

Petkanas v Petkanas
2015 NY Slip Op 31323(U)
January 20, 2015
Supreme Court, Queens County
Docket Number: 15292/13
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IA Part 6
Justice

EVAN PETKANAS and GEORGE KALERGIOS,
individually and as shareholders of KANNALIFE
SCIENCES, INC.,

Plaintiffs,

-against-

DEAN PETKANAS and KANNALIFE SCIENCES,
INC.,

Defendants.

Index No. 15292/13

Motion

Date August 15, 2014

Motion Cal. No. 57

Motion Seq. No. 2

The following numbered papers read on this motion by defendants Dean Petkanas and KannaLife Sciences, Inc. (KannaLife) pursuant to CPLR 3211 and General Obligations Law § 5-701(a)(10) (the statute of frauds) to dismiss the causes of action asserted against them by plaintiff George Kalergios in the amended complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

Defendants, Dean Petkanas and KannaLife, previously made a pre-answer motion to dismiss the complaint pursuant to CPLR 3211, General Obligations Law § 5-701 (a)(10) (the statute of frauds) and Uniform Commercial Code § 8-310, and for an award of sanctions and reasonable attorneys' fees pursuant to 22 NYCRR 130-1.1. In the original complaint, plaintiffs asserted causes of action for conversion, breach of contract, unjust enrichment, breach of fiduciary duty, and a shareholder derivative claim. By order

dated April 28, 2014, the motion by defendants was granted to the extent of dismissing the first cause of action for conversion and the fifth cause of action for breach of fiduciary duty and based upon a shareholder derivative claim, insofar as asserted as against defendants and dismissing the second and third causes of action for breach of contract and unjust enrichment, respectively, insofar as asserted against them by plaintiff George Kalergios. The court also declared with respect to the fourth cause of action that defendant George Kalergios is not an owner of a 17% interest in the total shares of stock in defendant KannaLife based upon the alleged oral agreement with defendants. The court noted that to the extent defendant Dean Petkanas indicated he employed plaintiff Evan Petkanas as “executive director/corporate advisor” of KannaLife, and employed plaintiff George Kalergios as a “corporate advisor,” the determination of the motion was without prejudice to any further applications by plaintiffs.

Plaintiffs served the amended complaint, and by letter dated May 30, 2014, defendants rejected and returned it to plaintiffs, asserting that leave of court was required to file an amended complaint. Defendants nevertheless made the instant motion.

In support of their motion to dismiss, defendants contend that plaintiffs failed, in opposition to the prior motion, to ask for leave to replead any cause of action, the claims in the amended complaint asserted by plaintiff George Kalergios fail to state a cause of action against them and the causes of action asserted by plaintiff George Kalergios for breach of contract and unjust enrichment are barred by the statute of frauds (General Obligations Law § 5-701[a][10]).

At the outset, the court notes that to the extent plaintiffs previously failed to ask for leave to replead any cause of action, such failure to do so does not bar plaintiffs from serving an amended complaint (CPLR 3025, 3211; *see Janssen v Incorporated Village of Rockville Centre*, 59 AD3d 15 [2d Dept 2008]). In addition, service of the amended complaint was made prior to joinder of issue,¹ and therefore, plaintiffs were entitled to serve an amended complaint without leave of court (CPLR 3025[a]).

On a motion to dismiss a complaint for failure to state a cause of action (*see* CPLR 3211[a][7]), the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court’s function is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Morone v Morone*, 50 NY2d

¹

Defendants served an answer to the amended complaint on June 27, 2014, after making the instant motion.

481, 484 [1980]; *Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, 70 AD3d 928 [2d Dept 2010]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2d Dept 2003]).

In the amended complaint, plaintiff George Kalergios asserts a second cause of action, (denominated however as “PLAINTIFF KALERGIOS’S FIRST CAUSE OF ACTION AGAINST DEAN PETKANAS”) for breach of contract, alleging that he entered into an agreement with defendants creating a partnership at will or a “sweat equity” employment agreement, whereby he was employed as a “corporate advisor” to provide services to “manage KannaLife’s place of business,” “procure and select political connections, monetary resources, and investors, and “consider [p]laintiff’s [sic] capital contributions to KannaLife,” in exchange for a 17% ownership interest in KannaLife. It is alleged that defendant Dean Petkanas breached the contract by failing to enter into a written agreement recognizing plaintiffs’ respective ownership interests in KannaLife, removing computers, equipment, files and packaging from KannaLife’s headquarters, terminating his relationship and communications with plaintiffs, and then selling or licensing KannaLife’s patents or methods. Plaintiffs allege that plaintiff George Kalergios suffered compensatory damages and pecuniary loss, including the loss of opportunity profits.

Plaintiff George Kalergios also asserts a cause of action in the amended complaint for unjust enrichment against defendants (denominated as “THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS). Plaintiffs allegedly made payments to defendants, or had their payments diverted to defendants, which caused defendants to be enriched. Plaintiffs also allege that plaintiff George Kalergios, as a corporate advisor to KannaLife, provided labor and advice to defendants regarding the financing of KannaLife and the enhancement of defendant corporation’s goodwill, but defendants deprived him of compensation for such labor and advice and were enriched thereby.

Plaintiff George Kalergios also asserts as a cause of action (denominated as the “FOURTH CAUSE OF ACTION AGAINST DEFENDANT DEAN PETKANAS”) in the amended complaint alleging that an actual and justiciable controversy exists between plaintiffs and defendants regarding plaintiffs’ ownership of shares in KannaLife.

Plaintiffs seek a judgment awarding specific performance or alternatively money damages, and declaring that plaintiff Evan Petkanas owns 17% of KannaLife’s total shares and plaintiff George Kalergios owns 17% of KannaLife’s total shares.

The amended complaint, however, has failed to include an allegation that the purported oral partnership agreement between plaintiff George Kalergios and defendants included a provision for the sharing of losses, which is essential to a claim of partnership

(see *Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958]; *Community Capital Bank v Fischer & Yanowitz*, 47 AD3d 667, 668 [2d Dept 2008]; see also *Missan v Schoenfeld*, 95 AD2d 198 [1st Dept 1983]). In addition, an alleged oral agreement, promise or undertaking is unenforceable under section 5-701 (a) (10) of the General Obligations Law, if it “[i]s a contract to pay compensation for services rendered in negotiating a loan, . . . a business opportunity . . . or an interest therein.... ‘Negotiating’ includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.” The provision applies “to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman” (General Obligations Law § 5-701[a][10]). The statute of frauds is applicable “where . . . the intermediary’s activity is . . . that of providing . . . ‘know-who’, in bringing about between principals an enterprise of some complexity” (*Snyder v Bronfman*, 13 NY3d 504, 510 [2009] [internal quotation marks omitted]).

Thus, the unjust enrichment claim and that portion of the breach of contract claim asserted by plaintiff George Kalergios in which he seeks compensation for procurement and selection of political connections, monetary resources and investors, fall within the scope of section 5-701(a)(10), and are barred by the statute of frauds.

Furthermore, the elements of a cause of action to recover damages for breach of contract are: (1) the existence of a contract, (2) the plaintiff’s performance under the contract, (3) the defendant’s breach of the contract, and (4) resulting damages (see *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694 [2d Dept 1986]). To the extent plaintiff George Kalergios alleges breach of contract based upon his claim that he was to manage KannaLife’s “place of business,” he has failed to allege he performed any such management services.

That branch of the motion by defendants to dismiss the breach of contract and unjust enrichment claims asserted by plaintiff George Kalergios against them in the amended complaint is granted.

With respect to that branch of the motion by defendants to dismiss the fourth cause of action asserted against them by plaintiff George Kalergios, the allegations of plaintiff George Kalergios relative to his claimed ownership interest in defendant KannaLife are solely predicated upon his claim of an oral partnership agreement and/or a “sweat equity agreement” between him and defendants. Insofar as those claims fail to state a cause of action, or are barred by the statute of limitations, plaintiff George Kalergios did not obtain 17% of KannaLife’s total shares as alleged. That branch of the motion by defendants to

dismiss the fourth cause of action asserted by plaintiff George Kalergios in the amended complaint against them is granted only to the extent of declaring that plaintiff George Kalergios is not an owner of a 17% interest in the shares of stock in defendant KannaLife based upon the alleged oral partnership agreement or “sweat equity” agreement.

Dated: January 20, 2015

Howard G. Lane, J.S.C.