

Estate of Vacanti v Estevez

2014 NY Slip Op 33830(U)

April 7, 2014

Supreme Court, Nassau County

Docket Number: 601201-13

Judge: Timothy S. Driscoll

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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**ESTATE OF PETER VACANTI, by its
Administratrix Dorothy Vacanti**

Plaintiff,

-against-

**DARLENE ESTEVEZ, SAL GENOVA,
ANTHONY GENOVA, STELLA GENOVA COLLINS,
NIKKO CUCINA CORP., PIZZERIA AMICI CORP.,
JOHN and/or JANE DOE,**

Defendants.
-----x

TRIAL/IAS PART: 15

NASSAU COUNTY

Index No. 601201-13

Mot. Seq. No. 1

Submission Date: 2/14/14

Papers Read on this Motion:

- Notice of Motion, Affidavits in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affidavit in Opposition.....x**
- Memorandum of Law in Opposition.....x**
- Reply Affidavits and Affidavit of C. Giambalvo.....x**
- Memorandum of Law in Reply.....x**
- Correspondence dated November 1, 2013.....x**
- Correspondence dated November 4, 2013.....x**

This matter is before the court on the motion filed by Defendants Darlene Estevez (“Darlene”), Sal Genova (“Sal”) and Pizzeria Amici Corp. (“Amici”) (“Movants”) on July 30, 2013 and submitted on February 14, 2014, following oral argument before the Court. For the reasons set forth below, the Court grants Movants’ motion to dismiss the sixteenth cause of action in the Complaint, alleging intentional infliction of emotional distress/reckless infliction of emotional distress/negligent infliction of emotional distress, and otherwise denies the motion.

BACKGROUND

A. Relief Sought

Movants move for an order 1) pursuant to CPLR §§ 3211(a) and 3016(b), dismissing the complaint (“Complaint”); and 2) pursuant to CPLR § 3212, granting Movants summary judgment dismissing the Complaint.

Plaintiff Estate of Peter Vacanti (“Peter”), by its Administratrix Dorothy Vacanti (“Dorothy”) (“Plaintiff”) opposes the motion.

B. The Parties’ History

The parties’ history, including the parties’ positions with respect to the motions, is outlined in detail in a prior Order (“Prior Order”) of the Court dated January 6, 2014 in which the Court scheduled the motion for oral argument, which the Court held on January 31, 2014. The Court incorporates the Prior Order by reference as if set forth in full herein.

As noted in the Prior Order, Plaintiff, the legal representative of the estate of Decedent Peter Vacanti (“Peter”), alleges that Defendants breached a joint venture agreement entered into by Peter and Defendants Darlene Estevez (“Darlene”) and Sal Genova (“Sal”) concerning the operation of two restaurants. The Complaint contains sixteen (16) causes of action: 1) against Defendants Anthony Genova (“Anthony”), Stella Genova Collins (“Stella”) and Nikko Cucina Corp. (“Nikko”) for breach of the joint venture (“JV”) relationship, 2) against Anthony, Stella and Nikko for breach of their fiduciary duties owed to Peter, 3) against Sal, Darlene and Amici for breach of the JV relationship, 4) against Sal, Darlene and Amici for breach of their fiduciary duties owed to Peter, 5) against Sal and Darlene for inducing and participating in Anthony and Stella’s breach of their fiduciary duties to Peter, and against Anthony and Stella for inducing and participating in Sal and Darlene’s breach of their fiduciary duties to Peter, 6) against Defendants for breach of the implied covenant of good faith and fair dealing, 7) against Anthony and Stella on the theory of unjust enrichment, 8) against Sal and Darlene on the theory of unjust enrichment, 9) a request for a declaratory judgment that a) the JV relationship was in fact formed and existed between Peter and Defendants Anthony and Stella; b) Plaintiff has a 50% ownership interest in Nikko and the assets belonging to the establishment referred to as Pizza Cucina Westbury; and c) the profits and losses in the JV relationship are to be shared 50% by Plaintiff

and 50% by Defendants Anthony and Stella, 10) a request for a declaratory judgment that a) the JV relationship was in fact formed and existed between Peter and Defendants Sal and Darlene; b) Plaintiff has a 66% ownership interest in Amici and the assets belonging to the establishment referred to as Pizza Cucina North Merrick; and c) the profits and losses in the JV relationship are to be shared 66% by Plaintiff and 33% by Defendants Sal and Darlene, 11) against Anthony, Stella and Nikko, a request for a constructive trust against the net profits realized by a) Nikko and b) Pizza Cucina Westbury to the extent of Plaintiff's 50% membership interest in Nikko and Pizza Cucina Westbury as well as Plaintiff's equity interests in the entity and related assets, 12) against Sal, Darlene and Amici, a request for a constructive trust against the net profits realized by a) Amici and b) Pizza Cucina North Merrick, to the extent of Plaintiff's 66% membership interest in Amici and Pizza Cucina North Merrick, as well as Plaintiff's equity interest in the entity, restaurant and related assets, 13) a request for a period accounting from Defendants regarding all financial aspects of Nikko, Amici, Pizza Cucina Westbury and Pizza Cucina North Merrick, 14) against Anthony, Stella, Sal and Darlene for conversion of Plaintiff's interest in Nikko, Amici, Pizza Cucina Westbury and Pizza Cucina North Merrick, 15) against Sal, Anthony, Stella and Darlene for wrongful death, for which Plaintiff seeks punitive damages, and 16) against all Defendants for intentional infliction of emotional distress/reckless infliction of emotional distress/negligent infliction of emotional distress.

In the Prior Order, the Court directed oral argument on the motion to address issues including 1) whether the Court may properly consider the affidavits in support of the motion, or whether those affidavits are precluded under CPLR § 4519, the Dead Man's Statute; 2) whether the Court may properly consider the affidavit in opposition of Amanda Doring ("Amanda"), whose affidavit raises issues regarding whether she has the requisite personal knowledge to support her affidavit; 3) whether the Statute of Frauds bars Plaintiff's claims with respect to the joint venture between Peter and Defendants; 4) whether, in light of case law supporting the conclusion that members of a joint venture owe a fiduciary relationship to each other, the causes of action dependent on that relationship are legally sufficient; and 5) whether the Complaint alleges conduct that is sufficiently egregious to support the cause of action for infliction of emotional distress.

C. The Parties' Positions

The parties' positions, as outlined in their motion papers, are set forth in the Prior Order.

At oral argument, counsel for Movants conceded that the affidavits in support of Sal and Darlene come within the purview of the Dead Man's Statute with respect to their conversations and communications with Peter, the decedent. Counsel for Movants also argued that 1) the reply affidavit of Craig Giambalvo ("Craig"), the brother of Darlene, is admissible because Craig has no interest in this litigation; 2) the Court should not consider the affidavit of Amanda, the stepdaughter of Peter, because Amanda has too limited a knowledge of the operations of the restaurant to have personal knowledge of those operations, and because Amanda is an interested party by virtue of her relationship to Peter; 3) as the parties signed a ten-year lease for the pizzeria, the agreement could not be performed within a year, and is therefore barred by the Statute of Frauds; 4) any fiduciary duty that existed between the parties ended when Sal and Darlene paid Peter, and Peter provided a release; and 5) the alleged conduct is not egregious enough to support the cause of action for intentional infliction of emotional distress.

At oral argument, counsel for Plaintiff argued that 1) the affidavit of Craig does not establish payment and release, in part because Craig's affidavit is internally consistent because he affirms, on the one hand, that Darlene said she did not have the funds to pay Peter but also affirms, on the other hand, that Darlene thereafter produced \$23,000 in cash, and also because the purported payment and release was not memorialized in a writing; 2) Amanda, by virtue of her employment at the pizzeria, had sufficient interaction with its workings to provide details regarding its operation based on her personal knowledge; 3) the Statute of Frauds is inapplicable to the parties' agreement because a) the joint venture was entered into, and created, prior to the negotiation of the lease agreement, and the term of the joint venture agreement is not the same as the duration of the lease; b) the Statute of Frauds does not generally apply to joint venture agreements; c) there was partial performance by Peter; and d) pursuant to General Obligations Law ("GOL") § 5-701(b)(3)(c), the Statute of Frauds is not a defense to an action where, as here, the parties acknowledge that an agreement was entered into; 4) Defendants' argument that the fiduciary relationship, if it existed, was only three (3) months long does not affect the viability of the breach of fiduciary claim, but rather goes to the issue of damages; and 5) the alleged conduct

is sufficiently egregious to support the cause of action for intentional infliction of emotional distress.

RULING OF THE COURT

The Court incorporates by reference the principles outlined in the Prior Order regarding summary judgment, joint ventures, the Dead Man's statute and infliction of emotional distress.

A. Part Performance Exception to Writing Requirement

The doctrine of part performance may be invoked only if plaintiff's actions can be characterized as "unequivocally referable" to the agreement alleged. *Anostario v. Vicinanza*, 59 N.Y.2d 662, 664 (1983). It is not sufficient that the oral agreement gives significance to plaintiff's actions. Rather, the actions alone must be unintelligible or at least extraordinary, explainable only with reference to the oral agreement. *Id.*, citing, *inter alia*, *Burns v. McCormick*, 233 N.Y. 230, 232 (1922).

In *Gural v. Drasner*, 114 A.D.3d 25 (1st Dept. 2013), the First Department held that the partial performance exception to the Statute of Frauds applies only to GOL § 5-703, which concerns contracts for the conveyance of an interest in real property, and does not apply to GOL § 5-701. *Id.* at 32.

B. Agreements Performable Within One Year

GOL § 5-701(a)(1) provides that an agreement that, by its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime, must be in writing. An oral agreement will not be enforceable when the agreement by its terms is not to be performed within one year from the making thereof. *Cathy Daniels, Ltd. v. Weingast*, 91 A.D.3d 431, 434 (1st Dept. 2010), quoting GOL § 5-701(a)(1). The Court of Appeals has interpreted this provision to encompass only those contracts which, by their terms, have absolutely no possibility in fact and law of full performance within one year. As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbably that such performance will occur during that time frame. *Cathy Daniels, Ltd. v. Weingast*, 91 A.D.3d at 434, quoting *Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 366 (1998) (internal quotation marks and citations omitted).

GOL § 5-701(b)(3)(c) provides that, notwithstanding GOL § 5-701(a)(1), there is sufficient evidence that a contract has been made if “[t]he party against whom enforcement is sought admits in its pleading, testimony or otherwise in court that a contract was made[.]”

C. Application of these Principles to the Instant Action

The Court grants Movants’ motion to dismiss the sixteenth cause of action in the Complaint, alleging intentional infliction of emotional distress/reckless infliction of emotional distress/negligent infliction of emotional distress, based on the Court’s conclusion that the alleged conduct of the Defendants is not sufficiently outrageous and extreme to support this cause of action.

The Court otherwise denies Movants’ motions based on the Court’s conclusions, *inter alia*, that 1) the Court may consider the affidavit of Amanda, who had sufficient involvement with the pizzeria to provide an affidavit based on personal knowledge; 2) the affidavit of Craig does not establish, as a matter of law, that there was a payment and release, in part due to the arguably internal inconsistency of his affirmation that Darlene said that she lacked the money to pay Peter but then provided him with significant funds, and in consideration of the fact that there is no writing evidencing this transaction; 3) the Statute of Frauds does not preclude this action, even assuming the inapplicability of the part performance exception, because a) the term of the lease is not necessarily the term of the purported agreement between the parties and, therefore, the Court cannot say that the agreement was incapable of being performed within a year; b) pursuant to GOL § 5-701(b)(3)(c), Darlene’s admission in her supporting affidavit is evidence that there was a contract; and c) case law supports the conclusion that the Statute of Frauds is inapplicable to an agreement to create a joint venture; and 4) the breach of fiduciary cause of action is viable in light of the fiduciary duty that the parties owed to each other pursuant to their joint venture, and the length of their business relationship goes to the issue of damages, not to the viability of the cause of action.

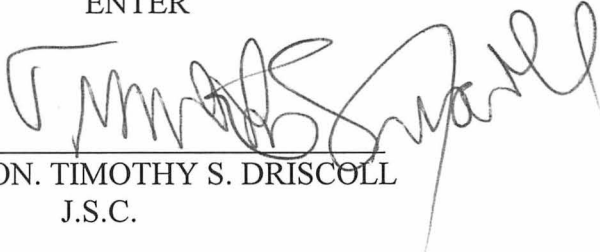
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of the required appearance before the Court for a Preliminary Conference on April 25, 2014 at 9:30 a.m. as directed herein.

ENTER

DATED: Mineola, NY
April 7, 2014



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

APR 17 2014

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