

**Nadelson v Zakharchenko**

2014 NY Slip Op 32552(U)

September 23, 2014

Supreme Court, Kings County

Docket Number: 501571/2012

Judge: David I. Schmidt

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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23<sup>rd</sup> day of September, 2014.

PRESENT:  
HON. DAVID I. SCHMIDT,  
Justice.

**DECISION AND ORDER**

Index No. 501571/2012  
Mot. Seq. No(s). 3

ALISA NADELSON and IRENE NADELSON,  
Plaintiff,

--against--

IGOR ZAKHARCHENKO, and ROSTISLAV  
NOVAKOVSKY a/k/a RUSSELL NOVAKOVSKY,  
Defendants.

Upon the foregoing papers, defendants, Igor Zakharchenko and Rostislav Novakovsky a/k/a Russell Novakovsky, (collectively "defendants"), move for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the verified complaint (complaint).

Background

The instant action concerns, a transaction between the parties, wherein plaintiffs, ALISA NADELSON and IRENE NADELSON (collectively "plaintiffs") purchased a share of the defendants' restaurant business located in Miami, Florida. By a sales agreement dated June 24, 2011, for the sum of \$ 10.00, defendants agreed to sell and plaintiffs agreed to buy, a 50.2% share in defendants' restaurant company named A.I.R Restaurant Group, LLC DBA Greenspoon Health Bar & Grill ("Greenspoon"). On the same date, all of the parties executed a new operating agreement for Greenspoon reflecting the new ownership interests created by the sales agreement and outlining to duties and obligations of the members.

Plaintiffs' complaint<sup>1</sup> alleges that, under the operating agreement, the parties agreed that 1) plaintiffs would infuse Greenspoon with \$260,000 of fresh capital to be mostly applied towards the completion of the construction of the restaurant, 2) defendants would manage the day-to-day operations of Greenspoon and 3) Greenspoon would be operational by September 1, 2011. Plaintiffs also allege that after the consummation of the deal, plaintiff repeatedly requested that the defendants provide accounting information relating to Greenspoon's operations so that plaintiffs could monitor how defendants were utilizing the plaintiffs' investment. Plaintiffs allege that on or about August of 2011, not having received a response from defendants regarding Greenspoon's accounting information, they contacted the construction company building the restaurant and were informed that Greenspoon was indebted to the construction company for approximately \$40,000.00. Plaintiffs also allege that the restaurant did not open on September 1, 2011 as originally planned and that the costs and expenses related to the construction continued to exceed the anticipated budget. Plaintiffs further allege that the defendants, in violation of the operating agreement, renegotiated the restaurant's lease after a near eviction and that, on or about May of 2012, shortly after the restaurant's March 2012 opening date, negotiated a sale of the restaurant without plaintiffs' knowledge and consent. Plaintiffs allege that their ongoing requests to defendants for records and information relating to the construction, lease and sale of the business were ignored by the defendants. Plaintiffs claim that in an effort to mitigate losses they consented

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<sup>1</sup> Plaintiffs commenced this action by Summons with Notice on June 18, 2012. Thereafter, plaintiffs filed an application seeking the entry of a default judgment based on defendants' failure to appear. During the pendency of the motion, defendants, by counsel, filed an answer, notice of appearance and demand for complaint. Plaintiffs' motion was withdrawn after the defendants appeared by counsel. Plaintiffs filed their verified complaint on October 5, 2012 and defendants joined issue on November 26, 2012. Approximately one-year later, defendants substituted counsel and the court ordered the parties to appear for a status conference on November 27, 2013. The conference was adjourned until December 18, 2013 at which time a preliminary conference order issued. A few weeks later, defendants' new attorney filed a motion seeking to have plaintiffs' attorney disqualified. That motion was denied by order dated February 6, 2014. Shortly thereafter defendants filed the instant motion seeking dismissal.

to the sale of the restaurant so the proceeds could be utilized to minimize the restaurant's liabilities, including for unpaid rent. Plaintiffs' complaint enumerates additional allegations concerning purported mismanagement of the company by the defendants and interposes eight causes of actions based on the above transactions and occurrences.

Plaintiffs' first cause of action alleges that plaintiffs were fraudulently induced into signing the June 24, 2011 sales agreement and the June 24, 2011 operating agreement. Plaintiffs' second cause of action sounds in fraud and alleges that the defendants misrepresented their intention to honor the provisions of the sale and operating agreements. Plaintiffs' third cause of action alleges that defendants conspired to commit the fraudulent acts alleged in causes of action one and two. The fourth cause of action alleges that defendants breached the sale and operating agreements. The fifth cause of action seeks damages based on a claim of unjust enrichment. The sixth cause of action alleges a claim for rescission. The seventh cause of action alleges a breach of fiduciary duty and the eighth cause of action seeks an accounting and disclosure of all of the LLC financial records.

Having already interposed an answer, defendants now move pursuant to CPLR 3211 based on two grounds. Defendants' argue as their first basis for dismissal that, pursuant to CPLR 3211(a)(1), that the plaintiffs' entire complaint should be dismissed because this court lacks subject matter jurisdiction since the operating agreement contains a forum selection clause requiring all claims concerning the operating agreement to be litigated in Florida. In the alternative, defendants move, pursuant to CPLR 3211(a)(7), to dismiss plaintiffs' first, second,

third, fourth and sixth causes of action based on the purported failure of the pleadings to adequately state those respective claims.<sup>2</sup>

In opposition, plaintiffs contend that the clause relied upon by the defendants is not a forum selection clause but a choice of law clause. Additionally, plaintiffs' allege that on or about June 2012, by a meeting of the majority of the members, the clause was amended to substitute New York law instead for Florida law, as the preferred substantive choice of law. Finally, plaintiffs argue that the complaint is sufficient on its face.

In reply, defendants reiterate that this court lacks subject matter jurisdiction over this matter urging dismissal not only based on the forum selection provisions but also based on the lack of contacts between the subject matter and the court.<sup>3</sup>

## Discussion

### CPLR 3211(a)(1)

When a party seeks an order dismissing a complaint pursuant to CPLR 3211(a)(1) based on documentary evidence, the application may be granted if the documentary evidence utterly refutes material allegations in the complaint and establishes a defense as a matter of law. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002); Xia-Ping Wang v. Diamond Hill Realty, LLC, 116 A.D.3d 767, 984 N.Y.S.2d 76 (2<sup>nd</sup> Dept. 2014).

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<sup>2</sup> Defendants annex the affidavit of Igor Zakharchenko in support of its motion. The court has not converted the application to one for summary judgment under CPLR 3212 and, as is plaintiffs' right, plaintiffs have not submitted any party affidavits in opposition to the motion instead choosing to have defendants' motion test the sufficiency of the complaint. Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633, 357 N.E.2d 970 (1976).

<sup>3</sup> The court declines to consider defendants' application as one for dismissal based on a claim of forum non convenience because it is being raised for the first time in defendants' reply papers.

Here, the clause, found in section 22 of the Operating Agreement, states in pertinent part that the, "...Agreement and the rights and liabilities of the parties hereunder shall be governed by and determined with the laws of the State of Florida." The clause is a choice of law provision and not a forum selection provision and the two clauses should not be read as one and the same. Tegra S.A. v. Bombardier, Inc., 80 A.D.3d 443, 915 N.Y.S.2d 61 (1<sup>st</sup> Dept. 2011). Therefore, defendants the motion made pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 (a)(7)

As an alternative to the complete dismissal of the complaint, defendants seek dismissal of the first, second, third, fourth and sixth causes of action based on CPLR 3211(a)(7).<sup>4</sup>

It is axiomatic that when determining a motion pursuant to CPLR 3211(a)(7), a court must "liberally construe the complaint ... and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion." 511 W. 232nd Owners Corp., 98 N.Y.2d at 152, 746 N.Y.S.2d 131, 773 N.E.2d 496 (2002). The court must also "accord [a] plaintiff the benefit of every possible favorable inference." (id. at 152). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" id. at 152, quoting Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d at 54, 735 N.Y.S.2d 479, 760 N.E.2d 1274 (2001). "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations [and] claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss." Godfrey v. Spano, 13 NY3d 358, 373 (2009);

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<sup>4</sup> In support of its CPLR 3211(a)(7) arguments, defendants cite to New York substantive law and neither party raises any arguments concerning the issue of choice of law.

a. First Cause of Action – Fraud in the Inducement

The first cause of action for fraud in the inducement is asserted against defendants for their alleged misrepresentations relating to material facts existing at the time the parties executed the sales and operating agreements

A cause of action for fraud in the inducement, must aver that there was a “representation of a material existing fact, falsity, scienter, deception and injury.” Channel Master Corp. v. Aluminium Ltd. Sales, 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 151 N.E.2d 833). Dalessio v. Kressler, 6 A.D.3d 57, 773 N.Y.S.2d 434 (2<sup>nd</sup> Dept. 2004).

In support of its application to dismiss the first cause of action, defendants argue that plaintiffs’ complaint fails to make allegations concerning the misrepresentations of fact existing at the time of the execution of the documents. Defendants also contend that plaintiffs’ decision to forego any due diligence belies plaintiffs’ allegation that it justifiably relied on defendants’ alleged representations concerning the state of Greenspoon’s affairs. Specifically, defendants contend that any statements they made regarding the anticipated opening date was merely an expression of future expectation and not a representation of an existing fact. Also, defendants argue that any representations made at the time of the execution of the agreements regarding the current state of the construction of the restaurant and its assets (i.e. equipment, furniture and fixtures) was readily apparent to plaintiffs based on their personal inspection of the premises. In opposition, defendants, citing to paragraphs 72 and 73 of the complaint, argue that complaint, on its face, adequately avers the elements of a claim for fraudulent inducement.

Plaintiffs’ complaint fails articulate with any specificity the misrepresentations allegedly made by the defendants concerning facts existing at the time of the execution of the documents.

Plaintiffs' complaint does not provide any details as to why they were unable to gather information concerning Greenspoon's state of affairs at the time they executed the agreements. Therefore, the complaint fails to sufficiently state a cause of action for a claim premised on fraud in the inducement and plaintiffs' first cause of action is dismissed.

b. Second Cause of Action - Fraud

Plaintiffs' second cause of action for fraud asserts that defendants misrepresented their intent to honor their obligations under the agreement to complete construction of the restaurant and to manage its operations. Plaintiffs allege that defendants' plan all along was to sabotage the business and utilize plaintiffs' investment for their personal benefit and that defendants made misrepresentations of fact in furtherance of that objective.

"The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages." Introna v. Huntington Learning Ctrs., Inc., 78 A.D.3d 896, 898, 911 N.Y.S.2d 442 (2<sup>nd</sup> Dept. 2010). "Where the gravamen of the alleged fraud does not arise from the mere failure of a promisor to perform his or her obligations under a contract, but arises from a promisor's successful attempts to induce a promisee to enter into a contractual relationship despite the fact that the promisor harbored an undisclosed intention not to perform under the contract, a proper cause of action sounding in fraud may be stated." Neckles Builders, Inc. v. Turner, 117 A.D.3d 923, 986 N.Y.S.2d 494 (2<sup>nd</sup> Dept. 2014).

Here, plaintiffs' complaint sufficiently articulates a cognizable claim sounding in fraud. Specifically, the complaint enumerates a number of actions taken by defendants that support the averment that defendants never intended to perform their contractual obligations. The alleged

actions taken by defendants include, *inter alia*, defendants' refusal to provide information regarding Greenspoon's construction delays, the ongoing issues with the landlord, and the sale of the entity and its assets. Therefore, defendants' motion with respect to plaintiff's second cause of action is denied.

c. Third Cause of Action - Conspiracy to Commit Fraud

The third cause of action for conspiracy to commit fraud is an ancillary claim to plaintiffs' first and second causes of action. Essentially the claim is pled as a failsafe to ensure that both defendants' are accountable to plaintiffs for the torts alleged in the first two causes of action, either as the primary tortfeasor or as a conspirator to the underlying tort.

"Although an independent cause of action for civil conspiracy is not recognized in this State, a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme." Litras v. Litras, 254 A.D.2d 395, 396, 681 N.Y.S.2d 545 [citation omitted]. "The allegation of conspiracy carries no greater burden, but also no less, than to assert adequately common action for a common purpose by common agreement or understanding among a group, from which common responsibility derives." Goldstein v. Siegel, 19 A.D.2d 489, 493, 244 N.Y.S.2d 378 (1<sup>st</sup> Dept. 1963). "Therefore, under New York law, '[i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement.'" Faulkner v. City of Yonkers, 105 A.D.3d 899, 902, 963 N.Y.S.2d 340 (2<sup>nd</sup> Dept. 2013), citing Perez v. Lopez, 97 A.D.3d 558, 560, 948 N.Y.S.2d 312 (2<sup>nd</sup> Dept. 2012).

Here, plaintiffs' complaint adequately alleges a cause of action sounding in conspiracy to commit fraud. First, as discussed above, plaintiffs' second cause of action alleges a cognizable tort. Second, plaintiffs allege that the defendants acted in concert to sabotage the business with the intention of disregarding their contractual obligations so they could ultimately abscond with plaintiffs' investment. Finally, plaintiffs (within their second cause of action) specify the alleged actions undertaken by defendants in furtherance of defendants' intention not to perform. Thus, plaintiffs adequately state a cause of action for conspiracy to commit fraud and defendants' motion with respect to that cause of action is denied.

d. Fourth Cause of Action – Breach of Contract

The essential elements of a breach of contract cause of action are “the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach” Canzona v. Atanasio, 118 A.D.3d 837, 989 N.Y.S.2d 44 (2<sup>nd</sup> Dept. 2014), citing Dee v. Rakower, 112 A.D.3d 204, 208–209, 976 N.Y.S.2d 470 (2<sup>nd</sup> Dept. 2013).

Here, plaintiffs' complaint adequately alleges all the essential elements of a breach of contract claim. First, the complaint alleges the existence of the sales agreement and the operating agreement. Second, the complaint alleges that plaintiffs performed their obligations by making the required monetary investments under the contract. Third, the complaint alleges various breaches of specific provisions of the contracts, including defendants' failure to properly manage the company and defendants' failure to obtain plaintiffs' consent with respect to the lease issues and the sale of the business. Lastly, the complaint alleges damages in stating that defendants' breach led to the failure of the business and the liquidation of its assets. Thus, defendants' motion is denied with respect to plaintiffs' fourth cause of action.

e. Sixth Cause of Action - Rescission

Rescission is available as a remedy only for (1) fraudulent inducement, (2) a failure of consideration, (3) an inability to perform the contract after it is made or (4) a breach which substantially defeats the purpose of the contract. Babylon Assoc. v County of Suffolk, 101 AD2d 207, 215 (2<sup>nd</sup> Dept. 1984).

As a general rule, rescission of a contract is permitted “for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but ... only for [breaches that] are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.” RR Chester, LLC v. Arlington Bldg. Corp., 22 A.D.3d 652, 803 N.Y.S.2d 100 (2<sup>nd</sup> Dept. 2005), citing Callanan v. Keeseville, Ausable Chasm & Lake Champlain R.R. Co., 199 N.Y. 268, 284, 92 N.E. 747 (1910). “If the party who seeks rescission has an adequate remedy at law, ordinarily he is not entitled to rescind, but in case of repudiation, or of a breach going to the root of the contract, unless the damages can be ascertained with reasonable certainty, rescission is a matter of right, with restitution instead of compensation.” Callanan v. Powers, 199 N.Y. 268, 284, 92 N.E. 747, 752 (1910).

Here, the plaintiffs’ complaint fails to adequately allege facts and claims to support the remedy of rescission. As stated above, plaintiffs’ fraud in the inducement claim failed to state a claim. Also, plaintiffs do not make any allegations relating to the issues of consideration and inability to perform. Lastly, plaintiffs’ complaint fails to make any allegations concerning the substantiality of defendants’ breach such that the purported breach defeated the plaintiffs’ objective. Fitzgerald v. Hudson Nat. Golf Club, 11 A.D.3d 426, 783 N.Y.S.2d 615 (2<sup>nd</sup> Dept.

2004). Therefore, defendants' motion is granted with respect to plaintiffs' sixth cause of action and the claim is hereby dismissed.

Accordingly, it is

**ORDERED** that defendants' motions is granted to the extent that the first and sixth causes of action fail to state a claim and as such those claims are dismissed, it is further

**ORDERED** that all other relief requested is denied.

E N T E R,



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J. S. C.

**HON. DAVID I. SCHMIDT**