Ripa v Petrosyants
2019 NY Slip Op 32638(U)
August 15, 2019
Supreme Court, Kings County
Docket Number: 510658/17
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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VYACHESLAV S. RIPA, EMIL BLANK, VADIM SHUBADEROV AND OLEG EGOROV,

Plaintiffs, Decision and order
Index No. 510658/17

- against -

mS # 6,7,8,9

ZHAN PETROSYANTS, ROBERT PETROSYANTS, AKIVA OFSHTEIN, AKIVA OFSHTEIN, P.C., OFSHTEIN LAW FIRM, P.C., PRIME ONE CATERING, INC., PRIME FOUR, INC. d/b/a FORNO ROSSO PIZZERIA, PRIME FIVE, INC., 242 WOOD FOOD, INC., d/b/a WALLABOUT SEAFOOD & CO., AND PRIME SIX, INC. d/b/a WOODLAND NYC,

Defendants, August 15, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to reargue a decision and order dated May 16, 2019 pursuant to CPLR §2221. Further, the defendants have made additional motions seeking dismissal and other reliefs. The plaintiff opposes the motions. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in the prior decision the plaintiff alleged he invested approximately $340,000 to open a seafood restaurant located at 271 Adelphi Street in Kings County with the defendants. The plaintiff alleged that he paid the investments noted and essentially the defendants diverted the funds to other sources depriving the defendant any return upon his investment. The plaintiff instituted a lawsuit and asserted numerous causes of action. The court dismissed all the causes of action except for

breach of contract finding that the complaint adequately alleged the existence of an oral contract.

The defendants have now moved seeking to reargue that determination. They argue that in the prior motion documentary evidence submitted failed to establish the existence of any oral contract.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

First, the defendants concede that plaintiff submitted checks to substantiate the money paid, however, those checks were written by third parties and not the plaintiff, thus the defendants argue they fail to support any investment made. However, the nature of those third parties and whether those third parties had the authority to expend funds on behalf of the plaintiff has not been explored. Indeed, there is evidence the third parties are entities owned by the plaintiff. The entity Eve Pharmacy Inc., invested $60,000, half that amount to open an account for Prime Five Inc., an entity incorporated by Akiva Ofshtein in August 2013 and the other half two months later. The entity Prime Five Inc., signed the lease for the premises along with the plaintiff and Akiva

Ofshtein, raising sufficient questions whether such payments were made on behalf of the plaintiff. The defendants further suggest that perhaps the checks were written by third parties on behalf of the plaintiff and that such debts for another violate the Statute of Frauds absent a writing. However, as noted, the precise nature of the origins of those checks requires further clarification. It is for these very reasons discovery is warranted to further explore these issues. Further, there is no inconsistency between when the checks were written and when the funds were allegedly diverted. The checks were written before January 2014 and were allegedly diverted over the next year and a half. The fact the defendants were not signatories to either the lease or the liquor license does not mean the checks were not written to benefit the defendants. All these matters must be fully explored via discovery including depositions of all the parties. The issues noted are sufficient to warrant further discovery and would not encourage frivolous litigation by anyone seeking to make baseless breach of oral contract claims. Therefore, based on the foregoing the motion seeking to reargue or renew the prior decision is denied.

Turning to Ofshtein's motion seeking to dismiss the complaint and the restaurant defendant's motion seeking to dismiss the complaint, based upon the previous ruling all the causes of action sounding in tort are hereby dismissed. The motion seeking to dismiss the breach of contract cause of action is denied. The

legal malpractice claim will now be explored.

To succeed on a claim for legal malpractice it must be shown that the attorney failed to act with the "ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (Darby & Darby, P.C. v. VSI International, Inc., 95 NY2d 308, 716 NYS2d 378 [2000]). As a preliminary matter, of course, there must be evidence of an attorney client relationship (Wei Cheng Chang v. Pi, 288 AD2d 378, 733 NYS2d 471 [2d Dept., 2001]). A client's unilateral belief that an attorney client relationship existed is insufficient to establish such relationship even though a formal retainer agreement is not required (Terio v. Spodek, 63 AD3d 719, 880 NYS2d 679 [2d Dept., 2015]). Thus, "to prove an attorney-client relationship, there must be an explicit undertaking 'to perform a specific task'" (Nelson v. Roth, 69 AD3d 912, 893 NYS2d 605 [2d Dept., 2010]).

The plaintiff has asserted an attorney client relationship existed but has failed to present any evidence supporting that contention. The plaintiff asserts that Ofshtein "billed several thousand dollars for legal services" (Affirmation in Opposition, ¶ 9). However, the plaintiff has not presented any evidence of any such bills that would conclusively substantiate the allegation contained in the complaint. Thus, that allegation is conclusory and unsupported. Consequently, the plaintiff has failed to establish an attorney client relationship and consequently the

motion to dismiss the malpractice claim is granted.

Lastly, the motion seeking to disqualify counsel for Prime Four Inc., Prime Four, Inc. d/b/a Forno Rossi Pizzeria, Prime Five, Inc., 242 Wood Food, Inc., d/b/a Wallabout Seafood & Co., and Prime Six, Inc. d/b/a Woodland NYC is denied. The counsel has provided adequate proof it maintains a physical office in New York (see, Arrowhead Capital Finance Ltd., v. Cheyne Specialty Finance Fund L.P., 32 NY3d 645, 95 NYS3d 128 [2019]). Moreover, even if counsel did not maintain such office the court can cure such deficiency with an appropriate remedy (Arrowhead, supra).

It is well settled that "a temporary receiver should only be appointed where there is a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect a party's interests in that property" (see, Quick v. Quick, 69 AD3d 828, 893 NYS2d 583 [2d Dept., 2010]). Thus, a temporary receiver is appropriate where the party has presented "clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (Magee v. Magee, 120 AD3d 637, 990 NYS2d 894 [2d Dept., 2014]). In this case the plaintiff has failed to demonstrate the necessity of the appointment of a temporary receiver. The plaintiff notes the complaint alleges money was invested and was diverted and that the defendants will "seek to frustrate the collection of any potential and anticipated judgement

rendered against them by removing and secreting funds that would be subject to collection for a nominal amount" (see, Affirmation in Support of Cross-Motion, ¶ 8). Thus, the basis of the receiver is to insure there is no risk of insolvency or fraud. However, CPLR §5228 entitled 'Receivers' upon which this relief is sought only apples for a judgement creditor not a party that is in the middle of discovery. In any event the plaintiff has not presented sufficient need for such receiver. Consequently, the motion seeking a receiver is denied.

So ordered.

ENTER:

DATED: August 15, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC