

Land v Forgione

2018 NY Slip Op 33652(U)

July 27, 2018

Supreme Court, Nassau County

Docket Number: 600747-17

Judge: Timothy S. Driscoll

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
COREY LAND,

Plaintiff,

-against-

**JOSEPH FORGIONE, DIANE FORGIONE, JEFFREY
STATE, DUE PAESANI, INC. d/b/a S.T.A.G.'S TAP
HOUSE, and HUNTINGTON TOBACCO COMPANY,
INC. d/b/a HUNTINGTON TOBACCO COMPANY, INC.
MONEY PURCHASE PENSION AND PROFIT SHARING
TRUST,**

Defendants.

-----X
Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affidavit in Opposition and Exhibit.....X**
- Affirmation in Reply and Exhibit.....X**

This matter is before the court on the motion by Plaintiff Corey Land (“Land” or “Plaintiff”) filed on May 11, 2018 and submitted on July 18, 2018. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiffs moves for an Order 1) granting Plaintiffs’ motion to reargue and/or renew its opposition to the prior motion to dismiss (“Prior Motion”) by Defendant Huntington Tobacco Company, Inc. d/b/a Huntington Tobacco Company, Inc. Money Purchase Pension and Profit Sharing Trust (“Huntington Trust”), and denying the Prior Motion; and 2) granting Plaintiff leave to amend the amended verified complaint to add a cause of action against Huntington Trust for

aiding and abetting.

Huntington Trust opposes the motion.

B. The Parties' History

The parties' history is outlined in detail in the prior decision of the Court dated October 26, 2017 ("Prior Decision") (Ex. A to Impellizeri Aff. in Supp.) and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, the initial Verified Complaint ("Initial Complaint") in the above-captioned action ("Instant Action"), filed January 27, 2017, is based on the following allegations: 1) Plaintiff is the general manager and one-third owner of S.T.A.G.'s Tap House (the "Restaurant"); 2) Defendants Joseph Forgione and Diane Forgione (the "Forgiones") were 87% owners of the Restaurant; 3) Defendant Jeffrey State ("State") was a 13% owner of the Restaurant; 4) on or about November 10, 2016, after four and one-half months of operating the Restaurant at a loss, which totaled approximately \$148,000.00, Defendants fired the Restaurant's employees; 5) on November 11, 2016, Plaintiff met with the Forgiones and State ("Former Owners") and advised them that he was willing to operate the Restaurant as general manager on the condition that Defendants give him a one-third ownership in the Restaurant and a right of first refusal to purchase the Restaurant in the event of a sale of the Restaurant; 6) Defendants agreed that in exchange for Plaintiff turning the \$9,000 weekly loss around and having the restaurant break even, Plaintiff would be given a one-third ownership interest in the Restaurant, a position as general manager of the Restaurant, and a right of first refusal to purchase in the event of a sale of the Restaurant; 7) as the new one-third owner and general manager of the Restaurant, Plaintiff invested \$47,000 of capital into the restaurant for improvements, marketing and the paying of liabilities, and worked at the Restaurant 16 hours per day, 7 days per week; 8) as part of his duties as general manager, Plaintiff re-hired employees, reduced labor costs and increased revenues; 9) as a result of Plaintiff's contributions, the Restaurant made a profit in December 2016; 10) in December 2016, Defendants advised Plaintiff that they were willing to sell the Restaurant to Plaintiff; 11) on January 7, 2017, Defendants and Plaintiff finalized the terms for an asset purchase agreement for the sale of the entire Restaurant, thereby substantially increasing Plaintiff's one-third ownership interest in the Restaurant; 12) during the meeting on January 7,

2017, Defendants advised Plaintiff of outstanding invoices that needed to be paid, including an invoice for a liquor vendor, which had to be satisfied to ensure that the Restaurant would maintain its liquor license, and Plaintiff paid the \$2,400.00 invoice in full; 13) on January 17, 2017, while Plaintiff was waiting to learn the final closing date and sign the final purchase agreement, Defendants advised Plaintiff that his employment was terminated effective immediately, and that they would not sell the Restaurant to Plaintiff; 14) Defendants never paid Plaintiff for the monies that he contributed to the Restaurant's improvements, marketing and satisfaction of outstanding liabilities; and 15) Defendants never paid any compensation or wages to Plaintiff for the more than 700 hours that he worked at the Restaurant after he assumed the general manager position. The Initial Complaint contained causes of action for promissory estoppel, equitable estoppel, breach of contract, breach of the covenant of good faith and fair dealing, conversion, fraud/deceit/misrepresentation, unjust enrichment, and Labor Law violations.

As also noted in the Prior Decision, the Amended Verified Complaint ("Amended Complaint") contains the following additional allegations: 1) at all relevant times, Huntington Trust was the owner of the Premises; 2) at all relevant times, the Restaurant held a valuable leasehold at the Premises; 3) on January 27, 2017, to protect his ownership interest in the Restaurant, Plaintiff commenced this action, while simultaneously filing an Order to Show Cause for a preliminary injunction and temporary restraining order; 4) following a hearing on that Order to Show Cause, the Court granted Plaintiff a temporary restraining order ("TRO"), directing the Former Owners to keep the Restaurant open and operational, and restraining the Former Owners from selling or transferring the Restaurant; 5) on or about May 2, 2017, without Plaintiff's knowledge, the Former Owners violated the TRO by failing to pay rent at the Premises, thereby jeopardizing the Restaurant's leasehold and, as a result, Huntington Trust filed a landlord-tenant action assigned Index Number LT-240-17/HU ("Landlord Tenant Action"); 6) on or about May 15, 2017, the Former Owners requested that the Court vacate the TRO in the Instant Action because they had a "cash" offer to buy the Restaurant (Am. Comp. at ¶ 29); 7) the Court denied the Former Owners' application and directed the Former Owners to provide Plaintiff with a right of first refusal to purchase the Restaurant; 8) the representations by the Former Owners were misleading because they suggested that the Landlord Tenant Action would be obviated by the purchase of the Restaurant by the putative third-party buyer or by Plaintiff; 9) the following

week, Plaintiff was never advised of the details of the alleged cash offer, and instead was advised that the Premises may have closed on or about May 25, 2017; 10) on May 25, 2017, Plaintiff advised Huntington Trust of the TRO and the Former Owners' inability to surrender the Premises in light of that TRO; 11) on May 26, 2017, Plaintiff advised the Former Owners of their violation of the TRO by failing to keep the Restaurant open and operational; 12) on June 1, 2017, without notice to Plaintiff, the Former Owners entered into a stipulation of settlement with Huntington Trust ("Stipulation"), pursuant to which the Restaurant would vacate the Premises and surrender the lease; 13) prior to the execution of the Stipulation, Defendants entered into a different agreement pursuant to which the equipment leases and debts of the Restaurant would be paid off; 14) prior to the Restaurant's lease being surrendered, but after being notified of the TRO and without notifying Plaintiff, Huntington Trust leased the Premises to a third party; and 15) the Stipulation was not agreed to by Plaintiff, and was in violation of the TRO.

The Amended Complaint contains fifteen (15) causes of action:

- 1) against the Former Owners for promissory estoppel;
- 2) against the Former Owners for equitable estoppel;
- 3) against the Former Owners for breach of contract;
- 4) against the Former Owners for breach of the covenant of good faith and fair dealing;
- 5) against the Former Owners for conversion;
- 6) against Huntington Trust for conversion;
- 7) against the Former Owners for fraud/deceit/misrepresentation;
- 8) against all Defendants for fraud/deceit/misrepresentation;
- 9) against the Former Owners for unjust enrichment;
- 10) against all Defendants for unjust enrichment;
- 11) against the Former Owners for Labor Law violations;
- 12) against all Defendants for tortious interference with contract;
- 13) against all Defendants for tortious interference with prospective advantage;
- 14) against all Defendants for abuse of process; and
- 15) against all Defendants for civil conspiracy.

The Prior Decision addressed the Prior Motion by Huntington Trust to dismiss the Instant Action against Huntington Trust, pursuant to CPLR § 3211(a)(7). In the Prior Decision, the Court granted the Prior Motion. The Court so ruled based on its determination that the Amended Complaint as asserted against Huntington Trust was insufficient because all of the causes of action asserted against Huntington Trust contained an element of improper or unjustified conduct by Huntington Trust and the Amended Complaint did not include allegations establishing that Huntington Trust, which had a fiduciary duty to the landlord with respect to the lease, was not permitted to prosecute the landlord's rights with respect to that lease, whose payments were in arrears. This result was reinforced by the fact, *inter alia*, that 1) Huntington Trust was not a party to the alleged agreement between Plaintiff and the Former Owners; 2) that alleged agreement had no effect on Huntington Trust's landlord-tenant relationship with Due Paesani, or its rights arising from that relationship; 2) in the absence of allegations that Plaintiff provided proof to Huntington Trust that he had the authority to act on Due Paesani's behalf, the landlord had no obligation to Plaintiff, and no reason to be involved in Plaintiff's relationship with the Prior Owners; and 3) the TRO did not suspend the payment of rent or restrain the landlord from doing anything to protect its rights, including filing the Landlord Tenant Action. Under these circumstances, the Court concluded, the Amended Complaint failed to adequately allege that Huntington Trust had a legal obligation to Plaintiff which prohibited it from exercising its rights pursuant to its written lease with Due Paesani, and entering into the Stipulation in the Landlord Tenant Action.

In support of the motion now before the Court, counsel for Plaintiff ("Plaintiff's Counsel") affirms that on or about February 27, 2018, Defendants Joseph Forgione ("Joseph"), Diane Forgione, Jeffrey States, and Due Paesani Inc. d/b/a S.T.A.G.'s Tap House ("Stags") (the "Stags Defendants") responded to Plaintiff's combined discovery demands. Plaintiff's Counsel submits that the Stags Defendants' document production, at a minimum, reveals that Huntington Trust acted in concert with the Stags Defendants to circumvent the TRO, to Plaintiff's detriment.

Plaintiff's Counsel provides an email between Huntington Trust and the Stags Defendants dated January 15, 2017 (Ex. C to Impellizeri Aff. in Supp.), provided to Plaintiff as part of the discovery in this action. Plaintiff submits that this documentation refutes the Stags Defendants' contention that they were unable to consummate the agreement with Plaintiff because Huntington Trust refused to accept an assignment of STAGs' lease. The January 15, 2017 email is the third email of a series, which consist of the following emails:

1) an incomplete email from Howard Novick ¹ to “Joe” dated January 14, 2017 at 7:48:

After reviewing our conversation, I have a question about the prospective purchaser that did not occur to me at the.....

2) an email from Joseph to Howard and others dated January 14, 2017 at 1:20 p.m.;

Howard:

That’s a great question and I had the same one when I first met Corey. Corey is extremely dedicated to his work and he puts a lot into it. Over the course of the years that he managed Cheesecake Factories, Yard House, and as assistant manager of Toku in Manhasset he burnt himself out. He just wanted wait tables [sic] for some time so that he could get somewhat of a life back and recharge. But when our other GM left the end of October we offered the job to Corey knowing his background and desire to own his own place one day. When we decided we want to sell we approached Corey to see if he would be interested in buying the restaurant knowing that he had been here from the beginning and shared the same vision of the place as we did.

Regards,

Joe

3) an email from Howard to Joseph dated January 15, 2017 at 1:48 p.m.:

Joe,

If he became burnt out at 29 as an employee, I’m afraid to think what will happen to him by the age of 35 as an owner! However, people do grow into the role and as I said previously as long as his financials are acceptable we will agree to the assignment given his experience.

I am still a little unclear as to whether your curing the default in the rent is contingent upon this deal happening. I am hoping that it is not. However, should that be the case, perhaps we could work something out so that at least you could salvage some of the security we are holding.

Howard

Plaintiff’s Counsel also submits that documents obtained during discovery demonstrate that Huntington Trust began negotiating with the Stags Defendants to surrender the lease or have the lease purchased from a different buyer as early as April 19, 2017. In support, Plaintiff’s

¹ As noted in the Prior Decision, Howard Novick (“Howard”) is a Trustee of Huntington Trust and the manager of the building in which the Premises are located.

Counsel provides April 19 and April 20, 2017 emails between Huntington Trust and the Stags Defendants (Ex. D to Impellizeri Aff. in Supp.). Those emails consist of the following:

1) an email from Howard to Joseph and “Jeff,” which the Court presumes is a reference to Defendant Jeffrey State, dated April 19, 2017 at 4:08 p.m.:

Joe and Jeff,

I heard a rumor today from people in town that you may be intending to close the restaurant. If that is the case, I would be willing to consider offering an incentive for a lease surrender. If you are interested, please feel free to contact me.

Howard

2) an email from Joseph to Howard dated April 19, 2017 at 5:19 p.m.;

Howard,

That was not our intent however Jeff and I would be interested in discussing this with you tomorrow at a time that would be convenient for you. Please let us know some times that might work.

Regards,

Joe

3) an email from Howard dated April 19, 2017 at 5:51 p.m.;

Joe,

We could talk between 7-9 or after 10.

4) an email from Joseph to Howard dated April 19, 2017 at 8:13 p.m.;

Howard,

How would noon work? If that’s ok Jeff and I will call you then.

Joe.

5) an email from Howard to Joseph dated April 20, 2017 at 6:11 p.m.;

Joe and Jeff,

According to my records we are holding \$33,000.00 in security. The outstanding balance is currently \$11,840.00. Accordingly, we would be able to refund the difference (\$21,160.00) if the transaction is completed prior to an eviction notice being served. The legal costs of that action would reduce the current balance as would extending the occupancy into the month of May. As I had explained earlier the end of April deadline I referred to only related to the maximum dollars available.

Howard

Plaintiff's Counsel affirms that Plaintiff believes that at or about this time, Flat Top Long Beach, Inc. d/b/a Burgerology ("Flat Top") was introduced to Huntington Trust as a potential purchaser of Stags. Plaintiff believes that the purported cash offer, to which the Stags Defendants made reference at a prior court appearance, was from Flat Top. Plaintiff submits that, in an effort to circumvent the TRO, Huntington Trust, the Stags Defendants and Flat Top, instead of assigning Stags' lease, agreed to the surrender of the lease, with Flat Top paying certain debts and liabilities of the Stags Defendants, and Huntington Trust agreeing to provide Flat Top with a new lease with the same terms as Stags' lease. In support, Plaintiff copies of emails dated August 16, 2017 and August 17, 2017 (Ex. E to Impellizeri Aff. in Supp.). In light of the foregoing, Plaintiff submits, the Court should grant leave to reargue and renew, deny the Prior Motion, and permit Plaintiff to file and serve his proposed Second Amended Verified Complaint (Ex. F to Impellizeri Aff. in Supp.).

In opposition, with respect to Plaintiff's motion to reargue, counsel for Huntington Trust ("Huntington Counsel") submits that the motion was not timely filed. Huntington Counsel affirms that the Prior Decision was entered on October 31, 2017, and notice of entry of the Prior Decision was served and filed on November 1, 2017 (*see* Ex. A to Novick Aff. in Opp.). As the motion to reargue was not timely filed, Huntington Counsel does not address the merits of that branch of Plaintiff's motion.

With respect to Plaintiff's motion to renew, Huntington Counsel submits that Plaintiff is confronted with a situation in which his former employer started a business that did not survive, resulting in significant financial losses. Huntington Counsel contends that Plaintiff is hoping to hold Huntington Trust responsible for the breach of the alleged agreement between the parties, because it is "doubtful" (Novick Aff. in Opp. at ¶ 3) that Plaintiff will be able to recover any funds from the Stags Defendants. Huntington Counsel submits, however, that nothing presented

by Plaintiff in support of the instant motion should change the Court's determination, as set forth in the Prior Decision, that Huntington Trust owed no duty to Plaintiff, and did not violate any court order by protecting its rights as landlord.

C. The Parties' Positions

Plaintiff submits that the new evidence presented in support of the instant motion supports the conclusion that Huntington Trust did more than simply re-let the premises or enforce its lease. Plaintiff submits that the evidence presented demonstrates that Huntington Trust colluded with the Stags Defendants, as well as the new tenant. Plaintiff argues that, to circumvent the TRO, instead of assigning the Stags lease, Huntington Trust, the Stags Defendants and Flat Top agreed to the surrender of the lease, with Flat Top paying certain debts and liabilities of the Stags Defendants, and Huntington Trust agreeing to provide Flat Top with a new lease with identical terms as the Stags Lease. Plaintiff submits that, under these circumstances, Huntington Trust can be liable for a party's violation of the TRO, and there are sufficient allegations to support that claim in the Instant Action. Plaintiff contends, further, that Plaintiff's conspiracy claim should have survived because the allegations in the Amended Complaint support the conclusion that Huntington Trust had knowledge of the TRO on or about May 25, 2017, yet still acted in concert with the Stags Defendants to violate the TRO, to the detriment of Plaintiff. In light of the foregoing, Plaintiff submits, the Court should grant reargument and renewal and, upon that reargument and renewal, deny the Prior Motion. Plaintiff contends, further, that the Court should permit Plaintiff to amend its complaint again, and file and serve its proposed Second Amended Verified Complaint.

With respect to Plaintiff's motion to reargue, Huntington Trust submits that the motion was not timely filed, and Huntington Trust does not address the merits of Plaintiff's motion to reargue. With respect to Plaintiff's motion to renew, Huntington Trust submits that Plaintiff's motion ignores the fact that 1) Huntington Trust was not a party to the Instant Action when the TRO was issued; 2) Huntington Trust had every right, and the obligation as a fiduciary, to enforce its lease with the Stags Defendants; and 3) Huntington Trust had the right to seek and obtain an order of eviction against the Stags Defendants for non-payment of rent. Moreover, Huntington Trust notes, Plaintiff does not allege that he ever offered to pay the rent arrears, tendered the rent arrears, or had the ability or intention to make those payments. Huntington Trust submits that Plaintiff's motion to renew is predicated upon the flawed assumption that the surrender of the lease by the Stags Defendants was necessary in order for Huntington Trust to protect its rights as a landlord. Huntington Trust, however, obtained a judgment of eviction

which also terminated the lease, rendering the surrender agreement necessary. Huntington Trust submits that the purported new evidence presented, specifically emails suggesting that the Stags Defendants were attempting to negotiate a lease surrender prior to the commencement of the eviction proceeding, does not change the Court's determination in the Prior Decision that the Amended Complaint failed to allege that Huntington Trust had a legal obligation to Plaintiff that prohibited it from exercising its rights pursuant to its written lease with the Stags Defendants. In light of the foregoing, Huntington Trust, neither reargument nor renewal is warranted.

RULING OF THE COURT

A. Reargument

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. *Matter of American Alternative Insurance Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), *lv. app. den.*, 18 N.Y.3d 803 (2012), quoting CPLR § 2221(d)(2). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999).

B. Renewal

A motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion. *Schenectady Steel Co., Inc. v. Meyer Contracting Corp.*, 73 A.D.3d 1013, 1015 (2d Dept. 2010), quoting CPLR §§ 2221(e)(2) and (3) and citing, *inter alia*, *Barnett v. Smith*, 64 A.D.3d 669 (2d Dept. 2009); *Chernysheva v. Pinchuk*, 57 A.D.3d 936 (2d Dept. 2008).

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion to reargue. Plaintiff has not demonstrated that the Court overlooked or misapprehended matters of law or fact in reaching the Prior Decision.

The Court denies Plaintiff's motion to renew. The new evidence submitted by Plaintiff in support of his motion to renew would not have changed the Prior Decision. This new evidence does not alter the Court's conclusion, as set forth in the Prior Decision, that the Amended Complaint as asserted against Huntington Trust was insufficient because (a) all of the causes of action asserted against Huntington Trust contained an element of improper or unjustified conduct by Huntington Trust and (b) the Amended Complaint did not include allegations establishing that

Huntington Trust, which had a fiduciary duty to the landlord with respect to the lease, was not permitted to prosecute the landlord's rights with respect to that lease, whose payments were in arrears. The new evidence presented by Plaintiff in support of the instant motion does not change the fact that Huntington Trust was not a party to the alleged agreement between Plaintiff and the Former Owners, and the TRO did not suspend the payment of rent or restrain the landlord from doing anything to protect its rights, including filing the Landlord Tenant Action. Under these circumstances, the Court adheres to its determination in the Prior Decision that the Amended Complaint failed to adequately allege that Huntington Trust had a legal obligation to Plaintiff which prohibited it from exercising its rights pursuant to its written lease with Due Paesani, entering into the Stipulation in the Landlord Tenant Action, or engaging in the other conduct to which the instant motion makes reference.

All matters not decided herein are hereby denied.

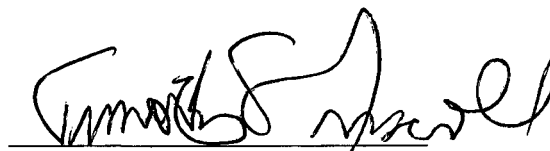
This constitutes the decision and order of the Court.

The Court reminds counsel for Plaintiff and counsel for the Stags Defendants of their required appearance before the Court for a Certification Conference on September 10, 2018 at 9:30 a.m.

ENTER

DATED: Mineola, NY

July 27, 2018



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUL 30 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE