

Paleja v KP NY Operations LLC
2022 NY Slip Op 32735(U)
July 14, 2022
Supreme Court, New York County
Docket Number: Index No. 651826/2020
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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PIYUSH PALEJA,

Plaintiff,

- v -

KP NY OPERATIONS LLC, PRADEEP MALHOTRA, ANIKA MALHOTRA, VARUN MALHOTRA, KAILASH PARBAT RESTAURANTS PRIVATE LIMITED, KAILASA SPECIALTY CUISINE PRIVATE LIMITED, GARY MULCHANDANI, MUTHALAMPET MAHADEVAN, HOT BREAD FRANCHISE LLC, JOHN DOES

Defendants.

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INDEX NO. 651826/2020

06/17/2021,
06/17/2021,
08/18/2021,
09/17/2021

MOTION DATE

MOTION SEQ. NO. 002 003 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 27, 28 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 43, 44, 45, 57 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 008) 88, 89, 90, 91, 92, 93 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 009) 94, 95, 96, 97 were read on this motion to/for JUDGMENT - DEFAULT

Plaintiff, Piyush Paleja (plaintiff), commenced this action seeking a declaration stemming from an alleged agreement to purchase shares of a restaurant located in New York City. In motion sequence 002, co-defendant Kailasa Specialty Cuisine Private Limited (Kailasa) now moves pursuant to CPLR 3211(a)(8) to dismiss this action. In motion sequence 003, co-defendant Gary Mulchandani a/k/a Girish Mulchandani (Mulchandani) now moves pursuant to CPLR 3211(a)(7) to dismiss the complaint. Plaintiff cross-moves pursuant to CPLR 311 to permit alternate service on co-defendants Kailash Parbat Restaurants Private Limited (Kailash) and Kailasa, or in the alternative, pursuant to CPLR 306 for an extension of time to serve. In motion sequence 008, co-defendant KP NY Operations LLC (KP NY) now moves pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the complaint. In motion sequence 009, plaintiff moves pursuant to CPLR 3215 for a default judgment against non-appearing co-defendants Kailash and Muthalampet Mahadevan (Mahadevan). The motions are opposed.

FACTUAL ALLEGATIONS

This action arises from an alleged dispute over the ownership of a restaurant known as Kailash Parbat (the restaurant). According to the amended complaint, co-defendant KP NY Operations LLC (KP NY or the restaurant) owns the restaurant. Plaintiff was hired as a chef to work at the restaurant in February 2014 and worked as a chef until his separation from employment in late 2019. According to plaintiff, in late 2018, co-defendant Pradeep Malhotra, an investor in the restaurant, inquired whether plaintiff would be interested in purchasing his 10% ownership share in the restaurant. Plaintiff discussed the purchase of Pradeep Malhotra's share of the business with Malhotra, Mulchandani and Mahadevan. The latter two co-defendants were "involved in the [r]estaurant" (NYSCEF doc. no. 2, amended complaint at ¶35). The parties eventually agreed that plaintiff would pay \$60,000 in exchange for the 10% interest belonging to Pradeep Malhotra.

In January 2019, plaintiff met with Pradeep Malhotra, Mulchandani, Mahadevan, in which it was agreed that the \$60,000 payment would be made in two installments, once upon the signing of documents and the second in June 2019. According to plaintiff, the ownership shares would be transferred after the second payment. On February 12, 2019, plaintiff met with Pradeep Malhotra, Mahadevan, and the restaurant's head waiter, non-party Mosin Ali, who also performed bookkeeping services. During the meeting plaintiff executed an agreement which set forth the purchase price for the share, amount of membership shares to be exchanged, and the payment installations (February 12 agreement).

On February 20, 2019, the parties met again, wherein Mahadevan presented a pre-typed letter on KP NY's letterhead dated February 2019 and titled "Resolution Resolved." According to the resolution: "To[sic] resolved that Anika Malhotra is selling her 10% membership to [plaintiff] from KP NY OPERATIONS LLC as of 02/20/2019 at \$65000.00[sic] without incurring any capital gain or loss" (compl at ex b). Notably, the resolution differed from the February 12 agreement in that plaintiff would purchase the shares from Anika Malhotra, Pradeep Malhotra's daughter, and that the cost of the shares increased from \$60,000 to \$65,000. Plaintiff claims that he orally agreed with Pradeep Malhotra to pay the amount originally agreed upon in the February 12 agreement. Plaintiff alleges that Pradeep Malhotra and Anika Malhotra had both apparent authority and actual authority to both transfer and approve the transfer of shares and to bind the restaurant as it related to the agreement to purchase shares.

Also on February 20, 2022, plaintiff gave three checks to Pradeep Malhotra, in the amounts of \$10,000, \$15,000, and \$35,000, the last of which was postdated to June 2019. Plaintiff did not receive a share certificate at that time. In March 2019, the parties determined that the postdated check had an error written on it and had to be redrafted, which plaintiff did. At this time, Anika Malhotra gave plaintiff an ownership certificate in the restaurant which on its face was for 5% ownership and was endorsed by Anika Malhotra. According to the amended complaint, Pradeep Malhotra and Anika Malhotra advised plaintiff that the remaining 5% of shares were being held by Mulchandani until Pradeep Malhotra's green card application status was resolved.

Plaintiff alleges that from March 2019 through August 25, 2019 he requested that Mahadevan, Mulchandani, Pradeep Malhotra, and Anika Malhotra give him the share certificates representing the balance of the shares. Plaintiff did not receive the requested certificate.

On August 25, 2019, plaintiff met with Pradeep Malhotra and Mahadevan wherein the parties entered into a "second agreement," which allegedly stated that \$5,000 would be transferred to Pradeep Malhotra and the remaining \$30,000.00 would be held in escrow until the actual share transfer occurred. Plaintiff made full payment pursuant to the second agreement by means of a bank check dated August 26, 2019. At the request of Pradeep Malhotra, the check was made payable to his son, co-defendant Varun Malhotra. According to the amended complaint, Pradeep Malhotra withdrew the \$30,000 to be held in escrow prior to the transfer of shares.

As of August 2019, plaintiff still did not receive the share certificate representing the balance of shares he claims to be entitled. Despite this, the restaurant was providing plaintiff with "dividend" checks since approximately April of 2019. According to plaintiff, in October 2019, the restaurant, through Mulchandani provided plaintiff with two checks, each in the amount of \$548.33, only one of which cleared. One of the checks was labeled "5% share September 2019" and the other was labeled "5% incentive." When plaintiff confronted Mulchandani as to why he was only receiving 5% of the profits and a stop payment had been placed on the second check, Mulchandani informed plaintiff that he put a stop payment on one of the checks, because of a dispute between Pradeep Malhotra and the restaurant in that Pradeep Malhotra allegedly owed money to the restaurant.

Sometime thereafter, plaintiff was discharged from employment and stopped receiving the dividend payments. Plaintiff thereafter made two formal requests to the restaurant for inspection of the books and records, once on February 11, 2020 and a second request on April 14, 2020. The restaurant denied both requests.

Plaintiff commenced this action seeking a declaratory judgment that he is a 10% owner of the restaurant, for an accounting, and to compel the restaurant to distribute plaintiff's share of the restaurant's profits. In the alternative, plaintiff seeks damages for fraud, unjust enrichment, breach of fiduciary duty, conversion, and breach of contract, and/or rescission of the alleged agreement to purchase shares of the restaurant.

DISCUSSION

CPLR 3211(a)(8)

In support of its motion to dismiss the amended complaint, Kailasa argues that plaintiff lacks personal jurisdiction over Kailasa. Specifically, Kailasa contends that it is not registered to do business in New York and does not conduct any business in New York. Kailasa further contends that the only allegations in the amended complaint concerning Kailasa are that it is an Indian corporation with its principal place of business in India and that it is a nominal shareholder of KP NY. Kailasa further contends that plaintiff has not properly served Kailasa in this action, and thus, Kailasa reserves all defenses related to service of process by way of the

foregoing limited notice of appearance. In opposition, plaintiff argues that the amended complaint alleges that Kailasa acts as the sole managing member of KP NY, and that plaintiff's claims arise directly from the operation of the restaurant. Moreover, plaintiff argues that Kailasa operated the restaurant through its agent, Mulchandani.

On a CPLR 3211(a)(8) motion to dismiss for lack of personal jurisdiction, it is the plaintiff who bears the “ultimate burden of proof” to establish a basis for such jurisdiction (*Am./Intl 1994 Venture v Mau*, 146 AD3d 40, 51 [2d Dept 2016]). “However, to successfully oppose such a motion, the plaintiff need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the court” (*id.*). Here, plaintiff argues that the basis for personal jurisdiction is the “transacting-of-business” provision contained in CPLR 302[a][1], which provides:

“§ 302. Personal jurisdiction by acts of non-domiciliaries:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state.”

CPLR 302(a) is a “single act statute” . . . proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted” (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], quoting *Kreutter v McFadden Oil Corp.*, 71 NY2d 460 [1988]).

Here, in opposition to Kailasa's showing that it did not transact business in New York, plaintiff argues that Mulchandani acted as an agent on behalf of Kailasa by operating the restaurant. “The conduct of an agent may be attributed to the principal for jurisdictional purposes where the agent engaged in purposeful activities in this state in relation to the transaction at issue for the benefit of and with the knowledge and consent of the principal and the principal exercised some control over the agent in the matter” (*Morgan v A Better Chance, Inc.*, 70 AD3d 481, 482 [1st Dept 2010]). Plaintiff only offers conclusory arguments that Mulchandani was Kailasa's agent. Kailasa correctly argues that the amended complaint does not allege Kailasa was involved in the transaction for the sale of shares or that Mulchandani was an agent acting on behalf of Kailasa. As plaintiff fails to allege the critical element of control—that Kailasa exercised any control over Mulchandani—plaintiff fails to demonstrate that Kailasa is subject to personal jurisdiction in New York State. Accordingly, Kailasa's motion to dismiss the amended complaint is granted.

CPLR 3211(a)(1) and (7)

CPLR § 3211(a)(1) states that: “A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that a defense is founded upon documentary

evidence.” Dismissal under CPLR 3211(a)(1) is warranted where the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim” (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson. LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). “Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus” (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1,6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

In support of his motion to dismiss, Mulchandani argues that the amended complaint only indicates that he was a passive observer of the alleged agreement to purchase shares of the restaurant. Further, Mulchandani argues that plaintiff fails to allege sufficient facts to pierce the corporate veil. In opposition, plaintiff argues that Mulchandani improperly stopped dividend payments to plaintiff despite plaintiff’s membership in the restaurant.

A member of a limited liability company may be liable to third persons injured by an intentional tort committed by or for the benefit of a corporate defendant (*D’Auvergne v Dis Is We Thing, Inc.*, 110 AD3d 948, 949 [2d Dept 2013]; *Retropolis, Inc. v 14th Street Development LLC*, 17 AD3d 209 [1st Dept 2005]). “A corporate officer is not held liable for the negligence of the corporation merely because of his official relationship to it. It must be shown that the officer was a participant in the wrongful conduct” (*Aguirre v Paul*, 54 AD3d 302, 304 [2d Dept 2008]). Here, plaintiff alleges that the restaurant, through Mulchandani, paid plaintiff dividends for his alleged proportionate ownership in the restaurant since April 2019 but stopped those payments in October 2019. According to plaintiff, Mulchandani stopped payment because “[t]here was dispute between [] Pradeep Malhotra and the [r]estaurant and that [] Pradeep Malhotra allegedly owed money to the [r]estaurant” (compl at ¶72). Thus, plaintiff alleges Mulchandani unilaterally reduced plaintiff’s share to make up for the difference owed to the restaurant. The court notes that Mulchandani does not dispute the substantive allegations against him for unjust enrichment.

In light of the above allegations against Mulchandani concerning his participation in the “stop payment” of dividends, plaintiff was not required to allege facts to pierce the corporate veil (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012] [internal citations and quotation marks omitted] [“a corporate officer who participates in the commission of a tort may be held individually liable, . . . regardless of whether the corporate veil is pierced”]; *Espinosa v Rand*, 24 AD3d 102, 102 [1st Dept 2005] [“a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced”]). Accordingly, Mulchandani’s motion to dismiss the amended complaint is denied.

In support of its motion to dismiss the amended complaint, KP NY argues that Anika Malhotra and plaintiff failed to adhere to the operating agreement’s rules and procedures for the

admission of a member to the restaurant. KP NY contends that the contracting parties failed to obtain majority interest approval concerning a right of first refusal and for additional membership interest, as required by the operating agreement. Thus, KP NY argues that plaintiff may not bring claims for declaratory judgment, inspection, and accounting against KP NY because plaintiff is not a member of the company. In opposition, plaintiff contends that Anika Malhotra acted with apparent authority when she entered into the sale of shares. Further, plaintiff argues that KP NY waived strict compliance with the operating agreement by paying dividends to plaintiff.

Here, KP NY fails to demonstrate that the operating agreement utterly refutes plaintiff's allegations that Anika Malhotra had authority to sell her shares to plaintiff. Indeed, plaintiff alleges that Anika Malhotra had "apparent authority in that the agreements [] were made with full knowledge and approval of the Restaurant's management and membership representatives" and that "Anika Malhotra had authority to act not only on her own behalf but on behalf of the other members of the Restaurant" (NYSCEF doc. no. 23 at ¶¶52-54). Accepting the facts as alleged in the amended complaint as true and according the plaintiff the benefit of every possible favorable inference, plaintiff adequately alleges that Anika Malhotra had authority to enter the agreement to purchase shares of the restaurant on behalf of KP NY, and thus, that plaintiff is a member of KP NY. Accordingly, the branch of KP NY's motion to dismiss those claims sounding in declaratory judgment, inspection, and accounting is denied.

Counsel for KP NY's affirmation stating that Kailasa, as the majority shareholder, did not approve of the transfer of shares does not constitute documentary evidence within the meaning of CPLR 3211(a)(1) (*see Attias v Costiera*, 120 AD3d 1281, 1283 [2d Dept 2014] [holding that "the affidavits submitted by the defendants, their attorney's affirmation, and the correspondence that was submitted in support of the defendants' motion did not constitute documentary evidence within the meaning of CPLR 3211(a)(1)"]. In any event, counsel's affirmation does not conclusively establish that plaintiff has no cause of action, but rather disputes the factual allegations contained in the amended complaint (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976]).

KP NY next argues that plaintiff fails to state a claim for unjust enrichment because plaintiff alleges that he paid Anika, Pradeep, and/or Varun Malhotra, not KP NY, and thus, KP NY was not enriched. To establish a cause of action for unjust enrichment a party must show that "(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" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Here, plaintiff alleges that the restaurant was unjustly enriched by not paying plaintiff dividends, which plaintiff alleges he was entitled to as a shareholder of the KP NY. Accordingly, the branch of KP NY's motion to dismiss plaintiff's claim sounding in unjust enrichment is denied.

In support of the branch of its motion to dismiss plaintiff's claim for conversion, KP NY argues that plaintiff did not have a possessory right or interest in any shares of KP NY because plaintiff was never a member of KP NY. "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" (*Colavito v New York Organ Donor*

Network, Inc., 8 NY3d 43, 49-50 [2006]). To state a cause of action for conversion, the plaintiff must plead its possessory right or interest in the property and the defendant's dominion over the property or interference with it, in derogation of the plaintiff's rights (*id.*). As discussed above, the amended complaint alleges that plaintiff was a member of KP NY. Further, plaintiff's claim for conversion relates to the money plaintiff paid for the additional shares in KP NY, not necessarily the shares in the company (compl at ¶¶106-108). As for the portion of plaintiff's claim for conversion concerning personal property in a storage locker located in the restaurant, counsel for KP NY's representation that those personal items were returned is insufficient to warrant dismissal.

In support of the branch of KP NY's motion to dismiss plaintiff's claims sounding in equitable estoppel, KP NY argues that it did not make a promise to plaintiff concerning membership and that the "dividend checks" do not qualify as a promise. In order to state a claim for equitable estoppel, a plaintiff must establish that defendant: (i) made a false representation or concealment of material facts; (ii) with the intention or expectation that the other party will act upon such conduct, and (iii) had actual or constructive knowledge of the true facts (*Forman v Guardian Life Ins. Co. of Am.*, 25 Misc 3d 1224(A) [Sup Ct, New York County 2009], *affd sub nom. Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886 [1st Dept 2010]). As discussed above, plaintiff alleges that Anika Malhotra, who was allegedly acting on KP NY's behalf, gave plaintiff a share certificate, endorsed by her, purporting to represent 5% of the restaurant's shares and promised to give plaintiff the remaining 5% of shares. The amended complaint further alleges that plaintiff received "dividend payments," resulting in his belief that he owned shares in the restaurant and would continue receiving payments. Accordingly, the branch of KP NY's motion to dismiss plaintiff's claim of equitable estoppel is denied.

CPLR 3215

In support of his motion for a default judgment against non-appearing co-defendants Kailash and Mahadevan, plaintiff demonstrates proof of service of the amended summons and complaint or summons with notice, facts constituting plaintiff's claims and Kailash and Mahadevan's default in answering or appearing (*see* CPLR 3215). Accordingly, plaintiff is entitled to a default judgment against those defendants.

The court notes that the default judgment here only binds the defaulting defendants and is not given preclusive effect to deprive the non-defaulting defendants of their right to litigate the issues, including the ownership of shares of KP NY (*see Henderson-Jones v City of New York*, 120 AD3d 1123, 1124 [1st Dept 2014] [default judgment against non-appearing defendants does not bind the appearing parties or otherwise affect their substantive rights]).

Accordingly, it is hereby

ORDERED that co-defendant Kailasa Specialty Cuisine Private Limited's motion pursuant to CPLR 3211(a)(8) to dismiss the complaint (motion sequence 002) is granted, and the compliant is dismissed as to Kailasa Specialty Cuisine Private Limited; and it is further

ORDERED that co-defendant Gary Mulchandani a/k/a Girish Mulchandani's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint (motion sequence 003) is denied; and it is further

ORDERED that plaintiff's cross-motion pursuant for an extension of time to serve co-defendant Kailasa Specialty Cuisine Private Limited (motion sequence 003) is denied as moot; and it is further

ORDERED that KP NY Operations LLC's motion pursuant to CPLR 3211(a)(1), and (7) is denied; and it is further

ORDERED that plaintiff's motion pursuant to CPLR 3215 for a default judgment against co-defendants Kailash Parbat Restaurants Private Limited and Muthalampet Mahadevan is granted, and an inquest shall be held as to damages at the time of trial of the remaining defendants; and it is further

ORDERED that the parties shall appear for a virtual conference on August 23, 2022 at 11:00 a.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

7/14/2022
DATE


DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE