Zunzurovski v Bukefal LLC

2020 NY Slip Op 30264(U)

January 3, 2020

Supreme Court, New York County

Docket Number: 653043/2015

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** IAS MOTION 39EFM

Justice

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ALEKSANDAR ZUNZUROVSKI,

Plaintiff,

- v -

BUKEFAL LLC,MARJANNE MOTAMEDI, DRAGAN RISTOVSKI

Defendant.

----------X

INDEX NO. 653043/2015

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 142, 143

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, it is

In this action for, inter alia, breach of contract, defendants Bukefal LLC ("Bukefal" or the "Company"), Marjanne Motamedi ("Motamedi") and Dragan Ristovski ("Ristovski") (collectively, "Defendants") move for summary judgment, pursuant to CPLR 3212 against plaintiff Aleksandar Zunzurovski ("Plaintiff"). Defendants also move, pursuant to CPLR 3215(b), for default judgment on their counterclaim. Alternatively, Defendants move, pursuant to CPLR 3212, for summary judgment on their counterclaim. Plaintiff cross-moves for summary judgment against Defendants.

Motamedi and Ristovski asked Plaintiff to invest in a new company that would operate a restaurant, Cibo e Vino, on the Upper West Side (the "Restaurant"). Defendants presented Plaintiff with a business plan (the "Business Plan") and equity

investment term sheet (the "Term Sheet"). The term sheet, dated March 15, 2013, listed the names of the Plaintiff and individual Defendants but was unsigned. Plaintiff alleges that after he received the aforementioned documents, the parties reached a verbal agreement. Bukefal was organized as a New York limited liability company on March 7, 2013.

Bukefal and Plaintiff executed a purchase agreement on April 1, 2013 (the "Purchase Agreement") which stated that Plaintiff agreed "to invest in the Project" and "to advance the sum of $150,000 in the Project in return for 13% membership units of Bukefal." The Purchase Agreement provided that Bukefal would refund the $150,000 to Plaintiff by December 31, 2024 and that upon repayment, "Bukefal shall distribute its net profits on an annual basis to its members *pro rata*."

The Purchase Agreement contains an integration clause which states that:

> [t]his Agreement constitutes the entire agreement among the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings among the parties hereto, whether oral or written. No modifications, amendment or waiver of any provision of this Agreement shall be effective unless in writing and signed by the parties.

Plaintiff alleges, and Defendants agree, that Plaintiff invested $150,000 in the project.

According to Plaintiff, Defendants emailed a proposed operating agreement to him on May 30, 2013 which only identified Motamedi and Ristovski as members. Plaintiff further alleges that he protested the omission of his name from the proposed operating agreement and that Defendants responded that the agreement would be reworked.

However, on June 10, 2013, the terms of operation for Bukefal were set forth in an operating agreement (the "Operating Agreement") which listed Motamedi and Ristovski as members with 50 units of membership interest each. Plaintiff was not a party to the Operating Agreement.

Subsequently, on July 1, 2013, Bukefal and Plaintiff entered into another agreement, which stated that it replaced the Purchase Agreement (the "Loan Agreement"). Plaintiff asserts that Defendants represented to him that the Loan Agreement was needed in order for the Company to obtain a liquor license because the State Liquor Authority (the "SLA") examines the source(s) of applicants' funding. Plaintiff further states that Ristovski told him that he was not a member of the Company because he was not listed on the Operating Agreement and that the SLA would view him as a lender.

The Loan Agreement stated that

> [Plaintiff] had loaned to Bukefal the sum of $100,000. Bukefal shall, at its own discretion and in good faith, repay said sum, without interest, to [plaintiff], no later than 36 months from the first day Bukefal opens the business to the general public.
>
> Upon repayment of the full amount of the loan, Bukefal shall issue to [Plaintiff] a 13% membership interest in Bukefal, subject to, and provided, that an application for approval of corporate change has first been made to and approved by the New York State Liquor Authority. [Plaintiff's] interest shall be as a non-managing member. He further agrees to sign such documents and provide such information as is necessary in connection with the application for approval of corporate change.

Plaintiff states that "the Loan Agreement bootstrapped $100,000 of Plaintiff's $150,000 investment and converted that amount into a loan" while the remaining $50,000

(which was not reflected in the Loan Agreement) was neither returned to Plaintiff nor converted into a loan.

The Restaurant opened on November 8, 2013. All parties agree that Bukefal has refunded at least $96,000 to Plaintiff. Plaintiff alleges that, although he has not yet been repaid in full, the Company has distributed net profits to Motamedi and Ristovski.

On September 8, 2015, Plaintiff filed a petition seeking the appointment of a receiver and an equitable accounting and Defendants moved to dismiss. Following oral argument, Plaintiff amended his pleading and filed a complaint on May 5, 2016. A Second Verified Amended Complaint ("SVAC") was filed on September 15, 2017. The SVAC asserted fifteen causes of action for declaratory judgments, breach of contract, fraud, breach of good faith and fair dealing, conversion, tortious interference with economic advantage, unjust enrichment, request for an equitable accounting, and removal of managers.

Defendants now move for summary judgment and default judgment on their counterclaim (or, alternatively, summary judgment if default judgment is not granted). Plaintiff cross-moves for summary judgment.

Discussion

I. Defendants' Motion for Default Judgment

Defendants move, pursuant to CPLR 3215, for a default judgment on their counterclaim. On October 9, 2017, Defendants filed their Answer to the SVAC with a counterclaim which demanded "a judgment rescinding all agreements between Defendants and Plaintiff" (the "October 2017 Counterclaim").

Plaintiff did not file a reply to the October 2017 Counterclaim. Plaintiff argues that despite this "procedural error," Defendants' motion for default judgment should be denied as "unduly prejudicial" given that Plaintiff previously filed a reply to Defendants' initial counterclaim – asserted in Defendants' Answer to Plaintiff's May 11, 2016 complaint – which was identical to the October 2017 Counterclaim.

Courts have "broad discretion" in deciding default judgment motions. *Gantt v. North Shore-LIJ Health Sys.*, 140 A.D.3d 418, 418 (1st Dept. 2016). Here, I deny Defendants' motion for default judgment because Plaintiff is vigorously prosecuting the main claims, Plaintiff did respond to Defendants' previous identical counterclaim, Defendants have failed to demonstrate any prejudice, and because of the "strong preference in this State for deciding matters on the merits." *Id*. at 419.

II. Defendants' Motion for Summary Judgment on the Counterclaim

In the event that I denied Defendants' default judgment motion, Defendants request summary judgment on their counterclaim. I deny summary judgment on the counterclaim because Defendants have not established that the Purchase Agreement should be rescinded. The document itself is clear and unambiguous. That the parties differ as to the Purchase Agreement's interpretation does not render it unenforceable. *See, e.g., NCSPlus Inc. v. WBR Management Corp.*, 37 Misc.3d 227, 236 (N.Y. Sup. Ct. 2012) ("The language of a contract is not ambiguous simply because the parties urge different interpretations."). Indeed, Defendants' further argument concerning the Loan Agreement (see below) concedes the validity of the Purchase Agreement.

III. The Loan Agreement

Defendants indicated, in both their brief and at oral argument, that in the event that I do not grant either default judgment or summary judgment on their counterclaim seeking to rescind all agreements between the parties, they agree to a rescission of the Loan Agreement in favor of the Purchase Agreement. As default judgment and summary judgment on the counterclaim was denied, I now grant rescission of the Loan Agreement and deem the Purchase Agreement to be the controlling document.

Consequently, Plaintiff's first, third and fourth causes of action – seeking declarations pertaining to the Loan Agreement – are dismissed as moot. In addition, I dismiss Plaintiff's sixth cause of action for breach of contract, which was contingent on the Loan Agreement being declared valid. Similarly, Plaintiff's fifteenth cause of action for breach of the Loan Agreement and Plaintiff's second cause of action for fraud in connection with the Loan Agreement are moot and thus dismissed. Lastly, Plaintiff's eighth cause of action for conversion and tenth cause of action for unjust enrichment which are also based on the Loan Agreement are dismissed as well.

IV. Defendants' Motion for Summary Judgment on the SVAC and Plaintiff's Cross-Motion for Summary Judgment

The movant on a motion for summary judgment must make "a prima facie showing of entitlement to judgment as a matter of law." *Bruckner Realty LLC v. Cruz*, 28 N.Y.3d 1138, 1139 (2016). To prevail on the motion, movant must "tender[] sufficient evidence to eliminate any material issue of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). If the movant makes a prima

facie showing, then "the party opposing the motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v. Grasso*, 50 A.D.3d 535, 545 (1st Dept. 2008) (citation omitted).

1. Pre-Purchase Agreement documents

As an initial matter, Plaintiff's complaint and affidavit contain numerous claims concerning terms that the parties allegedly agreed to in oral discussions and based on the Business Plan and the Term Sheet. However, the oral representations, Business Plan and Term Sheet all pre-dated the Purchase Agreement, which contained an explicit integration clause stating that it "supersedes all prior and contemporaneous agreements and understandings among the parties hereto, whether oral or written." Merger/Integration clauses such as this "are not mere boilerplate" and prevent parties from relying on "on any previous understanding or oral representation that was not included in the mutually executed written document." *Torres v. D'Alesso*, 80 A.D.3d 46, 53 (1st Dept. 2010). Hence, any allegations premised on oral representations, the Business Plan or Term Sheet cannot support Plaintiff's causes of action.

2. Breach of Contract

Plaintiff's fifth cause of action alleges that Defendants breached the Purchase Agreement by: 1) failing to acknowledge Plaintiff's membership interest; and 2) making distributions to Motamedi and Ristovski, and not Plaintiff, without having repaid the full amount of Plaintiff's investment.

First, the Purchase Agreement clearly states that "[Plaintiff] agrees to advance the sum of $150,000 in the Project in return for 13% membership units of Bukefal." *See Greenfield v. Philles Records,* 98 N.Y.2d 562, 569 (2002) ("The best evidence of what parties to a written agreement intend is what they say in their writing") (internal quotation marks and citation omitted). Moreover, the parties do not dispute that Plaintiff gave $150,000 to Defendants and that they accepted it. Thus, under the terms of the Purchase Agreement, Plaintiff is a 13% member of Bukefal.

Defendants' acceptance of the Purchase Agreement as the document governing the parties' relationship renders Plaintiff's breach allegation premised on Defendants' alleged failure to acknowledge Plaintiff's membership interest moot.

Second, the Purchase Agreement explicitly provided that once Plaintiff's funds are repaid, "Bukefal shall distribute its net profits on an annual basis to its members *pro rata*." While it is Plaintiff's position that Bukefal has made distributions, Motamedi's reply affidavit states that "[t]o date, Bukefal LLC has not distributed any profits to its members [and]… no member's original capital contributions has been repaid to date."

These conflicting affidavits create an issue of fact as to whether distributions were made in breach of the Purchase Agreement which precludes summary judgment in either Plaintiff's or Defendants' favor.

3. Tortious Interference with Economic Advantage

To establish a claim for tortious interference with economic advantage, "a plaintiff must demonstrate that the defendant's interference with its prospective business relations

was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." *Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294, 299-300 (1st Dept. 1999) (citation omitted).

Plaintiff's ninth cause of action for tortious interference with economic advantage references fraud in connection with the Loan Agreement. As I have already dismissed all causes of action premised on the Loan Agreement, including the fraud claim, Plaintiff cannot establish that Defendants utilized "wrongful means." *See Moulton Paving, LLC v. Town of Poughkeepsie*, 98 A.D.3d 1009, 1013(2d Dept. 2012) (finding claim for tortious interference with prospective economic advantage was properly dismissed where plaintiff failed to demonstrate either that defendants acted with wrongful means or solely to harm plaintiff). Nor has Plaintiff established how any act by Defendants affected his prospective business relations. Therefore, summary judgment is granted on this claim in favor of Defendants and the cause of action is dismissed.

4. Breach of Fiduciary Duty

Plaintiff's seventh cause of action for breach of good faith and fair dealing contains 14 subsections. I dismiss subsections b, c, d, m and n of this claim as moot because they stem from the Loan Agreement.

The remaining subsections state that

> Defendants Marjanne and Dragan have with gross negligence, by willful misconduct and/or in bad faith – and in abject dereliction of their duties – breached their fiduciary duties to Plaintiff… by…: (a) inducing Plaintiff into tendering his $150,000 investment under the belief that he would be granted an immediate 13% membership interest in the Company… (e) misappropriating business assets and preventing the transparency of business records; (f) refusing to account for all income and sales; (g)

> refusing to deposit all income and sales into the business checking account; (h) refusing to pay several of the Company's debt obligations including sales tax; (i) refusing to generate and/or account for profit earnings; (j) engaging in self-dealing (underscored by the fact that the Defendants have paid themselves dividends while refusing to pay Plaintiff any distribution other than nominal loan reimbursements); (k) acting in their own best interests at the expense of the Plaintiff, (l) failing to hold, or conversely provide Plaintiff with notice of the Company's annual or special meetings as required by the LLCL…

During oral argument on the motions before me, Plaintiff's counsel argued that the SVAC asserted a cause of action for breach of fiduciary duty.[1] Defendants responded that no such claim was asserted.

Failure of a plaintiff's complaint to state a cause of action does not automatically result in summary judgment for the defendant so long as plaintiff "adduced evidentiary facts in support of such an unpleaded cause of action." *Swift Funding, LLC v. Isacc*, 144 A.D.3d 471, 472 (1st Dept. 2016); *see also Alvord and Swift v. Stewart M. Muller Const. Co., Inc.*, 46 N.Y.2d 276, 280 (1978) (stating that on motions involving summary judgment, rather than sufficiency of the complaint, "failure to state a [] cause of action in the pleading would not be sufficient to permit unconditional summary judgment in favor of defendant, as a matter of law, if plaintiff's submissions provided evidentiary facts making out a cause of action").

Here, a cause of action for breach of fiduciary duty was not unpleaded in the SVAC but was instead incorrectly named. Specifically, a review of the SVAC reveals

[1] Additionally, counsel's affirmation in opposition to Defendants' summary judgment motion and in support of Plaintiff's cross-motion also refers to breach of fiduciary duty and enumerates instances of the alleged breach.

that Plaintiff's breach of good faith and fair dealing claim was actually a misnamed claim for breach of fiduciary duty. Even if the misnaming had not occurred, however, Plaintiff could still survive Defendants' summary judgment motion if documents or testimony support a claim for breach of fiduciary duty.

To assert a claim for breach of fiduciary duty, a plaintiff must allege that "(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dept. 2011).

As the managing members of Bukefal, Motamedi and Ristovski owed non-managing member Plaintiff a fiduciary duty. *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dept. 2014) (stating that managing LLC members owe non-managing LLC members a fiduciary duty). Plaintiff has alleged that Motamedi and Ristovski misappropriated business assets, kept a "secret" set of books and records and engaged in self-enrichment at Plaintiff's expense. Given the existence of disputes as to the underlying factual allegations in support of the claim for breach of fiduciary duty and the paucity of relevant evidence submitted by both parties[2], it is not appropriate to dismiss this claim in favor of

[2] Virtually all of the affidavits submitted by the individual merely recite the relief being sought. The one exception is Motamedi's reply affidavit which included, among other things, the averments that Bukefal never distributed profits to its members or agreed to limit management's salaries. In addition, neither Plaintiff's deposition nor the excerpts from the depositions of Motamedi and Ristovski establish a prima facie case for summary judgment. Lastly, the numerous financial documents submitted by Plaintiff, without more, also fail to establish his entitlement to judgment as a matter of law.

either party and thus summary judgment is denied to both. *See Brunetti v. Musallam*, 11 A.D.3d 280, 280 (1st Dept. 2004) (stating that "[i]t is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits") (citations omitted).

5. Breaches of LLCL

Plaintiffs' eleventh and twelfth causes of action for breaches of New York's Limited Liability Company Law ("LLC") are duplicative of the breach of fiduciary duty claim and are thus dismissed.

6. Request for an Equitable Accounting

The SVAC's thirteenth cause of action is for an equitable accounting and states that "Plaintiff has demanded an accounting from Defendants and has further demanded repayment of his capital contributions, both of which have been denied." On this motion, Plaintiff's affidavit states, "Defendants have repeatedly rejected nearly all of my requests to examine the Company's books and records." Defendants do not address this claim in their summary judgment motion.

As a member of a limited liability company, Plaintiff may seek an equitable accounting under common law. *See Gottlieb v. Northriver Trading Co.*, LLC, 58 A.D.3d 550, 551 (1st Dept. 2009). The right to an accounting "is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Ctr. for Rehabilitation and Nursing at Birchwood, LLC v. S & L Birchwood, LLC*, 92 A.D.3d 711, 713 (2d Dept. 2012).

Plaintiff has failed to provide any details as to when or how demands for Bukefal's books and records were made. Further, Plaintiff admits that a few of its requests for such information were granted. Moreover, Plaintiff has not yet established a breach of the fiduciary relationship. Accordingly, Plaintiff has not met its prima facie burden for summary judgment on this claim. Defendants' motion for summary judgment on this claim fails as well as they do not even address the cause of action in their papers.

7. Removal of Managers

Plaintiff's fourteenth cause of action states that as the sole contributing member, Plaintiff has exclusive voting rights and is allowed to remove Motamedi and Ristovski as Bukefal's managers and requests a removal order from the Court.

Although Plaintiff states that this claim is based on Limited Liability Company Law Sections 402 and 503,[3] Plaintiff's counsel's affirmation lists the removal of Motamedi and Ristovski as a requested remedy for the breach of fiduciary duty claim. I agree with the latter formulation of the fourteenth cause of action and believe it is more appropriately viewed as a requested remedy for breach of fiduciary duty. Therefore, I dismiss the fourteenth cause of action as duplicative.

[3] Section 402 states that "Except as provided in the operating agreement… each member of a limited liability company shall vote in proportion to such member's share of the current profits of the limited liability company in accordance with section five hundred three of this chapter." Section 503 provides that "If the operating agreement does not so provide, profits and losses shall be allocated on the basis of the value, as stated in the records of the limited liability company if so stated, of the contributions of each member…"

In accordance with the foregoing, it is

ORDERED that Defendants' motion for default judgment on their counterclaim is denied; and it is further

ORDERED that Defendants' motion for summary judgment on their counterclaim is denied; and it is further

ORDERED that Plaintiff's first, second, third, fourth, sixth, eighth, tenth and fifteenth cause of action are dismissed as moot; and it is further

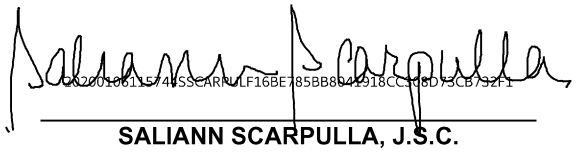
ORDERED that Plaintiff's eleventh, twelfth and fourteenth causes of action are dismissed as duplicative; and it is

ORDERED that Defendants' motion for summary judgment on Plaintiff's complaint is granted as to the ninth cause of action and otherwise denied;

ORDERED that Plaintiffs' cross-motion for summary judgment is denied in its entirety; and it is further

ORDERED that the parties appear for a pre-trial conference at 60 Centre Street, Room 208, on February 12, 2019 at 2:15 p.m.

This constitutes the decision and order of the Court.



1/3/2020
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE