

**Khanna v Uddin**

2017 NY Slip Op 31570(U)

June 13, 2017

Supreme Court, Queens County

Docket Number: 701609/2015

Judge: Cheree A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS  
Justice

IA Part 30

RAJESH KHANNA,

Index

Number 701609/ 2015

Plaintiff,

-against-

Motion

Date January 11, 2017

**FILED**  
JUN 22 2017  
COUNTY CLERK  
QUEENS COUNTY

RUSNA B. UDDIN,

Defendants.

Motion Seq. No. 4

The following papers read on this motion by plaintiff pursuant to CPLR 3212 for partial summary judgment (1) on his first and second causes of action for breach of contract, and awarding him damages in the amount of \$76,365.55 plus interest from the date of the breach, and (2) on his third cause of action for breach of fiduciary duty and awarding him damages in the amount of \$76,365.55.

Papers  
Numbered

- Notice of Motion - Affidavits - Exhibits .....EF Doc. #71-90
- Answering Affidavits - Exhibits .....EF Doc. #92-97
- Reply Affidavits .....EF Doc. #98-99

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

Plaintiff, a former shareholder of Sunmoon Pizza, Inc., a closely held New York corporation, commenced this action in 2014, alleging that the parties executed a

shareholders' agreement, whereby plaintiff and defendant were named equal shareholders of the outstanding stock in the corporation, and the directors and officers of the corporation. Plaintiff asserts that pursuant to the shareholders' agreement, he was employed by the corporation as the "Operating Partner," and the parties were required to contribute equally to the payment of corporate expenses, including employee salaries. Plaintiff asserts that over the next six years, he personally paid authorized corporate expenses, including employee salaries, but defendant failed to make any contribution towards such expenses, or reimburse him for his payment of her share of the expenses. Plaintiff also asserts that he loaned defendant the sum of \$10,000.00 loan to use towards payment of corporate expenses, including salaries, but she failed to make such payments, and has not repaid him the loan amount. Plaintiff thereafter entered into a stock sale agreement dated December 21, 2012, pursuant to which he sold his shares of stock in the corporation to MD Abdul Qayum, a nonparty.

In the complaint, plaintiff asserts, as a first cause of action, that defendant breached the shareholders' agreement by failing to pay corporate expenses, despite due demand, resulting in damage to plaintiff in the amount of \$76,365.55, plus interest. The second cause of action is based upon defendant's alleged failure to pay employees' salaries, including plaintiff's salary as Operating Partner, despite due demand, resulting in damage to plaintiff in the amount of \$9,000.00, plus interest. The third cause of action is based upon plaintiff's claim that defendant breached her fiduciary duty to plaintiff by failing to pay corporate expenses, including employee salaries, committing waste of corporate assets and usurping corporate assets, resulting in damage to plaintiff in the amount of \$85,365.55, together with interest. Plaintiff alleges as a fourth and fifth cause of action for unjust enrichment and conversion, that he gave loans to defendant and the corporation to be used for payment of corporate expenses, including employee salaries, and that defendant has damaged him in an amount not less than \$85,365.55, together with interest, by failing to repay the loans.

Defendant served an answer, denying the material allegations of the complaint, asserting various affirmative defenses, and interposing two counterclaims for breach of contract and breach of fiduciary duty. Plaintiff served a reply to the counterclaims, asserting certain affirmative defenses.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851

[1985]). Furthermore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

In support of the motion, plaintiff offers, among other things, his affidavit, and an affirmation of his counsel, and a copy of the pleadings, the shareholders' agreement, certain checks, including a check dated October 20, 2009, cashier's checks purchased by plaintiff as remitter, receipts, so-ordered stipulations filed on April 27, 2016 and July 6, 2016, and defendant's response dated July 8, 2016 to plaintiff's demands for discovery.

The shareholder agreement contains an acknowledgment that the parties each made an original capital contribution of \$165,000.00 as of June 2, 2007 (*see* paragraph 2.1), but lacks any requirement that the parties make additional capital contributions thereafter. Although the agreement provided for the corporation's employment of plaintiff as operating partner, and set his salary as \$900.00 per week (*see* paragraph 3.3[a]), and authorizes reimbursement of expenses incurred on behalf of the corporation by a shareholder upon a unanimous vote of the Board of Directors (*see* paragraph 3.2), plaintiff makes no claim against the corporation for failure to pay him his salary, or reimburse him for expenses he incurred on behalf of the corporation. Rather, his claims, asserted in the first and second causes of action of the complaint, are predicated upon defendant's alleged breach of the shareholders' agreement for failure to pay corporation expenses, including employee salaries. Plaintiff does not allege that defendant failed to make the original capital contribution. Nor does plaintiff cite to any provision in the shareholders' agreement, whereby defendant, as a shareholder or officer, was required to personally pay expenses incurred by the corporation during the period plaintiff also was a shareholder, or to reimburse plaintiff, to any degree, for his payment of such expenses out of his personal funds.<sup>1</sup>

Plaintiff also has failed to make a prima facie showing that he paid \$66,365.55, representing defendant's alleged share of the expenses incurred by the corporation, including employee salaries. The checks submitted by plaintiff include a number of which were drawn on the account of "Suman Khanna," and plaintiff has made no showing that he is a co-owner of such account. With respect to the receipts offered by plaintiff, it is unclear from who paid the items for which the receipts were provided. It is also unclear whether the payments made

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Plaintiff makes no claim in the complaint that the parties had an oral agreement, or a written agreement separate from the shareholders' agreement, whereby defendant was to pay 50% of the corporate expenses, including employee salaries, or to reimburse him for his payment of her share of such expenses.

pursuant to the checks, or acknowledged by the receipts, were for expenses or debts of the corporation.

Plaintiff also has failed to establish prima facie that defendant owes him \$10,000.00 pursuant to any loan agreement. Although he asserts that the check dated October 20, 2009 represents the money loaned to defendant, it is drawn on the account of Suman Khanna, made payable to one "Mohammad N. Uddin," and lacks a copy of the reverse side (*see* Plaintiff's Exhibit "C"). Again, plaintiff has made no showing that he is an owner of the account. Defendant, furthermore, has raised a question of fact as to whether plaintiff made any loan to her or to the corporation, insofar as she states, in her affidavit dated November 2, 2016 in opposition, that plaintiff "gave the check as a gift."

To the extent plaintiff contends that defendant breached his fiduciary duty to him, the third cause of action is duplicative of the breach of contract cause of action, since the claims are based on the same facts and seek identical damages (*see Federico v Brancato*, 144 AD3d 965, 966-967 [2d Dept 2016]; *Canzona v Atanasio*, 118 AD3d 841, 843 [2d Dept 2014]). Plaintiff no longer is an officer, director or shareholder of the corporation, and therefore, cannot assert a derivative claim against defendant for breach of fiduciary duty owing to the corporation, or conversion or waste of corporate assets (*see* Business Corporation Law §§ 626[b], 720; *see generally Independent Inv. Protective League v Time, Inc.*, 50 NY2d 259, 263 [1980]; *Pursnani v Stylish Move Sportswear, Inc.*, 92 AD3d 663, 664-665 [2d Dept 2012]). Furthermore, plaintiff's claims are to vindicate his personal rights as an individual.

Under such circumstances, the motion by plaintiff for partial summary judgment against defendant on the first, second and third causes of action is denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

Dated: June 13, 2017



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Hon. Thérèse A. Buggs, JSC

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