based on allegations that while Faust received the benefits of being part of Dumann, he did not perform any of his obligations as a member towards Dumann. Specifically, it is alleged that while Faust received all of the payments due to him from his brokerage work as a member of Dumann, he did not make his required capital contribution. It is also alleged that Faust negotiated a $7,500 check for an unearned commission payment.

Unjust enrichment is a quasi-contract theory of recovery and "is an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties concerned." Georgia Malone & Co., Inc. v. Reider, 86 A.D.3d 406, 408 (1st Dept 2011). A claim of unjust enrichment is duplicative when it seeks damages for events arising out of the same subject matter

that is governed by an enforceable contract. See Bettan v. Geico General Ins. Co., 296 A.D.2d 469, 470 (2d Dept 2002). In this case, the events alleged—lack of capital contribution payment, not fulfilling an oral promise,—are governed either by the Operating Agreement or defendant's oral promise to pay $600,000 to plaintiff. Thus, this cause of action is duplicative of the breach of contract cause of action, and must be dismissed.

The fifth cause of action--which alleges that Faust owed a common law duty of good faith and fair dealing to the other members of Dumann and that he breached this duty through his active and knowing breach of the Operating Agreement--must also be dismissed as duplicative of the breach of contract claim. See TeeVee Toons, Inc. v. Prudential Sec. Credit Corp., L.L.C., 8 A.D.3d 134, 134 (1st Dept 2004) (affirming dismissal of breach of implied covenant of good faith and fair dealing claim because it was superfluous given the presence of a breach of contract claim); see also, Canstar v. Jones Constr. Co., 212 A.D.2d 452, 453 (1st Dept 1995)(holding that a breach of implied covenant of good faith and fair dealing cause of action is duplicative when it is "intrinsically tied to the damages allegedly resulting from a breach of contract").

The sixth cause of action, for "detrimental reliance,"rests on the allegations that, *inter alia*, Dumann detrimentally relied on Faust's promise to pay Dumann $600,000 upon his departure.[5] Under New York law, detrimental reliance is not an independent cause of action but is an element of estoppel. See Keane v. Kamin, 257 A.D.2d 433 (1st Dept.), aff'd, 94 N.Y.2d 263 (1999); see also Blass v. Kincaid Consulting, CPA, LLC, 2008 WL 1694824 (Sup Ct NY Co.

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[5] It is alleged that part of the financial damage resulting included financial harm to Dumann based on Faust's failure to make his one-third share of loan repayments to Profitechnik and its agent Lawrence Luk of $600,000 and to Mac Luk. However, as indicated above, Faust cannot be held personal liable for loan obligations of Dumann.

2008). Here, as the complaint does not plead a cause of action of estoppel, this cause of action is dismissed.

The next cause of action, for breach of fiduciary duty, is based on allegations that Faust did not fulfill his fiduciary duty as a Managing Member of Dumann to use his best efforts to maintain the finances of Dumann, as he failed to pay his capital contribution. To state a cause of action for breach of fiduciary duty, plaintiff must establish (1) the existence of a fiduciary relationship, and (2) a breach of the fiduciary duty. Chasanoff v. Perlberg, 19 A.D.3d 635, 636 (2d Dept 2005). Assuming *arguendo* that Faust owed Dumann and its other members a fidiciary duty, this claim must nonetheless be dismissed as it is based his alleged failure to pay his capital contribution, the same conduct which provides the basis for the breach of contract claim. See William Kaufman Organization Ltd v. Graham & James, 269 A.D.2d 171, 173 (1st Dept 2000)(holding that "[a]cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand")(internal citations omitted).

The next cause of action for "abandonment of work duties" must be dismissed as there is no such cause of action in New York.

The final cause of action alleging that Faust was paid an unearned commission of $7,500 is subsumed in the breach of contract cause of action and must be dismissed.

Finally, since that part of the breach of contract action seeking to hold Faust personally liable for loans made to Dumann by Profitechnik and its agent Lawrence Luk and/or to Mac Luk, has been dismissed, it cannot be said at least at this juncture that Profitechnik, Lawrence Luk or

Mac Luk are necessary or indispensable parties. See generally Joanne S. v. Carey, 115 AD2d 4, 7 (1st Dept 1986) ,

In view of the above, it is

ORDERED that motion to dismiss is granted to the extent of striking paragraph 39(a) and (b) of the first cause of action and dismissing the second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action; and it is further

ORDERED that the action shall continue as to the first cause of action, except for paragraphs 39(a) and (b) which have been stricken; and it is further

ORDERED within 30 days of the e-filing of this decision and order, Faust shall file an answer to the complaint; and it is further

ORDERED that the parties shall appear on September 25, 2014 at 11:00 am for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY 10007.

DATED: July 18, 2014

HON. JOAN A. MADDEN
J.S.C.

J.S.C.