

Rahman v Alim

2018 NY Slip Op 31764(U)

June 28, 2018

Supreme Court, Queens County

Docket Number: 715746/17

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

MOHAMMED RAHMAN individually and as sole
owner and managing member of CORE FOODS &
CATERING LLC d/b/a MAYURA BANQUET HALL
& RESTAURANT,

Index No. 715746/17

Motion

Date February 1, 2018

Plaintiff,

Motion

Cal. No. 153

- against-

MOHAMMED ALIM, MOHAMMED UDDIN,
WOODHAVEN ASSOCIATES INC., RAN NY
GROUP LLC d/b/a JOYA HALL, and JOHN
DOEs #1-10,

Motion

Seq. No. 5

Defendants.

The following numbered papers read on this motion by defendants, Mohammed Alim, Mohammed Uddin, and Ran NY Group LLC, d/b/a Joya Hall (collectively referred to as moving defendants), pursuant to CPLR 3211 (a) (1) and (7), and 3211 (c), to dismiss the third, fourth, fifth, sixth, seventh, eighth and ninth causes of action of plaintiff, Mohammed Rahman, individually and as sole owner and managing member of Core Foods & Catering LLC d/b/a Mayurya Banquet Hall & Restaurant (collectively referred to as plaintiffs).

Papers
Numbered

Notice of Motion - Affirmation - Exhibits.....	EF 24-34
Affirmation in Opposition - Exhibits.....	EF 38-42, 46-48
Reply Affirmation.....	EF 49-51

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

This is an action arising out of causes of action sounding in: 1) breach of contract, 2) breach of implied covenant of good faith and fair dealings, 3) specific performance, 4) wrongful eviction under RPAPL § 853, 5) unjust enrichment, 6) conversion, 7) fraud and rescission, 8) civil conspiracy, and 9) for declaratory judgment. Plaintiff, Mohammed Rahman (plaintiff), has alleged that on or about May 27, 2014, he formed plaintiff, Core Foods & Catering LLC d/b/a Mayurya Banquet Hall & Restaurant (Core Foods), in order to operate a restaurant, that he was

the sole owner and managing member of Core Foods, and that on or about June 23, 2014, he assumed all rights, title and interest in a lease for a restaurant at premises located at 63-108A and 63-110 Woodhaven Boulevard, in the County of Queens from non-party Shivak Restuarant Corp. Plaintiff has further alleged that defendant, Woodhaven Associates Inc., which was allegedly the owner of the subject premises, agreed to the assumption and assignment of the lease from Shivak Restuarant Corp., to Core Foods, and that Woodhaven Associates Inc., extended Core Foods' lease term until October 31, 2028.

Plaintiff has alleged that after surrendering control of the restaurant to his business partners, he discovered it was being operated poorly and then opted to buy out his business partners, which resulted in a final "Buy-Out Agreement." He has alleged that during this time, he was also discussing the sale of Core Foods along with an assignment of the underlying lease of the subject premises with defendants, Mohammed Alim and Mohammed Uddin. Plaintiff has alleged that, without his knowledge or consent, Mohammed Alim and Mohammed Uddin, in conjunction with Woodhaven Associates Inc., occupied the subject premises, ejected him from the premises, appropriated Core Foods' lease agreement, used his personal and financial information, changed the name of the restaurant to Joya Hall and began to operate the new restaurant at the subject premises without ever finalizing the sale of the business in an agreement with plaintiff.

Moving defendants have now moved to dismiss plaintiffs' third, fourth, fifth, sixth, seventh, eighth and ninth causes of action pursuant to CPLR 3211 (a) (1) and (7), and 3211 (c). CPLR 3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence..." "To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453 [2d Dept 2000]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Lakhi Gen. Contractor, Inc. v N.Y. City Sch. Const. Auth.*, 147 AD3d 917 [2d Dept 2017]). In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996–997 [2d Dept 2010]; see *Flushing Sav. Bank, FSB v Siunykalmi*, 94 AD3d 807 [2d Dept 2012]).

CPLR 3211 (a)(7) provides that a party may move to dismiss an action on the ground that "the pleading fails to state a cause of action." "On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; CPLR 3026; see *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]).

CPLR 3211 (c) provides the following:

“Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.”

Although this court may treat a motion made pursuant to CPLR 3211 as one for summary judgment, in light of the early stage of the proceedings and the extremely limited record before the court, the instant motion papers do not support the application of a summary judgment standard and the court declines to treat the motion as such. The court will now address the branches of moving defendants’ motion made, pursuant to CPLR 3211 (a) (1) and (7).

The limited record contains, among other things, a copy of the pleadings, a copy of an assignment and assumption of lease dated June 23, 2014, along with an amendment also dated June 23, 2014, a copy of an agreement of absolute transfer and assignment dated May 18, 2015, a copy of assignment of lease with consent of landlord dated May 19, 2015, a copy of a limited power of attorney for finances dated July 26, 2014, copies of letters from Woodhaven Associates, Inc., dated October 16, 2014, and October 29, 2014, and affidavits from plaintiff, Mohammed Alim, Mohammed Uddin, as well from non-party Michael Gedell (Gedell), the president of Woodhaven Associates Inc.

Plaintiffs’ third cause of action sounds in specific performance. “The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law” (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004], *lv dismissed* 3 NY3d 656 [2004], and *lv denied* 3 NY3d 607 [2004]; *see E & D Group, LLC v Violet*, 134 AD3d 981, 982–83 [2d Dept 2015]). Based upon a careful reading of the allegations contained in the complaint, plaintiffs have sufficiently alleged a cause of action sounding in specific performance. Additionally, the documents contained in the record, when read along with the affidavit from Gedell, are not sufficiently “unambiguous, authentic, and undeniable” in nature (*Granada Condominium III Assn. v Palomino*, 78 AD3d at 996–997). Therefore, moving defendants are not entitled to the dismissal of this cause of action.

Plaintiffs’ fourth cause of action sounds in wrongful eviction under RPAPL § 853. That section provides the following:

“If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by

putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.”

Giving plaintiffs’ allegations, contained in the complaint, “the benefit of every favorable inference,” (*Gorbatov v Tsirelman*, 155 AD3d at 836), the court finds that plaintiffs have adequately alleged a cause of action pursuant to RPAPL § 853. Furthermore, the documentary evidence presented has failed to resolve all factual issues as a matter of law and to dispose of this cause of action (*see AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d at 900). Therefore, moving defendants are not entitled to the dismissal of the cause of action sounding in wrongful eviction under RPAPL 853.

The fifth cause of action sounds in unjust enrichment. “The elements of a cause of action to recover for unjust enrichment are ‘(1) the defendant was enriched, (2) at the plaintiff’s expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered’” (*GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 [2d Dept 2015], quoting *Mobarak v Mowad*, 117 AD3d 998, 1001 [2d Dept 2014]). In the complaint, plaintiffs have failed to sufficiently allege all the elements of this cause of action (CPLR 3211[a][7]; *see GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d at 570). Therefore, moving defendants are entitled to the dismissal of plaintiffs’ fifth cause of action sounding in unjust enrichment.

With regard to plaintiffs’ sixth cause of action sounding in conversion, “[a] conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). “Two key elements of conversion are (1) plaintiff’s possessory right or interest in the property ... and (2) defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights” (*id.*, at 50 [internal quotes and citation omitted]).

After a careful reading of the allegations contained in plaintiffs’ complaint and giving the facts alleged the benefit of every favorable inference, the court has determined that plaintiffs have sufficiently alleged the elements of a cause of action sounding in conversion. Furthermore, inasmuch as the documentary evidence in the record has failed to sufficiently resolve all factual issues as a matter of law as to this cause of action (*see AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d at 900), moving defendants are not entitled to the dismissal of plaintiffs’ sixth cause of action sounding in conversion.

Plaintiffs’ seventh cause of action sounds in fraud and rescission. “The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages” (*McMorrow v Angelopoulos*, 113 AD3d 736, 739–740 [2d Dept 2014], quoting *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 951 [2d Dept 2013]). Any cause of action for fraud must be pled with particularity (CPLR 3016 [b]; *see Greentech*

Research LLC v Wissman, 104 AD3d 540 [1st Dept 2013]). “[T]he necessary elements of a cause of action to rescind a contract on the ground of fraud [are]... that the defendant misrepresented a material fact or intentionally concealed a material fact upon which the plaintiffs reasonably relied to their detriment” (*Almap Holdings, Inc. v Bank Leumi Tr. Co. of New York*, 196 AD2d 518, 518–19 [2d Dept 1993], *lv denied* 83 NY2d 754 [1994]).

Based upon the court’s reading of the allegations contained in the complaint, and affording those allegations the benefit of every favorable inference, plaintiffs have failed to sufficiently allege the elements of these causes of action (*Gorbatov v Tsirelman*, 155 AD3d at 836). Therefore, moving defendants are entitled to the dismissal of plaintiffs’ seventh cause of action sounding in fraud and rescission.

With regard to plaintiffs’ eighth cause of action sounding in civil conspiracy, “New York does not recognize civil conspiracy to commit a tort as an independent cause of action, and a cause of action alleging conspiracy to commit a tort stands or falls with [an] underlying tort,” upon which it is premised (*Williams v Williams*, 149 AD3d 1145, 1146 [2d Dept 2017], *lv denied*, 30 NY3d 913 [2018]; *see also Matter of Hoge [Select Fabricators, Inc.]*, 96 AD3d 1398, 1400 [4th Dept 2012]). “[U]nder New York Law, to establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties’ intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury” (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010][internal quotes and citation omitted]; *see also Great Lakes Motor Corp. v Johnson*, 156 AD3d 1369, 1371–72 [4th Dept 2017]).

Here, the court has already determined that plaintiffs have alleged a cause of action for the tort of conversion. After careful consideration of the allegations contained in plaintiffs’ complaint, the court finds that plaintiffs have also sufficiently set forth the elements of a cause of action sounding in civil conspiracy. Additionally, the documentary evidence in the record is insufficient to resolve all factual issues as to this cause of action (*see AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d at 900). As such, moving defendants are not entitled to the dismissal of plaintiffs’ eighth cause of action sounding in civil conspiracy.

Plaintiffs’ ninth cause of action is for declaratory judgment. CPLR 3001 provides the following:

“The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.”

CPLR 3017 (b) provides the following:

“In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed.”

Upon the instant motion, the court must consider ““only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration”” (*State Farm Mut. Auto. Ins. Co. v Anikeyeva*, 89 AD3d 1009, 1010 [2d Dept 2011], quoting *Staver Co. v Skrobisch*, 144 AD2d 449, 450 [2d Dept 1988], *appeal dismissed* 74 NY2d 791 [1989]). Where, such as in the instant case, “a cause of action is sufficient to invoke the court’s power to render a declaratory judgment ... as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied” (*State Farm Mut. Auto. Ins. Co. v Anikeyeva*, 89 AD3d at 1011 [internal quotes and citation omitted]). A careful reading of the allegations contained in plaintiffs’ complaint, has demonstrated that plaintiffs have sufficiently alleged that a justiciable controversy exists that invokes the court’s power (CPLR 3001; *see State Farm Mut. Auto. Ins. Co. v Anikeyeva*, 89 AD3d at 1011). Therefore, moving defendants are not entitled to the dismissal of this cause of action.

Accordingly, the branches of moving defendants’ motion to dismiss plaintiffs’ fifth cause of action sounding in unjust enrichment and the seventh cause of action sounding in fraud and rescission are, hereby, granted. The motion is denied in all other respects.

Dated: June 28, 2018

DARRELL L. GAVRIN, J.S.C.