

I & M Kosher Catering LLC v BHNG Inc.

2021 NY Slip Op 30878(U)

March 18, 2021

Supreme Court, Kings County

Docket Number: 523834/19

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 PART 8

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I & M KOSHER CATERING LLC,
Plaintiff, Decision and order

- against - Index No. 523834/19

BHNG INC. and KARIEN GANAH a/k/a KARIEN
NADAV,
Defendants, March 18, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §602 seeking to consolidate this matter with a related matter entitled *BHNG, INC. v. I & M Kosher Catering, LLC, et. al.*, Index No. 524541/2020. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

In this action the plaintiff sued the defendants alleging essentially the defendants withheld vital financial information concerning the purchase of a bagel store in Kings county which induced the plaintiffs to pay more than it was actually worth. Pursuant to the complaint the defendants represented the bagel store generated profits of \$250,000 a year and pursuant to the Asset Purchase Agreement the parties agreed upon a sale price of \$800,000. The plaintiff paid \$500,000 by the time of closing and the remaining "three hundred thousand and 00/100 dollars (\$300,000.00) balance of the Purchase Price was made in the form of a promissory note from Plaintiff to Defendants" (see, Verified Complaint, ¶24). The complaint further alleges that indeed the

business did not generate any income at all. The complaint alleges causes of action for fraud and breach of contract. In the other action, the seller, the defendants here sued the plaintiff purchaser for the failure to make the first payment pursuant to the promissory note and security agreement that accompanied the note and asset purchase agreement. The complaint in the other action alleges seven causes of action including breach of contract, unjust enrichment, quantum meruit and related claims. Thus, while the present action alleges the defendants engaged in improprieties the other action alleges the plaintiff has not fulfilled its obligations based upon those improprieties. This motion for consolidation has now been filed.

Conclusions of Law

It is well settled that when two cases represent common questions of law or fact then there should be a consolidation (Moses v. B & E Lorge Familt Trust, 147 AD3d 1043, 48 NYS3d 427 [2d Dept., 2017]). A party objecting to the consolidation has the burden of demonstrating prejudice which harms a substantial right (Oboku v. New York City Transit Authority, 141 AD3d 708, 35 NYS3d 710 [2d Dept., 2016]).

In this case the two lawsuits clearly concern the same questions of law and fact, namely whether the defendants fraudulently misrepresented the value of the bagel store and

whether that misrepresentation permitted the plaintiff purchaser to withhold any further payments. The defendants assert that "the actions differ insofar as the instant action concerns the contract between the parties, whereas in the 2020 Action further seeks a declaratory judgment relating to the premises as well as a money judgment pursuant to the promissory note, dated November 1, 2018 and the guaranty made as of November 1, 2018 by Ira Schorr and Mitchell Froelich. Thus, both actions involve the different issues of law" (see, Affirmation in Partial Opposition, ¶15). However, that is difficult to discern since at root both lawsuits really concern whether the purchase price of the bagel store was reasonable and whether any misrepresentation was involved. The mere fact the other action contains additional allegations of wrongdoing does not render both actions so different that consolidation would be an inappropriate abuse of discretion (see, St James Plaza v. Notey, 166 AD2d 439, 560 NYS2d 670 [2d Dept., 1990]).


However, consolidation is not possible whereby a plaintiff would also become a defendant and a defendant would also become a plaintiff. That would lead to juror confusion, in the event the case reaches trial and would prejudice the fair administration of the cases. Thus, the matters may be joined for all discovery. Therefore, based on the foregoing the motion seeking to join Index Number 524541/2020 with this case is granted. The clerk is

directed to consolidate both actions for the purposes of discovery. Further, without opposition the motion seeking to extend the time in which to file the note of issue is granted. The parties shall agree upon a mutual date and present such order to the court.

So ordered.

ENTER:

DATED: March 18, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC