

Karen's Shipping, LLC v West Side Foods, Inc.

2020 NY Slip Op 32347(U)

July 16, 2020

Supreme Court, New York County

Docket Number: 653579/2019

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

-----X

KAREN'S SHIPPING, LLC, PETER ABATE

Plaintiff,

- v -

WEST SIDE FOODS, INC., THOMAS RYAN,

Defendant.

-----X

INDEX NO. 653579/2019
MOTION DATE 01/28/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, (i) West Side Foods, Inc. (West Side Foods) and Thomas Ryan's motion to dismiss the Amended Complaint pursuant to CPLR § 3211 (a) (7) and CPLR § 3211 (a) (5) is granted in part and the first cause of action for equitable accounting is dismissed, and (ii) Karen's Shipping, LLC (Karen's Shipping) and Peter Abate's cross motion for sanctions pursuant to Uniform Rule 130 1.1 is denied.

The Facts Relevant to the Motion to Dismiss

Mr. Abate is the co-owner of Karen's Shipping (Amend. Compl., NYSCEF Doc. No. 18, ¶ 17). He has worked in the meat and poultry industry since the 1960's, coordinating the purchase and sale of poultry and meat (id., ¶¶ 21-23). Karen's Shipping provides shipping services to suppliers and supermarket customers and was founded in 2009 by Mr. Abate's wife (id., ¶ 25).

Mr. Ryan is the chief executive officer and co-owner of West Side Foods (id., ¶ 18). West Side Foods provides processing and distribution services for grocery stores and supermarkets (id., ¶ 26).

In or around 2000, Mr. Abate began working with Mr. Ryan by way of a handshake agreement (id.). The parties never memorialized their agreement in writing. During the course of their business relationship, Mr. Abate and Karen's Shipping allegedly introduced Mr. Ryan and West Side Foods to poultry and meat suppliers, and coordinated sales of poultry and meat products at wholesale prices (id., ¶ 6). In turn, West Side Foods, through Mr. Ryan, compensated Mr.

Abate and Karen's Shipping with a quarterly payment of the company's profits based on West Side Foods' revenue (*id.*, ¶ 41). This payment was roughly equivalent to \$0.02 per pound of poultry and meat and \$0.05 for certified angus beef products (*id.*, ¶¶ 41, 49). West Side Foods also reimbursed Mr. Abate's monthly expenses (*id.*, ¶ 40). Over the course of Mr. Abate's and Mr. Ryan's working relationship, West Side Foods allegedly paid Mr. Abate between \$250,000 and \$500,000 per quarter (*id.*, ¶ 43).

In September 2018, Mr. Ryan ended the business relationship with Mr. Abate and Karen's Shipping (*id.*, ¶ 10). On June 20, 2019, Mr. Abate and Karen's Shipping commenced this action for equitable accounting, unjust enrichment and quantum meruit (Compl., NYSCEF Doc. No. 1). Pursuant to a Decision and Order dated December 18, 2019, this court granted the motion to dismiss the complaint solely to the extent of dismissing the claim for equitable accounting without prejudice (Decision and Order, Mtn. Seq. No. 001, NYSCEF Doc. No. 15).

Subsequently, on January 8, 2020, the plaintiffs filed an Amended Complaint alleging claims for equitable accounting, unjust enrichment and quantum meruit (Amend. Compl., NYSCEF Doc. No. 18). Mr. Ryan and West Side Foods now move to dismiss the Amended Complaint in its entirety pursuant to CPLR 3211(a)(5) and (a)(7). The plaintiffs cross-move for Rule 130 sanctions.

Discussion

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481[1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*).

A party may also move pursuant to CPLR § 3211 (a) (5) to dismiss on the ground that a cause of action is barred by the statute of frauds or statute of limitations.

I. Equitable Accounting

To demonstrate entitlement to equitable accounting, a plaintiff must establish (i) the existence of a confidential or fiduciary relationship between the parties, (ii) the defendant's breach of the duty imposed by that relationship with respect to money or property in which the plaintiff has an interest, and (iii) the absence of an adequate remedy at law (*see Adam v Cutner & Rathkopf*, 238

AD2d 234, 242 [1st Dept 1997]; *Unitel Telecard Distrib. Corp v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]).

Previously, in support of this claim, Mr. Abate and Karen's Shipping alleged that they provided Mr. Ryan and West Side foods with sales leads, customer connections, the opportunity to sell certified angus beef products, and that they invested their time, services, reputation and goodwill for Mr. Ryan's and West Side Foods' benefit (Compl., NYSCEF Doc. No. 1, ¶ 74). They further alleged that West Side Foods and Mr. Ryan failed to compensate Mr. Abate and Karen's Shipping with a portion of West Side Foods' profits derived from deals that Mr. Abate had arranged and that Mr. Ryan was in control of and had custody over all the books, records and financial accounts of West Side Foods (*id.*, ¶ 79) and that Mr. Ryan would change the formula for compensation without providing an explanation for the change (*id.*, ¶ 84). Mr. Abate also stated that he personally loaned Mr. Ryan and West Side Foods \$200,000 because he trusted Mr. Ryan and believed that their relationship would continue. At oral argument, these allegations were found to be insufficient to establish a confidential or fiduciary relationship as is necessary to maintain an equitable accounting claim -- i.e., as opposed to a simple arm's length business relationship (*12/18/2019 Tr.*, NYSCEF Doc. No. 29).

Now, Mr. Abate and Karen's Shipping allege many of the same facts, including, but not limited to, the nature of the services provided, the alleged failure to compensate them for services rendered, and the nature of the \$200,000 loan. In addition, they allege that upon Mr. Ryan's insistence and inducement, Mr. Abate refrained from offering his services to competitors (Amend. Compl., NYSCEF Doc. No. 18, ¶ 77) and that Mr. Ryan considered Mr. Abate "like family" and that they functioned as *de facto* business partners in a near-joint venture (*id.*, ¶¶ 76, 79). For the reasons set forth below, these allegations are still insufficient.

i. Plaintiffs Fail to Establish a Confidential Relationship

Critically, Mr. Abate and Karen's Shipping fail to demonstrate that they maintained a confidential or fiduciary relationship with Mr. Ryan and West Side Foods. As discussed, under New York law, to sustain an action for accounting a plaintiff must demonstrate either a fiduciary or confidential relationship with the defendant (*see Palazzo v Palazzo*, 121 AD2d 261, 265 [1st Dept 1986]). A fiduciary or confidential relationship arises when one is under a duty to act for the benefit of another within the scope of that relation (*DiTolla v Doral Dental IPA of NY, LLC*, 100 AD3d 586, 587 [2d Dept 2012]). It is, therefore, "grounded on a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Generally, a business relationship, without more, is insufficient to create a fiduciary relationship (*DiTolla*, 100 AD3d at 587).

Here, as noted, in support of their claim of a fiduciary or confidential relationship, Mr. Abate and Karen's Shipping allege that Mr. Ryan induced Mr. Abate to refrain from offering his services to competitors, that Mr. Ryan considered Mr. Abate "like family," and that they functioned as *de facto* business partners in a near-joint venture in support of their claim. Mr. Abate and Karen's Shipping also point to a 2005 \$200,000 loan (the **Loan**) that Mr. Abate made personally to Mr. Ryan as evidence of the depth of the parties' relationship, claiming that Mr. Abate made the Loan because he "trusted Defendants to deal fairly regarding [his] compensation, repayment and interest in the parties' venture, in so doing reposed trust and confidence in Defendants' integrity and fidelity" (Amend. Compl., NYSCEF Doc. No. 18, ¶ 78). For the avoidance of doubt, although the Amended Complaint states that this Loan was never repaid (*id.*, ¶ 36), Mr. Abate and Karen's Shipping are not suing on the Loan and the Loan is not at issue in this action.

While fiduciary relationships can exist "between close friends . . . or [] where confidence is based upon prior business dealings," (*Apple v Capitol Records*, 137 AD2d 50, 57 [1st Dept 1988]), a one-time loan, made based on feelings of trust and confidence, is simply not enough to establish any kind of special relationship.

Family relationships are likewise insufficient to establish a confidential or fiduciary relationship (*see Castellotti v Free*, 138 AD3d 198 [1st Dept 2016]; *see also McGregor v McGregor*, 55 Misc 3d 586, 592 [Sup Ct Kings Cnty February 7, 2017] ["the existence of a familial relationship is insufficient in itself to create a confidential relationship"]). Therefore, a "like family" relationship, without more, cannot constitute a confidential relationship.

The sharing of profits – without the sharing of losses – also does not establish a partnership and/or a confidential or fiduciary relationship (*see Lawrence v Kennedy*, 95 AD3d 955, 958 [2d Dept 2012]). Simply put, the conclusory assertion by Mr. Abate and Karen's Shipping of a "near-joint venture" and a *de facto* partnership does not sufficiently demonstrate the type of relationship necessary for equitable accounting. Critically, a partnership requires the sharing of both profits **and losses** (*see Blaustein v Lazar Borck & Mensch*, 161 AD2d 507, 508 [1st Dept 1990] ["Whether partnership status is enjoyed turns on various factors including sharing in profits and losses"]). Here, Mr. Abate and Karen's Shipping do not allege any sharing of losses between the parties. Rather, they assert only that they were paid a portion of the profits of West Side Foods (Amend. Compl., NYSCEF Doc. No. 18, ¶ 8). This alone does not allege sufficient facts of a *de facto* partnership to survive a motion to dismiss.

Nor do subjective reliance and trust establish a confidential or fiduciary relationship (*see Rosenberg v Hedlund*, 2016 2016 NY Slip Op 30201, *3 [Sup Ct NY Cnty February 3, 2016], citing *RNK Capital LLC v Natsource LLC*, 76 AD3d 840, 842 [1st Dept 2010]). Here, Mr. Abate's subjective "trust and confidence in Defendants' integrity and fidelity" (Amend. Compl., NYSCEF Doc. No. 18, ¶ 78) fail to establish a confidential relationship.

Rather, a showing of special circumstances is required to transform the parties' conventional business relationship into a fiduciary one. (*see AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 22 [2d Dept 2008]). Inasmuch as the Amended Complaint asserts that, "Plaintiffs' relationship with Defendants was not an arm's length business relationship between an independent sales agent and distributor" (Amend. Compl., NYSCEF Doc. No. 18, ¶ 75), the allegations in the Amended Complaint simply do not support that assertion. Here, Mr. Abate claims that he made introductions and facilitated contact between merchants and West Side Foods and Mr. Ryan based on his connections in the meat and poultry industry, but these introductions do not present special circumstances that transform the relationship into a confidential or fiduciary one. Mr. Abate and Karen's Shipping fail to demonstrate the existence of a confidential relationship. Failure to establish this element requires the dismissal of the cause of action (*see Luong v Ha The Luong*, 67 Misc 3d 1210[A], *13 [Sup Ct NY Cnty April 28, 2020], citing *Front, Inc. v Khalil*, 103 AD3d 481, 483 [1st Dept 2013], *affd* 24 NY3d 713 [2015]).

II. Unjust Enrichment and Quantum Meruit

i. The Amended Complaint Sufficiently Alleges the Claims for Unjust Enrichment and Quantum Meruit

The theory of unjust enrichment "contemplates 'an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties'" (*Sprecase v Tenreiro*, 2020 Misc. LEXIS 224, *6 [Sup Ct NY Cnty January 17, 2020], citing *Georgia Malone & Co., Inc. v Reider*, 19 NY3d 511, 516 [2012]). To state a cause of action for unjust enrichment, a plaintiff must allege "that (1) the other party was enriched, (2) at the that party's expense, and (3) that it is against equity and good conscious to permit the other party to retain what is ought to be recovered" (*id.* at *7, citing *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

To state a cause of action for quantum meruit requires sufficient proof of (1) performance of the service in good faith; (2) the acceptance of the services by ther person to whom they are rendered; (3) the reasonable value of the services; and (4) the expectation of compensation (*see Atlas Refrigeration-Air Conditioning, Inc v Lo Pinto*, 33 AD3d 639, 640 [2d Dept 2006]).

At the pleading stage, an action may be maintained on both quasi contract theories (*see John Anthony Rubino & Co.*, 84 AD3d 599, 599 [1st Dept 2011]).

As discussed, on the prior motion to dismiss the Complaint, the court found that Mr. Abate and Karen's Shipping sufficiently established the elements necessary to maintain these causes of action. That decision is now law of the case and nothing raised by Mr. Ryan and West Side Foods on this motion warrants a different conclusion.

ii. The Claims are Not Barred by the Statute of Frauds

Inasmuch as Mr. Ryan and West Side Foods again argue that quantum meruit and unjust enrichment causes of action fail to state a claim because of the statute of frauds, the court has already rejected this argument on the record at oral argument on the prior motion (*12/18/19 Tr.*, NYSCEF Doc. No. 29 at 17-20). As the court observed at oral argument, Mr. Abate and Karen's Shipping have presented a check (i.e., a writing) for \$230,000 as evidence of the agreement (*id.*). Moreover, the statute of frauds does not apply to causes of action based on theories of quantum meruit and unjust enrichment where the plaintiff does not seek to enforce an oral agreement, but rather seeks only to recover the reasonable value of property or services rendered by the plaintiff in reliance on an alleged promise (*see Grimes v Kaplin*, 305 AD2d 1024, 1024 [4th Dept 2003]). As the court noted at oral argument on the prior motion, and as is the case here, Mr. Abate and Karen's Shipping do not seek to enforce any oral contract or promise. Rather, they seek only to recover the amount by which Mr. Ryan and West Side Foods were enriched on account of Mr. Abate's services and business contacts. The Amended Complaint sufficiently makes out their claims.

iii. The Statute of Limitations

To the extent that Mr. Ryan and West Side Foods now argue for the first time that the unjust enrichment and quantum meruit causes of action are also barred by the statute of limitations, the statute of limitations would apply only to limit the temporal scope of the claims asserted. The applicable statute of limitations in cases of unjust enrichment and quantum meruit is six years (CPLR 213 [1], [2]). Mr. Ryan and West Side Foods argue that any claim for unjust enrichment or quantum meruit accruing before June 20, 2013 is time barred (Def. Supp. Memo., NYSCEF Doc. No. 24 at 21). However, based on the Amended Complaint, it appears that Mr. Abate and Karen's Shipping only seek damages related to alleged unjust enrichment accruing *after* the termination of the parties' relationship in September 2018 (Amed. Compl., NYSCEF Doc. No. 18, ¶ 102). The statute of limitations argument, thus, appears to be inapplicable. However, for the avoidance of doubt, any claims asserted in this action are limited to those accruing after June 2013 based on the applicable six year statute of limitations.

iv. Piercing the Corporate Veil

The decision to pierce the corporate veil depends on attendant circumstances; there is "no definitive rules governing the varying circumstances when this power may be exercised" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]). The Amended Complaint alleges that Mr. Ryan is the alter ego of West Side Foods and that he operates the

company as “his own personal piggy bank,” allegedly cashing “checks drawn upon West Side Foods’ bank account to pay for personal expenses” and purchasing “vehicles for himself and family members” even though his family members did not work for West Side Foods and the vehicles were allegedly not used in West Side Foods’ business (Amend. Compl., NYSCEF Doc. No. 18, ¶¶ 66-68). The Amended Complaint further states that Mr. Ryan “completely dominated West Side Foods in that he organized, managed, and controlled West Side Foods” (*id.*, ¶ 69). Mr. Ryan argues that the alleged facts fail to sustain alter ego liability by failing to sufficiently demonstrate that he exercised complete control over the transaction attacked (Def. Supp. Mem., NYSCEF Doc. No. 24 at 21). However, at this stage in the proceeding, the allegations in the Amended Complaint are sufficient to survive dismissal. As is well settled, on a motion to dismiss pursuant to CPLR 3211(a)(7), the plaintiffs must be afforded the benefit of every possible favorable inference and the court must determine only whether the facts as alleged fit within a cognizable legal theory. Here, the allegations meet that threshold. Further, a “fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss” (*Cortland St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]).

III. Sanctions

Mr. Abate and Karen’s Shipping argue that sanctions against Mr. Ryan and West Side Foods should be imposed for frivolous conduct in bringing this second motion to dismiss the Amended Complaint. Under Uniform Rule 130 1.1, conduct is considered frivolous if it is (i) wholly without merit and cannot be supported by a reasonable argument, (ii) is undertaken to prolong or delay litigation, or to harass or injure another, or (iii) if it asserts materially false statements (NYCRR §§ 130-1.1 [c] [1]-[3]).

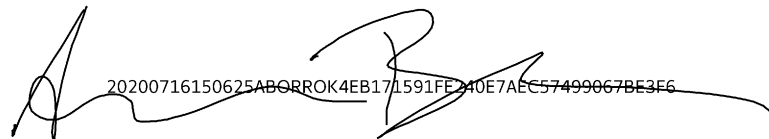
Here, although many of the arguments raised by Mr. Ryan and West Side Foods with respect to the quantum meruit and unjust enrichment claims were raised on the prior motion, the instant motion cannot be said to be wholly without merit as the court is granting the motion in part with respect to the equitable estoppel claim and as the statute of limitations argument was not previously raised on the prior motion (*12/18/19 Tr.*, NYSCEF Doc. No. 29). Under the circumstances, sanctions, which are a drastic remedy, are not appropriate.

Accordingly, it is

ORDERED that the motion to dismiss the amended complaint is granted to dismiss the first cause of action for equitable accounting; and it is further

ORDERED that the cross motion for sanctions is denied; and it is further

ORDERED that the defendants are directed to file an answer to the amended complaint within 20 days of this decision and order.


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7/16/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
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