

Greene v Manavalan
2014 NY Slip Op 32747(U)
October 20, 2014
Sup Ct, New York County
Docket Number: 109690/2008
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MICHAEL GREENE,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 109690/2008

JOHN SANIL MANAVALAN, a/k/a, SANIL
MANAVALAN

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Michael Greene moves to dismiss this action pursuant CPLR 3211(a)(1), (7) and (10) and for sanctions, on the ground that the action is frivolous. Plaintiff cross-moves for sanctions. The parties' motions for sanctions are denied, and the motion to dismiss is granted.

I. Background

Since this is a motion to dismiss, the following facts are taken from the complaint and the documents submitted. Plaintiff brings this action alleging that he, defendant and Stefano Pratico are joint venturers in a wine bar operating at 331 East 81st Street in Manhattan. Compl., para. 7. Plaintiff contends that in late 2012 and early 2013, he, defendant and Pratico agreed that he would own 32% of the venture and the other two each would own 34%, with profits distributed in those percentages; plaintiff filed documents to form the LLC. *Id.* at 8, 9. He further alleges that through much of 2013, he was actively involved in obtaining the liquor license for, finding the location for, obtaining the approval of the community board for, overseeing the construction of and hiring employees for the bar. *Id.* at 15-21, 26-28.

According to the complaint, a dispute arose between defendant and the renovation contractor which imploded the relationship between plaintiff, Pratico and defendant. *Id.* at 21-

37. Plaintiff contends that in November 2013, defendant locked plaintiff out of the bar's premises and "asserted exclusive control" of its bank account. *Id.* at 39-41. Subsequently, in March 2014, plaintiff changed the locks on the bar. *Id.* at 44. In response, defendant changed the locks and filed a police report, claiming plaintiff was not an owner of the bar and had improperly changed its locks. *Id.* at 44-46. The police concluded that no criminal activity had taken place and "immediately closed the investigation." *Id.* at 47. Plaintiff contends that the false police report was made in order to harm him and, in fact, damaged his standing in the community. *Id.* at 50. Plaintiff further claims that the bar opened in May 2014, that it is a profitable venture and that he is frozen out of it by defendant. *Id.* at 51-53.

The complaint alleges the following causes of action, numbered herein as in the complaint: 1) breach of fiduciary duty; 2) breach of duty of loyalty; 3) breach of duty not to oppress; 4) defamation; and 5) abuse of process.

II. Motion to Dismiss and for Sanctions

Defendant contends that plaintiff has no interest in the bar. In support, he argues that no written agreement establishing plaintiff's claim exists and submits an October 17, 2013, LLC operating agreement which names defendant as the 100% member of Per Lei LLC, located at 331 E. 81st St., New York, New York, which is in the business of running a wine bar. He also submits a document from the Division of Corporations of the New York Department of State, which indicates that a domestic limited liability company was registered on January 28, 2013 under a fictitious name and that the current name of the entity is Per Lei LLC. Defendant is named as the person upon whom process is to be served. Additionally, a December 16, 2013 conditional letter of approval from the New York Liquor Authority addressed to defendant for

Per Lei LLC is submitted, as well as checks written on defendant's bank account allegedly evidencing \$140,000 expended on constructing the bar. Finally, a lease for the bar, dated March 6, 2013, signed and guaranteed by defendant, is annexed.

Defendant moves for sanctions, contending that the action is frivolous and was filed for harassment purposes.

III. Opposition and Cross-Motion for Sanctions

In opposition, plaintiff claims he had no knowledge of the operating agreement and submits a slew of emails, including some from defendant supporting plaintiff's position. The submitted emails begin with a January 17, 2013 message from defendant to plaintiff and another individual outlining the concept for the wine bar and referring to plaintiff as a partner. Also annexed are: a receipt from the Corporate Division of the New York Department of State indicating that plaintiff filed the articles of incorporation in January 2013, which receipt was forwarded to defendant; a January 2013 email chain between plaintiff, defendant and a real estate broker regarding Per Lei LLC and a community board meeting; a State liquor license application for the bar's location, submitted by plaintiff, stating that the license is to be in defendant's name and listing plaintiff as a "partner/owner"; May 2013 and July 2013 email chains between plaintiff, defendant and an attorney apparently representing them on the liquor license application, in which plaintiff, defendant and Pratico are stated to be partners in the bar; a May 3, 2013 email from defendant to the lawyer asking if the liquor license could be in both plaintiff's and defendant's names; an August 8, 2013 email from defendant to an attorney regarding the liquor license in which he refers to plaintiff as his "business partner"; and March and May 2013 emails between defendant, plaintiff and Pratico discussing a name for the bar.

Plaintiff cross-moves for sanctions, arguing that the motion to dismiss is frivolous.

IV. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Breach of Fiduciary, Duty of Loyalty and Duty Not To Oppress

The elements of the cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by

the defendant's misconduct. *Kurtzman v Bergstol*, 40 AD3d 588, 590 (2d Dept 2007). A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." As noted in *EBC I, INC. V Goldman Sachs & Co.*, 5 NY3d 11, 19-20 (2005), a fiduciary relationship,

necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. Generally, where parties have entered into a contract, courts look to that agreement "to discover . . . the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency..." However, it is fundamental that fiduciary "liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation." [citations omitted]

"[A] fiduciary relationship arises 'between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'"

[Citation omitted]. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011).

A fiduciary relationship may arise from a joint venture. *Dura v Walker, Hart & Co.*, 27 NY2d 346 (1971). "The existence of a joint venture are: acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses." *Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 298 (1st Dept 2003). Neither the contributions nor the shared profits need be equal. *Dura, supra* at 350.

Joint venture agreements need not be in writing. *Dura, id.* Nonetheless, the earmarks of a joint venture must exist. The complaint and documents submitted here demonstrate the intent of plaintiff and defendant to be associated in a joint venture to establish the wine bar, mutual contribution to that undertaking and an allegation as to an agreement to share profits. Nowhere,

however, is there any allegation of an agreement to share any losses. Consequently, although the complaint alleges misconduct by defendant that may constitute a breach of fiduciary duty and damages resulting therefrom, a joint venture creating such a fiduciary duty is not made out. This cause of action, therefore, is dismissed. Similarly, the court dismisses the claims for breach of defendant's duty of loyalty and duty not to oppress, both because no relationship upon which these duties rest is established and because these claims are a reiteration of the breach of fiduciary duty claim and duplicative.

B. Abuse of Process

Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective....First, the process used must involve 'an unlawful interference with one's person or property'...the 'gist of the action for abuse of process'...is 'the improper use of process after it is issued.'... A malicious motive alone, however, does not give rise to a cause of action for abuse of process." [citations omitted]

Curiano v Suozzi, 63 NY2d 113, 116-117 (1984); *accord Liss v Forte*, 96 AD3d 1592 (4th Dept 2012); *Ronaldson v Countryside Manor Condominium Bd of Managers*, 189 AD2d 808, 809 (2d Dept 1993).

Here, the elements establishing abuse of process are lacking. Plaintiff complained to the police, they investigated and they immediately closed the investigation. No process issued. The claim, therefore, is dismissed.

C. Defamation

This claim also is dismissed. The elements of defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation

per se.” *D’Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 962 (4th Dept 2014). CPLR 3016(a) requires that in an action alleging libel or slander, “the particular words complained of shall be set forth in the complaint.” Here, plaintiff claims that defendant filed a deposition with the police falsely claiming that plaintiff was not an owner of the wine bar and had no legal right to change the locks. The specific words written or uttered by plaintiff are not in the complaint, making it impossible for the court to determine whether what was said was libelous or was slander per se. Further, if the words were not slander per se, the requirement that special damages be pleaded was not met. *See Matherson v Marchello*, 100 AD2d 233, 235 (2d Dept 1984) (special damages consist of “the loss of something having economic or pecuniary value” which must flow directly from the injury to reputation caused by the defamation; not from the effects of defamation”).

D. Motion to Amend

At oral argument, plaintiff requested leave to amend his complaint. Based upon the documents submitted, plaintiff may have a claim despite the pleading deficiencies. Hence, plaintiff may file and serve an amended complaint.

E. Sanctions

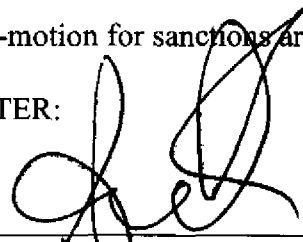
The motions for sanctions are denied. It does not appear that plaintiff’s position was entirely frivolous, in light of the documentary evidence that defendant considered him a “partner” and the allegations that plaintiff invested sweat equity in the bar. Defendant was successful on the motion so the imposition of sanctions on him is unwarranted. Accordingly, it is

ORDERED that defendant's motion to dismiss is granted with leave to replead within 20 days of service upon plaintiff of a copy of this order with notice of entry; and it is further

ORDERED that the motion and the cross-motion for sanctions are denied.

Dated: October 20, 2014

ENTER:



J.S.G.