

Garcia v Molina

2016 NY Slip Op 32676(U)

June 27, 2016

Supreme Court, Westchester County

Docket Number: 64431/2014

Judge: Orazio R. Bellantoni

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

DANIEL GARCIA,

Plaintiff(s),

- against -

HERNAN MOLINA, MARY MOLINA, AND
TCC YORKTOWN, INC.,

Defendant(s).

ORDER

Index No.: 64431/2014
Motion Date: 2/24/16

Defendants move for an order, granting summary judgment in their favor. Plaintiff cross moves for an order, granting plaintiff leave to serve and file a proposed amended complaint.

The following papers were read:

Notice of Motion, Affirmation, Exhibits (4), and Memo of Law	1-7
Notice of Cross-Motion, Aff'n in Opp'n and Support, Exs (2), and Memo of Law	8-13
Affirmation in Reply and Memo of Law	14-15
Affirmation in Reply and Memo of Law	16-17

By way of background, Plaintiff alleges that he and defendant Hernan Molina agreed to form TCC Yorktown, Inc. (TCC) to operate a retail cell phone store (Store) and that plaintiff would own 49% of the shares and defendant Hernan Molina would own 51% of the shares. As part of this agreement, plaintiff alleges that the parties agreed that plaintiff would contribute \$50,000.00 towards the Store and that plaintiff did tender \$50,000.00 to TCC, which was deposited in an account held by TCC. Subsequently, plaintiff alleges that defendants Hernan Molina and Mary Molina improperly withdrew almost the entirety of these funds for their personal use and not for the operation of the store between the period of August 30, 2010 through January 10, 2011.

On May 16, 2014, plaintiff commenced this action for money damages, asserting claims for breach of contract, fraud, and unjust enrichment. Plaintiff's claim for breach of

contract alleges that although plaintiff tendered the \$50,000.00, defendants failed to convey a 49% percent interest in TCC. Plaintiff's claim for fraud alleges that defendant Hernan Molina falsely represented to plaintiff that a 49% percent interest in TCC would be conveyed to him in exchange for \$50,000.00. Plaintiff's claim for unjust enrichment alleges that defendants retained the \$50,000.00 for personal use and to plaintiff's detriment. On January 22, 2016, the Court (per Hon. Joan B. Lefkowitz, J.S.C.) issued a trial readiness order. On February 16, 2016, plaintiff filed a note of issue and certificate of readiness. Defendants now move for summary judgment and plaintiff moves for leave to amend the complaint.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In support of the motion, defendants proffer evidence that defendants did convey a 49% interest in TCC to plaintiff, including a shareholders agreement as well as plaintiff's testimony that he was named on and possessed a debit card for TCC's bank account. As such, defendants contend, plaintiff's claim for breach of contract must fail. As plaintiff's claim for fraud is based on the same factual allegations, defendants contend, it too must fail as duplicative of the breach of contract claim. Defendants also contend that plaintiff's claim for unjust enrichment is also duplicative or barred by applicable statute of limitations.

Defendants have made a *prima facie* showing that they performed under the subject contract and conveyed plaintiff's 49% interest to him (*see JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802, 803 [2d Dept 2010]), that plaintiff's claim for fraud is duplicative of the breach of contract claim (*see Gorman v Fowkes*, 97 AD3d 726, 727 [2d Dept 2012]), and that the unjust enrichment claim is barred by the applicable statute of limitations (*see Ingrami v Rovner*, 45 AD3d 806, 808 [2d Dept 2007]). As such, the burden of going forward shifts to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In response, plaintiff contends that the claim for breach of contract should remain as the transfer of the 49% interest was illusory inasmuch as his interest had no value due to the actions of defendants Hernan Molina and Mary Molina in stripping TCC of monetary value, which precluded the Store from opening. In the alternative, plaintiff seeks leave to amend the complaint to assert a claim for breach of an oral agreement whereby defendant Hernan Molina agreed that plaintiff's \$50,000.00 investment would only be used to pay expenses related to the Store and only after discussing the expenses with plaintiff.

Notwithstanding this oral agreement, plaintiff alleges, defendant Hernan Molina used the approximately \$50,000.00 for his own personal use. Plaintiff further alleges that defendant Mary Molina falsely represented to plaintiff that she would only disburse checks from the TCC bank account to pay the expenses of the Store. Notwithstanding this fact, plaintiff alleges that, defendant Mary Molina used the approximately \$50,000.00 for her own personal use. Plaintiff notes that, should the cross-motion be denied, plaintiff withdraws the second cause of action against defendant Hernan Molina and the third cause of action against defendants.

In opposition and reply, defendants contend that there is no basis to grant plaintiff leave to amend the complaint. In particular, defendants contend that the proposed amendment is palpably insufficient and note, among other things, that the shareholders agreement expressly provides that "all prior agreements and understandings among the parties hereto, written or oral, with respect to the subject matter hereof . . . are hereby terminated and are of no further force and effect." Moreover, defendants contend that plaintiff offers no excuse for the lengthy delay in seeking to amend and that defendants will be prejudiced by allowing plaintiff to assert new factual allegations.

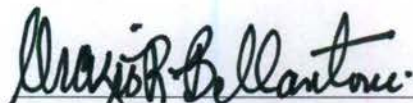
Initially, the Court addresses plaintiff's motion for leave to amend. The determination of whether to grant leave to amend a pleading rests in the sound discretion of the Court (*see Darby Group Companies, Inc. v Wulforst Acquisition, LLC*, 130 AD3d 866, 867 [2d Dept 2015]). In exercising its discretion, the Court should consider the length of the delay, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom (*see Haller v Lopane*, 305 AD2d 370 [2d Dept 2003]). Here, plaintiff has failed to offer any excuse for the delay in seeking to amend the pleading to insert new facts (i.e., the existence of an oral contract) and has failed to demonstrate that defendants will not be prejudiced by the inclusion of these new facts. Accordingly, plaintiff's motion for leave to amend is denied.

Pursuant to plaintiff's representation, plaintiff has consented to the dismissal of the second and third causes of action. As such, the Court now addresses defendants' motion as it relates to the first cause of action. As to that claim, plaintiff has succeeded in raising a material issue of fact as against defendant Hernan Molina. Although the complaint is inartfully drafted, plaintiff has proffered evidence that he entered into an agreement and performed by tendering \$50,000.00, that defendant Hernan Molina breached the agreement by failing to contribute his \$15,000.00 and by using plaintiff's \$50,000.00 for his own personal use, and that plaintiff was damaged as a result.

Based on the foregoing, defendants' motion for summary judgment is granted as to plaintiff's first cause of action against defendants Mary Molina and TCC, denied as to plaintiff's first cause of action against defendant Hernan Molina, and granted as to plaintiff's second and third causes of action. This matter is scheduled for a Settlement

Conference on July 26, 2016 at 9:15 a.m. in Courtroom 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York.

Dated: June 27, 2016
White Plains, New York


HON. ORAZIO R. BELLANTONI
Justice of the Supreme Court

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