

Shivdat v Dhyana Hibachi Lounge Inc.
2015 NY Slip Op 32488(U)
December 9, 2015
Supreme Court, Queens County
Docket Number: 704198/2014
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

BABITA R. SHIVDAT AND ZEN HIBACHI X
LOUNGE CORP.,
Plaintiff(s)

Index
Number 704198 2014

-against-

Motion
Date October 9, 2015

DHYANA HIBACHI LOUNGE INC., TREVOR
RUPNARAIN, MALA RUPNARAIN, RAVI
RAMOUTAR AND ACCESS ENTERPRISES
INC.,
Defendant(s)

Motion
Cal. Number 118
Motion Seq. No. 5

The following papers numbered 1 to 12 read on this motion by defendants Mala Rupnarain and Access Enterprises Inc. (Access Enterprises), for leave to renew their prior motion to dismiss the amended complaint pursuant to CPLR §3211 (a)(3), (4), and (7), which was denied by this court in an order dated July 10, 2015, and upon renewal, to dismiss the amended complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-9
Reply Affidavits	10-12

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

This is an action sounding in fraud, conversion, replevin, unjust enrichment and unfair competition, which has arisen out of a failed business venture to design, build and operate a lounge at premises located at 117-15 101 Avenue, in the County of Queens. Mala Rupnarain was a principal of Access Enterprises, which owned the subject premises. Plaintiff Zen Hibachi Lounge Corp., (Zen Hibachi) is allegedly a former tenant

at the subject premises, pursuant to a lease agreement between Access and Michael Shivdat (plaintiff in Action No. 1, entitled: *Michael Shivdat v Trevor Rupnardin, et al.*, *NYS Supreme Court, Queens, Index Number 700700/2013*). Michael Shivdat, defendant Trevor Rupnardin and defendant Ravi Ramoutar were allegedly shareholders in corporate plaintiff Zen Hibachi.

Plaintiff Babita R. Shivdat was the wife of Michael Shivdat. Defendant Karib Works Enterprises, Inc. (Karib Works) (defendant in Action No. 1), was a mortgagee of the subject premises. Defendant Dhyana Hibachi Lounge Inc. (Dhyana Hibachi), was allegedly the tenant at the subject premises immediately after Zen Hibachi's tenancy ended, and allegedly benefitted from the improvements Zen Hibachi made to the premises.

Upon their prior motion, Mala Rupnardin and Access Enterprises moved to dismiss the amended complaint pursuant to CPLR §3211 (a)(3), (4), and (7). In the related Action No. 1, in an order dated March 30, 2015, and filed on April 7, 2015, this Court joined the instant action for trial with Action No. 1. Subsequently, in an Order dated July 10, 2015, and filed on July 16, 2015, this Court denied Mala Rupnardin's and Access Enterprises' motion to dismiss the complaint, and granted them leave to renew.

Leave to renew is granted as this Court's prior decision provided for such leave.

Mala Rupnardin and Access Enterprises have moved to dismiss the complaint pursuant to CPLR §3211 (a)(3), (4) and (7). The Court will first address the branch of the motion relating to CPLR §3211 (a)(4), which provides that a party may move to dismiss a cause of action if "there is another action pending between the same parties for the same cause of action in a Court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires..." Inasmuch as the instant action has alleged different causes of action against different defendants when compared to Action No. 1; this branch of the motion is denied (CPLR §3211 [a][4]).

Next, the Court will turn to the branch of the motion relating to CPLR §3211 (a)(3), which provides for dismissal of an action if the party commencing the action does not have the legal capacity to sue. In this matter, Mala Rupnardin and Access Enterprises have argued that Babita R. Shivdat lacks the capacity to bring this action on her own behalf as she has no involvement in this matter, and that she lacks the capacity to bring it on behalf of Zen Hibachi because she is not a shareholder in, nor a lender to, Zen Hibachi, nor does she have any interest in Access Enterprises or Dhyana Hibachi. Factual allegations in a complaint are accepted as true and given every favorable inference on a pre-answer motion to dismiss for a plaintiff's alleged lack of capacity to sue (*see Matter of Graziano v County of Albany*, 3 NY3d 475, 481 [2004]; *Lazar v Merchants' Natl. Props*, 45 Misc 2d 235, 236 [1964], *aff'd* 23 AD2d 630 [1965]).

On the face of the amended complaint, Babita R. Shivdat has alleged that she and Michael Shivdat entered into an agreement with Trevor Rupnarain to equally provide funding for the development of the subject premises into a lounge and that following the improvements to the property, Trevor Rupnarain, Mala Rupnarain, and Access Enterprises, among others, converted the improvements that she, Michael Shivdat, and Zen Hibachi made at the premises. As such, based upon a favorable reading of the allegations in the amended complaint, Babita R. Shivdat has the capacity to sue for damages on her own behalf. Per the affirmation of Michael Shivdat, as president of Zen Hibachi, he authorized the corporation to commence the instant action on its own behalf. Therefore, Mala Rupnarain and Access Enterprises are not entitled to the dismissal of the claims for lack of capacity to sue.

As to the branch of the motion relating to CPLR §3211 (a)(7), this section provides that a party may also move to dismiss an action on the ground that “the pleading fails to state a cause of action.” “On a motion to dismiss pursuant to CPLR §3211 (a) (7), the pleading is to be afforded a liberal construction” (*Kempf v Magida*, 37 AD3d 763, 764 [2007]; see *Yusin v Saddle Lakes Home Owners Assn., Inc.*, 73 AD3d 1168, 1170 [2010]). “The court must accept the facts as alleged in the complaint as true, accord the plaintiff[] the benefit of every possible favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory” (*id.*). In the amended complaint, Babita R. Shivdat has alleged causes of action sounding in fraud and conversion, while Zen Hibachi has alleged causes of action sounding in conversion, replevin, unjust enrichment, unfair competition, and for the imposition of a constructive trust.

The Court will first address Babita R. Shivdat’s cause of action sounding in fraud. “The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages” (*McMorrow v Angelopoulos*, 113 AD3d 736, 739–740 [2014] quoting *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 951 [2013]). Any cause of action for fraud must be pled with particularity (CPLR 3016 [b]; see *Greentech Research LLC v Wissman*, 104 AD3d 540 [2013]). The purpose of such a requirement is to inform a defendant of the alleged wrongful conduct and give notice of the allegations a plaintiff intends to prove, and the heightened pleading requirement “‘should not be confused with unassailable proof of fraud,’ and ‘may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct’” (*McDonnell v Bradley*, 109 AD3d 592, 593 [2013], quoting *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]; see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

In the amended complaint, Babita R. Shivdat has alleged that Trevor Rupnarain, on behalf of himself, Mala Rupnarain and Access Enterprises, made certain representations to her regarding the suitability of the subject premises as a lounge, the condition of the building

at the premises, the terms of an alleged agreement with Zen Hibachi, his preparedness to begin construction, and also regarding his role in the construction of the lounge. Babita R. Shivdat has further alleged that these statements were made with knowledge of their falsity, with the intent to induce her into investing in the business venture, and that she justifiably relied upon Trevor Rupnarain's representations and invested approximately \$ 626,850.00 in the business venture.

In general, "[t]he court is limited to 'an examination of the pleadings to determine whether they state a cause of action,' and the 'plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face'" (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2014], quoting *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). Based upon a careful and liberal reading of the allegations contained in the amended complaint, and accepting the facts as alleged as true, Babita R. Shivdat has adequately alleged a cause of action for fraud because her allegations fit within a cognizable legal theory (see *McDonnell v Bradley*, 109 AD3d at 593-594; see *Yusin v Saddle Lakes Home Owners Assn., Inc.*, 73 AD3d at 1170). Mala Rupnarain's and Access Enterprises' argument that Babita R. Shivdat's claims are barred by the provisions of the lease between Access Enterprises and Zen Hibachi is unavailing, since the record has demonstrated that Babita R. Shivdat was not a party to the lease agreement. Therefore, Mala Rupnarain and Access Enterprises have failed to adequately demonstrate their entitlement to the dismissal of this cause of action.

The Court will next turn to Babita R. Shivdat's and Zen Hibachi's cause of action for conversion. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property ... and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*id.*, at 50 [internal quotes and citation omitted]).

In the complaint, Babita R. Shivdat and Zen Hibachi have alleged that they both invested funds toward the improvement of the subject premises, that such improvements included, among other things, repairs and upgrades to the premises as a whole, including fixtures, furniture, equipment such as refrigerators, ice machines, hibachi tables, cameras, televisions, computers, lighting, and decor, and air duct systems. The complaint has also alleged that Zen Hibachi had legal ownership and right of possession of those improvements, demanded the return of these improvements, and that Dhyana Hibachi, Ravi Ramoutar, Mala

Rupnarain and Access Enterprises have interfered with Zen Hibachi's right of possession.

After a careful reading of the allegations, the Court has concluded that Babita R. Shivdat has failed to adequately allege sufficient facts to support a cause of action for conversion. Therefore, Mala Rupnarain and Access Enterprises are entitled to the dismissal of Babita R. Shivdat's cause of action sounding in conversion. However, inasmuch as the allegations in the amended complaint have alleged facts sufficient to constitute a legally cognizable cause of action for conversion on behalf of Zen Hibachi, Mala Rupnarain and Access Enterprises are not entitled to the dismissal of that cause of action (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]).

As to the cause of action for replevin, "a substantive element of [that] cause of action ... is that the plaintiff demand the return of the subject property and the one in possession thereof refuses to return it" (*Matter of Vogel*, 19 Misc3d 853, 857 [2008]; see *McGough v Leslie*, 65 AD3d 895, 896 [2009]). Inasmuch as the allegations in the amended complaint have sufficiently alleged that Zen Hibachi was in possession of certain improvements, that it has demanded the return of those improvements, and that Mala Rupnarain and Access Enterprises have refused to return said improvements, the complaint sufficiently alleges a cause of action for replevin and Mala Rupnarain and Access Enterprises are not entitled to the dismissal of this cause of action.

Turning to the cause of action for unjust enrichment, "[t]he elements of a cause of action to recover for unjust enrichment are '(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (*GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 [2015], quoting *Mobarak v Mowad*, 117 AD3d 998, 1001 [2014]). A careful reading of the amended complaint has demonstrated that Zen Hibachi has alleged all of the elements of this cause of action and Mala Rupnarain and Access Enterprises are not entitled to its dismissal.

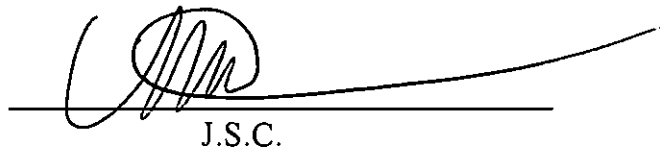
Zen Hibachi has also alleged causes of action alleging unfair competition and for the imposition of a constructive trust. However, Mala Rupnarain and Access Enterprises have failed to address these causes of action in their motion papers and these are not entitled to the relief sought.

While Babita R. Shivdat and Zen Hibachi have argued, in opposition, that the instant motion should be dismissed since disclosure is outstanding and that Mala Rupnarain and Access Enterprises are in exclusive possession of facts essential to their opposition, they have failed to adequately demonstrate what such relevant evidence may be and the sources through

which they believe the necessary evidence can be secured (*see Siegel, Practice Commentaries, McKinney's Cons Laws of NY*, Book 7B, C3211:49).

Accordingly, the branch of the motion to renew is granted. The branch of the motion to dismiss the amended complaint pursuant to CPLR §3211 (a)(7), is granted only to the limited extent as discussed above, dismissing Babita R. Shivdat's cause of action for conversion, and the motion is denied in all other respects.

Dated: December 9, 2015


J.S.C.

FILED
DEC 30 2015
COUNTY CLERK
QUEENS COUNTY