Shakeen LLC v Courtelyou Wine LLC
2020 NY Slip Op 31232(U)
April 27, 2020
Supreme Court, Kings County
Docket Number: 521415/2019
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: COMMERCIAL PART 8

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SHAKEEN LLC,

Plaintiff,

Decision and Order

-against-

April 27, 2020

Index #521415/2019

COURTELYOU WINE LLC, ADELAIDE GROUP LLC,
MIMI'S HUMMUS 2 LLC, MIMI'S HUMMMUS INC.,
ASBH LLC, BENJAMIN HEEMSKERK & AVRAHAM SHUKER,

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking essentially to dismiss the lawsuit. The plaintiff has cross-moved pursuant to CPLR §3212 seeking summary judgement. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On February 1, 2019 the plaintiff purchased a restaurant and other assets and inventory from defendant Cortelyou Wine LLC pursuant to the terms of an asset purchase agreement. The closing took place on April 15, 2019. According to the Amended Complaint the plaintiff alleges the defendants falsely represented they did not have any outstanding tax obligations and that they had all necessary permits including a certificate of occupancy to enable the plaintiff to obtain a liquor license. The plaintiff has asserted eight causes of action including breach of contract, unjust enrichment, breach of duty of

good faith and fair dealing, conversion, rescission, fraud, injunctive relief and piercing the corporate veil. The motions seeking to dismiss and for summary judgement have now been filed.

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 plaintiff (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 Asset Purchase Agreement states that "seller has filed each tax return, including, without limitation, all income, excise, property, gain, sales, franchise, and license tax returns, required to be filed by Seller. Each such return is true, complete, and correct, and Seller has paid all taxes, assessments, and charges of any governmental authority required to be paid by them and has created

reserves for all taxes accrued but not yet payable" (see, Asset Purchase Agreement, ¶9(j)). The plaintiff alleges that in fact there were sales tax arrears that were owed by the defendants that have accrued to the plaintiff by virtue of the asset purchase. Consequently, the plaintiff asserts the defendants breached the contract. The defendants do not dispute the tax arrears but rather argues the plaintiff as the purchaser had an obligation to notify the State Tax Commission of their existence pursuant to Tax Law §1141(c) and that since the plaintiff failed to so notify the Commission the plaintiff must be responsible for their payment. Thus, on the one hand the defendants clearly breached the contract by misstating the tax liabilities, however, on the other hand, the plaintiff failed to follow the strictures of Tax Law §1141(c).

Tax Law §1141(c) requires any bulk purchaser of a business to notify the State Tax Commission of the proposed sale at least ten days before taking possession. While the plaintiff failed to do so, the defendants misrepresented the tax liabilities of the entity that was the subject of the sale. In Harcel Liquors Inc., v. Evsam Parking Inc., 48 NY2d 503, 423 NYS2d 873 [1979] the Court of Appeals dealt with an almost identical case. In that case the purchaser failed to notify the Tax Commission of an impending bulk purchase but argued that the seller provided an affidavit that the entity was "debt free" and the purchaser relied upon that affidavit by not notifying the Tax Commission of the purchase. The court held that it could not accept the purchaser's "contention that the existence of an affidavit from the seller stating that the corporation is 'debt free' insulates it

from liability under subdivision (c) of section 1141 of the Tax Law. That section provides, in unequivocal terms, that a purchaser who fails to give notice of the proposed sale to the tax commission becomes personally liable for the payment of the seller's unpaid sales and use taxes to the extent of the purchase price or the fair market value of the assets sold, whichever is higher…In our opinion, to exempt any purchaser who has failed to comply with the clear notice requirements of this section would work to deprive the State of a means of collecting taxes duly imposed pursuant to the State's taxing power. Thus, we conclude that the existence of an affidavit from the seller stating that the corporation has no creditors cannot either cure plaintiff's failure to notify the tax commission of the sale as required by law or insulate a purchaser from the liability which attaches due to its failure to follow clearly delineated notice procedures" (id). There is no material distinction between an affidavit stating no taxes were owed (Harcel, supra) and the Asset Purchase Agreement itself. Either way, the purchaser had an absolute obligation to notify the Tax Commission of the impending purchase and the failure to do so, regardless of the good faith asserted, does not absolve the plaintiff from the tax obligations. While, the defendants breached the contract in the strict sense, no damages are possible since the overriding harm to the purchaser was not that breach but rather their own failure to notify the Tax Commission.

Therefore, based on the foregoing, the causes of action based upon the tax issue are all dismissed and the motion seeking summary judgement is consequently denied.

Turning to the breach of contract claims based upon a failure to deliver the premises with a certificate of occupancy, the Asset Purchase Agreement states that "no action, approval, consent, or authorization, including, without limitation, any action, approval, consent, or authorization of any governmental or quasi-governmental agency, commission, board, bureau, or instrumentality, is necessary for Seller to enter this Agreement and to fulfill its binding and enforceable obligations under this Agreement" (see, Asset Purchase Agreement, ¶9(b)). There are certainly questions of fact whether the failure to deliver a valid certificate of occupancy was a breach of the above provision. The defendants assert that even if such breach existed the plaintiff cannot demonstrate any damages since the only damages alleged is the failure to obtain a liquor license and there is no basis to conclude a liquor license will be denied the purchaser. This is especially true since the New York State Liquor Authority has approved a temporary license. However, the defendants concede that "any claim that it will not be able to obtain a permanent liquor license is improbable or, at the very least, premature" (see, Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgement, page 13). Therefore, there are questions of fact whether the defendants breached the Asset Purchase Agreement and consequently, the motion seeking to dismiss this action and the motion seeking summary judgement on this claim are all denied.

Concerning the remaining causes of action, 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]). Thus, fraud must be pled with a heightened degree of specificity and detail (Minico Insurance Agency LLC, v. AJP Contracting Corp., 166 AD3d 605, 88 NYS3d 64 [2d Dept., 2018]).

It is true that a misrepresentation of a material fact that is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain an action of fraud and is distinct from the breach of contract claim (Selinger Enterprises Inc., v. Cassuto, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only to the intent or ability to perform under the contract then such misrepresentation is duplicative of the breach of contract claim (see, Gorman v. Fowkes, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). Generally, for a fraud claim to be collateral to a breach of contract claim the misrepresentation must consist of a present fact that is unrelated to the precise terms of the contract itself. Thus, in American Media Inc., v. Bainbridge & Knight Laboratories LLC, 135 AD3d 477, 22 NYS3d 437 [1st Dept., 2016] the plaintiff sued defendant for advertisements it placed in various periodicals without receiving payment pursuant to the contract. The court held misrepresentations made by the defendant were not duplicative of the breach of contract claim. Specifically, the

principal of the defendant made statements that he loaned the defendant sufficient funds to cover the advertising expenses thereby inducing the plaintiff to enter into the contract. The court noted those misrepresentations were collateral since they were misrepresentations of present facts, namely that the defendant had sufficient funds. Further, these misrepresentations were collateral to the actual terms of the contract which involved placing advertising in plaintiff's periodicals (see, also, Deerfield Communications Corp., v. Chesebrough Ponds Inc., 68 NY2d 954, 510 NYS2d 88 [1986]). Thus, the critical distinction whether a fraud claim is distinct from a breach of contract claim rests upon the following criteria. The first is whether the misrepresentation concerns a future intent to perform or whether the statement misrepresents present facts (see, Wylie Inc., v. ITT Corp., 130 AD3d 438, 13 NYS3d 375 [1st Dept., 2015]). If the misrepresentation concerns present facts it will generally be considered collateral. If the misrepresentation concerns a future intent to perform then it is generally duplicative of a breach of contract claim. This does not mean to imply a fraud claim regarding future conduct can never be distinct from a breach of contract claim. It surely can where the promise is collateral to the contract (see, Fairway Prime Estate Management LLC v. First American International Bank, 99 AD3d 554, 952 NYS2d 524 [1st Dept., 2012]). Moreover, even if the misrepresentation concerns a present statement of facts, those facts must touch a matter that is not the subject of the contract. Therefore, if the promise or misrepresentations "concerned the performance of the contract itself,

the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (HSH Nordbank AG v. UBS AG, 95 AD3d 185, 941 NYS2d 59 [1st Dept., 2012]).

In this case, the fraud claims, as noted, allege misrepresentations regarding the certificate of occupancy. That allegation does not include matters not already subject to the contract. Thus, any misrepresentations of defendant upon which the plaintiff relied in this case, even if they were present facts, were all related to the agreement between the parties which forms the basis of the breach of contract claim. Indeed, the breach of contract claim alleges that the defendants were not "in possession of the necessary certificate of occupancy needed to permit plaintiff to obtain a license to serve alcohol" (see, Amended Complaint, ¶32).

Therefore, the fraud claim is duplicative of the breach of contract claim and consequently the motion seeking to dismiss the fraud claim is granted and the motion seeking summary judgement is denied.

Likewise, 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 and the motion seeking summary judgement is denied.

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, the motion to dismiss those causes of action is granted and the cross-motion seeking summary judgement is denied.

The motion to dismiss the cause of action seeking rescission is denied and the summary judgement seeking a determination regarding this claim is denied as well. As noted, there are questions of fact whether the contract was breached and whether such breach damaged the plaintiff. The rescission claim must necessarily await that determination.

Lastly, to pierce the corporate veil the plaintiff must establish that the owners, through their domination, abused the privilege of doing business in the corporate form thereby perpetrating a wrong that resulted in injury to the plaintiff (Morris v. New York State Department of Taxation and Finance, 82 NY2d 135, 603 NYS2d 807 [1993]). "Factors to be considered in determining whether the [parent company] has 'abused [that] privilege ...' include whether there was a 'failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use'" (East Hampton Union Free School District v. Sandpebble Builders Inc., 66 AD3d 122, 884 NYS2d 94 [2d Dept., 2009]). Further,

to state a claim against an individual director or officer, the plaintiff is required to present particularized allegations that the acts of the corporate officers were beyond the scope of employment or for personal gain (see, Petkanas v. Kooyman, 303 AD2d 303, 795 NYS2d 1 [1st Dept., 2003]). The allegations that comprise the claims contain a single speculative paragraph regarding the individual officers. Thus, in paragraph 69 of the Amended Complaint it states that "it is reasonable to believe that they [Heemskerk and Shuker] have taken money out of CW and transferred it to other businesses that they operate with each other or their spouses, specifically defendants AG, Mimi's 1, Mimi's 2 and ASBH thereby making it appropriate for the Court to treat defendants CW, AG, Mimi's 1, Mimi's 2 and ASBH as merely alter egos of defendants Heemskerk and Shuker" (see, Amended Complaint, ¶69). There are no specific facts demonstrating the individual defendants exercised any dominion and control sufficient to pierce the corporate veil. Indeed, there are no facts presented at all demonstrating such dominion and control. The claim merely alleges in conclusory fashion such dominion and control, without providing any underlying facts supporting that contention. Therefore, the motion seeking to dismiss the claims as to defendants Adelaide Group LLC, Mimi's 1, Mimi's 2 and ASBH LLC, Heemskerk and Shuker is granted.

The motion seeking to dismiss the claim for injunctive relief is granted.

Therefore, all the causes of action are dismissed except for the breach of contract claim based upon the certificate of occupancy issue and only concerning defendant Cortelyou Wine LLC.

So ordered.

ENTER:

Dated: April 27, 2020
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC