

Fizzy Bubbly Beverage LLC v RMG Distrib. LLC

2019 NY Slip Op 30434(U)

January 25, 2019

Supreme Court, Richmond County

Docket Number: 151026/2018

Judge: Jr., Orlando Marrazzo

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This opinion is uncorrected and not selected for official publication.

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

**FIZZY BUBBLY BEVERAGE LLC and
ANTHONY CARUSO,**

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Plaintiff(s),

Index No.: 151026/2018
Motion No. 1,2,

-against-

**RMG DISTRIBUTORS LLC and
STEPHEN GARZONE.**

Defendant(s)

The following numbered 1 to 2 were fully submitted on 15th day of January 2019

Papers
Numbered

Defendant’s Motion to Dismiss, with Supporting Papers and Exhibits, dated,
November 7, 2018 1

Plaintiff’s Cross-Motion to Amend the Complaint and Opposition to Defendant’s
Motion to Dismiss, with Supporting Papers and Exhibits, dated, January 4, 2019.. 2

Defendant moves for an order pursuant to CPLR 3012 (b), 3211(a)(7) to
dismiss the complaint. Plaintiff cross-moves for an order to serve an amended
verified complaint. As is set forth below, defendant’s motion to dismiss is denied
and plaintiff’s cross-motion to serve an amended verified complaint is granted.

A review of the file hereto indicates that plaintiff's complaint has merit and has adequately set forth causes of action for breach of contract, breach of promissory note, quantum meruit, unjust enrichment, and fraud. Plaintiffs alleged there was a contract, defendants breached a contract, and damages. Plaintiffs alleged there was a promissory note, defendants breached that agreement and failed to make payments.

Defendants' motion to dismiss alleges that the complaint pursuant to CPLR must be dismissed as plaintiff did not serve the complaint within twenty (20) days from the notice of appearance. However, the late filing of the complaint by 5 days creates no prejudice to defendants.

Accordingly, defendants' motion to dismiss the complaint is denied.

Plaintiffs' cross-motion pursuant to CPLR 3025 for leave to serve an amended complaint upon RMG DISTRIBUTORS, LLC. And STEPHEN GARZONE and deem same served timely nunc pro tunc in the form attached to the cross-motion is granted.

As set forth in the amended verified complaint, based upon information and belief, the defendant Garzone, through and with his shell corporate entity, the corporate defendant RMG, as solely owned, operated and managed by Garzone, entered into a contract with promissory note as purchaser for the purchase of a beverage and juice route with plaintiffs as seller. Prior to, and after closing, plaintiff alleges that it was defendants' scheme and intention to breach the contract and not

pay on the promissory note. Garzone sabotaged the route. Garzone through alleged intentional acts lost certain customers while retaining others for his own benefit and the benefit of other alter ego corporate entities, and allegedly damaged plaintiffs' relationships with vendors and distributors. Defendant Garzone allegedly has a propensity for same. Defendant allegedly retained a delivery truck and customer list as part of the purchase. Plaintiff alleges it was left without a route and without compensation. Garzone allegedly perpetrated a fraud and plaintiff was allegedly his victim.

It is well settled that leave to amended pleading 'shall be freely given' absent prejudice or surprise. [CPLR 3025, subd [b]; *Fahey v County of Ontario*, 44 NY2d 934, 935; *McCaskey, Davies & Assoc. v New York City Health and Hosps. Corp.* 59 NY2d 755, 757; *Lucido v Mancuso*, 49 AD3d 220, 222, 851 NYS2d 238.)

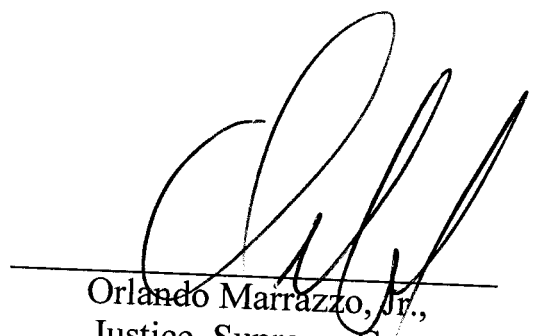
A review of the record indicates to the court that there is no prejudice to either party. Defendants are fully aware of the pending litigation and have competent legal representation. The initial action and amended pleading are timely. Counsel for both parties have been in contact with one another and have corresponded on this matter. The granting of plaintiff's cross-motion in pursuant to CPLR 3025 for leave to serve an amended complaint upon RMG DISTRIBUTORS, LLC. And STEPHEN GARZONE and deem same served timely nunc pro tunc in the form attached to the

cross-motion is appropriate and is hereby granted to the court as requested in plaintiff's cross-motion.

This matter is adjourned to February 19, 2019, 9:30AM for a conference.

This constitutes the decision and order of the court.

Dated: January 25, 2019
Staten Island, New York



Orlando Marrazzo, Jr.,
Justice, Supreme Court