

<b>Can Man Carting, LLC v Spiezio</b>
2014 NY Slip Op 33995(U)
October 10, 2014
Supreme Court, Westchester County
Docket Number: 61783/14
Judge: Mary H. Smith
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**FILED: WESTCHESTER COUNTY CLERK** INDEX NO. 18/2014 10:4  
**11/24/2014**

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**DECISION AND ORDER**

FILED & ENTERED

11/24/14

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH  
Supreme Court Justice

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CAN MAN CARTING, LLC and ANDRIS KURINS,

Plaintiffs,

MOTION DATE: 10/3/14  
INDEX NO.: 61783/14

-against-

JOSEPH SPIEZIO, CAN MAN SANITATION, INC., and  
JLS WASTE SERVICES OF NEVADA CORP.,

Defendants.  
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The following papers numbered 1 to 13 were read on this pre-answer motion by defendants for an Order pursuant to CPLR 3211 dismissing the complaint, etc., and on this cross-motion for discovery.

**Papers Numbered**

Notice of Motion - Affidavits (Buss, Spiezio) - Exh. ....	1-4
Notice of Cross-Motion - Affirmation (Burstein) - Exhs. (A-B) - Affidavit (Lostumbo) - Exhs. (A-B) - Supplemental Affirmation (Burstein) - Exh. -	
Memorandum of Law .....	5-12
Answering/Replying Affirmation (Buss) .....	13

Upon the foregoing papers, it is Ordered that this pre-answer motion and cross-

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motion are disposed of as follows:

This action arises out of a 34-page Purchase Agreement, dated January 21, 2013, between plaintiff Can Man Carting, LLC ("Can Man")<sup>1</sup> and defendant J.L.S. Waste Services of Nevada, LLC ("Waste Services"), whose sole principal is defendant Joseph Spiezio, wherein defendant Waste Services was to purchase "one hundred (100%) percent of all membership interests in Can Man, Can Man's waste hauling business and assets, as well as licenses, customer lists, contracts, good will, "related operations," a "yard," etc. for the purchase price of \$2,350,000.00. The purchase price was to have been paid through a \$600,000.00 cash payment at closing, the payment of \$1,445,000.00 over a six-year period and defendant Waste Service's assumption of Can Man's \$238,796.84 loan from the Wilton Bank.

Plaintiff alleges that no closing thereon took place, on January 31, 2013, as had been scheduled, because defendant Spiezio had concerns regarding delinquent payroll withholding tax obligations of Can Man. Accordingly, it is alleged in the complaint that the parties' agreement thereupon orally had been "changed," which plaintiff argues at bar really had meant that the parties had entered into a new agreement, such that, on February 1, 2013, Waste Services had purchased all of Can Man's assets and good will and began operating Can Man's waste carting business. At that same time, the parties allegedly orally had agreed that the purchase price would be the same but that Waste Services would repay the Wilton Bank loan, and further pay \$600,000.00 as reduced by \$481,431.86 to take into account Waste Service's payment of certain herein unspecified Can Man trade

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<sup>1</sup>Can Man's sole members had been plaintiff Andris Kurins, and non-parties Fior Lostumbo and Anthony Passaniti.

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obligations, and that Waste Services would execute a promissory note in the sum of \$1,348,554.17, owed by Can Man to plaintiff Kurins for shareholder loans, which sum would be paid directly to Kurins over a six-year period with 5 percent interest and a balloon payment in the 73<sup>rd</sup> month, with the remaining \$281,217.13 owing to Can Man to be paid directly to Can Man by Waste Services over a period of six years at a 5 percent interest rate, with a balloon payment in the 73<sup>rd</sup> month. According to plaintiffs, neither loan agreement had any pre-payment penalty in the event of early payment of same within a year, and allegedly both agreements had called for acceleration of all monies owed in the event of a default. The required payments allegedly were to have commenced in April, 2013.

Plaintiffs further allege that Spiezio had asked Can Man whether Waste Services could defer making the required payments to Can Man under the parties' oral agreement to begin in June, 2013, to which Can Man had agreed. No such payments however allegedly were ever made.

According to plaintiff, on February 19, 2013, defendant Spiezio had created defendant Can Man Sanitation, Inc. ("Sanitation"), and thereafter he fraudulently had transferred the assets that Waste Services had acquired from Can Man to Sanitation, without any consideration; on February 21, 2013, Spiezio had dissolved Waste Services. Plaintiffs further allege that defendants Sanitation and Spiezio thereafter had pledged the then assets of Sanitation (that had originated from Can Man) as security for a bank line of credit with The Westchester Bank.

During the ensuing first 12 months following the alleged April, 2013, commencement date of defendant Waste Services financial obligations to plaintiffs, it is

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alleged that plaintiff Kurins had received his payments in accordance with the terms of the promissory note, notwithstanding that the note, despite numerous promises by Spiezio to execute same, never actually had been signed. Allegedly Kurins only had learned of Waste Service's dissolution, in April or May, 2014, when a check that he had received from Spiezio had been unpaid due to a "stop order" placed on it by Spiezio.

It appears that, on July 30, 2014, Spiezio had sent an email to Kurins, in response to Kurin's earlier default notice to Spiezio, which had been spent pursuant to the terms of the unsigned note, wherein Spiezio had advised that he rejected Kurin's default notice and further that Spiezio's counsel had advised defendants that they had claims against Kurins for fraud relating to Can Man's actual assets and values.

Plaintiffs thereafter had commenced this action in August, 2014, alleging eight separate causes of action: for breach of contract claim by plaintiff Kurins against Waste Services, for a claim of defendant Spiezio's liability to plaintiff Kurins for Waste Services' debt, for a breach of contract claim by Can Man against Waste Services, for a claim of defendant Spiezio's liability to plaintiff Can Man for Waste Services' debt, for a fraudulent conveyance claim pursuant to Debtor and Creditor Law section 273 as against defendants Waste Services and Sanitation, for a fraudulent conveyance claim pursuant to Debtor and Creditor Law section 276 as against defendants Spiezio, Waste Services and Sanitation, for a claim of unjust enrichment by plaintiff Kurins against defendants Spiezio and Waste Services and for a claim of unjust enrichment by plaintiff Can Man against defendants Spiezio and Waste Services.

Presently, defendants are moving for an Order pursuant to CPLR 3211, dismissing the complaint, arguing that dismissal is supported based upon the documentary evidence,

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and that any alleged oral agreement is unenforceable because (1) the parties' executed Purchase Agreement includes a provision requiring that any changes thereto be put into a writing signed by the parties, which writing does not exist, (2) same is barred by the Statute of Frauds, set forth in General Obligations Law §5-701(1), since the alleged oral agreements, which by their alleged terms were not to have been performed within one year, were required to be in writing in order to be enforceable, and (3) same is barred by General Obligations Law 5-701(2) which requires any agreement where a party agrees to be responsible for the debt of a third party to be in writing. Additionally, defendants maintain that this action must be dismissed since plaintiff Can Man is a limited liability company that lacks capacity to sue because (1) it had not properly first obtained the required authorization from its managing member, Fior Lombusto, (2) Can Man is not registered as a foreign limited liability corporation authorized to do business in New York, (3) Can Man also has failed to properly file a Certificate of Authority, as required by section 808 of the Limited Liability Law, and (4) Can Man has not published its articles of incorporation, as required by section 802(b)(3) of the Limited Liability Law. Defendants further argue that plaintiffs' asserted fraud claims are not properly pleaded with the required specificity of CPLR 3016, subdivision (b), that plaintiffs' complaint fails to state a cause of action and is vague and ambiguous," and that defendant Spiezio has not been properly personally served herein. Finally, defendants maintain that personal jurisdiction has not been conferred over defendant Spiezio, who has submitted his affidavit wherein he swears that he has "no idea who [is] that person" identified in the affidavit of service, that no one had stated to him that they had received any papers for him and that "no one at that address is authorized to accept service of papers upon [him] personally."

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Firstly, the Court observes that defendants have failed to include a copy of the complaint in their moving papers but that, in light of plaintiffs' inclusion of same, the Court nevertheless will address the merits of defendants' motion. See Aleksandrowicz v. Cantella & Co., Inc., 72 A.D.3d 1580 (4<sup>th</sup> Dept. 2010); Soule v. Lozada, 232 A.D.2d 825 (3<sup>rd</sup> Dept. 1996); Levy v. Lee Finkel Op Digital LLC, 2012 WL 3018625 (Sup. Ct. Suff. Co. 2012).

Addressing next the issue of personal jurisdiction over defendant Spiezio, plaintiffs assert that the filed affidavit of service is prima facie proof of proper service upon defendant Spiezio and that Spiezio has failed to swear to specific factual statements rebutting the affidavit of service, and therefore that said defendant is not entitled to a Traverse hearing on the issue of jurisdiction. Nevertheless, to avoid appellate review of this issue, plaintiffs consent to the holding of a Traverse hearing on whether jurisdiction over defendant Spiezio properly has been conferred. In that event, plaintiffs further are cross-moving for an Order permitting them to undertake jurisdictional discovery to identify the person of suitable age and discretion that had been served on behalf of Spiezio at Spiezio's actual place of business.

The Court denies defendant Spiezio's motion for dismissal predicated upon improper service and lack of jurisdiction. The subject affidavit of service, which notably too had failed to annex to their moving papers, shows substituted service upon Spiezio by way of service upon a person of suitable age, on August 4, 2014, at said defendant's actual place of business, and same constitutes prima facie proof of proper service which is not refuted by Spiezio's bare claim that he was not properly served. See Edan v. Johnson, 117 A.D.3d 528 (1st Dept. 2014); U.S. Bank v. Arias, 85 A.D.3d 1014, 1015 (2nd Dept.

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2011). Spiezio does not deny that he physically is present with regularity at his workplace service address and/or that he does not regularly transact business at that location. See Selmani v. City of New York, 100 A.D.3d 861 (2nd Dept. 2012). That defendant Spiezio claims not to know the person who is described by the process server is without moment given that Spiezio does not aver that there is no "clerk" at his office, which is the stated descriptive title given by the process server as to the person he had served, nor does Spiezio state that there is no one working at his office meeting the physical description set forth by the process server. Moreover, Spiezio nowhere asserts that he never had received the summons and complaint, he instead only carefully has stated that "no one has ever indicated to [him] that they received any papers by hand on [his] behalf." This is insufficient to warrant a Traverse hearing since defendant Spiezio has failed to swear to "specific facts to rebut the statements in the process server's affidavits." Indymac Federal Bank FSB v. Quattrochi, 99 A.D.3d 763 (2nd Dept. 2012); cf. Essex Credit Corp. v. Theodore Tarantini Associates Ltd., 179 A.D.2d 973, 974 (3rd Dept. 1992). Nor is Spiezio's claim that the no one is authorized to accept service on his behalf at his office in any way persuasive given that CPLR 308, subdivision 2, does not require that the person to whom the pleadings are delivered be actually designated or authorized to receive service; the statute requires only that the served person be of "suitable age and discretion at the actual place of business," which requirements have been satisfied at bar. Therefore, notwithstanding plaintiffs' consent to the Court's conducting of a Traverse hearing, the Court finds that no hearing is required.

In opposition to defendants' dispositive motion, plaintiffs also dispute defendants' argument that Can Man lacks standing to bring this action. Plaintiffs have submitted an

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affidavit from Fior Lostumbo, the managing member of plaintiff Can Man, which title he has been given pursuant to Can Man's Articles of Incorporation, wherein Lostumbo states that he had authorized the filing of this action and further that he and plaintiff Kurins collectively own 2/3 of Can Man and that they agree on Can Man's bringing of this action. Further, he avers that an application recently has been made to the New York State Secretary of State seeking authorization for Can Man to transact business in New York and, indeed, counsel now has submitted his supplemental affirmation to which he attaches a recently issued Certificate of Authority, pursuant to Limited Liability Company Law §805, demonstrating that Can Man is authorized to do business in New York as a registered limited liability company. Based upon the foregoing, this Court agrees with plaintiff that defendants' claim that Can Man is barred from pursuing its claims herein is without merit. See Horizon Bancorp v. Pompee, 82 A.D.3d 935 (2nd Dept. 2011); Matter of Mobilevision Med. Imaging Servs., LLC v. Sinai Diagnostic & Interventional Radiology, P.C., 66 A.D.3d 685, 686 (2<sup>nd</sup> Dept. 2009).

To the extent however that defendants further argue that plaintiff Can Man nevertheless has not complied with the further publication requirement of Limited Liability Company section 802, subdivision (b), and that it therefore cannot prosecute this action, and given plaintiffs' failure to have addressed this issue, the Court hereby directs Can Man to perform the required publication within sixty (60) days after the date of entry of this Order and to submit proof of same to defendants. Plaintiff's failure to timely comply herewith may otherwise result in an Order dismissing this action.

To the extent that defendants argue that plaintiff Kurin is not authorized to individually bring any liability claims belonging to Can Man, it is clear that Kurin is not

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purporting to bring claims on behalf of Can Man but rather that Kurin's claims are based upon his own personal causes of action against defendants. Accordingly, dismissal of Kurin's claims on the basis that he is not authorized to bring claims on behalf of the company in his individual name is not warranted.

Defendants' motion seeking dismissal of this complaint based upon its being "vague and ambiguous" and for failure to have set forth a cause of action also is denied. Plaintiffs' lengthy complaint describes the formation, terms, and alleged breaches of the oral agreements upon which this dispute is centered, and is sufficiently particular to give the defendants notice "of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action." CPLR 3013. No more definite statements are required, and any further details that defendants seek properly can and will be obtained through defendants' serving requests for a bill of particulars and discovery.

To the extent that defendants argue that they are entitled to dismissal of this action based upon the documentary evidence and specifically paragraph 10.5 of the parties' written Purchase Agreement which requires modifications thereto to be in writing to be enforceable and the absence of any written Agreement modifications, defendants' motion is denied. It is well established that upon a motion to dismiss, the pleading must be afforded a liberal construction and all inferences in favor of plaintiffs must be accorded to determine whether the facts fit within a cognizable legal theory. See Ark Bryant Park Corp. v. Bryant Park Restoration Corp., 285 A.D.2d 143 (1<sup>st</sup> Dept. 2001); Rickson v. Town of Schuyler Falls, 263 A.D.2d 863 (3<sup>rd</sup> Dept. 1999); Cooper v. 620 Properties Associates, 242 A.D.2d 359 (2<sup>nd</sup> Dept. 1997). Moreover, in order to prevail upon a defense founded upon

documentary evidence, the documents relied upon must resolve all of the factual issues as a matter of law. See Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 303 (2000); Scott v. Bell Atlantic Corp., 282 A.D.2d 180, 183 (1<sup>st</sup> Dept. 2001); Weiss v. Cuddy & Feder, 200 A.D.2d 665 (2<sup>nd</sup> Dept. 1994). Here, the Court does not find that the executed Purchase Agreement between the parties resolves all of the factual issues as a matter of law given that plaintiffs have sworn to a number of additional facts which arose since the Purchase Agreement's execution, including that the Purchase Agreement never had been enforced and that an entirely new oral agreement between the parties had been entered into that had replaced the written Purchase Agreement.

Moreover, the Court agrees with plaintiffs that, irrespective of the Purchase Agreement's prohibition against oral modification, plaintiffs have pleaded sufficient facts demonstrating that the parties partially had performed pursuant to the alleged oral modification, including the payment of monies to plaintiff Kurins, which performance unequivocally refers to the alleged modification, rendering the contractual provision unenforceable. See Healy v. Williams, 30 A.D.3d 466 (2<sup>nd</sup> Dept. 2006); Calica v. Reisman, Peirez & Reisman, 296 A.D.2d 367 (2<sup>nd</sup> Dept. 2002).

The Court also does not find that plaintiffs' claims against defendants for breaches of contract pertaining to alleged oral loans is unenforceable as violative of the Statute of Frauds since the loans were capable of being paid back within the year. General Obligations Law section 5-701(a)(1) is limited to contracts that "have absolutely no possibility in fact and law of full performance within one year," Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 (1998), and does not include an agreement, like those at bar, which is

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simply not likely to be or expected to be performed within the space of a year. See Gural v. Drasner, 114 A.D.3d 25 (1st Dept. 2013). Here, defendants have not met their burden of establishing that the statute of frauds renders the alleged oral loan agreements void and unenforceable given plaintiffs' claim that the loan agreements did not include any terms prohibiting payment in full within the first year and, upon any default, that the entirety of the loan amounts would become due. See DeJohn v. Speech, Language & Communication Associates, 111 A.D.3d 1313 (4th Dept. 2013); Moon v. Moon, 6 A.D.3d 796 (3rd Dept. 2004).

While defendants correctly contend that General Obligations Law section 5-701, subdivision a, paragraph 2, which requires that a promise to pay the debt of another be in writing and signed by the party to be charged in order to be enforceable, generally would require dismissal of those claims of plaintiff seeking to hold defendant Spiezio liable for Waste Services' alleged debts to each plaintiff, see Parma Tile Mosaic & Marble Co. v. Estate of Short, 87 N.Y.2d 524, 527 (1996); Rosenheck v. Calcam Assoc., 233 A.D.2d 553 (3<sup>rd</sup> Dept. 1996), and plaintiffs notably have not addressed this aspect of defendants' motion, the Court declines herein to dismiss said claims in light of plaintiffs having pleaded that, under "Nevada Revised Statute 78.597,<sup>2</sup> Spiezio is personally liable for the debt of JLS [Waste Services] because its assets were distributed to his wholly owned corporation, CMS [Sanitation] without first paying the obligations of JLS." Defendants have not addressed this specific allegation of the claims falling under Nevada law, nor have they addressed why the requirements of General Obligations Law section 5-701, subdivision

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<sup>2</sup>The Complaint alleges that defendant Waste Services is "now dissolved corporation organized under the laws of the State of Nevada ..."

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a, paragraph 2, remain applicable. Accordingly, the Court finds that defendants have not established their entitlement to dismissal of those claims either.

The Court also does not find that plaintiffs have asserted any separate fraud claim against defendants to which the pleading specificity requirement of CPLR 3016, subdivision (b) applies, and further that said statute is inapplicable to plaintiffs' claims brought under section 273 of the Debtor and Creditor Law, and thus that dismissal of plaintiffs' claims on that basis is not warranted. See Gateway I Group, Inc. v. Park Ave. Physicians, P.C., 62 A.D.3d 141, 149-150 (2<sup>nd</sup> Dept. 2009); Board of Managers of the Baxter Street Condominium v. Baxter Street, 2013 WL 5859534 (Sup. Ct. N.Y. Co. 2013).

In any event, plaintiffs' adequately and sufficiently claim that they are creditors of Waste Services, the latter of which fraudulently had transferred its assets to Sanitation without consideration, and that said transfer had rendered Waste Services insolvent and unable to pay its debt to plaintiffs, is sufficient to withstand defendants' dispositive motion with respect to Debtor and Creditor Law section 273. See Joslin v. Lopez, 309 A.D.2d 837 (2<sup>nd</sup> Dept. 2003).

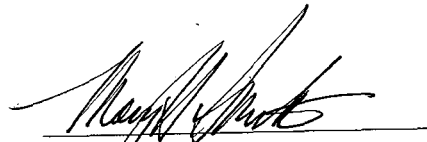
Finally, while CPLR 3016, subdivision (b), is applicable to plaintiffs' claims alleging violations of section 276 of the Debtor and Creditor Law, the Court finds that plaintiffs have satisfied this requirement in their detailed pleading alleging that defendants collectively had participated in the fraudulent conveyance of Waste Services' assets to Sanitation, without any consideration, with the actual intent to hinder, delay or defraud plaintiffs, as creditors, and that they further wrongfully had pledged Can Man's former assets in order to secure a credit line from the bank and that it had used these assets to cross-collateralize other debts owed by Spiezio and other companies of his.

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The Court observes that defendants have proffered no specific arguments in support of dismissal of plaintiffs' unjust enrichment claims, and thus dismissal of same is denied.

Defendants shall answer within thirty (30) days after the date of entry of this Decision and Order. The parties shall appear in the Preliminary Conference Part, room 811, at 9:30 a.m., on December 1, 2014.

Dated: October 10, 2014  
White Plains, New York



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