Blank v Petrosyants
2019 NY Slip Op 33769(U)
December 19, 2019
Supreme Court, Kings County
Docket Number: 517568/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
--x
EMIL BLANK, VADIM SHUBADEROV AND OLEG EGOROV,
Plaintiffs,

Decision and order
Index No. 517568/19

- against -

MS # 1 & 2

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,

December 19, 2019
--x
PRESENT: HON. LEON RUCHELSMAN

The defendants Zhan Petrosyants, Robert Petrosyants, Akiva Ofshtein, Akiva Ofshtein, P.C., and Ofshtein Law Firm, P.C., have moved and cross-moved seeking to dismiss the complaint pursuant to CPLR §3211 on the grounds the complaint fails to allege any cause of action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

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Findings of Fact

The complaint in this case alleges that the plaintiffs invested sums of money in a venture with the defendants. Specifically, the plaintiffs claim the parties agreed to open a restaurant and catering hall in Queens County. The plaintiffs allege that they paid the investments noted and essentially the

defendants diverted the funds to other sources depriving them of any return upon their investments. The defendants have now moved seeking to dismiss the case on the grounds the plaintiffs have failed to present any valid cause of action.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the party (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

Preliminarily, all motions seeking to dismiss based upon the expiration of the statute of limitations is denied.

It is further 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]). There is no contract between Robert Petrosyants and any of the parties, therefore, the motion seeking to dismiss the breach of contract claim as to Robert is granted. Further, the plaintiff Emil Blank was not a

party to any contract and therefore cannot pursue any breach of contract claims.

Turning to the claim 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 any allegations of fraud are all the same allegations of breach of contract and are thus duplicative and are dismissed except as to Robert. As noted, there are no contractual claims against Robert. Robert argues that in any event the fraud claim must be dismissed since the representations were not about any present facts. Thus, to

assert a misrepresentation, the misrepresentation must concern a present fact, not a future promise (see, Scialdone v. Stepping Stones Associates L.P., 148 AD3d 953, 50 NYS2d 413 [2d Dept., 2017]). However, the complaint does assert that Robert represented that he and his brother were "successful operators of three restaurants in Manhattan, Barclay's Center, and Dumbo areas of the City of New York" (see, Complaint and Jury Demand, ¶ 18). That representation concerned a present fact not a future promise or an opinion. Therefore, at this stage of the proceeding the motion to dismiss the fraud claim against Robert is denied.

The third cause of action for aiding and abetting fraud is likewise dismissed as to all defendants except Robert.

The motion seeking to dismiss the malpractice claims is granted. First, there is no allegation Blank maintained any attorney client relationship. Concerning the other two plaintiffs the Complaint fails to allege any specific malpractice committed by the defendants. The Complaint alleges in conclusory fashion that counsel "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession in respect to preparation of the Agreements and representations of Plaintiffs in connection with these documents and ownership and operation of Prime One Catering" (see, Complaint and Jury Demand, ¶ 110). However, the Complaint does not explain or elaborate upon any conduct committed by any

counsel that supports those allegations. The ensuing paragraphs allege that counsel "failed to safeguard Plaintiffs-client funds entrusted to him" (id at ¶ 111) and were in "conflict of interest" with the plaintiff (id at ¶ 114) without explaining how that constituted malpractice. Therefore, the fourth cause of action is dismissed.

The motion seeking to dismiss the conversion claim is granted since it arises from the same circumstances as the breach of contract and fraud claims and is therefore duplicative (Connecticut New York Lighting Company v. Manos Business Management Company Inc., 171 AD3d 698, 98 NYS3d 101 [2d Dept., 2019]).

To establish a cause of action for promissory estoppel it must be shown that the defendant made a clear and unambiguous promise upon which the plaintiff reasonably relied to his or her detriment (Skillgames LLC v. Brody, 1 AD3d 247, 767 NYS2d 418 [1st Dept., 2003]). However, where the claim is premised upon the same claims asserted in a breach of contract claim then the cause of action is improper (Martin Greenfield Clothiers Ltd., v. Brooks Brothers Group Inc., 175 AD3d 636, 107 NYS3d 83 [2d Dept., 2019]). Therefore, the promissory estoppel claim is dismissed as to all defendants except Robert.

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). Therefore, the unjust enrichment claim is dismissed as to all defendants.

The eighth cause of action is a RICO claim pursuant to 18 USC §1962(c). To succeed on a RICO claim, the moving party must show three elements: (1) a violation of the RICO statute, 18 U.S.C. §1962; (2) an injury to business or property; and (3) the injury was caused by the violation of section 1962 (Spool v. World Child Int'l Adoption Agency, 520 F.3d 178 [2d. Cir. 2008]). Under 18 U.S.C. §1962(c) it is unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. Racketeering activity is defined as any activity included within 18 USC §1961(1). That statute includes within racketeering activity "wire fraud" (id).

However, in addition, to establishing racketeering, the plaintiffs must demonstrate the defendants engaged in an enterprise. A RICO enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal

entity" (see, 18 USC §1961(4)). Thus, the 'enterprise' must be an entity "separate and apart from the pattern of activity in which it engages" (United States v. Turkette, 452 US 576, 101 S.Ct 2524 [1981]). Thus, in Goldfine v. Sichenzia, 118 F.Supp2d 392 [S.D.N.Y. 2002] the court held that "in a fraud-based RICO claim, if the sole purpose of the alleged enterprise is to perpetuate the alleged fraud, there can be no enterprise for RICO purposes" (id). In this case the entire purpose of the enterprise was to defraud the plaintiffs. There has been no evidence presented the enterprise served a purpose other than to engage in the alleged fraud (Goldfine, supra). Therefore, the RICO cause of action is improper and is dismissed.

So ordered.

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DATED: December 19, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC