

Maraj v MRS Elec.

2014 NY Slip Op 32947(U)

October 27, 2014

Supreme Court, Queens County

Docket Number: 701272/2013

Judge: Orin R. Kitzes

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UNRECORDED

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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GEORGE MARAJ and PINCHAS SHAKHMOROFF, Number 701272/ 2013

Plaintiffs,

-against-

Motion
Date June 27, 2014

MRS ELECTRIC and SONJA ROSE,

Motion Seq. No. 2

Defendants.

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FILED
NOV - 3 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered E29 to E80 read on this motion by defendants for summary judgment dismissing the complaint against them or, in the alternative, to vacate plaintiffs' discovery demands; and on this cross motion by plaintiffs to compel defendants to respond to discovery demands.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	E29-E44
Notice of Cross Motion - Affidavits - Exhibits..	E46-E76
Memorandum of Law.....	E75
Answering Affidavits - Exhibits.....	E77-E79
Reply Affidavits.....	E80

Upon the foregoing papers it is ordered that the branch of the motion which is for summary judgment is denied. The branch of the motion which is for an order vacating the discovery demands made by plaintiffs is granted without prejudice to the service of more narrowly drawn demands. The cross motion is denied.

According to plaintiffs, in or about 1998, plaintiff George Maraj worked at D. L. Blaine Corp., an electrical contracting company, as a union electrician, engineer, and project manager, plaintiff Pinchas Shakhmoroff (Pinchas) worked at the company as a union electrical foreman and engineer, and defendant Sonja Rose

worked at the company as a bookkeeper. By July 2002, Maraj earned \$250,000 per year (including benefits) and Pinchas earned \$200,000 per year (including benefits) at Blaine, but they decided to leave the company and enter into a joint venture with defendant Rose.

Plaintiffs further allege that as part of their plan, they agreed to organize a company in which they would all share in the assets, profits, and liabilities and from which they would all draw salaries. Although they agreed that only Rose would be named as the owner of the company, they also agreed that the assets, profits, revenues, and liabilities would be divided as follows: (a) 40% for Maraj, (b) 30% for Pinchas, and (c) 30% for Rose. "It ... made sense to list Rose as the shareholder insofar as union electricians cannot hold shares or officer positions in an electrical contracting company." (Affidavit of George Maraj, ¶ 17.) In furtherance of their plans, Maraj, Rose, and Pinchas made capital contributions of \$50,000, \$20,000, and \$9,000, respectively, and Maraj and Pinchas also contributed another \$220,000 in tools, equipment, supplies plus their personal services. Plaintiffs also made loans totaling more than \$250,000 to the company. The parties named Rose as the president of the company, although she only did bookkeeping and other financial work and managed the office. Pinchas, the corporate vice-president, worked for the company as its licensed master electrician, and Maraj, the corporate secretary, managed the company and its projects.

Plaintiffs allege that by June 2012, the relationship between plaintiffs and defendant Rose had deteriorated to the point where she stopped speaking and interacting with them and had begun to make defamatory statements about them to customers and company employees. On or about February 25, 2013, Rose changed the locks to the company's place of business, thereby preventing plaintiffs from entering into the premises and retrieving their personal property. She also improperly withdrew company funds from its bank accounts.

According to defendants, Sonja Rose formed MRS Electric, Inc. on or about July 1, 2002, and she is the only shareholder, as evidenced by the Certificate of Directors' Action. MRS Electric obtained certification from several government agencies that it is an M/WBE company, a status which entitles companies owned by women or minorities to obtain certain contracts. In order to obtain M/WBE status, plaintiffs executed affidavits acknowledging Rose's sole ownership of MRS Electric. Plaintiffs have further admitted that their names are not stated on any issued shares of the corporation. Plaintiffs were only employees of MRS Electric, although at times they may have received additional compensation

based on a percentage of the net profit of a job. Plaintiffs served as officers and directors of the corporation, but this service did not confer any ownership interest upon them. Plaintiffs quit without notice, removed company property, and locked Rose out of the premises.

Plaintiffs began this action by the filing of a summons and complaint on or about September 9, 2013. The complaint asserts causes of action for, *inter alia*, breach of contract, breach of fiduciary duty, conversion, and defamation.

Summary Judgment

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) The defendants successfully carried this burden in regard to the first cause of action (breach of contract) by submitting the affidavit of Sonja Rose alleging that plaintiffs were merely employees of the company with no ownership interest. The burden on this motion in regard to the first cause of action shifted to plaintiffs, requiring them to produce evidence showing that there is an issue of fact which must be tried. (See *Alvarez v Prospect Hospital*, *supra*.) They successfully carried this burden. Even though plaintiffs' papers are somewhat equivocal concerning whether they are claiming to have an equitable ownership in MRS Electric or whether they are claiming to be joint venturers with MRS Electric, which equivocation is understandable in view of the M/WBE status of the corporation and the prohibition against union electricians holding shares or officer positions in an electrical contracting company, the defendants are not entitled to summary judgment on either alternative.

With respect to an ownership interest in MRS Electric, the absence of a party's name on a record of stockholders or lack of physical possession of stock certificates is not conclusive evidence that he has no interest in the corporation. (See *Kun v Fulop*, 71 AD3d 832; *Blank v Blank*, 256 AD2d 688; *Benincasa v Garrubbo*, 141 AD2d 636.) "The burden of establishing shareholder status may be satisfied in a number of ways, including tendering proof of share certificates; the existence of an agreement between parties demonstrating an intent to form a corporation; tax records; as well as the conduct of the parties which may evidence exercise of functions consistent with shareholder status." (*Langella v Front Door Associates, Inc.*, 34 Misc 3d 1212[A] [Table], 2012 WL 149347, 3 [Text] [NY Sup Ct].) Under all of the circumstances of this case,

including the alleged capital contributions of the defendants and their role in MRS Electric, there is an issue of fact concerning their ownership interest in the corporation.

With respect to the second alternative, there is an issue of fact concerning whether defendant Rose breached a joint venture agreement. A joint venture is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge. (*Fallone v Misericordia Hosp.*, 23 AD2d 222, 225, *aff'd*, 17 NY2d 648.) "The essential elements are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses." (*Ackerman v Landes*, 112 AD2d 1081, 1082.) In this case, plaintiffs have sufficiently alleged an agreement with MRS Electric which meets these criteria, and defendants' denial of an ownership interest in MRS Electric by plaintiffs does not entitle them to summary judgment on the joint venture issue.

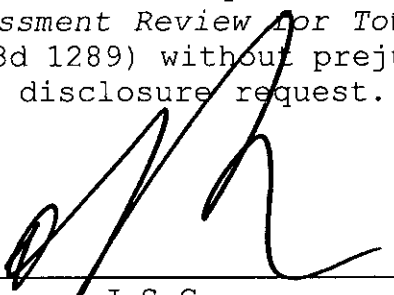
With respect to the remaining causes of action, defendants' conclusory denials of the allegations in the complaint are insufficient for a *prima facie* showing of entitlement to summary judgment. "A movant's failure to sufficiently demonstrate its right to summary judgment requires a denial of the motion regardless of the sufficiency, or lack thereof, of the opposing papers." (*Cugini v System Lumber Co., Inc.* 111 AD2d 114, 114; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fialkin v Hodnik*, 226 AD2d 1134.) Despite the insufficiency of defendants' showing, plaintiffs' attorney has shown in detail that the causes of action are well-stated and supported by evidentiary allegations. In any event, the contradictory allegations of the parties have raised issues of fact and credibility which cannot be resolved on this motion. (See *Bi Bo Chiu v Malik*, 86 AD3d 548; *Dayan v Yurkowski*, 238 AD2d 541; *T&L Redemption Center Corp. v Phoenix Beverages, Inc.*, 238 AD2d 504; *First New York Realty Co., Inc. v DeSetto*, 237 AD2d 219.)

Disclosure

Plaintiffs have served sweeping discovery demands requiring the production of voluminous documents. Plaintiffs have, for example, demanded "[a]ll communications and correspondence between defendants and any MRS employee" and "[a]ll communications between defendants and any MRS client and/or customer". The sweeping

demands made by plaintiffs are overly broad and burdensome. (See *Greenfield v Board of Assessment Review for Town of Babylon*, 106 AD3d 908.) Where discovery demands are overly broad and burdensome, they will be vacated in their entirety rather than pruned (see, *Greenfield v Board of Assessment Review for Town of Babylon, supra; Kregg v Maldonado*, 98 AD3d 1289) without prejudice to the service of a more narrowly drawn disclosure request. (See *Kregg v Maldonado, supra.*)

Dated: October 27, 2014



J.S.C.