

Young S. Chung v Xie
2021 NY Slip Op 31167(U)
April 7, 2021
Supreme Court, Kings County
Docket Number: 503139/2020
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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YOUNG S. CHUNG, individually and on behalf of
URBAN FRESH CORP. and 11 UM FOOD CORP.,

Plaintiffs, Decision and order

- against -

Index No. 503139/2020

COLIN K. XIE, BARBARA JANUS, JUICEBROTHERS,
LLC, AND DOES 1-100

April 7, 2021

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3025(b) seeking to amend the complaint. The motion is partially opposed. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, the plaintiff Young Chung and the defendant Colin Xie are equal owners of two grocery stores, one located in Queens County and the other in Kings County. The plaintiff alleges the defendant has failed to pay his share of a business loan and owes over \$58,000. The plaintiff asserts that he cannot continue to pay his share as well as defendant's share and this can cause great damage to the future of the business. In addition, the plaintiff alleges the defendant used over one million dollars of business money to pay for personal debts from August 2018 through June 2019. The defendant counters the plaintiff utilized and basically stole over \$400,000 of the business for his own personal needs. The plaintiff seeks to add

various causes of action and the defendant opposes the inclusion of four causes of action, namely the third, fourth, eleventh and twelfth causes of action of the proposed amended complaint.

Conclusions of Law

A party may be allowed to amend or supplement a pleading at any time by leave of court and such leave shall be "freely granted" unless the amendment is palpably insufficient or clearly devoid of merit (Lomeli v. Falkirk Management Corp., 179 AD3d 660, 116 NYS3d 332 [2nd Dept. 2020], CPLR §3025(b)). The decision whether to grant such leave is within the court's sound discretion and such discretion will not lightly be disturbed (AFBT-II LLC v. Country Village of Mooney Pond Inc., 21 AD3d 972, 801 NYS2d 366 [2nd Dept. 2005]). Generally, leave to amend should be granted where there is no significant prejudice or surprise to the defendants, and where the documentary evidence submitted in support of the motion indicates that the proposed amendment to the pleading may have merit (Pike v. New York Life Insurance Company, 72 AD3d 1043, 901 NYS2d 76 [2d Dept., 2010]).

The defendant objects to the third, fourth and eleventh proposed causes of action because they all refer to the fact defendant Xie did not pay his share of loan payments that were due even though he was a guarantor of such payments. The third

cause of action alleges conversion committed by Xie and is asserted derivatively. Specifically, the Amended Complaint states that "Defendant Xie has further maintained ownership, possessory, and property rights over goods and services purchased solely for his own personal use and benefit through, as set forth above, at least \$2,952,300.00 taken from the Companies to pay Defendant Xie's personal credit cards" (see, Proposed Amended Complaint, ¶ 132). The fourth count asserts a direct claim for conversion against Xie. The proposed Amended Complaint alleges that "Defendant Xie removed \$530,390.82 from Urban Fresh leaving the Company without sufficient funds to service its Loan past November 2019" (see, Proposed Amended Complaint, ¶ 137). It is true that both causes of action also assert that Xie did not pay his share of a loan and that such payments were necessarily borne by the plaintiff, however, that allegation is a mere consequence of the conversion alleged not the crux of the actual allegation. Thus, the mere fact the plaintiff had to pay for loans that were the responsibility of Xie does mean the allegations "are based upon the loan payments owed by Urban Fresh" (see, Memorandum of Law in Opposition, page 6).

Thus, examining the claims for conversion, it is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership

over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). As the Court of Appeals explained "a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession...Two key elements of conversion are (1) plaintiff's possessory right or interest in the property...and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see, Colavito v. New York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006]). Therefore, where a defendant "interfered with plaintiff's right to possess the property" (Hillcrest Homes, LLC v. Albion Mobile Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred. Therefore, at this juncture, the motion seeking to amend the complaint to add the third and fourth causes of action is granted.

Likewise, the eleventh cause of action, assertions there were violations of New York Business Corporation Law §720 is properly pled. The Amended Complaint asserts that "Defendant Xie neglected, failed to perform, and violated his duties in the management of Urban Fresh by, among other things: (i) stealing corporate assets; and (ii) failing to pay his share of loan payments owed by Urban Fresh, totaling \$60,000.00 to date; (iii) using Urban Fresh funds to pay for 11 UM's credit cards and to

pay for lavish personal expenses” (see, Proposed Amended Complaint, ¶ 179). The inclusion of Xie’s failure to pay his share of a loan due is not the crux of the violation of the business corporation law. Indeed, the allegation asserting theft of corporate assets and utilizing corporate assets for personal use are clearly asserted even without any mention of any loan payments not made. Again, that language merely supports the plaintiff’s consequences of dealing with Xie’s conduct and is not the basis upon which the allegation rests. Therefore, the motion seeking to amend the complaint to include the eleventh cause of action is granted.

The twelfth cause of action alleges fraud. It is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O’Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]).

The proposed Amended Complaint does not specifically allege any representations or omissions at all that could constitute fraud. First, the allegations are entirely conclusory merely

noting that the defendants materially misrepresented facts through actions and omissions. Thus, the Amended Complaint states that "as a director, secretary and treasurer of the Companies, Defendant Xie knowingly made numerous materially false statements and representations on behalf of himself and the Companies" (see, Proposed Amended Complaint, ¶ 183). However, no facts whatsoever are presented detailing the misrepresentations or any omissions. The Amended Complaint does not provide any accompanying information such as when such material misrepresentations were made, in what context they were made and how such statements were misrepresentations and how there was reliance upon them. Thus, pursuant to CPLR §3016(b) to plead fraud the complaint must "sufficiently detail the alleged conduct" and contain fact that "are sufficient to permit a reasonable inference of the alleged conduct" (Pludeman v. Northern Leasing Systems Inc., 10 NY3d 486, 860 NYS2d 422 [2010]). In the Amended Complaint in this case there are absolutely no facts supporting allegations of fraud. The allegations merely contain conclusions that fraud was committed without explaining, with the detail required, how such fraud occurred. The Amended Complaint alleges misrepresentations made by Xie regarding the expenses charged to the company's credit cards. However, even if that allegation is true there is nothing demonstrating there was any reliance upon that misrepresentation.

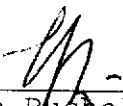
Further, allegations Xie used company funds for personal benefit is not fraud. The fraud claim is really another attempt to assert Xie stole corporate funds. That allegation is sufficiently represented in the other causes of action. Thus, a complaint that alleges fraud "absent specific and detailed allegations establishing a material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth, scienter, justifiable reliance, and damages proximately caused thereby, is insufficient to state a cause of action for fraud" (Old Republic National Title Insurance Company v. Cardinal Abstract Corp., 14 AD3d 678, 790 NYS2d 143 [2d Dept., 2005]).

Therefore, the motion seeking to amend the complaint to assert the proposed twelfth cause of action is denied.

So ordered.

ENTER:

DATED: April 7, 2021
Brooklyn N.Y.



Hon. Leon Richelsman
JSC