

Krieger v Edri

2022 NY Slip Op 31929(U)

June 15, 2022

Supreme Court, Kings County

Docket Number: Index No. 532982/2021

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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RALPH KRIEGER,

Plaintiff,

Decision and Order

Index No. 532982/2021

-against-

DANIEL EDRI a/l da DANNY EDRI a/k/a DANNY ADRI
a/k/a SHAY EDRI a/k/a SHAY ADRI, MUSTARD PANINI
BAR, INC. and MUSTARD PANINI BAR a/k/a
MUSTARD PANINI BAR SI,

Defendant,

June 15, 2022

-and-

DERK CORP. d/b/a MUSTARD PANINI BAR,

Nominal Defendant,
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The defendant Mustard Panini Bar SI [hereinafter 'Mustard SI'] has moved seeking to dismiss the complaint pursuant to CPLR §3211 on the grounds it fails to state any cause of action. The plaintiff has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According to the Complaint the plaintiff Ralph Krieger and defendant Daniel Edri formed Derk Corp., on March 13, 2021. Each was a fifty percent owner of the corporation. The Complaint alleges that Edri applied for a loan without informing Krieger, sold assets of Derk without compensating Krieger and used the assets of Derk for his own personal use. Concerning Mustard SI the Complaint alleges that Edri essentially used Derk funds for the benefit of Mustard SI. Thus, Paragraph 33 of the Complaint asserts that upon information and belief "Edri used Derk's assets

and funds to purchase inventory for the benefit of defendant Mustard SI" (id). Paragraph 34 asserts that upon information and belief "Edri used Derk assets and funds for the benefit of defendant Mustard, Inc." (id) and Paragraph 35 asserts that upon information and belief "Edri used Derk assets and funds for the benefit of defendant Mustard SI" (id). Further, Paragraph 45 asserts, upon information and belief that Edri maintained an interest in Mustard Inc., and/or Mustard SI. Thus, the fifth and sixth causes of action of the Complaint seek claims for unjust enrichment against Mustard Inc., (Count Five) and Mustard SI (Count Six). Thus, Paragraph 107 of the Complaint alleges that "upon information and belief, Mustard Inc. received inventory and/or assets from Derk at no cost as a result of Edri's actions" (id) and Paragraph 110 of the Complaint alleges that "upon information and belief, Mustard SI received inventory and/or assets from Derk at no cost as a result of Edri's actions" (id). Further, the seventh cause of action seeks conversion and Paragraph 115 asserts that "upon information and belief, Mustard, Inc. and Mustard SI were provided inventory at the expense of Plaintiff as the funds used to purchase the inventory was taken from the Derk bank account" (id).

Mustard SI has now moved seeking to dismiss the causes of action asserted against it on the grounds it has no business dealings whatsoever with the plaintiff or Mustard Inc., and has

no involvement in any of the claims giving rise to the causes of action at all. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

To succeed upon a claim of unjust enrichment the plaintiff must demonstrate that another party was enriched, at the plaintiff's expense and that it is against equity and good conscience to allow the other party to retain what is sought to be recovered (Mandarin Trading Ltd., v. Wildenstein, 16 NY3d 173, 919 NYS2d 465 [2011]).

The Complaint alleges that the defendant Daniel Edri was affiliated with Mustard SI to support allegations of unjust

enrichment. In opposition David Adri the principal agent of Mustard SI asserts that Mustard SI maintained no contracts with the plaintiff or Derk Corp. However, the allegations are not contractual at all. Further, Mr. Adri does state that he did not "purchase, exercise ownership over, or use any assets from the Plaintiff or any other Defendants" (see, Affidavit of David Adri, ¶ 10) however, the affidavit provides no information whether defendant Edri maintained any ownership in Mustard SI. Thus, Adri's denial of any connection with this lawsuit is merely a factual dispute which is not a firm basis upon which to dismiss the lawsuit.

Thus, the Complaint alleges that Edri moved assets from Derk Corp., to Mustard SI. Whether Mustard SI has any connection to this lawsuit requires discovery. At this juncture the court cannot conclude there are no questions of fact that require further analysis and discovery. Therefore, the motion seeking to dismiss the unjust enrichment causes of actions is denied.

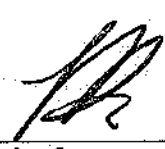
Turning to the claim for conversion, it is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 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. The plaintiff has adequately presented claims for conversion. Consequently, the motion seeking to dismiss this cause of action is denied. Therefore, the motion seeking to dismiss is denied.

So ordered.

ENTER:

DATED: June 15, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC