

Ripa v Petrosyants
2019 NY Slip Op 34521(U)
May 16, 2019
Supreme Court, Kings County
Docket Number: Index No. 510658/17
Judge: Leon Ruchelsman
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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 -

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ZHAN PETROSYANTS, ROBERT PETROSYANTS,
AKIVA OFSHEIN, AKIVA OFSHEIN, P.C.,
OFSHEIN 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,

May 16, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendants have 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.

Findings of Fact

The complaint in this case alleges that the plaintiff invested approximately \$340,000 in a venture with the defendants. Specifically, the parties agreed to open a seafood restaurant located at 271 Adelphi Street in Kings County. The plaintiff alleges that he paid the investments

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noted and essentially the defendants diverted the funds to other sources depriving the defendant any return upon his investment. The defendants have now moved seeking to dismiss the case on the grounds the plaintiff has 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 (Dauids 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]).

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]). The defendants assert that the plaintiff has failed to demonstrate "that an oral contract existed and prove its

terms" (see, Affirmation in Support of Order to Show Cause, §34). However, the complaint states that the defendants offered the plaintiff "a Fifty Percent (50%) equity interest in the proposed seafood restaurant business for putting up the initial \$120,000 as well as Fifty Percent (%50) of any additional renovation costs" (see, Complaint and Jury Demand, ¶21). In addition, the Complaint further states that "in or around the beginning of August 2013, after several meetings, defendants Zhan, Robert and Akiva verbally agreed (hereinafter referred to as the 'Wallabout Agreement') that, for a \$120,000 investment plus %50 of the additional renovation costs, Plaintiff Steven would receive a Fifty Percent equity interest in an operational seafood restaurant to be opened at 271 Adelphi Street, Brooklyn, New York, 11205}" (id at ¶25). Indeed, the Complaint further states that "the remaining terms of the Wallabut Agreement involved Akiva providing legal services for all the parties while Zhan and Robert (also referred to as the 'twins') would be responsible for managing the renovation of the site chosen for the restaurant" (id). Of course, further discovery in the case will yield information concerning further details concerning the contract and any alleged breaches. Ultimately, a motion for summary judgement or perhaps a jury will determine whether in fact a

contract existed and if any breaches occurred. However, at this juncture the complaint establishes a cause of action for breach of contract. Consequently, the motion seeking to dismiss the breach of contract claim is denied.

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]). The defendants seek to dismiss the fraud claims on the grounds the fraud is the same as the breach of contract claims. In Hawthorne Group v. RRE

Ventures, 7 AD3d 320, 776 NYS2d 273 [1st Dept., 2004] the plaintiff and defendant entered into a contract whereby plaintiff acted as a 'finder' for investment opportunities presented by the defendant. Plaintiff sued arguing he was not awarded a finder's fee pursuant to the contract. He also sued alleging misrepresentations. The court dismissed the fraud claim holding they stemmed from the contract itself and were not "extraneous to the contract" and did not involve "a duty separate from or in addition to that imposed by the contract" (id). Again, in Reiser Inc., v. Roberts Real Estate, 292 AD2d 726, 739 NYS2d 753 [3rd Dept., 2002] the plaintiff a real estate developer entered into a contract with defendant, a real estate broker, to market and sell real estate. A lawsuit concerning job performance by defendant and commissions owed defendant ensued. The plaintiff alleged defendant breached the contract and likewise sued for fraud. In dismissing the fraud claim the court noted "promises made, if any, with respect to the manner in which defendant agreed to perform under the listing agreements cannot form the basis of a claim for fraud in the inducement inasmuch as promises to perform in the future pursuant to a contract merely duplicate claims for breach of contract" (id).

Thus, clearly where the misrepresentations that give

rise to the fraud are duties contained in the contract no fraud claim is viable (see, Wyle Inc., v. ITT Corporation, 130 AD3d 438, 13 NYS3d 375 [1st Dept., 2015]). In this case the claims for fraud are duties contained within the alleged oral contract the motion seeking to dismiss the claim for fraud is granted.

The next causes of action that must be discussed are conversion and the breach of good faith and fair dealing. These causes of action are duplicative of the breach of contract claim (AJW Partners LLC v. Itronics Inc., 68 AD3d 567, 892 NYS2d 46 [1st Dept., 2009]). Consequently, those causes of action are dismissed.

Turning to the motion seeking to dismiss the cause of action 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 in this case there is a viable claim for breach of contract, the claim for unjust enrichment is duplicative and the motion seeking to dismiss this cause of action is granted. Likewise, the claim for promissory estoppel is dismissed since it is duplicative

of the breach of contract claim.

Thus, the motion seeking to dismiss all the causes of action is hereby dismissed except the breach of contract claim.

Concerning discovery sought by the defendants, the plaintiff must comply with all discovery demands within thirty days of receipt of this order. Specifically, the plaintiff must provide documents that are responsive to the defendants requests. The parties can reach out to the court for any further discovery issues before making any further motions.

So ordered.

ENTER:

DATED: May 16, 2019
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

Jr
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