

Stratigos v Brio Bar Corp.

2020 NY Slip Op 31536(U)

April 2, 2020

Supreme Court, New York County

Docket Number: 654963/2018

Judge: Louis L. Nock

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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THEODORE STRATIGOS,

Plaintiff,

- v -

BRIO BAR CORPORATION; CAMILLE GLICKMAN; RAVI LALCHANDANI; DEROSI GLOBAL LLC; DEROSI MANAGEMENT LCC; and DEROSI MAC LLC,

Defendants.

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Table with 2 columns: Field Name, Value. Fields include INDEX NO. (654963/2018), MOTION DATE (3/4/2019), MOTION SEQ. NO. (002), and DECISION + ORDER ON MOTION.

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 23-31, 34-49 were read on this motion to DISMISS.

Upon the foregoing documents, the motion of defendants Ravi Lalchandani ("Lalchandani"), Derossi Global LLC ("Derossi Global"), Derossi Management LCC ("Derossi Mgt.") and Derossi MAC LLC ("Derossi MAC") to dismiss the complaint (the "Complaint") against them is granted in accord with the following memorandum decision.

Background

This action arises from a failed business venture for a bar and restaurant located at 26 Astor Place, New York, New York ("26 Astor Place"). The salient facts are heavily disputed by the parties. As alleged in the Complaint, defendant Brio Bar Corporation ("Brio Corp") operated a wine bar at 26 Astor Place ("Bahr Che") from sometime in 2011 until September 2015. In November 2015, defendant Brio Corp entered into an agreement (the "Management Agreement") with an entity identified as non-party Derossi Cooper, LLC ("Derossi Cooper") that sets forth the terms of a scheme whereby Brio Bar would be converted to a restaurant named Bergen Hill ("Bergen Hill"). The Management Agreement provides that Derossi Cooper would oversee the

renovation and conversion of Brio Bar into Bergen Hill and would then operate and manage Bergen Hill. The parties submit different versions of the Management Agreement in support of their respective positions on the motion (NYSCEF Doc. Nos. 26, 39) and they dispute whether Derossi Cooper is a legal entity.¹ Plaintiff alleges that Lalchandani is personally liable for the actions of Derossi Cooper because it is not a legal entity. The Management Agreement lists Defendant Camille Glickman (“Glickman”), as Camille Dunst, President of Brio Corp, and Lalchandani, as Member and Manager of Derossi Cooper, as signatories to the agreement. The Management Agreement also outlines various responsibilities of Lalchandani and defendant Derossi Mgt. in connection with the renovation and operations at 26 Astor Place.

By virtue of three promissory notes dated April 5, 2016, May 23, 2016, and June 16, 2016 (together, the “Notes”), plaintiff Theodore Stratigos (“Plaintiff”) extended loans in the amounts of \$100,000, \$50,000, and \$20,000, respectively, to Glickman to be used “exclusively for the renovation and conversion” of Bahr Che into Bergen Hill (NYSCEF Doc. Nos. 27-29, 36-38). Each note indicates that it “is secured by and the Borrower grants to the Lender the fixtures, equipment and inventory of Brio Bar Corp found at 26 Astor Place” (*id.*). Under a section titled “Additional Terms,” the April 5, 2016 loan indicates that “[Glickman] grants to [Plaintiff] 2.5% (Two and Half Percentage Points) equity in said Bergen Hill Restaurant found at 26 Astor Place, and the May 23, 2016 note contains an identical provision granting 3% equity in “said Bergen Hill Restaurant found at 26 Astor Place” (NYSCEF Doc. Nos. 27-28, 36-37). The April 5, 2016 and May 23, 2016 notes also contain a “Prepayment Incentive” provision that grants additional equity “in said Bergen Hill restaurant” to Plaintiff if certain payment benchmarks are not met (*id.*). Glickman personally guaranteed all three notes.

¹ The differences between the two versions of the Management Agreement submitted by the parties in support of their respective positions on the motion are not material for the purpose of the present motion.

In December 2016, Bergen Hill closed and was subsequently reopened as a bar named Coup (Compl. ¶ 52-53). The Complaint alleges that during the course of renovation and management of Bergen Hill, Lalchandani fraudulently misused, misappropriated, or converted funds of Brio Corp, Bahr Che, Bergen Hill, or Coup and violated the terms of the Management Agreement and his fiduciary obligations to Brio Corp and the various restaurant and bar ventures operating at 26 Astor Place. Several specific allegations of wrongdoing are set forth in the complaint (*see e.g.*, Compl. ¶¶ 58, 62). On October 5, 2018, Plaintiff commenced this action by filing a summons and complaint asserting causes of action for a declaratory judgment establishing that he is entitled to a 16.5% interest in Brio Corp, breach of contract for breach of the Management Agreement, breach of fiduciary duty, fraud, conversion, and an accounting of the books and records of Brio Corp. Glickman appeared in the action by filing, by counsel, an answer to the complaint on February 6, 2019. Brio Corp has not filed an answer or otherwise appeared in the action. The Derossi Defendants now move to dismiss the Complaint against them pursuant to CPLR 3211(a)(1), (3) and (7), and Plaintiff opposes.

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff’s favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152

[2002][internal citations omitted]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of “bare legal conclusions” is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Dismissal under CPLR 3211 (a) (1) is warranted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). “To be considered ‘documentary’ under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity” (*Fontanetta v John Doe I*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). In effect, “the paper’s content must be ‘essentially undeniable and . . . assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citation omitted]). Affidavits and deposition testimony do not qualify as documentary evidence for the purposes of CPLR 3211 (a) (1) (*Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011]), but judicial records, mortgages, deeds and contracts (*Fontanetta*, 73 AD3d at 84), and email and letter correspondence (*Kolchins v Evolution Mkts, Inc.*, 31 NY3d 100, 106 [2008]) may be considered.

Discussion

Each of Plaintiff's claims, as pled in the Complaint, is predicated on his assertion that he is a minority shareholder in Brio Corp pursuant to the terms of the April 5, 2016 and May 23, 2016 promissory notes. In opposition to the motion, Plaintiff contends that the April 5, 2016 note "conferred '2.5 % (Two and Half Percentage Points equity' in Brio Bar Corp. to Stratigos as a condition of the agreement" and the May 23, 2016 note "contained the exact same provisions as the first Promissory Note, except that Stratigos' equity share was increased by three (3) percent" (Opp Mem at 3). Nevertheless, the clear language of the April 5, 2016 note states that Glickman, as Borrower, "grants to the Lender 2.5% (Two and Half Percentage Points) equity **in said Bergen Hill Restaurant found at 26 Astor Place.**" (NYSCEF Doc. Nos. 27, 36 [emphasis added]). The May 23, 2016 note similarly provides that Glickman, as Borrower, "grants to the Lender 3% (Three Percentage Points) equity **in said Bergen Hill Restaurant found at 26 Astor Place**" (NYSCEF Doc. Nos. 28, 37 [emphasis added]). Brio Corp is separately referred to in each agreement as "Brio Bar Corp," and each note also contains a provision that states "[t]his Note is secured by and the Borrower grants to the Lender the fixtures, equipment and inventory of Brio Bar Corp found at 26 Astor Place" (NYSCEF Doc. Nos. 27-28, 36-37).

Although generally on a motion to dismiss, the court should accept as true the facts as alleged in the complaint and afford the plaintiff every favorable inference, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 [1st Dept 2001]). Furthermore, "the interpretation of an unambiguous contract is a question of law for the court, and the provisions of the contract delineating the rights of the parties prevail over the allegations

set forth in the complaint” (*id.*). Here, the unambiguous terms of the April 5, 2016 and May 23, 2016 notes do not grant Plaintiff an equity interest in Brio Corp, as he asserts. At best, the notes grant an equity interest in the Bergen Hill restaurant and a security interest in the fixtures, equipment and inventory of Brio Corp that are located at 26 Astor Place. Therefore, the documentary evidence submitted by both parties in support of their respective positions on the motion, the April 5, 2016 and May 23, 2016 notes, establishes unequivocally that Plaintiff’s claims, as pled, fail as a matter of law and must be dismissed.

In opposition to the motion, Plaintiff moves informally “for leave to submit an Amended Complaint that addresses any alleged deficiencies in his pleadings” (Opp Mem at 2). No cross-motion or proposed amended complaint was filed in support of Plaintiff’s request. The standard of review for leave to re-plead on a motion to dismiss is consistent with the standard for motions for leave to amend a complaint (*170 West Village Associates v. G & E Realty, Inc.*, 56 A.D.3d 372, 373 [1st Dept 2008], *Chaikin v Karipas*, 162 A.D.3d 842, 844 [2d Dept 2018]), and leave to amend a pleading “should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Y.A. v Conair Corp.*, 154 AD3d 611, 612 [2017]). To the extent that Plaintiff seeks to re-plead his claims as a minority shareholder of Bergen Hill and secured lender, he may do so only to the extent that such claims are not palpably insufficient or patently devoid of merit.

Plaintiff’s claim for breach of the Management Agreement is palpably insufficient as a matter of law and cannot be re-pled. To state a cause of action for breach of contract, a plaintiff must plead the existence of a contract between the parties, plaintiff’s performance, the defendant’s breach, and damages (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 A.D.3d 605, 606 [1st Dept 2019]). Plaintiff cannot state a claim for breach of the Management

Agreement because he is neither a party to the agreement nor was it made for his benefit (*Freeford Ltd. v Pendleton*, 53 A.D.3d 32, 38 [1st Dept 2008] [generally only parties in privity of contract may enforce terms of the contract], *lv denied* 12 NY3d 702 [2009]; *see also Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 N.Y.3d 704 [2018] [setting forth conditions where a third party may sue as a beneficiary on a contract made for its benefit]). Therefore, this claim cannot be re-pled. Plaintiff's claims against defendants Derossi Global and Derossi MAC are similarly deficient. Neither party is a signatory to the Notes or the Management Agreement and Plaintiff does not plead that they played any role in the management or operation of Bergen Hill or plead any other specific allegations against either party. Absent any non-conclusory allegations against these parties, Plaintiff's claims cannot be re-pled against them.

In light of the extensive revisions to the complaint that would be required to re-plead Plaintiff's remaining claims as a minority shareholder of Bergen Hill and secured lender, a motion to amend the complaint and proposed amended complaint are necessary for the court to properly determine whether such claims are insufficient or patently devoid of merit. Although it appears that the claims for declaratory judgment and for an accounting may be re-pled in accord with the terms of the Notes, it is unclear whether Plaintiff may adequately state claims for breach of fiduciary duty, fraud, or conversion as a minority shareholder of Bergen Hill and secured lender, particularly because there is no allegation before the court regarding whether Bergen Hill is an incorporated entity.

Accordingly, it is

ORDERED that the motion of defendants Ravi Lalchandani, Derossi Global LLC, Derossi Management LCC, and Derossi MAC LLC to dismiss the claims against them is granted and the claims against them are dismissed; and it is further

ORDERED that Plaintiff's claim for breach of contract is dismissed in its entirety; and it is further

ORDERED that within 30 days of entry of this order, Plaintiff may file a motion to amend the complaint and re-plead his causes of action for declaratory judgment, breach of fiduciary duty, fraud, conversion, and for an accounting.²

ENTER:

Louis L. Nock

<u>4/2/2020</u>					<u>LOUIS L. NOCK, J.S.C.</u>
DATE					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE

² The deadline set forth herein is currently tolled pursuant to Executive Order 202.13 of the Governor of the State of New York (the "Governor") and shall be extended until 30 days after said order is lifted or as further provided by any subsequent order by the Governor.