

<b>Conzentino v Reda</b>
2021 NY Slip Op 32283(U)
October 26, 2021
Supreme Court, New York County
Docket Number: Index No. 651624/2020
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LAURENCE LOVE **PART** **63M**

*Justice*

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CHARLES CONZENTINO, AMBULATORY SURGICAL  
CONSULTANTS, LLC, DAECREW 63, LLC, 1324 OCEAN  
LLC,

Plaintiffs,

- v -

CHRISTOPHER REDA, CRED A, LLC, SLJ BAR, LLC,  
NICOLE PASSARO, DAE LLC, ABC COMPANIES 1-10  
SAID NAMES BEING FICTITIOUS

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents,

The following read on defendants' order to show cause, i) to dismiss, CPLR 3212 - for lack of capacity, ii) to dismiss, CPLR 3212 - for failure to state a cause of action, iii) to quash any non-party subpoena, iv) to quash plaintiff's subpoena duces tecum and ad testificandum to JP Morgan Chase, NA, dated June 10, 2021 and served upon Citibank, N.A. on or about June 10, 2021, v) to quash plaintiff's subpoena duces tecum and ad testificandum to American Express Company, dated June 10, 2021, and served on or about June 10, 2021; and plaintiff's cross-motion i) for leave to amend the original complaint with the proposed first amended complaint, per CPLR 3025(b), ii) for an order to compel compliance with plaintiff's discovery demands, per CPLR 3124, and iii) to impose conditional sanctions for failure to comply with plaintiff's discovery demands, and iv) for an order to impose sanctions upon defendants for frivolous conduct, per 22 NYCRR 130-1.1.

This litigation involves the funding of a nightclub and restaurant establishment at 63 Gansevoort Street, New York, New York.

A Virtual Microsoft Teams Appearance was held on August 13, 2021 at 9:45 a.m. where both parties were in attendance. This court issued an interim order dated August 13, 2021, stating “a more substantial decision to follow” (see NYSCEF Doc. NO. 67).

Now the court addresses the substance of the order to show cause, the cross-motion, and various subpoenas.

CPLR 1001(a) defines necessary parties to be joined to an action as those parties who may “be inequitably affected by a judgment in the action ...”

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

The affidavit of Christopher Reda affirms,

“In January 2015, D63 became a member of SLJ Bar, owning a fifty percent (50%) membership interest in SLJ bar. The other fifty percent (50%) membership interest in SLJ Bar was held by James Haber. On September 7, 2016, Haber agreed to transfer one hundred percent (100%) of the SLJ Bar to D63 in exchange for payment of rent owed by SLJ Bar, my personal guaranty on the new amended lease and all outstanding liabilities for SLJ Bar. From January 1, 2015 to August 2015, Creda was the sole owner of D63 and owned a hundred percent (100%) membership interest in D63. On or about May 10, 2015 and June 10, 2015, Conzentino provided loans of a total of One Hundred Fifty Thousand and 0/100 (\$150,000) Dollars to Creda to be added to D63’s funding for building, furniture, fixtures and equipment for SLJ Bar. From August 2015 to July 2016, ASC invested approximately Five Hundred Nine Thousand,

Five Hundred and 0/100 (\$509,500) Dollars in D63 and in exchange for a seventy percent (70%) membership interest in D63. Between the loans and investments, Conzentino and ASC funded a total of Six Hundred Fifty-Nine Thousand, Five Hundred and 0/100 (\$659,500) Dollars into D63 for the acquisition of SLJ Bar. On or about May 9, 2019, Conzentino elected to waive his rights to the loan repayment and ASC relinquished its forty-nine percent (49%) membership interest in D63 totaling Six Hundred Fifty-Nine Thousand, Five Hundred and 0/100 (\$659,500) Dollars, in exchange for Eight Hundred Thousand and 0/100 (\$800,000) Dollars [the “Buy-Out”] (see NYSCEF Doc. No. 33 Pars. 10 – 11, 15 – 17, 22).

Plaintiff submits a text message attempting to show a “Buy-Out” (see NYSCEF Doc. No.

40).

The affidavit of named plaintiff – Charles Conzentino affirms,

“I am a principal of the plaintiffs, ambulatory surgical consultants, LLC, Daecrew63 LLC, 1324 Ocean LLC. I have made numerous efforts to seek discovery of the very financial information the (sic) supports the causes of action alleged in the First Initial Complaint and proposed First Amended Verified Complaint” (see NYSCEF Doc. No. 46 Pars. 1, 11). The Charles Conzentino affidavit continues, “Mr. Reda and I agreed to be 50/50 partners in the nightclub and restaurant business then located at 63 Gansevoort Street, New York, New York. [I]t is and has been my position that I hold a 50% ownership interest in SLJ Bar, LLC. It is and has been my position that D63 is the 100% owner of SLJ Bar, LLC, and that Ambulatory Surgical Consultants, LLC is a 50% owner of D63. I provided Mr. Reda with \$200,000, which Mr. Reda used to pay Mr. Haber. There was never any ‘loan’ made by myself ... to Mr. Reda or CREDA, LLC. It is and has been my position that any note or ‘loan’ documents Mr. Reda purports to have been executed by me are forged. There had been multiple times where Mr. Red and I had discussed the possibility of a ‘Buy-Out’ as a potential solution ... None of these discussions had ever materialized into a final written (or oral) agreement. [W]ith respect to all mentions of a ‘Buy-Out,’ ‘no longer has any interest in SLJ Bar,’ and ‘has no relationship to financial stake,’ the accuracy and truth of Reda’s positions are denied.” (see NYSCEF Doc. No. 46 Pars. 2 – 4, 6, 8).

Defendants' affirmation highlights plaintiff's lack of standing. "Plaintiff Charles Conzentino, Ambulatory Surgical Consultants, LLC and 1324 Ocean LLC lack standing to bring this action and the Complaint must be dismissed as to them, pursuant to CPLR 3211(a)(3) and CPLR 3212. Conzentino, ASC and 1324 Ocean improperly instituted this action on March 11, 2020, implicitly as a derivative suit, claiming indirect interest in SLJ Bar, LLC through Daecrew 63, LLC" (see NYSCEF Doc. No. 43 P. 7).

BCL 626(a) provides that a derivative action may be brought on behalf of a corporation "by a holder of shares or voting trust certificates or of a beneficial interest in such shares or certificates."

Defendants also affirm, "Conzentino also claims a membership interest in SLJ Bar through the holding entity ACS' membership interest in D63. However, Conzentino conveniently omits that ACS was bought out of D63" (see NYSCEF Doc. No. 43 P. 9).

Plaintiff's affirmation states, "[b]oth the Original Complaint, the proposed First Amended Complaint and Mr. Conzantino's affidavit in opposition to Defendants' Motion Sequence No. 2 raise material triable issues of fact that are in direct contradiction to Defendants' 'hail Mary' strained interpretation of text messages describing only a payment of money and failure to even make mention of any 'Buy-Out' or 'sale' or 'transfer' of any membership or ownership interest in D63 or SLJ Bar, LLC" (see NYSCEF Doc. No. 47 P. 61).

The motion court properly denied defendants' motion for summary judgment ... as premature ... as no representatives from defendants have been deposed, and the record suggests that crucial facts may be within defendants' knowledge, additional discovery is necessary (see *Jackson v. Hunter Roberts Construction Group, LLC*, 161 A.D.3d 666 [1st Dept. 2018]).

CPLR 3025(b) states, "[l]eave shall be freely given upon such terms as may be just."

ORDERED that defendants' motion to dismiss, CPLR 3212 – lack of capacity, is DENIED; and it is further

ORDERED that defendants' motion to dismiss, CPLR 3212 – failure to state a cause of action, is DENIED; and it is further

ORDERED that defendants' motion to quash any non-party subpoena is DENIED; and it is further

ORDERED that defendants' motion to quash plaintiff's subpoena duces tecum and ad testificandum to JP Morgan Chase, NA, dated June 10, 2021 and served upon Citibank, N.A. on or about June 10, 2021 is DENIED; and it is further

ORDERED that defendants' motion to quash plaintiff's subpoena duces tecum and ad testificandum to American Express Company, dated June 10, 2021, and served on or about June 10, 2021, is DENIED; and it is further

ORDERED that the plaintiff's motion for leave to amend the complaint herein is GRANTED, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that plaintiff's motion to compel defendants to comply with discovery is DENIED; and it is further

ORDERED that plaintiffs' motion for sanctions is DENIED.

ORDERED that counsel are directed to appear for a preliminary conference via Virtual Microsoft Teams, on December 22 , 2021 at 2:30p.m.

10/26/2021

DATE



LAURENCE LOVE, 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