Roy Food & Wine LLC v Meregalli
2019 NY Slip Op 32875(U)
September 25, 2019
Supreme Court, New York County
Docket Number: 655430/2017
Judge: O. Peter Sherwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

ROY FOOD AND WINE LLC AND I.K. FINANZIARIA SRL, INDIVIDUALLY AND AS MEMBERS OF F&W INTERNATIONAL LLC,

Plaintiffs,

-against-

PAOLO MEREGALLI, F&W INTERNATIONAL LLC, AND FIRST LLC,

Defendants.

----------X

DECISION AND ORDER
Index No.: 655430/2017

Motion Seq. Nos.: 002-003

O. PETER SHERWOOD, J.:

I. BACKGROUND

This is a case about a restaurant business. According to the Complaint, defendant Paolo Meregalli was the sole manager of the F&W International LLC (the Company), which operates a restaurant in the Meatpacking District, Mulino a Vino (the Restaurant). According to the Complaint, Meregalli did not make capital contributions, used Company funds to support his lifestyle, and, when confronted, started a competing Italian restaurant, defendant First LLC d/b/a RavioloNYC (Raviolo). Raviolo copied the Restaurant's menu, stole the its executive chef, and used images of food prepared and photographed in the Restaurant to promote itself. Plaintiffs, Roy Food and Wine LLC and I.K. Finanziaria SRL, the other members of the Company, then removed Meregalli as manager, but Meregalli refused to go quietly. Plaintiffs asserted claims for:

1) Declaratory Judgment establishing the membership percentages of the parties;

2) Breach of Fiduciary Duty by Meregalli and the Company;

3) Fraud for failures of Meregalli and the Company to disclose Meregalli's failure to make capital contributions;

4) Unfair Competition by Meregalli for appropriating Company funds, resources, and menus to compete with the Company;

5) Misappropriation of Corporate Opportunity for Meregalli's actions in creating Raviolo; and

6) Equitable Accounting.

II. FACTS

In 2013, Meregalli's personal bank account totaled under $40,000 and showed he had monthly income of under $7,000. The parties dispute whether Meregalli told the other partners that he would make cash capital contributions. Plaintiff Roy Food and Wine LLC (Roy) made capital contributions of $183,900 to the Company. Plaintiff IK Finanziaria SRL (IKF) made $179,850 in capital contributions. The parties dispute whether IKF made additional loans to the Company. The Restaurant's landlord, through the management agent, Superior Management (Superior), paid for certain costs associated with the renovation of the Restaurant space. The parties also dispute whether Superior or the landlord expected to be reimbursed. The parties dispute whether and how much Meregalli paid out of his own pocket or Company funds for various expenses related to the Restaurant and whether Meregalli took credit for making capital contributions for Company expenses which were paid by others.

Plaintiffs allege that in 2018, Meregalli transferred Company funds to his own accounts or to the Company's attorney and tried to cut plaintiffs out of the lease for the Restaurant. Defendants contend Meregalli was trying to sell the Restaurant and had accepted a down payment, but plaintiffs interfered and stopped transfer of the lease, leaving Meregalli on the hook for the down payment, $245,000 of which went to the Company or the Company's counsel, and had to be paid back by Meregalli, personally.

The parties admit an entity, HHF&B, of which plaintiffs were not members, entered into a lease with the Fortuna Realty Soho Hotel LLC in May 2018 and paid money to the hotel. The parties dispute whether Meregalli transferred Company funds to HHF&B.

III. DISCUSSION

Defendants moved pursuant to CPLR 3213 for summary judgment in lieu of complaint. As that is not appropriate here, the motion will be treated as a motion for summary judgment pursuant to CPLR 3212.

Defendants have not submitted a Rule 19a Statement of undisputed Material Facts ("SUMF") in support of motion sequence 002. Nor have defendants submitted an opposing statement to the statement provided by plaintiffs in motion sequence 003. However, the Meregalli affidavit (Dkt. # 346) responds to the SUMF paragraph by paragraph. That affidavit does not provide much more than bald, vague, and self-serving statements which rarely cite to any evidence and sometimes merely deny a statement without explaining why or offering any affirmative facts. Plaintiffs argue that "[defendants'] counter-statement, as well as the affidavits supporting its motion, are virtually bereft of citations to evidence supporting its contentions and thus inadequate to the task of contravening defendant's statement of undisputed facts" (*Callisto Pharm., Inc. v Picker*, 74 AD3d 545, 546 [1st Dept 2010] citing Rule 19–a[d]). However, the affidavit provided by Meregalli in support of the defendants' motion (002) does have statements and citations to the record.

A. Motion 003- Plaintiffs' Motion

Plaintiffs move for summary judgment on their breach of contract and breach of fiduciary duty claims. Notably, the complaint does not assert a claim for breach of contract.

i. Breach of Contract

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Plaintiffs argue defendants breached the Operating Agreement (Dkt 305) by claiming Meregalli had made capital contributions he did not make (003 Memo at 20). It is undisputed

that the Operating Agreement is an enforceable agreement. Plaintiffs' performance is not disputed. The parties dispute whether Meregalli breached it.

According to the Operating Agreement, "the Company's net profits or net losses shall be determined on an annual basis and shall be allocated to the Member/s in proportion to each Member's relative capital interest in the Company" (Operating Agreement, § 3.1). Meregalli initially had a 60% interest. Pursuant to Article 6.1, Meregalli "shall maintain complete and accurate books of account of the Company's affairs. . . . Each member's capital account shall . . . consist of his initial capital contribution increased by: (a) any additional capital contribution made by him/her; (b) credit balances transferred from his distribution account to his capital account; and decreased by: (a) distributions to him/her in reduction of Company capital; (b) the Member's share of Company losses if charged to his/her capital account." As far as plaintiffs claim Meregalli held himself out to have made contributions he didn't or that he does not own as much of the Company as he claimed, for voting purposes, that conduct does not appear to be a violation of a provision of the Operating Agreement. The closest thing is the manager's obligation to maintain accurate books (Operating Agreement, § 6.1).

Plaintiffs claim, in the SUMF, that Meregalli claimed amounts paid by others as capital contributions (SUMF 14-15). Plaintiffs cite to the Meregalli deposition transcript (Dkt. 329, pp 267-74, 218-19, 222, 261, 256-57). However, the statements in the transcript are not clear admissions of anything and do not make a prima facie case that Meregalli claimed credit for amounts paid by the Company, or other amounts he did not actually pay in. Although Meregalli admitted it would be wrong to credit him with payments he hadn't made, he does not go further than that (*id.* at 263-64). Accordingly, even though Meregalli's response to the SUMF was insufficient, conclusory, and not supported, plaintiffs have failed to make a prima facie case for a prospective claim for breach of contract.

ii. Breach of Fiduciary Duty

Plaintiffs seek summary judgment on their second claim, for breach of fiduciary duty by Meregalli and the Company. Meregalli is alleged to have falsely claimed to have made capital contributions and loans to the Company. It is not clear what fiduciary duty the Company is alleged to have breached. The claim against Meregalli fails for the same reasons as the ersatz breach of contract claim, discussed above.

B. Motion 002- Defendants' Motion for Summary Judgment

Defendants move for summary judgment on claims 2-5, also arguing the 6th (for an accounting) has already been resolved and the first becomes moot, if the motion is granted, so the entire case would be disposed of, if they are successful.

1. Breach of Fiduciary Duty

Defendants argue this claim should be dismissed because there is no evidence Meregalli used Company assets for the benefit of First. Also, the restaurants do not compete with each other. Whether the restaurants compete with each other is an issue of fact. Also, as discussed above, there are issues of fact as to whether Meregalli breached a fiduciary duty by misrepresenting his capital contributions.

2. Fraud

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]).

In the complaint, the alleged misrepresentation is Meregalli and the Company not informing plaintiffs of the true amount of Meregalli's capital contribution (or the representation that the amount of contribution was higher than it really was). Defendants contend plaintiffs cannot show reasonable reliance because, due to their involvement in the business, they should have been aware of the state of things. Plaintiffs do not point to any actions they took in reliance on those representations. In their opposition, they claim the reliance was their decision to invest in the Company. That action was taken before Meregalli allegedly misrepresented his contributions, so statements about his having made those contributions could not have led to their investments.

If this claim is cast, instead, as a claim for fraud in the inducement, "the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67

AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Representations of opinion, even as to matters of fact, are not representations and are not actionable unless guaranteed (*see Lanzi v Brooks*, 54 AD2d 1057 [1976], *affd* 43 NY2d 778 [1977]; *Mun. Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313 [1930]). Plaintiffs have not alleged a misrepresentation of a then-present fact other than intent to perform, which could provide the basis for this claim. Accordingly, this claim shall be dismissed.

iii. Unfair Competition and Misappropriation of a Corporate Opportunity

New York State has "long recognized two theories of common-law unfair competition: palming off and misappropriation. "Palming off"—that is, the sale of the goods of one manufacturer as those of another—was the first theory of unfair competition endorsed by New York courts, and "has been extended ... to situations where the parties are not even in competition" (*ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 476 [2007] quoting *Electrolux,* 6 NY2d 556, 567 [1959] [discussing the acceptance of these theories of unfair competition in New York courts and collecting cases]). Later, following the United States Supreme Court's decision in *International News Service v. Associated Press* (248 US 215 [1918]), an unfair competition claim based on "[t]he principle that one may not misappropriate the results of the skill, expenditures and labors of a competitor has ... often been implemented in [New York] courts" (*ITC Ltd,* 9 NY3d at 477, quoting *Electrolux,* 6 NY2d at 567). There are issues of fact as to whether defendants have presented Raviolo as related to the Restaurant or used Restaurant and the Company's resources to benefit Raviolo, including the Restaurant's staff and expertise.

As to the Misappropriation claim, defendants cite neither fact nor law in support of their motion and have failed to make a prima facie case on this point.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendant (Motion Sequence Number 002) is GRANTED to the extent that the Third Cause of Action (Fraud) is DISMISSED and the motion is otherwise DENIED; and it is further

ORDERED that the motion of plaintiff for partial summary judgment (Motion Sequence Number 003) is DENIED.

This constitutes the decision and order of the court.

DATED: September 25, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.