

**Louis v Gomes**

2020 NY Slip Op 33899(U)

November 23, 2020

Supreme Court, Kings County

Docket Number: 510515/16

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 11  
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PATRICK LOUIS, Individually and  
Derivatively, As CO-DIRECTOR and as 33  
1/3% SHAREHOLDER OF INFINITY  
RESTAURANT GROUP, INC., A NEW YORK  
CORPORATION,

Plaintiffs, Decision and order

- against -

Index No. 510515/16

J. ANTHONY GOMES a/k/a JEREMY A. GOMES  
AND INFINITY RESTAURANT GROUP, INC.,  
A NEW YORK CORPORATION,

Defendants, November 23, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has filed the instant motion seeking to restore the case to the trial calendar. The plaintiff also seeks a default judgement. The defendant has not opposed the motion. Papers were submitted by the plaintiff and after reviewing the arguments this court now makes the following determination.

This action was administratively marked off the court's calendar on October 15, 2019. It is well settled that dismissal pursuant to CPLR §3404 is inapplicable prior to the filing of a note of issue (Lucious v. Rutland Nursing Home of Kingsbrook Jewish Medical Center, 2 AD3d 412, 767 NYS2d 792 [2d Dept., 2003]). This is likewise the case where plaintiff fails to file such note of issue (see, Johnson v. Sam Minskoff & Sons, Inc., 287 AD2d 233, 735 NYS2d 503 [1<sup>st</sup> Dept., 2001]). Furthermore, where as here there was no order of dismissal nor was there a 90 day notice permitting such dismissal, thus the proper course of action is to restore the

matter to the trial calendar (Torres v. Nu-Way Machinery Corp. Co. Ltd., 296 AD2d 545, 745 NYS2d 703 [2d Dept., 2002]). In this case, then, the tests utilized whether such restoration is proper including an examination of the merits of the action is inapplicable (Basetti v. Nour, 287 AD2d 126, 731 NYS2d 35 [2d Dept., 2001]).

Therefore, based on the foregoing, plaintiff's motion seeking to restore the case to the active calendar is granted.

Concerning the further motion, as recorded in the prior order this lawsuit is based on the fact that on March 5, 2015 the plaintiff Patrick Lewis and the defendant Jeremy Gomes entered into a shareholder agreement whereby the plaintiff tendered \$320,000 to the defendant in return for shares of a corporation that was intended to operate as a business. The plaintiff alleged the defendant never operated the business and never fulfilled his end of the bargain. The court dismissed causes of action for fraud, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, civil conspiracy, tortious interference, conversion, rescission, unjust enrichment, RICO claims, the appointment of a receiver, an injunction, an accounting, attorney's fees, an injunction and indemnification. Indeed, the only viable causes of action that remain are breach of contract and dissolution.

First, the plaintiff alleges that he suffers from Legal Abuse Syndrome due to excess and bad faith perpetrated by various

attorney's for the defendant. While it may be true the plaintiff is suffering from such a syndrome there has been little evidence presented the defendant or his counsel acted in such vicious and improper ways as alleged by the plaintiff. Further, the abuse alleged consisted of the fact the defendant maintained seven attorneys to argue a dismissal motion. While standing alone that can hardly constitute abuse, those events took place in another action entitled Patrick Louis et al v. Jean Ling Chou, Esq. & JLC Associates, Index Number 100767/2018 and any allegations of impropriety must be raised there.

The plaintiff further moves seeking a default against the defendant. The basis for such default appears to be an alleged misrepresentation or fraud committed by counsel to the defendant in another case. First, even if such fraud on the court was committed, it took place in another matter in New York County that really has no bearing on this action. More importantly, even if such fraud occurred in this action the plaintiff fails to explain why fraud should result in a default of the defendant's answer and a summary determination of the lawsuit. The plaintiff further alleges inconsistencies, which he terms fraud, between testimony by counsel for Gomes given before a case in New York County and a settlement agreement reached between Gomes and parties in the restaurant transaction. Again, even if true, that does not demonstrate any entitlement to relief because the inconsistencies


of counsel do not flow to the party Gomes. Furthermore, the facts presented are confusing as to whether fraud was even committed. Moreover, the perpetrator of the fraud, an attorney of Gomes is not a party to this action and was not afforded an opportunity to oppose or challenge these serious allegations. Moreover, to the extent there are claims Gomes himself committed fraud, the allegations are unsubstantiated and conclusory and do not warrant striking his pleadings without further investigation.

Therefore, based on the foregoing the motion seeking to restore is granted and the motion seeking a default is denied.

So ordered.

ENTER:

DATED: November 23, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC