De La Cruz v Teuscher Promenade LLC
2018 NY Slip Op 31646(U)
July 12, 2018
Supreme Court, New York County
Docket Number: 650141/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57

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PETER DE LA CRUZ, et al.

Plaintiff(s) **Index no. 650141/2018**

-against-

DECISION/ORDER

TEUSCHER PROMENADE LLC, et al. **Motion No. 1**

Defendant(s)

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Recitation, as required by CPLR §2219(a), of the papers considered on the review of this motion to dismiss the complaint pursuant to CPLR § 3211(a)(1), (a)(5) and (a)(7)

PAPERS	NUMBERED
Notice of Motion and Affidavits and Exhibits Annexed	**1**
Answering Affidavits and Exhibits Annexed	**2**
Replying Affidavits and Exhibits Annexed	**3**

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

The motion to dismiss the action is granted only to the extent that the Sixteenth cause of action for violation of G.B.L. §349 is dismissed but is otherwise denied in its entirety.

Facts Relevant to the Defendants' Motion

Peter De La Cruz and Jeff Loeffelholz (collectively, the **Plaintiffs**) bring this action individually and on behalf of Teuscher Promenade LLC **(Promenade)** for breach of oral agreements by and between the Plaintiffs and Dolf Teuscher and Rolando Ramos. The plaintiffs each acquired 15% of the equity in Promenade. In

2007, the defendants discovered a tax problem resulting from the plaintiffs' purchasing their interest with undistributed bonuses. The defendants allege that problem was addressed by redistributing bonuses and offering to the plaintiffs the opportunity to repurchase the 15% interests which the defendants allege the plaintiffs failed to do. According to the defendants, the breach of contract claim therefore arose in 2007 or at the latest in 2009, when an undated, handwritten unsigned note including the date of "2009" midway through the note (the **handwritten note**) was allegedly sent to the plaintiffs inquired "why not think again of a ownership of this shop for the future?"[1]

The plaintiffs argue that when Mr. Teuscher discussed ownership he often meant control and total ownership and that after 2007, the plaintiffs never purchased any more of the business because they were wary of doing so without a written agreement in place.[2] The plaintiffs also dispute that they received redistributed bonuses and that the interests were bought back. Instead, according to the plaintiffs, the plaintiffs wrote checks that represented the untaxed portion of the distributions which had been used to acquire the equity interests and then they issued themselves checks through ADP minus withholdings. According to the plaintiffs, the defendants were aware that this is how the plaintiffs addressed their 2006 disbursements. In addition, the plaintiffs claim that the reason that there is not a signed written agreement is that the written agreement that they were provided had a glaring error in it. To wit, the agreement indicated that they were acquiring 15% of Mr. Teuscher's interest in Promenade instead of 15% of Promenade and that they had already paid for their interests.[3]

Plaintiff's bring this lawsuit alleging sixteen causes of action. The first fifteen causes of action are for breach of contract, an accounting, breach of fiduciary duties, declaratory judgment, preliminary and permanent injunction, dissolution of Promenade, conversion, constructive trust, unjust enrichment, quantum merit, and breach of the implied covenant of good faith and fair dealing. The sixteenth cause of action is for violation G.B.L. §349.

I. The First Fifteen Causes of Action

A motion pursuant to CPLR § 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "may be appropriately granted only

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[1] *See Exhibit B and H of Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint Pursuant to CPLR §§ 3211(a)(1), (5) and (7).*
[2] *See* Affidavit by Jeff Loeffelholz and Affidavit of Peter de la Cruz, each dated April 11, 2018.
[3] *id.*

where the documentary evidence utterly refutes [the] plaintiff's factual allegations, and conclusively establishing a defense as a matter of law". *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 (2002), 774 N.E.2d 1190; *See Rodolico v. Rubin & Licatesi, P.C.,* 114 A.D.3d 923, 924–925, 981 N.Y.S.2d 144 (2nd Dept. 2014). Review of the documentary evidence submitted by the defendant does not utterly refute the factual allegations of the plaintiffs' claim that they owned an equity interest in Promenade and that the plaintiffs agreed to the "buy back" of their interests and that such buy-back actually occurred.

CPLR § 3211(a)(5) provides for dismissal of an action based on the claim being barred by the statute of limitations. It is well settled that the burden of establishing a statute of limitations defense is on the party asserting it. *Gray v. Gray,* 232 A.D.2d 287, 648 N.Y.S.2d 914 (1st Dept. 1996). The defendants bear the initial burden of showing when the cause of action for breach of contract accrued by the open repudiation of the Plaintiffs' equity interests. *See Lebev v. Blavatnik*, 144 A.D.3d 24, 38 N.Y.S.3d 159, 2016 N.Y. Slip Op. 06463 (1st Dept.). Inasmuch as the defendants have failed to establish when the breach allegedly occurred, and it is otherwise unclear from the papers submitted to the court when such breach occurred (i.e., among other things what is meant by the defendants in the handwritten note (re: is the reference to ownership for a percentage, control or total ownership (additional ownership to the 15 percent potentially already owned?) or whether such handwritten note was in fact sent or received) dismissal is also denied based on the statute of limitations (re: CPLR § 3211(a)(5)).

In considering a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720 (2007); see *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994). Giving the plaintiffs every favorable inference (i.e., that they in fact each own 15% of Promenade), the plaintiffs make out the first fifteen causes of action (re: CPLR 3211(a)(7)).

II. Sixteenth Cause of Action For Violation of G.B.L. §349

In order to allege a claim under G.B.L. §349, the plaintiff must allege deceptive acts that were consumer oriented and not simply a private dispute with alleged deceptive acts specific to the plaintiffs. *Gaidon v. Guardian Life Insurance Company of America*, 94 N.Y.2d 330, 725 N.E.2d 598, 704 N.Y.S.2d 177, 1999

N.Y. Slip Op. 10743 (1999). Inasmuch as the plaintiff does allege that the conduct at issue were consumer oriented, the Sixteenth Cause of Action is dismissed.

Accordingly, the motion to dismiss is granted as to the Sixteenth Cause of Action for violation of G.B.L. §349 but is otherwise denied in its entirety.

July 12, 2018

HON. ANDREW BORROK
J.S.C.

Hon. Andrew Borrok