

Formill Bldrs., Inc. v Azzi
2015 NY Slip Op 31847(U)
October 5, 2015
Supreme Court, New York County
Docket Number: 158460/2013
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

FORMILL BUILDERS, INC. and MICHAEL CONNOLLY,
Plaintiffs,

- v -

RAYMOND AZZI, A&Z RESTAURANT, INC. in its own capacity and as principal of WINEBAR PARTNERS, INC. and XYZ CORP.,
Defendants.

Index No.: 158460/2013
Motion Date: 10/05/15
Motion Seq. No.: 002
Motion Cal. No.:

The following papers, numbered 1 to 7 were read on this motion for a default judgment and cross motion to dismiss.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/Order to Show Cause -Affidavits -Exhibits
Notice of Cross Motion/Answering Affidavits - Exhibits
Replying Affidavits - Exhibits

Table with 2 columns: PAPERS NUMBERED, and rows for 1, 2; 3-4; 5-7

Cross-Motion: [X] Yes [] No

Upon the foregoing papers, it is ordered that the motion of plaintiffs for a default judgment shall be denied and the cross-motion of defendants to dismiss shall be granted in part and denied in part.

The affirmation of counsel for defendants that states that defendants sent by FedEx "working copies" of the papers on their original motion to dismiss the complaint (Motion

Check One: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION
Check if appropriate: [] DO NOT POST [] REFERENCE

Sequence Number 001), in compliance with the court's directive¹, states a reasonable excuse for their default. See Bodden v Penn-Attransco Corp., 20 AD3d 334 (1st Dept 2005) (plaintiff demonstrated a reasonable excuse in the form of a possible omission on the part of the court clerk). In addition, the defendants' papers, now re-filed as a cross motion to dismiss, set forth a meritorious defense, in part relying on the discontinuance and dismissal, respectively, of two prior lawsuits involving many of the same factual allegations made in the complaint now before the court.

With respect to defendants' pre-joinder cross motion to dismiss the complaint pursuant to CPLR(a)(5) and CPLR 205(a) (based upon statute of limitations), the court denies defendants' motion as to the claims for breach of contract or quasi contract damages for failure to pay for services rendered by plaintiffs to (1) defendant Azzi on or after October 3, 2007, i.e. no more than six years before service of the complaint upon him on October 3, 2013; and (2) defendant A&Z Restaurant Corp. s/h/a A&Z Restaurant, Inc. "in its own capacity and as principal of Winebar Partners, Inc." on or after October 10, 2007, or no more than six years before service of the complaint upon it on October 10, 2013. To the extent that the complaint alleges claims for breach of contract or quasi contract that accrued before such dates, such claims are dismissed as untimely brought, and plaintiffs may not receive the benefit of recommencing within six months of the terminated action pursuant to CPLR 205(a)², since plaintiff Formill Builders Inc. was not a party to the terminated action. See Reliance Ins. Co. v PolyVision Corp., 9 NY3d 52 54 (2007).

Turning to defendants' pre-joinder cross motion to dismiss pursuant to CPLR 3211(a)(1) (based upon documentary evidence), the license agreement, to which neither plaintiff is a party, does not refute plaintiffs' breach of contract and quasi contract claims, since the

¹Pursuant to CPLR § 5019(a), the court corrects the Decision and Order dated April 14, 2014 that on such Motion Sequence Number 001, which deemed such motion withdrawn, without prejudice, to state in its heading "The following papers numbered 1 to 1 were read on this motion to dismiss the complaint."

²Oing, J. dismissed the prior action in Connolly v Azzi, New York Supreme Court NY County Index No. 156068/2012 by Order entered on April 29, 2013.

complaint alleges, inter alia "that all renovations performed by plaintiffs were made at the specific insistence and request of Azzi and A&Z" Restaurant Inc.

As to defendants' pre-joinder cross motion to dismiss pursuant to CPLR 3211(a)(7)(based upon failure to state a cause of action), even with every favorable inferences, the complaint, which is not artfully drawn, fails to allege facts sufficient to state a cause of action for breach of contract against A&Z Restaurant, Inc. through piercing of the corporate veil of Winebar Partners, Inc. and/or XYZ Corp. The complaint contains no factual allegations that A&Z Restaurant, Inc. owned Winebar Partners, Inc., let alone that A&Z Restaurant, Inc. exercised complete domination and control of such corporate entity and that such domination was used to commit a fraud against plaintiff(s). See Morris v New York State Dept. of Taxation and Finance, 82 NY2d 135 (1993).

Moving to defendants' cross motion to dismiss pursuant to CPLR 3211(a)(10)(based upon failure to name an indispensable parties), it is not evident on this record that the shareholders of Wine Bar Partners, Inc. or Wine Bar Partners, Inc. are indispensable parties to this action for breach of contract or quasi contract.

Accordingly, it is

ORDERED that plaintiffs' motion for a default judgment is denied; and it is further

ORDERED that cross-motion of defendants pursuant to CPLR 3211(a)(5) is denied as to breach of contract or quasi contract causes of action that accrued on or before October 3, 2007 or October 10, 2007 against defendants Raymond Azzi and A&Z Restaurant, Inc. "in its own capacity and as principal of Winebar Partners, Inc.", respectively, and is granted to the extent that such claims accrued prior to such respective dates; and it is further

ORDERED that cross motion of defendants pursuant to CPLR 3211(a)(7) is granted and the breach of contract or quasi contract causes of action based upon piercing the corporate veil of Winebar Partners, Inc. is granted, and such causes of action are dismissed; and it is further

ORDERED that the cross motion of defendants pursuant to CPLR 3211(a)(1) and (10) is denied; and it is further

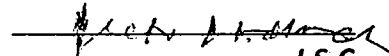
ORDERED that defendants shall serve and file an answer in accordance with CPLR § 3211(f); and it is further

ORDERED that the parties are directed to appear for a preliminary conference in IAS Part 59, 71 Thomas Street, Room 103, on November 5, 2015, 9:30 A.M.

This is the decision and order of the court.

Dated: October 5, 2015

ENTER:


J.S.C.

DEBRA A. JAMES