

Ghidetti v Draft House, LLC
2020 NY Slip Op 30251(U)
January 21, 2020
Supreme Court, New York County
Docket Number: 650889/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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LUIGI GHIDETTI,

Plaintiff,

- v -

THE DRAFT HOUSE, LLC, ANCHOR WINEBAR, LLC, MAURIZIO SALIERNO, FABRIZIO PELLIZZON

Defendant.

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INDEX NO. 650889/2019
MOTION DATE 07/12/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISSAL

Upon the foregoing documents and for the reasons set forth on the record (1/22/2020), Luigi Ghidetti's motion to dismiss the conversion counterclaim pursuant to CPLR 3211(a)(1) and (a)(7) is denied.

RELEVANT BACKGROUND

This action concerns a dispute between members of two LLCs, the forming the Draft House, LLC (the Draft House) and Anchor Winebar, LLC (Anchor) (Draft House and Anchor, collectively, the Companies). N Mr. Ghidetti joined Messrs. Salierno and Pellizzon formed the Companies to operate the Anchor Wine Bar and the Draft House restaurants (collectively, the Restaurants). Each individual was granted a one-third membership interest in the Companies and all three were designated as managers of the Companies (Answer, ¶¶ 9-10, 12). Mr. Ghidetti was initially put in charge of the kitchen functions (e.g., shopping lists, hiring cooks, etc.) (id., ¶

13). At some point, Mr. Ghidetti began operating a new restaurant, Porto Salvo, without the participation of either Messrs. Salierno or Pellizzon, and sought to be bought out of his interests in the Restaurants (*id.*, ¶ 6). The initial discussions concerning his potential buyout failed and the parties had a falling out. As things turned sour, in September of 2018, Mssrs. Salierno and Pellizzon elected to remove Mr. Ghidetti as a manager of the Restaurants and prevent him from performing any further services for the Restaurants.

Both sides now allege serious misconduct on the part of the other. Mr. Ghidetti, in his complaint, alleges wrongdoing by Mssrs. Salierno and Pellizzon (not relevant to the instant motion). Mssrs. Salierno and Pellizzon, in turn, bring a counterclaim against Mr. Ghidetti for conversion based on his alleged misuse of a corporate credit card and a company car to benefit Porto Salvo at the expense of the Companies. In this regard, they allege that Mr. Ghidetti had been entrusted with the credit card and company vehicle for the sole purpose of performing work to benefit the Companies.

The Answer sets forth the following allegations:

30. At all relevant times, Mr. Ghidetti was a Member of Anchor and Draft House.
31. Further, Mr. Ghidetti was a Manager of Anchor and Draft House from November 17, 2014 through September 19, 2018.
32. In dereliction of these roles and his duties as a Manager, Ghidetti converted and misappropriated the funds and assets of Anchor and Draft House in order to pay for food and supplies for his own restaurant, Porto Salvo, as well as through other misconduct which will be revealed through discovery.

33. Mr. Ghidetti converted and misappropriated the funds and assets of Anchor and Draft House to Porto Salvo improperly and without authorization, thus depriving the Companies' of these funds and assets.
34. Anchor and Draft House possessed a right to the funds and assets converted and misappropriated that is superior to any rights that Mr. Ghidetti possesses thereto.
35. Mr. Ghidetti continues to withhold Anchor and Draft House's funds and assets, and refuses to return them.
36. As a result of such misconduct, Counterclaim Plaintiffs have suffered damages to be proven at time of trial, but believed to be not less than \$10,000.

(NYSCEF Doc. No. 22).

DISCUSSION

The well-settled standard on a motion to dismiss is that the all allegations and reasonable inferences therefrom must be taken as true, "in a light most favorable to plaintiffs" (*Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 [1st Dept 2010]). To prevail on a motion to dismiss based on documentary evidence (CPLR 3211[a][1]), the document relied on must definitively and conclusively dispose of the plaintiff's claim and resolve all factual issues as a matter of law (*Matter of Elberg*, 164 AD3d 497, 498 [2d Dept 2018]). Where a defense is not "conclusively established" or a complaint's allegations "utterly refuted" by documentary evidence, the claim will be sustained (*IMO Indus. Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11 [1st Dept 1999]). Here, Mr. Ghidetti relies on the answer containing the counterclaim as his documentary evidence to argue that defendants cannot "credibly" assert that he had any chance or opportunity to commit conversion because the answer alleges that he was removed as manager. This argument fails. The answer clearly alleges that Mr. Ghidetti served as both a member and a manager from 2014 to 2018, focusing on "kitchen functions," and that he abused

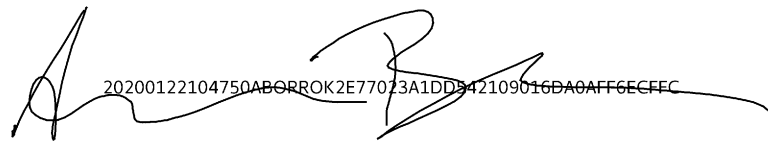
his position to “convert[] and misappropriate[] the funds and assets of Anchor and Draft House in order to pay for his own restaurant, Porto Salvo....” (Answer, ¶¶ 13, 30-33.) Mr. Pellizzon’s affidavit, submit in opposition to this motion, further amplifies the pleadings by setting forth how Mr. Ghidetti allegedly misused his access to the corporate credit card and company car to benefit his restaurant to the exclusion of the Companies (Pellizzon Aff., ¶¶ 6, 9). Taken as a whole, the elements of conversion here have been established and the answer, on which Mr. Ghidetti relies, does nothing to disprove them.

Because the court finds that the elements of conversion have been properly alleged (i.e., [1] legal ownership or an immediate right of possession to a specific identifiable thing, and [2] another’s unauthorized dominion over the thing in question to the exclusion of the rightful owner), the motion to dismiss for failure to state a claim pursuant to CPLR 3211(a)(7) must also be denied (*see Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883-884 [1st Dept 1982]). In making his argument that the conversion counterclaim is not supported, Mr. Ghidetti simply ignores the well-plead allegations of the answer with counterclaim that he abused his position as a member and manager of the Companies by “convert[ing] and misappropriate[ing] the funds and assets of Anchor and Draft House to Porto Salvo improperly and without authorization, thus depriving the Companies[] of these funds and assets” (Answer, ¶¶ 30-33). In addition, and as noted above, Mr. Pellizzon’s affidavit further establishes the allegations in support of the conversion counterclaim.

Accordingly, it is

ORDERED that the plaintiff's motion to dismiss the counterclaim asserted in the defendants' answer is denied, and it is further

ORDERED that the plaintiff is directed to serve an answer to the counterclaim within twenty days of this decision and order.



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1/21/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE