

Ilardo v Iuliano
2017 NY Slip Op 30287(U)
February 14, 2017
Supreme Court, New York County
Docket Number: 450607/2016
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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JASON ILARDO, et al.,

Plaintiffs,

DECISION AND
ORDER

-against-

Index No.

MICHELE IULIANO and GIOVANNA IULIANO,

450607/2016

Defendants.

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HON. ANIL C. SINGH, J.:

Defendant Giovanna Iuliano (“Giovanna”) moves to dismiss the complaint pursuant to CPLR 3211(a)(1), CPLR 3211(a)(7), and CPLR 3016(b). Plaintiffs oppose the motion.

Plaintiffs allege that they entered into an agreement with defendants dated October 20, 2011, in connection with the ownership and management of a restaurant located at 275 Church Street in Manhattan.

The first, second and third causes of action sound in breach of contract. The complaint alleges that Michele Iuliano (“Michele”), who is the non-moving defendant, breached the management agreement in three respects. First, Michele failed to properly report and pay sales taxes and incurred a tax fine (Complaint, paras. 14, 21, and 28). Second, he hired and paid funds to a management company

without authorization from fellow shareholders (Complaint, paras. 15, 22, and 29).

Third, plaintiffs allege that the “defendants stole at least \$25,000.00 cash from the business, transferring the funds from the business accounts into defendant Michele Iuliano’s personal account on or about May 6, 2015” (Complaint, paras. 16, 23, and 30).

The fourth cause of action alleges that Michele breached his fiduciary duty “by unilaterally ‘hiring’ his own ‘management company’ which he gave 10% of the gross receipts per month as a fee...” (Complaint, para. 37).

The fifth cause of action sounds in tortious interference of contract and is pled against both Michele and Giovanna. Plaintiffs allege that the defendants tortiously “interfered with contracts that benefitted the partnership ... [and] interfered with the financial condition of the corporation by incurring a sales tax fine by not accurately reporting and paying the sales tax and by hiring their wholly owned ‘management company’ to manage the affairs of the company” (Complaint, paras. 42, 43).

The sixth cause of action against Michele and Giovanna sounding in conversion alleges that the defendants “illegally transferred \$25,000.00 cash from the business account into defendant Michele Iuliano’s personal account on or about May 6, 2015” (Complaint, para. 48).

The seventh cause of action sounding in fraud alleges that all of the conduct alleged above resulted in the defendants fraudulently taking funds from the corporation without the other shareholders knowledge or consent (Complaint, para. 57).

The eighth cause of action sounds in unjust enrichment based on the above factual allegations.

Discussion

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences (Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 [1st Dept., 2004]). The court determines only whether the facts as alleged fit within any cognizable legal theory (Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994]). The court must deny a motion to dismiss, “if, from the pleading’s four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law” (511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 [2002]).

“[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary

evidence, are not entitled to such consideration” (Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 [1st Dept., 1994] (internal citation omitted)).

“A motion to dismiss the complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law” (Granada Conominium III Association v. Palomino, 78 A.D.3d 996, 996 [2d Dept., 2010]). “In order for evidence to qualify as ‘documentary,’ it must be unambiguous, authentic, and undeniable” (Id.).

Breach of Contract

It is not clear in the complaint – nor, for that matter, in plaintiffs’ opposition papers – whether plaintiffs are alleging that Giovanna breached the shareholder’s agreement. Plaintiffs allege that the parties are shareholders of the corporation, Via Vai Pizzeria, Inc. (Complaint, paras. 9, 10). It is undisputed that the shareholders’ agreement appended to the complaint does not contain Giovanna’s signature. Rather, plaintiff Antonino D’Aiuto states in a sworn affidavit made in opposition to the motion that he was “told my [sic.] Michele Iuliano in early 2015 that he was giving 20% of his ownership interest in and to Via Vai Pizzeria Inc. DBA Da Mikele to Giovanna Iuliano” (D’Aiuto Aff., para. 9).

The statement of what Michele Iuliano intended to do is insufficient to hold

Giovanna liable for breaching a shareholders's agreement to which she is not a party. Nor for that matter is D'Aiuto's vague and conclusory statement that Michele had "told everybody that 20% of his shares were transferred to his daughter" (D'Aiuto Aff., para. 12) sufficient to overcome the documentary evidence – namely, the shareholders' agreement – that was not signed by Giovanna.

Accordingly, the first, second and third causes of action sounding in breach of contract are dismissed against Giovanna pursuant to CPLR 3211(a)(1) and (7).

Tortious Interference with Contractual Relations

The elements of tortious interference with contract are: 1) the existence of a valid contract; 2) defendant's knowledge of the contract; and 3) defendant's intentional procurement of the breach (Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413 [1996]; see also Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90 [1993]).

It is axiomatic that if there is no valid existing contract, there can be no breach of an existing contract that may give rise to interference with contractual relations (see Jim Ball Chrysler LLC v. Marong Chrysler-Plymouth, Inc., 19 A.D.3d 1094 [4th Dept., 2005]). Plaintiff must also "allege that the contract would not have been breached 'but for' the defendant's conduct" (Burrowes v. Combs, 25 AD3d 370, 373 [1st Dept. 2006]) (internal citations omitted).

Here, although plaintiffs allege that Giovanna “interfered with contracts,” the contracts are not specified. This cause of action is also fatally deficient because plaintiffs have failed to allege that but for defendants’ actions, the contracts would have been performed. The alleged interference with the financial condition of the company is not an interference with a contract.

The fifth cause of action is dismissed pursuant to CPLR 3211(a)(7).

Conversion

The elements to establish conversion are: 1) plaintiff’s right to possess the property; and 2) defendant’s dominion or interference with plaintiff’s right to the property (Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d 43 [2006]).

Here, assuming for purposes of the motion the truth of the allegation that Giovanna stole \$25,000, plaintiffs are unable to establish a possessory right to the funds taken from the business’ bank account. The funds belonged to the corporation, not the individual shareholders. Plaintiffs’ have not alleged any direct injury as a result of the alleged theft. The injury here is to the corporation, which is not a party to this litigation (Yudell v. Gilbert, 99 AD3d 108 [1st Dept., 2012]).

This cause of action is dismissed for failure to state a cause of action.

Fraud

In order to make out a cause of action sounding in fraud, plaintiffs must show that: 1) defendant made a representation as to a material fact; 2) the representation was false; 3) defendant made such representation with the intention of deceiving or misleading the plaintiff; 4) plaintiffs reasonably relied upon the defendant's misrepresentations; and 5) that reliance resulted in a legally cognizable injury to the plaintiffs (Ross v. Louise Wise Services, Inc., 8 N.Y.3d 478, 488 [2007]; Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421 [1996]; P.T. Bank Central Asia v. ABN AMRO Bank N.V., 301 A.D.2d 373, 376 [1st Dept., 2003]).

Here, plaintiffs fail to allege what representations of material fact were made by Giovanna; that the representations were false; that Giovanna made the representations with the intention of deceiving or misleading the plaintiffs; and that plaintiffs reasonably relied upon the misrepresentations. Nor have plaintiffs sustained a legally recognizable injury in their capacity as shareholders. The alleged injury is to the corporation and is derivative.

Unjust Enrichment

The unjust enrichment claim must be dismissed as duplicative of plaintiffs' breach of contract causes of action. New York law holds that quasi-contractual

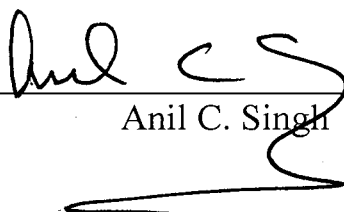
claims are prohibited where there is an express contract – here, the shareholders’ agreement – that covers the same subject matter, even when the third party – Giovanna – is not a signatory to the contract (AQ Asset Mgt. v. Levine, 119 A.D.3d 457 [1st Dept., 2014]).

Accordingly, it is

ORDERED that Giovanna’s motion to dismiss the complaint is granted.¹

The foregoing constitutes the decision and order of the court.

Date: February 14, 2017
New York, New York


Anil C. Singh

¹The fourth cause of action sounding in breach of fiduciary duty is not addressed as it is alleged only against Michele Iuliano.