

<b>NYC Green Transp. Group, LLC v Kirmani</b>
2021 NY Slip Op 31483(U)
April 30, 2021
Supreme Court, New York County
Docket Number: 657533/2019
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*

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NYC GREEN TRANSPORTATION GROUP, LLC, NURIDE  
TRANSPORTATION GROUP, LLC, GETCARS GROUP,  
LLC

Plaintiff,

- v -

KAMRAN KIRMANI,

Defendant.

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**INDEX NO.** 657533/2019

**MOTION DATE** 02/24/2020,  
05/04/2020

**MOTION SEQ. NO.** 003 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 62, 63, 65, 67, 69, 70, 71, 72, 73, 74, 80

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 81

were read on this motion to/for LEAVE TO FILE.

Kamran Kirmani's (the **Defendant**) motion for leave to file a sur-reply (Mot. Seq. No. 004) is granted because, under the circumstances, Mr. Kirmani filed his papers as soon as reasonably practicable, the delay was minimal, and there simply is no prejudice. NYC Green Transportation Group, LLC (**NYCGT**), NuRide Transportation Group, LLC (**NuRide**), and GetCars Group, LLC's (**GetCars**, together with NYCGT and NuRide, collectively, hereinafter the **Plaintiffs**) motion to dismiss (Mot. Seq. No. 003) is granted to the extent that the violations of the Fair Labor Standards Act and New York Labor Law (first and second counterclaims) as against NuRide and NYCGT are dismissed because the Defendant did not allege an employment relationship with these entities. The claim for piercing the corporate veil (third counterclaim) is dismissed because piercing the corporate veil is not recognized as a separate claim under New

York law. The breach of contract for the Prior Oral Agreement (hereinafter defined) claim (fourth counterclaim) is dismissed because it was superseded by a subsequent written contract for the same subject matter. The conversion claim (fifth counterclaim) is dismissed because this is duplicative of the breach of contract claim. The fraud claim (seventh counterclaim) is dismissed without prejudice because it is not pled with the requisite particularity under CPLR § 3016(b).

### **The Relevant Facts and Circumstances**

This action concerns the breakdown of the parties' business relationship following the Defendant's sale of his taxi business to the Plaintiffs and their Chairman, Nadim Ahmed. The Defendant owned a business where he financed livery cars that were leased and/or rented to individuals who were contracted by companies such as Uber and Lyft (NYSCEF Doc. No. 55, ¶ 82). The Defendant was subsequently introduced to the Mr. Ahmed, who offered to purchase the Defendant's business (*id.*, ¶¶ 83-84). Mr. Ahmed allegedly provided a business plan to the Defendant when they discussed the potential sale (*id.*, ¶ 84).

Mr. Ahmed initially entered into an oral agreement to purchase the Defendant's business for the sum of \$1,500,000 and pay all outstanding financing for the vehicles (the **Prior Oral Agreement**) (*id.*, ¶¶ 85-86). Pursuant to the Prior Oral Agreement, Mr. Ahmed paid the Defendant \$150,000 of the \$1,500,000 which the parties agreed would be paid within that year (*id.*, ¶ 88). Because of an investigation by the SEC, at Mr. Ahmed's request, the Defendant subsequently transferred all titles and licenses in the business to Mr. Ahmed (*id.*, ¶¶ 89-90).

On or about the time of the transfer, the parties entered into a Permit Leasing Agreement (the **Agreement**; NYSCEF Doc. No. 61), dated July 1, 2015, by and between 110 Cars Inc. (represented by the Defendant) and NYCGT, pursuant to which the Defendant agreed to arrange for NYCTG to acquire certain companies that owned or leased green taxi permits in exchange for the sum of \$1,000,000 (*id.*, §§1, 3). The Agreement contained an integration clause and also provided that it could not be amended without the written consent of the parties (*id.*, § 6[b]). The Defendant also alleges that he was to receive a salary of \$500,000 during the course of the year and that Mr. Ahmed only paid \$20,000 of the \$500,000 salary to which he was entitled in 2015 (*id.*, ¶¶ 91-92).

The Defendant claims that he was employed by plaintiff GetCars, which is wholly owned by plaintiff NuRide, for the years 2016 through 2019 (*id.*, ¶¶ 96-99, 111).<sup>1</sup> Although the Defendant was paid a yearly salary in 2016 and 2017 of \$150,000, he was partially paid for his salary of \$150,000 in 2018 and no salary was paid for 2019 (*id.*, ¶¶ 95-99). The Defendant further alleges that he owned an auto repair shop that serviced the Plaintiffs' vehicles and the Plaintiffs have failed to provide payment of \$451,459.47 for such work (*id.*, ¶¶ 102, 107; NYSCEF Doc. No. 70, ¶ 8).

The Plaintiffs commenced this action on December 17, 2019 alleging claims for (1) injunctive relief (first cause of action), (2) conversion (second cause of action), (3) unjust enrichment (third cause of action), and (4) breach of fiduciary duty (fourth cause of action). The Defendant filed

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<sup>1</sup> Although the Defendant alleges that he was employed by both NuRide and GetCars, the court presumes that the Defendant meant to refer solely to GetCars as it was wholly owned by NuRide. As such, the Defendant's employment relationship is explained with reference to GetCars only.

his answer (NYSCEF Doc. No. 55, the **Answer**) with counterclaims alleging (1) violation of the Fair Labor Standards Act (first counterclaim), (2) violation of New York Labor Law (second counterclaim), (3) piercing the corporate veil (third counterclaim), (4) breach of contract (fourth counterclaim), (5) conversion (fifth counterclaim), (6) unjust enrichment (sixth counterclaim), and (7) fraud (seventh counterclaim). The Plaintiffs responded by filing the instant motion to dismiss the counterclaims on February 24, 2020 (Mot. Seq. No. 003). Due to the COVID-19 pandemic, the Defendant was unable to file his opposition papers until May 4, 2020 at which time, he also moved for leave to file a sur-reply (Mot. Seq. No. 004).

## **Discussion**

### **I. Defendant's Motion to File a Sur-Reply (Mtn. Seq. No. 004)**

The Defendant is granted leave to file the sur-reply that accompanied the moving papers because he has demonstrated good cause for submitting these documents at a later date. The Defendant travelled to Pakistan shortly after the Plaintiffs filed their motion to dismiss. Although he was scheduled to return on April 3, 2020, he was unable to schedule a commercial flight due to the COVID-19 pandemic (NYSCEF Doc. No. 76 at 4). Although Defendant's counsel submitted his opposition to the Plaintiffs on April 10, 2020, the employment agreement was not included in the opposition papers because the Defendant had limited access to files while he was in Pakistan (*id.* at 1-2). After the Defendant returned on April 23, 2020, the motion for leave to file a sur-reply was filed on May 4, 2020 attaching the employment agreement. As such, the Defendant has a valid excuse for his late papers, the delay was minimal, and there is no prejudice to the Plaintiffs who had a full opportunity to address the sur-reply (*see U.S. Bank Trust, N.A. v Rudick*, 156 AD3d 841, 843 [2d Dept 2017] [holding that trial court properly exercised discretion to permit

sur-reply where there was valid excuse, minimal delay, and no prejudice]; CPLR § 2214[c]). Accordingly, the Defendant's motion for leave to file a sur-reply is granted.

## **II. Plaintiffs' Motion to Dismiss the Defendant's Counterclaims (Mtn. Seq. No. 005)**

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

### **A. Violation of the Fair Labor Standards Act (First Counterclaim)**

The Plaintiffs' motion to dismiss the claim for violation of the Fair Labor Standards Act (first counterclaim) is granted solely to the extent that the claims against NuRide and NYCGT are dismissed. The elements of a claim under the Federal Fair Labor Standards Act (FLSA) are that: (1) there existed an employer-employee relationship between the parties, (2) the employee's work involved interstate activity, and (3) that the employee worked hours for which minimum/overtime wages were not received (*Zhong v. August Corp.*, 498 F Supp 2d 625, 628 [SDNY 2007]). The Defendant alleges that he was employed by GetCars in 2016 through 2019 and adduces an Employment Agreement, dated January 1, 2016, pursuant to which GetCars employed the Defendant as a Managing Director and provided an annual base salary of \$120,000 (NYSCEF Doc. No. 55, ¶¶ 95-99; NYSCEF Doc. No. 77). The Defendant also alleges that his work involved interstate activity because he bought and sold vehicles in other states for the

Plaintiff (NYSCEF Doc. No. 76 at 5). The Defendant claims that he received partial payment for 2018 but nothing in 2019 (NYSCEF Doc. No. 55, ¶¶ 98-99). Under the circumstances, the Defendant has sufficiently alleged each element of a claim under the FLSA (*see DeJesus v HF Mgt. Servs.*, 726 F3d 85, 91 [2d Cir 2013] [employment is sufficiently alleged where pleadings state where party worked, outline their position, and provide dates of employment]). However, the Defendant does not allege that he had an employment relationship with NuRide or NYCGT. Accordingly, the branch of the Plaintiff's motion to dismiss the first counterclaim for a violation of the FLSA is granted solely to the extent that the claim asserted against NuRide and NYCGT is dismissed.

#### **B. Violation of the New York Labor Law (Second Counterclaim)**

The Plaintiffs motion to dismiss the claim for violation of the New York Labor Law (second counterclaim) is granted solely to the extent that the claim asserted against NuRide and NYCGT is dismissed. For the reasons set forth above, the Defendant has adequately pled that an employment relationship exists with GetCars such that he falls within the protection of New York Labor Law (Labor Law § 190). The Defendant also alleges that no wages were paid for 2019 and after he separated from GetCars so as to state a claim pursuant to Labor Law § 191(3). Accordingly, the branch of the Plaintiff's motion to dismiss the second counterclaim for violation of New York Labor Law is granted solely as to NuRide and NYCGT.

#### **C. Piercing the Corporate Veil (Third Counterclaim)**

New York does not recognize a separate cause of action for piercing the corporate veil (*Chiomenti Studio Legale, L.L.C. v Prodos Capital Mgt. LLC*, 140 AD3d 635, 636 [1st Dept

2016]). As such, dismissal of the claim for piercing the corporate veil as a separate cause of action is required.

#### **D. Breach of Contract (Fourth Counterclaim)**

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The Defendant alleges that he entered into a valid contract to sell his taxi business to the Plaintiffs for \$1,000,000. Pursuant to the Agreement, the Defendant worked daily in 2018 and 2019, and the Plaintiffs allegedly failed to pay him in full for those years (NYSCEF Doc. No. 55, ¶¶ 91-99, 152-170). Thus, the Defendant states a claim for breach of contract under the Agreement. However, the Defendant fails to state a claim for breach of the Prior Oral Agreement for the sum of \$1,500,000 because the Prior Oral Agreement was expressly superseded by the integration clause at Section 6(b) of the Agreement (NYSCEF Doc. No. 61, § 6[b]). Accordingly, the branch of the Plaintiffs' motion to dismiss the fourth counterclaim for breach of contract is granted solely to the extent of the Prior Oral Agreement.

#### **E. Conversion (Fifth Counterclaim)**

The conversion claim must be dismissed because it is premised on the theory that the Plaintiffs converted the Defendant's monies when they "failed [to] abide by the terms of the agreement" and that the Plaintiffs interfered with the Defendant's possessory interest by "refusing to honor the obligations pursuant to their agreements." These allegations are impermissibly duplicative of the Defendant's breach of contract claim (NYSCEF Doc. No. 55, ¶¶ 171-182; *see Fesseha v TD*

*Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]). Accordingly, the branch of the Plaintiffs' motion to dismiss the fifth counterclaim for conversion is granted.

#### **F. Unjust Enrichment (Sixth Counterclaim)**

The Plaintiffs motion to dismiss the unjust enrichment claim must be denied. The elements of unjust enrichment are “(1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). The Defendant has sufficiently alleged that the Plaintiffs were enriched at his expense by receiving the benefit of \$451,459.47 of auto repair work that he provided without payment (NYSCEF Doc. No. 55, ¶¶ 102, 183-189; NYSCEF Doc. No. 70, ¶ 8). Thus, the Defendant states a claim for unjust enrichment as to his auto repair work for the Plaintiffs. For the avoidance of doubt, the Defendant may not ground a claim for unjust enrichment as to any money owed under the Agreement as this is duplicative of his breach of contract claim (*see Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]). Accordingly, the branch of the Plaintiffs' motion to dismiss the sixth counterclaim for unjust enrichment is denied.

#### **G. Fraud (Seventh Counterclaim)**

The Defendant's fraud claim fails and must be dismissed without prejudice because the Defendant does not identify with particularity, in accordance with CPLR § 3016(b), what specific statement or statements were made by the Plaintiffs which induced him to sell his business (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The sole allegation is that the Defendant relied on a ninety-six-page business plan describing the

objectives of NYCGT when he contemplated selling his business to Mr. Ahmed (NYSCEF Doc. No. 72; NYSCEF Doc. No. 55, ¶¶ 84, 190-195). This is insufficient (*see Eurycleia*, 12 NY3d at 559 [pleadings do not need to provide unassailable proof but must allege basic facts that permit a reasonable inference of the alleged misconduct]). Accordingly, the branch of the Plaintiffs' motion to dismiss the seventh counterclaim for fraud is granted without prejudice.

Accordingly, it is

ORDERED that the Defendant's motion (Mtn. Seq. No. 004) for leave to file a sur-reply is granted; and it is further

ORDERED that the Plaintiffs' motion to dismiss (Mtn. Seq. No. 003) is granted to the extent of dismissing the counterclaims for violation of the FLSA as against NuRide and NYCGT (first counterclaim), violation of the NYLL as against NuRide and NYCGT (second counterclaim), piercing the corporate veil (third counterclaim), breach of contract for the Prior Oral Agreement (fourth counterclaim), and conversion (fifth counterclaim), but the claim for fraud (seventh counterclaim) is dismissed without prejudice; and it is further

ORDERED that the Plaintiffs shall file a reply to the Answer within 20 days of this decision and order; and it is further

ORDERED that the parties shall attend a remote conference on May 24, 2021 at 12pm.



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4/30/2021

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE