

VGM Realty Servs., LLC v Masseria
2019 NY Slip Op 31835(U)
May 29, 2019
Supreme Court, Richmond County
Docket Number: 151670/18
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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VGM REALTY SERVICES, LLC individually and
derivatively on behalf of TANJ PROPERTIES LLC,
And OUR TWO BUDDIES LLC,
Plaintiffs,

DCM Part 21
Present:
Hon. Orlando Marrazzo

DECISION AND ORDER

-against-

Index No. 151670/18
Motion No. 5281-002

STEVEN MASSERIA, TANJ PROPERTIES LLC,
JOSEPH LAFORTE, and OUR TWO BUDDIES, LLC,

Defendants.

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STEVEN MASSERIA and MASSERIA
CONSTRUCTION CORP.,
Third-Party Plaintiffs,

Index No. A151670/18

-against-

GUY PENNISI,
Third-Party Defendant.

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The following papers numbered 1 to 3 were marked submitted on the 19th day of February, 2019:

Notice of Motion to Dismiss By Third-Party Defendant, with Supporting Papers and Exhibits (dated December 18, 2018).....	1
Attorney’s Affirmation in Opposition to Third-Party Defendant’s Motion By Third-Party Plaintiff, with Supporting Papers and Exhibits (dated January 17, 2019).....	2
Reply Affirmation (dated February 13, 2019)	3

Upon the foregoing papers, the motion is denied.

The Plaintiff VGM Realty Services, LLC (hereinafter “VGM”) was a 33 1/3% owner of the two Defendant limited liability companies: TANJ Properties, LLC (hereinafter “TANJ”), and Our Two Buddies, LLC (hereinafter “Buddies”), each of which owned, in equal shares, a

commercial property located at 3475 Victory Boulevard, Staten Island, New York (*see* Verified Complaint, paras 6-7, 12-13, 17-18). The Plaintiff commenced the action against TANJ and Buddies, as well as the individual Defendants Steven Masseria and Joseph LaForte, who were principals in the companies (*id.* at 8, 14). The Plaintiff asserted causes of action for constructive trust, breach of contract, conversion, unjust enrichment, and breach of fiduciary duty, based upon the alleged failure to pay him distributions while other members received distributions from the companies (*id.* at 25-26, 51-53, 60-64).¹

The action was commenced on or about June 27, 2018. In a So Ordered Stipulation dated September 25, 2018, Plaintiff's order to show cause seeking the appointment of a receiver for TANJ and Buddies was granted on consent.

On November 7, 2018, Steven Masseria and Masseria Construction Corp commenced a third-party action against Guy Pennisi, principal of VGM, asserting causes of action alleging conversion, breach of fiduciary duty, fraud, unjust enrichment, and breach of the oral agreement. It is therein alleged that Pennisi engaged in a pattern of unauthorized deposits, transfers, and withdrawals from the operating account of Masseria Construction Corp while acting in his capacity as treasurer. More specifically, it is alleged that Pennisi deposited \$100,000 of his personal funds into the account of Masseria Construction Corp in 2015, and concealed the nature of said funds from the Third-Party Plaintiffs, which resulted in tax consequences paid by the latter (*see* Verified

¹ According to the allegations in the Verified Complaint, it appears that the two limited liability companies were formed for the purpose of purchasing and operating certain commercial property, and that members were entitled to, among other things, distributions from the rent and income generated through the ownership and management of same (*see* Verified Complaint, paras 24-26).

Third-Party Complaint, at 10-12).² It is alleged that the parties made an oral agreement wherein Pennisi would forego any distributions from TANJ and Buddies until the Third-Party Plaintiffs were reimbursed in full (*id.* at 15, 52). It is also alleged that from 2015 through 2018, Pennisi made unauthorized cash withdrawals in an amount exceeding \$250,000 and that he fraudulently concealed the nature of said withdrawals from Masseria (*id.* at 18-19).

Pennisi now moves to dismiss³ the third-party complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), and under CPLR 3016(b) for failure to plead with particularity, the causes of action for fraud and breach of fiduciary duty.

In opposition, Steven Masseria submits an affidavit and attests that as president of Masseria Construction Corp, he has personal knowledge of the facts surrounding the instant Third-Party Complaint (*see* Affidavit of Steven Masseria, para 4). Masseria attests, upon review of the monthly statements of account, that Guy Pennisi made an unauthorized deposit of \$100,000 into the operating account of Masseria Construction Corp on December 29, 2015, and an additional unauthorized deposit of \$66,000 on September 12, 2016 (*id.* at 12-13). According to Masseria, Pennisi also made several unauthorized transfers in the total amount of \$344,746.78 between February and May of 2017 (*id.* at 15-16). Annexed to the Affidavit of Steven Masseria are copies of the banking statements from December 2015, September 2016, and February through May 2017 (*see* Third-Party Plaintiffs' Exhibits "D", "E"). Masseria further attests that Pennisi had verbally

² As a result of the deposit, Masseria alleges that he suffered approximately \$40,000 in damages due to additional State and Federal tax payments for the 2015 tax year (*see* Verified Third-Party Complaint, paras 14, 32; *see also* Affidavit of Steven Masseria, para 15).

³ The branch of the motion to dismiss pursuant to CPLR 3211(a)(5) was withdrawn (*see* Reply Affirmation, paras 35-37).

agreed to pay back the above stated amounts within a year, and that Pennisi had agreed to forego his monthly distributions from TANJ and Buddies as part of his repayment (*id.* at 20-21).

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Webster v. Forest Hills Care Ctr*, 164 AD3d 1499, 1500 [2nd Dept 2018]). Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*see 260 Mamaroneck Ave, LLC v. Guaraglia*, ___ AD3d ___, 97 NYS3d 521 [2nd Dept 2019]).

Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail (CPLR 3016[b]). However, the requirements of CPLR 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct (*see Ramirez v. Donado Law Firm, PC*, 169 AD3d 940, 942 [2nd Dept 2019]).

Contrary to the Third-Party Defendant's contentions, the causes of action alleging breach of fiduciary duty and fraud are not duplicative of the breach of contract cause of action. The elements of a cause of action alleging fraud are a representation of a material existing fact, falsity,

scienter, deception and injury (*see 260 Mamaroneck Ave, LLC v. Guaraglia*, __ AD3d __, 97 NYS3d 521 [2nd Dept 2019]). Here, the third-party complaint, as amplified by the Affidavit of Steven Masseria and the attachments thereto, sets forth cognizable causes of action alleging breach of fiduciary duty and fraud.

Likewise, the third-party complaint sets forth a cognizable cause of action for 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. Two key elements of conversions 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 right. Money, if specifically identifiable, may be the subject of a conversion action. Conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose (*see Petrone v. Davidoff Hutcher & Citron, LLC*, 150 AD3d 776, 777 [2nd Dept 2017][internal quotation marks omitted]). Here, the third-party complaint, as amplified by the Affidavit of Steven Masseria and the attachments thereto, sufficiently alleges the specific amounts deposited and transferred by the Third-Party Defendant without Masseria's authority. Contrary to the Third-Party Defendant's contention, the fact that the funds were commingled with other money in the operating account does not preclude a cause of action for conversion (*see Petrone v. Davidoff Hutcher & Citron, LLC*, 150 AD3d 776, 778 [2nd Dept 2017]; *compare Auguston v. Spry*, 282 AD2d 489, 491 [2nd Dept 2001][conversion claims dismissed due to commingling of investment funds into corporation's capital]).

Finally, the Third-Party Defendant has failed to establish, prima facie, that the alleged oral agreement violated the statute of frauds. According to Masseria, Pennisi had verbally agreed to pay back the owed amounts within a year, and that Pennisi had agreed to forego his monthly distributions from TANJ and Buddies as part of his repayment (*see* Affidavit of Steven Masseria, paras 20-21). The statute of frauds concerns those agreements which, by their terms, have absolutely no possibility in fact and law of full performance within one year (*see Starr v. Akdeniz*, 162 AD3d 948, 949 [2nd Dept 2018]; *see* General Obligations Law §5-701[a][1]). Here, although the alleged oral agreement was capable of an indefinite continuance, it could have been fully performed within a year of its making.

In support of his motion, Pennisi refers to the operating agreements of TANJ and Buddies, which provide that “No amendment of this Agreement shall be effective unless made in writing duly executed by all members and specifically referring to each provision of this Agreement being amended” (*see* Third-Party Defendant’s Exhibits “E”, “F”, Article VII, item 3).⁴

A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law (*see Treeline 990 Stewart Partners, LLC v.*

⁴ Pennisi on behalf of VGM and Masseria executed an operating agreement on November 30, 2015, which set forth their rights and interest as the only members of TANJ Properties, LLC (*see* Third-Party Defendant’s Exhibit “E”). Pennisi on behalf of VGM and LaForte executed an operating agreement on November 30, 2015, which set forth their rights and interest as the only members of Our Two Buddies, LLC (*see* Third-Party Defendant’s Exhibit “F”). According to the allegations in the Verified Complaint, it appears that the two limited liability companies were formed for the purpose of purchasing and operating certain commercial property, and that members were entitled to, among other things, distributions from the rent and income generated through the ownership and management of same (*see* Verified Complaint, paras 24-26).

RAIT Atria, LLC, 107 AD3d 788, 790 [2nd Dept 2013]). Contrary to Pennisi's contentions, the operating agreements did not conclusively establish, as a matter of law, a defense to the breach of oral agreement cause of action. Here, the alleged oral agreement described by Masseria did not have the effect of modifying the terms and conditions of the operating agreement. The alleged oral agreement was a separate additional agreement addressing a situation not covered by the terms of the operating agreement. Accordingly, enforcement of the alleged oral agreement is not barred by General Obligations Law §15-301⁵ (see *Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 AD3d 788, 790 [2nd Dept 2013]).

Accordingly, it is hereby

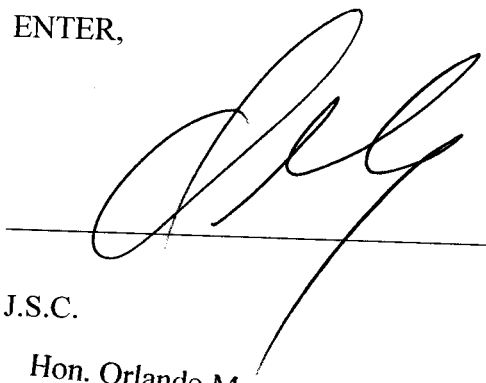
ORDERED that the Third-Party Defendant's motion to dismiss is denied; and it is further

ORDERED that the parties report to DCM Part 21 located at 26 Central Ave, Staten Island,

dy

NY Room 430 on August 27, 2019, at 9:30 A.M. for a conference.

ENTER,



J.S.C.

Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice

DATED: 8/29/19

⁵ General Obligations Law §15-301 governs when written agreement or other instrument cannot be changed by oral executory agreement, or discharged or terminated by oral executory agreement or oral consent or by oral notice.