

**Brooklyn Acquisition Holding LLC v Cipriani**

2022 NY Slip Op 31612(U)

May 16, 2022

Supreme Court, New York County

Docket Number: Index No. 652749/2021

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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BROOKLYN ACQUISITION HOLDING LLC, NORTHSIDE  
WHITE KNIGHT LLC,

Plaintiffs,

- v -

DANIEL CIPRIANI, DLC HOSPITALITY LLC, JAMES  
WISEMAN, JACOB SACKS, SEA WOLF SERVICES LLC,  
BROOKLYN CLEANING & MAINTENANCE SERVICES  
LLC, SEA OF WOLVES LLC, SEA WOLF TOO LLC,  
CYPRESS SERVICES LLC, DOE COMPANIES I-X

Defendants.

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INDEX NO. 652749/2021

MOTION DATE 09/20/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for DISMISS.

The counterclaim defendants’ motion must be granted solely to the extent that the unjust enrichment (fourth), quantum meruit (fifth), promissory estoppel (sixth) and fraudulent inducement (seventh) counterclaims are dismissed as duplicative of the breach of contract (third) counterclaim.

Reference is made to a Decision and Order (the **Prior Decision**), dated September 28, 2021, in a matter captioned *Daniel L. Cipriani v. James P. Wiseman, Jacob K. Sacks and Sea Wolf Services LLC*, Index 519963-2020, pursuant to which the Court (Rivera, J.) granted Mr. Cipriani’s CPLR § 3212 motion and held that Mr. Cipriani was a member of Sea Wolf Services LLC compelling an accounting of Sea Wolf Services LLC:

[P]laintiff has made a prima facie showing that he is a member of Sea World Services LLC, a member managed limited liability company, by demonstrating that the defendants James P. Wiseman and Jacob L. Sacks, signed a membership agreement making plaintiff a thirty (30) percent member of Sea Wolf Services LLC (*see Gould v Decolator, Cohen & DiPrisco, LLP*, --AD3d ---, 2021 NY Slip Op 05026 [2<sup>nd</sup> Dept 2021]).

In opposition, the defendants do not raise a triable issue of fact to rebut the plaintiff's prima facie showing. Accordingly, plaintiff is owed a fiduciary duty by the defendants as well as an accounting of the records of Sea Wolf Services LLC.

(NYSCEF Doc. No. 42).

For completeness, in opposition to Mr. Cipriani's summary judgment motion, the plaintiffs adduced the exact same Sea Wolves LLC SBA Borrower Information Form (Index 519963-2020 NYSCEF Doc. No. 126) and tax statements as they now adduce in this lawsuit (NYSCEF Doc. No. 28) to argue that Mr. Cipriani is not a member of Sea Wolves LLC. Having had a full and fair opportunity to litigate this issue, they are collaterally estopped from relitigating the same issue here (*Gamma Lending Omega LLC v Kaminski*, 197 AD3d 1066 [1st Dept 2021]). For the avoidance of doubt, relying on certain federal cases including *Simon v Safelite Glass Corp.*, 128 F3d 68, 72 (2d Cir 1997), the plaintiffs argue that Mr. Cipriani should be judicially estopped from asserting his ownership in Sea Wolves LLC. Judicial estoppel in New York is a narrow doctrine which precludes a party from taking a position inconsistent with a position taken in a prior proceeding upon which a tribunal has relied (*Lard-PT, LLC v Seokoh, Inc.*, 69 Misc3d 1207(A) at \*14 [Sup Ct, NY County 2020] citing *Kalikow 78/79 Co v State*, 174 AD2d 7, 11 [1st Dept 1992]). Putting aside that the Court (Rivera, J.) already has held in the Prior Decision that Mr. Cipriani is a partner of Sea Wolves LLC, nothing in the record suggests that the federal agency relied on the fact that Mr. Cipriani did not have an ownership interest in Sea Wolves LLC in issuing the loan. Nor can the counterclaim defendants rely on their own tax documents to

argue that the fact that they did not provide Mr. Cipriani with a K-1 precludes him from now arguing that he is a partner of Sea Wolves LLC. Simply put, he is not taking a position in this lawsuit inconsistent with a position he took with the taxing authority. He paid his taxes based on the forms he was provided (*cf. Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 881 NYS2d 369 (2009) (“the trial court properly exercised its discretion when it classified the money received by husband pursuant to the settlement agreement as marital property, given the fact that husband made representations that the money was business income for tax purposes”)).

Based on the Prior Decision, Mr. Cipriani is, in fact, entitled to a declaration that he is a thirty percent (30%) owner of Sea Wolves LLC (first counterclaim). It would also appear that Mr. Cipriani has also been granted the relief required under his second counterclaim in that the Prior Decision has already ordered an accounting. Additionally, the counterclaim defendants are not entitled to dismissal of the breach of contract (third counterclaim). Mr. Cipriani alleges that he was to be paid pursuant to a Management and Services Agreement which was to automatically renew unless properly terminated and then, upon termination, he was to receive a \$100,000 termination fee which he has not received (NYSCEF Doc. No. 13, ¶¶ 238-242). This is sufficient at this stage of the proceedings to make out a claim for breach of contract.

The counterclaims based on unjust enrichment (fourth), quantum meruit (fifth), promissory estoppel (sixth) and fraudulent inducement (seventh) now given the Prior Decision must be dismissed as duplicative of the breach of contract counterclaim and can not be plead in the alternative.

The counterclaim defendants are not entitled to dismissal of the counterclaim sounding in fraud (eighth) at this stage of the proceedings. As pled, among other things, Mr. Cipriani alleges that the counterclaim defendants put friends and family members on the payroll notwithstanding that they did not provide any services to the Sea of Wolves Restaurants (*id.* at ¶¶ 194, 277).

Inasmuch as the counterclaim defendants are alleged to have shut Mr. Cipriani out of the company and failed to provide him access to weekly reports or the books and records, the counter-claim defendants are also not entitled to claim that his pleadings fail to satisfy CPLR 3016(b).

Accordingly, it is

ORDERED that the counterclaim defendants' motion to dismiss is granted solely to the extent that the unjust enrichment (fourth), quantum meruit (fifth), promissory estoppel (sixth) and fraudulent inducement (seventh) counterclaims are dismissed as duplicative of the breach of contract counterclaim (third); and it is further

ORDERED that the counterclaim defendants shall file an answer on or before May 31, 2022; and it is further

ORDERED that the parties serve document demands on or before June 13, 2022; and it is further

ORDERED that the parties respond to document demands on or before July 13, 2022; and it is further

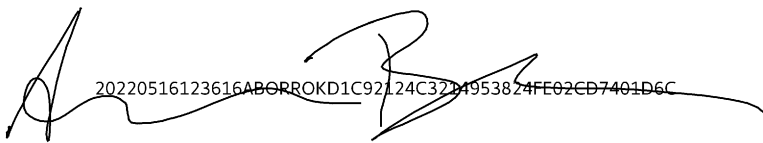
ORDERED that the parties complete document production or before September 14, 2022; and it is further

ORDERED that the parties complete depositions on or before October 28, 2022; and it is further

ORDERED that the parties complete fact discovery on or before November 11, 2022; and it is further

ORDERED that the parties file their Note of Issue on or before December 2, 2022, with dispositive motions to be filed within 30 days of the filing of the Note of Issue; and it is further

ORDERED that the parties appear for a status conference on **July 21, 2022 at 11:30 AM**. The parties shall provide an ESI protocol at or before the conference.



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5/16/2022

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

652749/2021 BROOKLYN ACQUISITION HOLDING vs. CIPRIANI, DANIEL L.  
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