

Palumbo v Piazza

2015 NY Slip Op 32964(U)

September 25, 2015

Supreme Court, Queens County

Docket Number: 700794/2015

Judge: Darrell L. Gavrin

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN IA Part 27
Justice

CHARLES PALUMBO, et al.,

Plaintiff,

- against-

JOSEPH PIAZZA, JR., et al.,

Defendants.
_____x

Index
Number 700794 2015

Motion
Dates May 14, 2015

Motion Seq. Nos. 1&2

FILED
SEP 30 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 18 read on these separate motions by plaintiffs pursuant to CPLR 3042 and CPLR 3126 to preclude defendants from offering any evidence at the time of trial on the issue of liability and to strike defendants' answer for failure to respond to plaintiffs' Notice of Discovery and Inspection, or in the alternative, for an order pursuant to CPLR 3124 to compel defendants to respond to plaintiffs' Notice of Discovery and Inspection, and on this cross motion by defendants to dismiss plaintiffs' Complaint pursuant to CPLR 3211 (a) (4) and/or (7), and to cancel and dismiss plaintiffs' Notice of Pendency, pursuant to Article 65 of the CPLR.

Papers
Numbered

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Upon the foregoing papers it is ordered that the motions and cross motion are consolidated and determined as follows:

This is a monetary action brought by plaintiffs Charles Palumbo (Charles) and his father, Pasquale Palumbo (Pasquale), concerning a fast food chicken franchise restaurant, which was supposed to open and operate within a pizzeria restaurant at 244-35 Merrick

Boulevard, Rosedale, New York (the premises), but never was opened. The premises are owned by defendants Joseph Piazza, Jr., as Trustee of Rose Piazza Irrevocable Trust (Rose), Maria Coniglione and Gasper Piazza (Gasper). The pizzeria is owned and operated by defendant Just Squares Inc. d/b/a J&S Pizzeria (J&S Pizzeria). Defendant Joseph Piazza, Jr. is shareholder and officer of defendant J&S Pizzeria.

In their complaint, plaintiffs allege the following:

On or about November 23, 2011, plaintiff Charles and defendant Piazza formed a corporation, J&C Chicken Corp., for the express purpose of owning and operating a "Chicken's Famous Skinless Fried Chicken B.B.Q. and Rotisserie" franchise along with the pizzeria at the premises. At that time, plaintiff Charles was an employee of defendant J&S Pizzeria. Plaintiff Charles and defendant Piazza are each 50% owners of J&C Chicken Corp. and are to share in the profits equally. J&C Chicken Corp., as licensee, entered into a written franchise agreement (the agreement) with nonparty Buzz Graphics, Inc. (Buzz), as licensor, for the "Chicken's Famous Skinless Fried Chicken B.B.Q. and Rotisserie" franchise (the franchise), which was to be operated at the premises along with the pizzeria. Plaintiff Charles and defendant Piazza jointly executed the agreement.

Pursuant to the terms of the agreement, plaintiff Charles and defendant Piazza were to each invest \$25,000.00 in the franchise to renovate and upgrade the entire facilities for the franchise operation at the premises. Defendant Piazza requested and plaintiff Charles agreed to pay an additional \$17,000.00 toward the renovations, for a total amount of \$42,000.00. Defendant Piazza represented to plaintiff Charles that said monies were to be used by defendant Piazza for the exclusive benefit of the franchise and to prepare the premises for the franchise, and plaintiff Charles justifiably relied upon this representation.

Plaintiff Pasquale agreed to pay the \$42,000.00 to defendants Piazza and J&S Pizzeria on behalf of his son, plaintiff Charles. Defendant Piazza represented to plaintiff Pasquale that said monies were to be used for the exclusive benefit of the franchise and to prepare the premises for the franchise, and plaintiff Pasquale justifiably relied upon this representation. Plaintiff Pasquale paid defendants Piazza and J&S Pizzeria the \$42,000.00, on behalf of plaintiff Charles, and defendants Piazza and J&S Pizzeria acknowledged that payment in writing.

Defendant Piazza renovated and upgraded the premises pursuant to the terms of the agreement using the monies provided by plaintiff Pasquale. The renovations made by defendants Piazza and J&S Pizzeria increased the value

of the premises to the exclusive benefit of defendants Piazza, J&S Pizzeria, Rose, Coniglione and Gasper because defendant Piazza refused to comply with the terms of the agreement and permit the franchise to open and operate at the premises. Instead, defendant Piazza continues to operate defendant J&S Pizzeria at the premises to the exclusive benefit of the defendants. Defendant Piazza intentionally and fraudulently misrepresented his intentions to plaintiffs Charles and Pasquale, and the other defendants acted in concert in this scheme. On December 31, 2013, plaintiff Charles was terminated from his employment with defendant J&S Pizzeria.

The Verified Complaint contains seven causes of action, the first three of which are asserted on behalf of plaintiff Charles and the last four of which are asserted on behalf of plaintiff Pasquale. The first cause of action against defendant Piazza seeks to recover damages for breach of contract. The second cause of action against defendants Piazza, Rose, Coniglione and Gasper seeks to recover damages for unjust enrichment. The third and fourth causes of action against defendant Piazza seek to recover damages for fraudulent misrepresentation. The fifth cause of action against defendant Piazza seeks to recover damages for fraud. The sixth cause of action against defendants Piazza, Rose, Coniglione and Gasper seeks to recover damages for unjust enrichment, and the seventh and final cause of action against defendant Piazza seeks to recover damages for deceptive business practices. Plaintiffs filed a notice of pendency against the subject premises along with their complaint.

Defendants Piazza, J&S, Rose, Coniglione and Gasper served an answer to plaintiffs' complaint, and interposed the following affirmative defenses: failure to state a cause of action; statute of limitations; failure to comply with the specificity requirements of CPLR 3016; waiver; estoppel; laches; statute of frauds; lack of standing; failure to join a necessary party; lack of legal capacity to sue; unclean hands; lack of personal jurisdiction; and lack of privity.

Plaintiffs now move to sanction defendants for failure to provide certain disclosure, and defendants cross-move to dismiss plaintiffs' complaint, and to cancel the notice of pendency.

It is well settled that an action in which a corporate shareholder alleges a wrong to the corporation, such as, depreciation of corporate stock, mismanagement, or diversion of corporate assets or opportunity for personal gain, is an action that must be brought in the shareholder's derivative capacity, on behalf of the corporation. (*See Abrams v Donati*, 66 NY2d 951 [1985]; *see also Barbaro v Spinelli*, 121 AD3d 727 [2014]; *Yudell v Gilbert*, 99 AD3d 108 [2012].) Direct claims may be asserted by the shareholder where the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation. (*See Abrams v Donati, supra*; *see also Serino v Lipper*, 123 AD3d 34 [2014].) In order to determine whether claims are derivative or individual, "a court should

consider (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually).” (*Yudell v Gilbert, supra* at 114 [internal quotation marks omitted].) Further, where a plaintiff’s allegations in the complaint confuse a shareholder’s derivative and individual rights, the complaint will be dismissed. (*See Abrams v Donati, supra.*)

In this case, plaintiffs are not suing in a derivative capacity. The first cause of action in plaintiffs’ complaint for breach of contract regarding the franchise agreement, however, is a derivative claim because any pecuniary loss plaintiffs suffered from the failure to open and operate the chicken franchise after the renovations at the premises derives from a breach of duty and harm to the corporation, J&C Chicken Corp. (*See Yudell v Gilbert, supra.*) With regard to the second and sixth causes of action for unjust enrichment, said causes of action are also derivative as they allege harm to the corporation, from defendants’ failure to open and operate the franchise at the premises after the renovations, rather than harm to plaintiffs, individually.

Since plaintiffs are not suing in a derivative capacity and the first cause of action for breach of contract and second and sixth causes of action for unjust enrichment assert claims relating to alleged harm to the corporation, as a whole, and not plaintiffs, individually, plaintiffs lack standing to make these claims. (*See Abrams v Donati, supra; see also Leonard v Gateway II, LLC*, 68 AD3d 408 [2009]; *Di Fabio v Omnipoint Communications, Inc., supra.*) Moreover, to the extent, if any, that plaintiffs have asserted any direct claims in support of the causes of action for breach of contract and unjust enrichment, such claims are embedded in their derivative claims, and as noted, causes of action, the allegations of which confuse a shareholder’s derivative and individual rights, will be dismissed. (*See Abrams v Donati, supra; see also Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635 [2009].)

Accordingly the branches of defendants’ cross motion to dismiss plaintiffs’ first cause of action for breach of contract and second and sixth causes of action for unjust enrichment are granted and said causes of action are dismissed.

With respect to the branch of defendants’ cross motion to dismiss plaintiffs’ third cause of action asserted on behalf of plaintiff Charles sounding in fraud as against defendant Piazza, however, same is denied.

This cause of action which alleges, among other things, that plaintiff Charles was fraudulently induced by defendant Piazza to form J&C Corporation and to invest in and to contract for the franchise, asserts claims relating to alleged harm to plaintiff Charles individually, and not the corporation.

On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the facts alleged in the complaint are accepted as true and are given a liberal construction to afford the pleading party every possible favorable inference, and the court's inquiry is limited to whether the pleading states any cognizable cause of action. (*See Nonnon v City of New York*, 9 NY3d 825 [2007]; *see also Leon v Martinez*, 84 NY2d 83 [1994]; *Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d 794 [2015].)

In order to state a cause of action for fraud, a plaintiff must allege a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance of plaintiff upon the misrepresentation, and damages. (*See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553[2009]; *see also Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896 [2010]; *Whitehead v Town House Equities, Ltd.*, 8 AD3d 367 [2004].) A cause of action for fraud must be pled with particularity. (*See CPLR 3016 [b]*.) 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. (*See Eurycleia Partners, LP v Seward & Kissel, LLP, supra.*)

Judged by this standard, and giving plaintiffs the benefit of every possible favorable inference, plaintiffs' allegations of fraud as against defendant Piazza, with regard to knowingly misrepresenting a present fact in order to induce plaintiff Charles to form the corporation and invest in and contract for the franchise, are sufficiently pleaded, and defendants have otherwise demonstrated no basis for the dismissal thereof.

Accordingly, the branch of defendants' cross motion to dismiss plaintiffs' third cause of action for fraudulent misrepresentation for failure to state a cause of action pursuant to CPLR 3211 (a) (7) is denied.

While the allegations in plaintiffs' complaint are sufficiently specific to state a fraud cause of action on behalf of plaintiff Charles, the allegations are insufficient to state such a cause of action on behalf of plaintiff Pasquale. Unlike with plaintiff Charles, there are no specific allegations that plaintiff Pasquale was a party to the franchise agreement or that defendant Piazza fraudulently induced plaintiff Pasquale to invest in the franchise. Rather, in their complaint, plaintiffs merely allege that plaintiff Pasquale paid for the renovations for the chicken franchise on behalf of his son, plaintiff Charles.

Accordingly, the branches of defendants' cross motion to dismiss plaintiffs' fourth cause of action for fraudulent misrepresentation and fifth cause of action for fraud pursuant to CPLR 3211 (a) (7) for failure to state a cause of action are granted and said causes of action asserted on behalf of defendant Pasquale are dismissed.

The branch of defendants' cross motion to dismiss plaintiffs' seventh cause of action to recover damages based on a violation of General Business Law § 349 is granted as the

conduct alleged by plaintiffs does not have a "broad impact on consumers at large" (U.S. Bank N.A. v Pia, 73 AD3d 752, 754 [2010], quoting New York Univ. v Continental Ins. Co., 87 NY2d 308, 320 [1995]), and therefore, fails to state a cause of action. (See Zawahir v Berkshire Life Ins. Co., 22 AD3d 841 [2005].)

Inasmuch as this lawsuit does not "affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501), the branch of defendants' cross motion to cancel the Notice of Pendency filed by plaintiffs is granted.

It is ordered that the Clerk of the County of Queens is directed, upon payment of proper fees, if any, to cancel and discharge a certain Notice of Pendency filed in this action on February 23, 2015, against property located at 244-35 Merrick Boulevard, Rosedale, New York 11422, and indexed under Block 12982 and Lot 1, and said Clerk is hereby directed to enter upon the margin of the record of same a Notice of Cancellation referring to this Order.

It is further ordered that the Clerk of the County of Queens be served with a copy of this order with Notice of Entry.

The branch of plaintiffs' motion to strike defendants' answer and to preclude defendants from offering evidence at trial for failure to comply with plaintiffs' Notice for Discovery and Inspection is denied since there has been no showing that defendants' failure to respond to plaintiffs' discovery demands was willful, contumacious or in bad faith. (See CPLR 3126; see also Kuzmin v Visiting Nurse Service of New York, 22 AD3d 643 [2005]; Pascarelli v City of New York, 16 AD3d 472 [2005].)

The branch of plaintiffs' motion to compel defendants to respond to plaintiffs' Notice of Discovery and Inspection is granted and defendants shall serve their response within 14 days after service upon them of a copy of this order with notice of entry.

Dated: *SEP 25, 2015*

[Signature]

J.S.C.

FILED
SEP 30 2015
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