Allaire v Mover
2014 NY Slip Op 32507(U)
September 29, 2014
Sup Ct, New York County
Docket Number: 650177/09
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

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RONALD ALLAIRE,

Plaintiff,

Index No. 650177/09

-against-

JONATHAN MOVER, individually, and RECKLESS MUSIC LLC, d/b/a SKYLINE STUDIOS, d/b/a SOSO MUSIC, a/k/a SKYLINE STUDIOS NYC and CDZ RECORDS LLC,

Defendants.

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Marcy Friedman, J.:

In this action to recover a share in an alleged partnership to run a recording studio, defendants Jonathan Mover (Mover), Reckless Music LLC (Reckless), d/b/a Skyline Studios d/b/a SoSo Music, a/k/a Skyline Studios NYC, and CDZ Records LLC move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Ronald Allaire appears pro se in opposition to the motion.

The complaint alleges that on or about July 1, 2000, plaintiff and Mover entered into a "partnership agreement," under which Mover would hold a 65% equity share, and plaintiff would provide services and equipment to defendants in exchange for a 35% equity share in "Skyline." (Compl., ¶ 8.) The complaint defines Skyline as all of the defendants collectively. (Compl., opening paragraph.) The complaint further alleges that Mover has "failed to provide Plaintiff Allaire of [sic] his net share of the income from Skyline and promised equity/ownership" (id., ¶ 13), and has "transferred, assigned, and diverted to himself, assets, property and business opportunities of Skyline." (Id., ¶ 14.)

The first cause of action of the complaint seeks, among other things, plaintiff's share of profits, an accounting, and dissolution of the partnership. The second cause and third causes of action plead claims for breach of contract and breach of fiduciary duty, respectively, based on the same factual allegations. The fourth cause of action alleges that plaintiff provided defendants with goods and services, including equipment, labor, and goodwill, and seeks damages for such goods and services in the amount of $750,000. The fifth and sixth causes of action plead claims for tortious interference with contract and tortious interference with prospective business relations, respectively. The seventh cause of action pleads fraud. The eighth cause of action pleads unjust enrichment. The ninth cause of action seeks an injunction directing defendants to return equipment to plaintiff that plaintiff allegedly provided to defendants but that remained his property.

The relevant undisputed facts are as follows: Prior to 1999, nonparty John King was the operator of a recording studio, under the name Chung King House of Metal. Plaintiff Ronald Allaire was employed by King as an independent contractor engineer. At that time, Mover was involved in running another recording studio. In 2000, King and Mover began to discuss running a studio together. King entered into a lease for the studio premises, dated July 21, 2000 (Mover Aff., Ex.A), in his capacity as president of 36 W 37 St. Partners, LLC. Mover and King subsequently signed an agreement, dated January 26, 2001 (2001 Agreement, Mover Aff., Ex. B), to "set forth the material terms governing our participation in Skyline Studios NYC, LLC," an LLC that was to be formed to operate the new recording studio. The 2001 Agreement was signed only by Mover and King, but provided: "John King shall hold fifty-five percent (55%) of the controlling interest in the Company. Jonathan Mover shall hold thirty-five percent (35%) of

the controlling interest in the Company. Ronald Allaire shall hold ten percent (10%) of the controlling interest in the Company. The purpose of the Company is . . . to operate a recording studio located at 36 West 37th Street . . . under the name 'Skyline Studios.'" Skyline Studios NYC, LLC was never formed. King failed to make payments under the lease, and the limited liability corporation formed to hold the lease was evicted in February 2002. In 2002, Mover incorporated Reckless Music LLC (Reckless) to operate the studio without any continuing involvement by King, and negotiated a new lease (Mover Aff., Ex. C) in Reckless' name for the remaining eight years of the initial lease term.

It is undisputed that commencing in 2000, from the outset of King's business dealings with Mover, Allaire worked at the studio, constructing and wiring it. (Mover Aff., ¶ 10.) It is also undisputed that Allaire worked with Mover at the studio from 2002, when Mover incorporated Reckless, until 2009, when Mover allegedly fired Allaire for using pirated software. The parties sharply dispute whether Allaire was an independent contractor – Mover's position – or a partner or other business associate – Allaire's position.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b]." (Zuckerman, 49 NY2d at 562.)

It is further settled that "in determining whether parties forged . . . an oral partnership agreement, a court will consider the intent of the parties, whether the parties shared joint control in the management of the business, whether the parties shared profits and losses and the existence of capital contribution." (Moses v Savedoff, 96 AD3d 466, 470 [1st Dept 2012].) "'[I]t is axiomatic that the essential elements of a partnership must include an agreement between the principals to share losses as well as profits.'" (Id., quoting Chanler v Roberts, 200 AD2d 489, 491 [1st Dept 1994], lv dismissed in part, denied in part 84 NY2d 903.)

Although the complaint alleges that an oral partnership agreement was made in July 2000, defendants acknowledge on this motion that "[p]laintiff expanded this claim in earlier motion practice and at his deposition and now asserts claims based on an oral agreement made in 2000, a written agreement dated January 2001, and an oral agreement made in October 2001, or some combination of them." (Ds.' Memo. In Support at 14.) In moving for summary judgment, defendants contend that plaintiff's claim of a partnership based on any of the alleged agreements is without merit. Plaintiff contends that triable issues of fact exist as to whether a partnership was formed.

In support of the motion, Mover offers an affidavit in which he asserts that he and Allaire did not make an oral agreement, in either 2000 or 2001, to be partners in the studio, and that Allaire "was at all times an independent contractor who earned money by performing engineering services" for him. (Mover Aff., ¶ 2.) Significantly, Mover attests, and Allaire does not dispute, that Mover operated Reckless as a single member LLC, and never filed a federal partnership income tax return or issued a form K-1 to Allaire. (Id., ¶ 21.) Mover also submits documentary evidence that strongly supports his contention that Allaire was an independent contractor – namely, 1099 forms showing compensation to Allaire for the years 2002 and 2005-

2008. This evidence is sufficient to make a prima facie showing that there not an oral agreement for a partnership or other business venture between Allaire and Mover or Reckless.

In opposition, Allaire offers an affidavit and deposition testimony in which he asserts that as a layperson, he does not know whether he is a partner, a member, or an equity shareholder, but that he "believed . . . [t]hat [he] could get 10 percent of the profits, and [he] was responsible for 10 percent of the loss." (Allaire Dep. at 77.)[1] Allaire acknowledges that he never received profits from the business, and that he never demanded an accounting. (Id. at 113-117.) His position appears to be that he contributed sweat equity in the form of technician services and equipment (gear), in exchange for an equity interest (id. at 76, 93), and that he deferred his compensation over the years. (Allaire Aff., ¶ 20.) Allaire does not deny that he received the 1099s but contends that "most" of them were not sent to his home address or left at the business location for him. (Id., ¶ 22.) By way of documentary evidence, Allaire submits two contracts with third parties to produce recordings. The contract from 2002 refers to Mover and Allaire as "SoSo," and the 2004 contract refers to Mover and Allaire as "Producer." (Id., Exs. 2, 4.) Allaire also produces a Certificate of Assumed Name, showing that Reckless does business as SoSo Music (id., Ex. 3), and a print-out from Skyline's website, apparently from 2003, stating that the studio has "re-opened. . . . Running the operations are Jonathan Mover, producer/drummer/composer . . . , and producer/engineer Ron Allaire. . . ." (Id., Ex. 8.)

On this record, the court holds that plaintiff fails to raise a triable issue of fact on his claims that he had an oral agreement for an equity interest in a partnership or other business venture with Mover or Reckless. Based on Allaire's documentary evidence, it does appear that

[1] Allaire testified variously that he believed that an oral agreement was made about July 1, 2000, and that the claim in the complaint that there was an oral agreement in 2000 was "a mistake. There was no oral agreement in 2000." (Compare Allaire Dep. at 67 with Allaire Dep. at 75-76, 160.)

Mover and Allaire held themselves out to the public as a business.[2] Moreover, the court makes no finding that Allaire did not have a good faith belief that the parties intended to "go into business together" or to pool their resources. (See Allaire Dep. at 69.) However, Allaire's vague testimony as to conversations with Mover about entering into a business and the terms of the partnership, and his documentary evidence are wholly insufficient to show that the parties in fact entered into a partnership or other business venture, or to raise a triable issue of fact in this regard. (See generally Coleman v Norton, 289 AD2d 130 [1st Dept 2001] [triable issue of fact not raised by conclusory allegations that are substantially contradicted by documentary evidence]; McGrath v Parker, 4 AD3d 457, 4 AD3d 457 [2d Dept 2004].)

Plaintiff also fails to raise a triable issue of fact as to whether he holds an equity interest based on the January 2001 Agreement. In 2003, King sued Mover and Allaire under that Agreement, claiming, among other things, that defendants failed to provide King with his net share of the income from the Skyline partnership and diverted assets from the partnership. (See King Compl, ¶¶ 30, 32 [Lehman Aff., Ex. F].) Mover provided a defense to Allaire in that action, and Allaire swore to an affidavit on September 16, 2003, stating:

> "5. I never 'entered into a written partnership agreement' with Mr. King . . . as my signature DOES NOT appear on nor was I ever asked to sign any agreement. In addition, I never received any end of year tax documents indicating that I was a partner.
>
> 6. I never agreed to be, nor did I ever believe that I was Mr. King's 'partner'. I never agreed to 'run an entity called 'Skyline Studios'' at 36 West 37th Street. (See King Aff., ¶¶ 5-7."

(Lehman Aff., Ex. H.)

Allaire's averments in the King action were formal admissions in that action that he was not a partner under the 2001 Agreement. Those admissions are informal judicial admissions for

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[2] In making this finding, the court relies on the contracts and Skyline website discussed above, not on the news reports about the re-opening of Skyline studio by Mover and Allaire (e.g., Allaire Exs. 5-7). The latter are inadmissible hearsay.

purposes of the instant action. (Matter of Liquidation of Union Indem. Ins. Co. of New York, 89 NY2d 94, 103 [1996].) As Allaire fails to offer a colorable explanation for the admissions, they are binding in the instant action, and bar his reliance on the 2001 Agreement to establish that he has an equity interest in a partnership or other venture with Mover.

Plaintiff's first and second causes of action based on the alleged partnership agreement will accordingly be dismissed. As the third cause of action for breach of fiduciary duty is based on the claim that Mover owed a fiduciary duty to Allaire as a partner, this cause of action will also be dismissed.

The fourth cause of action, to the extent it asserts a claim for payment for labor or goodwill, and the duplicative eighth cause of action for unjust enrichment, should also be dismissed. "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." (Corsello v Verizon New York, Inc., 18 NY3d 777, 790 [2012], rearg denied 19 NY3d 937.) Plaintiff fails to allege any basis on which he would be entitled to compensation for his services, other than the alleged partnership agreement which he has failed to establish. (See Rogowsky v McGarry, 55 AD3d 815, 817 [2d Dept 2008] [dismissing unjust enrichment claim where "plaintiffs failed to allege that the defendant violated a legal duty independent of the purported oral agreement"].)

The fifth and sixth causes of action for tortious interference with contract and prospective business relations, and the seventh cause of action for fraud will also be dismissed. Plaintiff does not oppose dismissal of these causes of action which, in any event, are not stated or are duplicative of the breach of contract causes of action.

The court reaches a different result as to the fourth cause of action, to the extent it asserts a claim for payment for equipment allegedly owned by plaintiff, and the ninth cause of action

seeking return of such equipment. In seeking dismissal of plaintiff's claims for equipment, defendants cite the 2001 Agreement between Mover and King, which called for King to provide specified equipment and "to provide material and complete construction of Skyline Studios." (2001 Agreement, ¶ 4.) In opposition, Allaire attests that when King failed to supply the recording equipment that King originally promised, Allaire installed equipment to get the studio up and running in August 2000. (Allaire Aff., ¶ 19.) Allaire attaches to the complaint a list of the equipment that he claims to have provided. He also submits the affidavit of Joe Salvatto, an audio recording engineer for whom Allaire once worked, who attests that many of the items on plaintiff's list were originally the property of a company that Salvatto owned and that were given to Allaire as part of a severance package when that company closed. (Salvatto Aff., ¶¶ 12-15 [Allaire Aff., Ex. 14].)

Allaire raises a question of fact as to whether any equipment at the studio belonged to him. Mover contends that Allaire is equitably estopped from claiming a right to any equipment because he allegedly aided Mover in determining what pieces of equipment belonged to King at the time of the settlement of the King action and allowed Mover, as part of that settlement, to pay King for equipment which Allaire allegedly now claims is his. (Ds.' Memo. In Support at 20-22.) In opposition to this motion, plaintiff claims that King was not paid by Mover for any equipment as part of the settlement, but was paid "to [go] away." (Allaire Aff., ¶ 29.) The settlement agreement in the King action (Lehman Aff., Ex. J) does not specify that the $30,000 settlement payment was for any equipment owned by King and, indeed, provides for King to pick up certain equipment, not for defendants to retain equipment. Defendants also do not provide a list of equipment that they allegedly obtained from King in connection with the settlement. The court will accordingly deny the branch of the motion to dismiss so much of

plaintiff's fourth cause of action as seeks payment for equipment allegedly owned by plaintiff, and the ninth cause of action for injunctive relief with respect to such equipment.

Finally, the court finds, based on the papers submitted on this motion for summary judgment, that a serious question has been raised as to whether defendants' attorney, Arthur Lehman, should be disqualified from continuing to represent defendants in this action. It is undisputed that Mr. Lehman represented both Allaire and Mover in the King action where they were named as defendants. Rule 1.9 (a) of the New York Rules of Professional Conduct (22 NYCRR § 1200) provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client give informed consent, confirmed in writing." (See also Kassis v Teacher's Ins. & Annuity Assn., 93 NY2d 611, 615-616 [1999].) At the outset of the instant action, by decision and order dated July 17, 2009, Justice Freed of this Court denied a motion by plaintiff for disqualification of defendants' attorney pursuant to this Rule. With respect to the equipment claim, Justice Freed held: "Plaintiff has not met his burden concerning the substantial sameness with regards to the equipment in each action. It is not clear that the equipment in the current action is exactly the same as the equipment in the prior action. Therefore, there is not a substantial relationship between the prior action and the current action, and accordingly Defendant's counsel is not disqualified from representing Defendant in this case." (July 17, 2000 Decision at 8.)

Since that decision, there has been a change in circumstances. It is now clear, from the briefing on the summary judgment motion, that one of defendants' primary defenses to plaintiff's equipment claim is that plaintiff "was heavily involved in the discussions concerning settlement

of the King Action," advised Mover on which items of King's equipment he should pay King to retain, and should have advised Mover that he (Allaire) was claiming title to certain items, before Mover paid King "to finally clarify that all of the disputed equipment belonged to Reckless or Mover." (Ds.' Memo. In Support at 20-21.) Thus, whether the equipment that King contributed to the studio is or is not the same as the equipment that Allaire allegedly contributed, it appears that Allaire's and Mover's attorney was privy to discussions with Allaire in the King action that he will seek to raise in defending Mover against Allaire's claims here. Before the court takes the weighty step of disqualification, however, it will afford defendants an opportunity to be heard on the issue.

It is accordingly hereby ORDERED that the motion brought by defendants Jonathan Mover, Reckless Music LLC, d/b/a Skyline Studios, d/b/a SoSo Music, a/k/a Skyline Studios NYC, and CDZ Records LLC for summary judgment dismissing the complaint is granted to the extent of dismissing of the first through third causes of action, the fourth cause of action except insofar as based on a claim for payment for equipment, and the fifth through eighth causes of action; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that defendants shall show cause in Part 60 of this Court, 60 Centre Street, Room 248, New York, New York, on December 4, 2014 at 11:30 a.m., as to whether their attorney, Arthur Lehman, should be disqualified from continuing to represent them in this action; and it is further

ORDERED that the following papers shall be served in connection with the disqualification issue: Defendants' papers, including an affirmation and/or affidavit, as appropriate, and a legal memorandum, of no more than 15 pages each, shall be served on or

before October 21, 2014; plaintiff's papers, including an affidavit of no more than 15 pages, shall be served on or before November 11, 2014; defendant's reply papers, including an affirmation and/or affidavit, as appropriate, and reply memorandum, of no more than five pages each, shall be served on or before November 18, 2014. All papers shall be served by NYSCEF and overnight mail by the above dates. Exhibits submitted in connection with the summary judgment motion may be referred to by the number or letter used on the summary judgment motion, and shall not be resubmitted. The papers on the disqualification issue shall be e-filed and two hard copies shall be filed with the Clerk of Part 60 on or before November 21, 2014.

This constitutes the decision and order of the court.

Dated: New York, New York
September 29, 2014

MARCY S. FRIEDMAN, J.S.C.