

Chefs Diet Acquisition Corp. v Ghiron

2018 NY Slip Op 32865(U)

November 7, 2018

Supreme Court, New York County

Docket Number: 650656/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

Part 57

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**CHEFS DIET ACQUISITION CORP., CHEFS
DIET NATIONAL CO. LLC d/b/a GOURMET
DAILY, INC. and KEVIN GLODEK,**

DECISION/ORDER

Plaintiff(s)

Index no. 650656/2018

-against-

Motion Seq. No. 2

**PAUL GHIRON, MONIQUE HAZEL
and CRYSTAL SPOON CORP., and JOHN
DOES 1-10,**

Defendant(s)
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**Recitation, as required by CPLR §2219(a), of the papers considered on the
review of this motion is as follows:**

PAPERS

NUMBERED

- Notice of Motion and Affidavits
and Exhibits Annexed** **1**
- Answering Affidavits and Exhibits Annexed** **2**
- Replying Affidavits** **3**
- Sur-Reply Affidavits**

Upon the foregoing cited papers, the motion is granted to the extent that (i) the action is dismissed in its entirety against Crystal Spoon Corp. (Crystal Spoon), (ii) the First (Defamation), the Second (Injurious Falsehood), the Third (Intentional Interference of Business), the Fourth (Breach of Contract), the Sixth (Declaratory Judgment) and the Eighth (Trade Secret Misappropriation Contract Based) Causes of Action are all dismissed and (iii) the caption of the case is amended as set forth below.

1. The action is dismissed as against Crystal Spoon for lack of service of process. The affidavits of service filed in the action show service was effected on Mr. Ghiron, Ms. Hazel and William Kutner on behalf of Crystal Spoon. The Plaintiff alleges in the moving papers that service on Crystal Spoon was proper because service was made on Mr. Ghiron as an officer of the corporation.¹ The Affidavit of Service however contradicts their position. Service on Mr. Ghiron was only made on Mr. Ghiron as an individual. In addition, to the extent that at oral argument Plaintiff's counsel also argued that service was proper because Mr. Kutner, a sales associate was served, this argument is also unavailing. *See* CPLR §311(a). Accordingly, the action as against Crystal Spoon is dismissed in its entirety.
2. The First Cause of Action for defamation is dismissed the action was not commenced until February 9, 2018 and the cause of action accrued no later than February 26, 2016. *See* CPLR §215(3).
3. The Second and Third Causes of Action, for injurious falsehood and intentional interference with business, respectively, are reformulations of the defamation claim and are therefore dismissed as time barred for the reasons set forth above. *Entertainment Partners Group, Inc. v Davis*, 198 A.D.2d 63, 603 N.Y.S.2d 439 (1st Dept. 1993); CPLR §215(3).
4. The Fourth Cause of Action for breach of contract is also dismissed. The Verified Complaint discusses the Contract in paragraph 78. Paragraph 78 of the Verified Complaint provides:

On or about November 20, 2018, 2013 CDAC and Crystal Spoon entered into a Food Production Agreement (hereinafter, "FPA"), wherein Crystal Spoon was to work closely with CDAC to curate a varied menu subject to CDAC's approval, and render food production service as more specifically defined in the FPA.²

There simply are no allegations in the Verified Complaint which indicate that the FPA (re: the contract) was between the Plaintiff and Mr. Ghiron and

¹ Affirmation in Opposition ¶138.

² For the avoidance of doubt, CDAC is Chefs Diet Acquisition Corp.

Ms. Hazel. Therefore, even taking all of the allegations set forth in the Verified Complaint as true, there is no theory upon which relief can be granted based on breach of contract as to relates to Mr. Ghiron or Ms. Hazel.³ Accordingly, the Fourth Cause of Action is dismissed.

5. The Fifth Cause of Action for conversion is not dismissed against Mr. Ghiron or Ms. Hazel because conversion has a three year statute of limitations and the movants have failed to establish when this claim accrued. *See* CPLR §214(3); *Harlem Capital Center v. Rosen & Gordon, LLC*, 145 A.D.3d 579, 44 N.Y.S.3d 36, 2016 N.Y. Slip Op. 08589 (1st Dept. 2016).
6. The Sixth Cause of Action for Declaratory Judgment is dismissed because as indicated above Mr. Ghiron and Ms. Hazel are not plead as parties to the contract and as such could not be in breach of the contract that the plaintiff does not allege that they are a party to, and for the reasons set forth above the action is dismissed as against Crystal Spoon.
7. The Seventh Cause of Action for Property Based Trade Secret Misappropriation is not dismissed because Misappropriation has a 3 year statute of limitations and the movants have failed to establish when this claim accrued. *See* CPLR §213(2); *CDx Labs., Inc. v Zila, Inc.*, 162 A.D.3d 970, 79 N.Y.S.3d 285, 2018 N.Y. Slip Op. 04692 (2nd Dept. 2018).
8. The Eighth Cause of Action for Contract Based Misappropriation of Trade Secrets is dismissed because the contract is between the Plaintiff and Crystal Spoon and not Mr. Ghiron and Ms. Hazel, and as such, even taking the allegations as true, there is no theory upon which relief can be granted.

And is ORDERED that the caption of the case is hereby amended to:

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**CHEFS DIET ACQUISITION CORP., CHEFS
DIET NATIONAL CO. LLC d/b/a GOURMET
DAILY, INC. and KEVIN GLODEK,**

³ Per the above, the action is dismissed as against Crystal Spoon.

Plaintiff(s)

-against-

**PAUL GHIRON, MONIQUE HAZEL, and JOHN
DOES 1-10,**

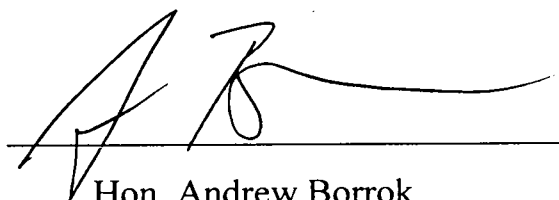
Defendant(s)

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And it is further ORDERED that counsel for the defendants shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) who are directed to mark the court's records to reflect the new caption of the action; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the Protocol on Courthouse and the County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

Dated: November 7, 2018



Hon. Andrew Borrok

J.S.C.