Biondi v Coffeed Corp.
2021 NY Slip Op 31053(U)
April 2, 2021
Supreme Court, New York County
Docket Number: 655069/2019
Judge: Louis L. Nock

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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ALFONSO BIONDI and LANDING AT PIER 45 LLC,

Plaintiffs,

- v -

COFFEED CORPORATION, JPMORGAN CHASE BANK, N.A., TD BANK, N.A., KEVIN MCDONALD, JIE KANG, GIANCARLO COCO, SAHBA SALIMI, and DAVID BARBAG,

Defendants.

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INDEX NO. 655069/2019

MOTION DATE 10/14/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37

were read on this motion to/for DISMISS.

Upon the foregoing documents, and after argument on the record, it is ordered that the motion by defendant JP Morgan Chase Bank, N.A. ("Chase"), to dismiss the claims asserted against it in the verified complaint, under CPLR 3211 (a) (7) (failure to state a claim), is decided in accordance with the following memorandum.

BACKGROUND

The complaint alleges that defendant Coffeed Corporation entered into an agreement with plaintiff Alfonso Biondi whereby Biondi would serve as operations manager for Coffeed in connection with plaintiff "Landing at Pier 45" (hereinafter, "Pier 45"), a cafe licensed to Coffeed for its use. The agreement is submitted as NYSCEF Doc. No. 11. It is signed by Biondi and by defendant David Barbag on behalf of Coffeed. Defendant Sahba Salimi is alleged to be the Executive Chairman of Coffeed, and Barbag is alleged to be its CEO. The complaint alleges that Salimi and Barbag wrongfully and unilaterally withdrew funds out of Pier 45's operating

account at Chase which were dedicated to Biondi's management capital for payroll, vendor payments, and other uses recognized in the parties' agreement. Moreover, the agreement provides, at paragraph 1(B), that Biondi's compensation as manager would consist of 93% of the cafe revenue exclusive of tax and tips.

The agreement, at paragraph 3(P), provides that "In the event there are any expenditures that have to be paid from this account exceeding five thousand dollars ($5000), two signatories, one from COFFEED and one from AB [i.e., Alfonso Biondi] must sign the check or withdrawal from the account." The complaint alleges that Salimi and Barbag violated that provision by withdrawing funds in excess of $5000 from the account without obtaining Biondi's authorization. The complaint alleges that such actions ultimately resulted in Biondi's inability "to pay rent, payroll, utilities, [and] purveyors." The complaint further alleges that the unauthorized withdrawals by Salimi and Barbag resulted in Biondi's inability to support himself and his family, leading him toward Chapter 13 Bankruptcy. The remaining individual defendants, alleged to be members of Coffeed's board of directors, were allegedly complicit in the actions of Salimi and Barbag.

The complaint asserts causes of action against all defendants generally, for breach of the agreement, conversion, and unjust enrichment, allegedly causing injury to plaintiffs in an amount not less than $100,000.

Chase now moves to dismiss the complaint insofar as it is included as a party defendant herein, arguing that this is an internal dispute between Biondi on the one hand and his business associates involved in the above-summarized actions, having no bearing on Chase's completely neutral and benign role as the bank in which the subject account was maintained.

DISCUSSION

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court accepts the facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]). At the same time, however, allegations consisting of bare legal conclusions are not entitled to any such consideration (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137 [2017]; *Simkin v. Blank*, 19 NY3d 46 [2012]; *Maas v Cornell Univ.*, 94 NY2d 87 [1999]). Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery (*Connaughton*, 29 NY3d at 142; *See also, Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014]).

Plaintiffs Fail to State a Claim for Breach of Contract Against Chase

To state a claim for breach of contract, a plaintiff must allege, (1) the existence of a contract, (2) the plaintiff's performance pursuant to the contract, (3) the defendant's breach of his or her contractual obligations, and (4) damages resulting from the breach" (Canzona v Atanasio, 118 AD3d 837 [2d Dept 2014]). A party alleging a breach of contract must demonstrate the existence of a contract reflecting the terms and conditions of their purported agreement (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]).

Here, plaintiffs allege the existence of, and submit, the employment agreement signed by Barbag (on behalf of Coffeed) and Biondi. However, Chase is not a party to that agreement. Insofar as Chase is even mentioned in the complaint, it is alleged that after Biondi learned of the

withdrawals by Salimi and Barbag, he spoke to a Chase representative in order to have Chase commence an internal fraud investigation of the matter. The complaint alleges that Chase took action in said regard, but was lied to by Barbag (*see*, Complaint ¶¶ 34-37). Although the complaint allegations themselves fall short of a cause of action for breach of contract by Chase, Biondi has submitted an opposition affidavit which asserts that Chase "had an affirmative obligation to ensure that only the correct and authorized individual had access to the account" and that "norms mandate Chase obtain and keep certain documents on file including but not limited to, licensing agreements, certificate of incorporation, and articles of association" and that Chase failed "to heed" those "protocols" (NYSCEF Doc. No. 30 ¶¶ 6-8). A plaintiff may oppose a motion to dismiss by submitting an affidavit supplementing the allegations of the complaint (*see, Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665 [1st Dept 1993]). Although the affidavit appears to suggest a negligence claim, or a statutory or regulatory claim,[1] which are not claims formally asserted in the complaint, a motion to dismiss ought not be granted with prejudice as long as the allegations might "manifest any cause of action to be valid" (*id.*, at 666; *see also, Leon v Martinez*, 84 NY2d 83 [1994] [on a motion to dismiss the court determines only whether the facts as alleged fit within any cognizable legal theory]).

But Chase's counsel raises an important point. Counsel asserts – without submitting any evidence – that there is a "Deposit Account Agreement" between Pier 45 and Chase which directly governs Chase's relationship with Pier 45, and that said agreement absolutely authorized

[1] Biondi's affidavit makes reference to "Federal law known as the Know Your Customer requirements ('KYC')" and "Anti-Money Laundering ('AML') laws and regulations" (NYSCEF Doc. No. 30 ¶ 5). However, those banking regulations were promulgated pursuant to the USA Patriot Act (Pub L 107-56, 115 US Stat 272) and Bank Secrecy Act (31 USC § 5311 *et seq.*), which do not provide a private right of action; nor do they give rise to a duty of care predicated upon those regulations' monitoring requirements (*see, Frankel-Ross v Congregation Ohr HaTalmud*, 2016 WL 4939074 [SD NY Sept 12, 2016]; *In re Agape Litig.*, 681 F Supp 2d 352 [ED NY Jan. 29, 2010]). That said – nothing prevents plaintiff from attempting to persuade a trier of fact that any act or omission by Chase might have constituted common law negligence.

Barbag to withdraw funds from the account at will (*see*, NYSCEF Doc. No. 33 at 2, 3, 4). Remarkably, though: despite the critical aspect of such an agreement, referred to by Chase's counsel multiple times, said counsel has not submitted a copy of it, which counsel certainly could have done under CPLR 3211 (a) (1) (a defense founded upon documentary evidence). In the absence of the actual Deposit Account Agreement, this court cannot ignore the possibility of a negligence cause of action, as plaintiffs have suggested in their affidavit submitted in opposition to the motion to dismiss.

Regardless, plaintiff has not stated a cause of action for breach of contract against Chase where the only contract relied upon in the complaint is a contract to which Chase is not a party; i.e., the employment contract between Coffeed and Biondi. In the absence of the Deposit Account Agreement, this court cannot foreclose the possibility of a negligence claim against Chase, which plaintiff has not pled in the complaint, but which this court might be amenable to entertaining through the vehicle of an amended complaint.

Thus, the first cause of action, for breach of contract as against Chase, is dismissed, without prejudice to the filing of an amended complaint asserting a cause of action for common law negligence, subject to proof. In the event of such filing, though: Chase will be free to move to dismiss that cause of action based on documentary evidence, to include the Deposit Account Agreement insofar as it may demonstrate that it authorized Chase to allow Barbag to withdraw account funds without restriction.

Plaintiffs Fail to State a Claim for Conversion Against Chase

In order to state a claim for conversion, a plaintiff must allege "legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant(s) exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights"

(*Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 592 [2d Dept 2007]). With respect to the "specifically identifiable funds" element, "funds deposited in a bank account are not sufficiently specific and identifiable, in relation to the bank's other funds, to support a claim for conversion against the bank" (*Chemical Bank v Ettinger*, 196 AD2d 711, 714 [1st Dept 1993]). But beyond that, the complaint alleges that Biondi is the rightful owner of 93% of the revenue that comes into Pier 45 and that Salimi and Barbag intentionally diverted such revenue to themselves, and with the acquiescence of the remaining individual defendants. Nothing in said regard translates into a conversion of said funds by Chase. Chase did not receive the proceeds of the account; i.e., it did not "covert" those funds. Rather, Salimi and Barbag did, allegedly. Absent a conversion by Chase of the account funds, its facilitation of Barbag's withdrawal of account funds (perhaps, indeed, in accordance with the Deposit Account Agreement) cannot sound as a "conversion" of account funds. This second cause of action, as against Chase, for conversion, is, therefore, dismissed.

Plaintiff Fails to State a Claim for Unjust Enrichment Against Chase

The elements of a cause of action for unjust enrichment are: (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Mobarak v Mowad*, 117 AD3d 998, 1001 [2d Dept 2014]). The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*see*, *Sperry v Crompton Corp.*, 8 NY3d 204 [2007]; *Paramount Film Distrib. Corp. v State of N.Y.*, 30 NY2d 415, *rearg denied* 31 NY2d 709 [1972], *cert denied* 414 US 829 [1973]).[2]

[2] Obviously, if the Deposit Account Agreement, in fact, exists and is consistent with counsel's representation of it, a cause of action for unjust enrichment could not be sustained (*see, ClarkFitzpatrick, Inc. v Long Island R.R. Co.*, 70

Here, plaintiffs merely claim that "all of the defendants were unjustly enriched by the actions of Salimi and Barbag" (Complaint ¶ 60). Plaintiffs further allege that, "Salimi and Barbag retained thousands of dollars at the Plaintiff's expense and for all of the Defendants' benefit (*id.*, ¶ 61). Even accepting these allegations as true, the complaint fails, as a matter of law, to sufficiently allege that Chase was enriched at plaintiffs' expense. Importantly, plaintiffs do not allege that Chase retained any of the alleged funds. Since plaintiffs fail to make out the elements of a claim for unjust enrichment, the claim must be dismissed (*see, GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569 570 [2d Dept 2015] ["Even accepting these allegations in the amended complaint as true, the amended complaint failed, as a matter of law, to sufficiently allege that U.S. Bank was enriched at the plaintiff's expense."). The mere fact that the subject account, like any account, generated ordinary administrative fees does not persuade the court "in equity and good conscience" (*Mobarak v Mowad, supra*) that such ordinary bank fees form the basis for a cause of action against Chase, which did not retain one penny of actual account funds for itself. Therefore, the third cause of action, for unjust enrichment, as against Chase, is dismissed.

Accordingly, it is

ORDERED that the motion to dismiss the causes of action of the verified complaint as against defendant JP Morgan Chase Bank, N.A., is granted, and said causes of action as against said defendant are dismissed, without prejudice to plaintiffs' right to file an amended complaint limiting any claim against said defendant to common law negligence; and it is further

NY2d 382 [1987]; *Cornhusker Farms, Inc. v Hunts Point Coop. Mkt.*, 2 AD3d 201 [1st Dept 2003]). However, as noted, no such agreement has been submitted yet in this action.

ORDERED that, in the event of filing of such amended complaint, said defendant will be free to move to dismiss such claim on the basis of documentary evidence, to include any Deposit Account Agreement between itself and other parties to this action.

This will constitute the decision and order of the court.

ENTER:

4/2/2021
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**