

Siwiec v United Rest. Group Inc.
2019 NY Slip Op 31152(U)
April 11, 2019
Supreme Court, Kings County
Docket Number: 518222/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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ANNA SIWIEC, individually and derivatively,
as a shareholder of EL SOTANO OF BROOKLYN
CORP.,

Plaintiffs, Decision and order

- against -

Index No. 518222/18

UNITED RESTAURANT GROUP INC., &
CHRISTIAN VEGA,

Defendants, #1 April 11, 2019

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3211 seeking to dismiss the counterclaims filed by the defendant. The defendant has amended the counterclaims and argues the motion should be denied. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On June 9, 2016 the plaintiff and defendant entered into an operating agreement wherein the defendant would help operate and maintain a restaurant funded by the plaintiff. The plaintiff commenced this lawsuit alleging the defendant lied about its ability to manage restaurants and neglected to operate the restaurant in question in a successful manner. The defendant counterclaimed alleging various improprieties allegedly committed by the plaintiff. The plaintiff has now moved seeking to dismiss those counterclaims.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id). The amended

counterclaim provides the actual provisions that were allegedly violated by the plaintiff. The plaintiff argues that such counterclaim is insufficient because "listing the titles of the alleged breached sections of the contract, without the text of those sections and without incorporating an attached copy of the agreement, still leaves the Court and Plaintiffs with a lack of information of specific facts as to what essential terms of the Operating Agreement at issue was allegedly breached by Plaintiffs" (see, Reply Memorandum, pages 5,6). However, there is no requirement the text of a contractual provision must be included within a pleading. Indeed, the provisions of a contract must be disclosed so that the court can evaluate whether a cause of action has been alleged (Barker v. Time Warner Cable Inc., 83 AD3d 750, 923 NYS2d 118 [2d Dept., 2011]). Therefore, the motion seeking to dismiss the breach of contract counterclaim is denied.

The second counterclaim is for conversion. It is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). Further, a conversion does not occur until the owner makes a demand of a return of the property and the one in possession refuses (Matter of Asch, 164 AD3d 787, 83 NYS3d 307 [2d Dept., 2018]). Paragrph

5 of the Amended Conversion Counterclaim states that "upon information and belief, Defendants' previous attorney in this matter contact Plaintiffs' present attorney and demanded the return of the wrongfully removed property" (id). Thus, conversion is properly pled and the motion to dismiss this counterclaim is denied.

The next counterclaim is for unjust enrichment. It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Since the defendant has already pled a breach of contract claim the unjust enrichment claims is duplicitive and the motion to dismiss this counterclaim is granted.

Turning to the counterclaim of fraud, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & McLaughlin, Esqs., 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept.,

2014)).

However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie" (McKernin v. Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]).

In this case all the fraud allegations are essentially further elaborations of the breach of contract counterclaim. Consequently, the motion seeking to dismiss the fraud counterclaim is granted. Likewise the counterclaim for agreement rescission is essentially a breach of contract claim and is likewise dismissed.

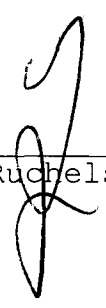
The counterclaim for trespass was not included within the amended counterclaims. Thus, the counterclaims for breach of contract and conversion survive this motion to dismiss.

So ordered.

ENTER

DATED: April 11, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC



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FILED