

Gutenbrunner v Neue Galerie N.Y.

2023 NY Slip Op 31122(U)

April 7, 2023

Supreme Court, New York County

Docket Number: Index No. 157326/2022

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

-----X

KURT GUTENBRUNNER, YKG CORPORATION

Plaintiff,

- v -

NEUE GALERIE NEW YORK,

Defendant.

-----X

INDEX NO. 157326/2022

MOTION DATE 12/12/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DISMISS

In August 2022, plaintiff Kurt Gutenbrunner and YKG Corporation (hereinafter, "YKG," an entity entirely owned by Gutenbrunner) commenced the instant litigation against defendant Neue Galerie New York ("Neue Galerie"), alleging that Neue Galerie assumed control over and continued to operate the restaurant that Gutenbrunner/YKG established and managed for twenty years after YKG's lease-term in Neue Galerie's museum-premise ended. Gutenbrunner and YKG assert causes of action for unjust enrichment, constructive trust, and conversion against Neue Galerie. In motion sequence 001, Neue Galerie has moved to dismiss, in lieu of an answer, each cause of action pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. For the following reasons, Neue Galerie's motion is denied in its entirety.

BACKGROUND

Renowned chef and restaurateur Kurt Gutenbrunner owns YKG, which in 2001 executed a lease with Neue Galerie—as the owner of the eponymous museum of Austrian and German art—for space on the ground floor and basement of the museum. (NYSCEF doc. no. 2 at ¶ 7-9, complaint.) The purpose of the lease was to operate a restaurant that served the Austrian and Viennese cuisine in which Gutenbrunner specializes. Neue Galerie mandated that the newly formed restaurant would be called "Café Sabarsky," after the museum's co-founder Serge Sabarsky. As such, Neue Galerie granted YKG a purported license to use the name and accompanying goodwill during the term of the lease. (NYSCEF doc. no. 3 at § 40, sublease.) Instead of a fixed rent term, YKG agreed to pay Neue Galerie 10% of its monthly gross receipts. (Id. at § 5.1; NYSCEF doc. no. 2 at ¶11.) Further, though YKG would pay this percent of its receipts, § 5.1 (e) of the agreement provides that in no event shall "[Neue Galerie] be construed or held to be a partner or associate of YKG in the conduct of YKG's business," and that "the relationship between the parties shall remain solely that of landlord and tenant." (Id. at § 5.1 [e].) In establishing the restaurant, Gutenbrunner "created the restaurant concept, hired, trained, and managed staff, formulated proprietary recipes, and developed a network of hand-picked vendors

and suppliers, to create the restaurant's celebrated cuisine." (NYSCEF doc. no. 2 at ¶15.) In managing and marketing the restaurant, he invested time and resources to building the restaurant's profitability, including by creating social media accounts. (*Id.* at ¶ 16.) Per the complaint, the restaurant generated approximately \$620,000 in revenue in 2018 and \$880,000 in 2019, the year before the COVID-19 pandemic largely closed New York City. (*Id.* at ¶21.)

In 2010, the parties agreed to a ten-year extension of the lease. But in September 2020, Neue Galerie informed YKG that it would allow the lease to expire without a renewal (*id.* at 22), and on November 15, 2020, the lease ended. (*Id.* at 13.) In a letter to YKG, Neue Galerie's co-founder and President, Ronald Lauder, explained its desire to "focus on offering a smaller menu and... bringing the management of all Café operations in-house." (*Id.* at ¶ 38.) Thereafter, without Gutenbrunner's involvement, Neue Galerie began offering some of Gutenbrunner's former employees their jobs for its planned re-opening of Café Sabarsky, reached out to his suppliers to obtain the ingredients for recipes and dishes previously offered, and took over Café Sabarsky's social media accounts and proceeded to market the restaurant's "re-opening" with the exact same "old favorites" on its menu. (*Id.* at ¶¶ 23-25, 27-28, 31.) In sum and substance, he alleges that, under his management, Café Sabarsky became a valuable asset, generating consistent revenue year after year, and that, by continuing the Café without him after declining to renew the lease, Neue Galerie unjustly obtained ownership of the restaurant and now receives 100% of its profits (as opposed to its previous 10%), all without paying him anything.

As described *supra*, Gutenbrunner and YKG brought this action for unjust enrichment, constructive trust, and conversion, all of which Neue Galerie now moves to dismiss pursuant to CPLR 3211 (a) (7). It contends that Gutenbrunner and YKG do not have ownership interests in the staff, kitchen, vendors, recipes, or the "goodwill" from which the restaurant draws its customers. Therefore, without such ownership interest, it did not appropriate any of his property and was not enriched to Gutenbrunner's detriment. Further, Neue Galerie argues that Gutenbrunner cannot bring an equitable action when (a) the lease agreement governs the disputed issues (even though it expired), and (b) the lease agreement gives Gutenbrunner no rights in the restaurant post-termination of the lease.

DISCUSSION

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) However, the court need not accept as true bare legal and factual conclusions. (*Vig v New York Hairspray Co.*, 67 AD3d 140,145 [1st Dept 2009].) A courts' inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764.)

Unjust Enrichment and Conversion Causes of Action

To properly plead a cause of action for unjust enrichment, a plaintiff must allege facts that demonstrate: (1) the opposing party was enriched, (2) at plaintiff's expense, and (3) 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 Court of Appeals has explained that the theory of unjust enrichment contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between parties." (*Id.*, citing *IDT Corp. v Morgan Stanley Dead Witter & Co.*, 12 NY3d 132, 142 [2009].) It is available only in "unusual situations, when though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable running from the defendant to the plaintiff." (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012].)

Here, Neue Galerie maintains that Gutenbrunner has no proprietary interest in the employees/vendors (because New York recognizes, within certain bounds, an expansive freedom of contract) or the recipes (because recipes are generally incapable of being copyrighted and YKG/Gutenbrunner have not asserted they are trade secrets). If true, defendant asserts, then it could not have enriched itself at plaintiffs' expense. Failing this, Neue Galerie also contends that the lease agreement directly addresses and resolves in its favor the dispute as to proprietary interests of the restaurant post- lease termination because the lease does not "impose any restrictions on [Neue Galerie's] right to operate Café Sabarsky." (NYSCEF doc. no. 8 at 10, def. memo of law.) The Court finds neither argument availing, and that Gutenbrunner has adequately pled an unjust-enrichment cause of action.

From the Court's perspective, to argue, as Neue Galerie has (NYSCEF doc. no. 8 at 7-9), that neither YKG or Gutenbrunner have proprietary interests in the employees, vendors, and recipes that it used to re-open the Café (and therefore, to argue they have no proprietary interests whatsoever) reduces, into component parts, the actual alleged proprietary interest: the Café Sabarsky brand.¹ Nowhere does YKG and Gutenbrunner assert that the alleged unjust enrichment arises from Neue Galerie's control over who is hired or what vendors are being used. Rather, using the same employees, vendors, and recipes is evidence of the continuation of Café Sabarsky as designed by plaintiffs. The real proprietary interest asserted—one not contained in the lease—is based on plaintiffs' continued ownership of Café Sabarsky, as an entity, through the expiration of the lease, given that they were instrumental in creating the "goodwill" that turned the original Café Sabarsky from, as they describe, nothing into a viable asset. (*See* NYSCEF doc. no. 3 at § 5.1 ["Payment by [YKG] to [Neue Galerie] of Percentage Rent shall in no event cause Neue Galerie to be construed or held to be a partner or associate of YKG in the conduct of its business"].)

That the name/brand "Café Sabarsky" did not exist prior to the lease, and thus, was valueless, is important here. Paragraph 40, the licensing provision, purports to grant a license to YKG for the name "Café Sabarsky" and "its accompanying goodwill" for the duration of the lease, but that goodwill was non-existent when parties entered the lease. (NYSCEF doc. no. 3 at § 40.1.) Paragraph 40, from all appearances, grants what is termed a "naked" license. (*See*

¹ The Court also notes that plaintiffs do not need to establish a legal, possessory right to have an unjust enrichment claim. Unjust enrichment is an equitable cause of action

Alexander Ave. Kosher Rest. Corp v Dragoon, 306 AD2d 298, 300 [2d Dept 2003] [“A licensor must have some quality control of the goods produced by the licensee. Otherwise the licensor has engaged in uncontrolled or ‘naked’ licensing”].) That sort of control by Neue Galerie in the restaurant is entirely absent. As described extensively, YKG and Gutenbrunner hired and trained the staff, individually created each recipe, and marketed the restaurant on social media without contribution from Neue Galerie. At its core, YKG and Gutenbrunner created and developed an asset² that the lease made no allowances for, including what would happen to the ownership of the café after the dissolution of the lease.³ Accordingly, the Court finds that plaintiffs’ theory of recovery on their unjust enrichment claim is “predicated on conduct not covered under the contract.” (*Sergeant’s Benevolent Ass’n Annuity Fund v Renck*, 19 AD3d 107, 112 [1st Dept 2005].)

As to the elements of an unjust enrichment claim, plaintiffs have sufficiently pled that Neue Galerie obtained a benefit, to plaintiffs’ detriment, and that considerations of equity and justice weigh against allowing Neue Galerie to retain the profits and/or control of the restaurant on account of plaintiffs’ lease expiring.

For very similar reasons, plaintiffs have properly pled a conversion cause of action. Conversion requires a plaintiff to show (1) legal ownership or possessory right to property, and (2) defendant’s dominion over, or interference with, that property interest. (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; *NY Medscan, LLC v JC-Duggan Inc.*, 40 AD3d 536, 537 [1st Dept 2007].) Here, plaintiffs have adequately pled an ownership interest in both Café Sabarsky and its social media accounts.

Constructive Trust Cause of Action

A constructive trust may be imposed where property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the benefit. (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976].) Generally, under *Sharp*, plaintiffs must plead four elements—(1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment—but the failure to plead any one element is not necessarily fatal to the cause of action. (*Robinson v Day*, 103 AD3d 584, 587 [1st Dept 2013] [holding that plaintiff’s failure to plead one element not fatal because the *Sharp* factors are useful though not rigidly applied].) As the Court of Appeals explained in *Simonds v Simonds* (45 NY2d 233, 241 [1978]), the doctrine of constructive trust is broad in scope, and to give it that broad scope, courts should refrain from attempting to describe all the specific circumstances in which it applies. Here, the Court finds a specific form of the doctrine.

² Neue Galerie’s co-founder Ronald Lauder admitted as such in a preface that he wrote for Gutenbrunner’s book *Neue Cuisine*, writing that “Through his work [at Café Sabarsky] and at his other restaurants... Kurt has revitalized the entire tradition of Austrian cuisine. He has made Café Sabarsky... an inseparable part of the Neue Galerie.” (NYSCEF doc. no. 2 at ¶18.) Elsewhere, he wrote that Gutenbrunner’s Café was a “crucial factor to the success of the Neue Galerie.” (*Id.* at ¶19.)

³ Contrary to Neue Galerie’s assertion, paragraph 40 does not by its terms allow it to “retain” possession of Café Sabarsky any more than it does YKG and Gutenbrunner. The pertinent sentence provides, “This license is made without prejudice to the rights of [Neue Galerie] in and to the mark, name and accompanying goodwill for ‘Café Sabarsky.’” (NYSCEF doc. no. 3 at § 40.)

As to (1), plaintiffs have pled that a relationship of trust and confidence existed between Neue Galerie and YKG given how thoroughly their interests were aligned before the lease term ended; as to (2) and (3), however skeptical the Court may be that plaintiffs relied on an implicit promise from Neue Galerie, such a promise is not fatal to plaintiffs' cause of action (*see Metropolitan Bank & Trust Co. v Lopez*, 189 AD3d 443, 445-446 [1st Dept 2020] [holding plaintiff pled constructive trust claim where defendants had embezzled money from defendant]); and as to (4), discussed *supra*, plaintiffs have adequately pled Neue Galerie was unjustly enriched as their expense. (*Id.* ["Since the Bank has stated a cause of action against Lannon for unjust enrichment...the Bank's cause of action for the imposition of a constructive trust on such real property is legally sufficient"].) Lastly, whether or not plaintiffs have identified a specific *res* to be the subject of the trust is immaterial. (*See Rogers v Rogers*, 63 NY2d 582, 587 [1984].)

Accordingly, for the foregoing reasons, it is hereby

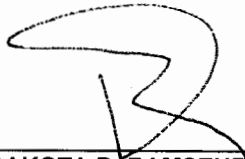
ORDERED that defendant Neue Galerie New York's motion to dismiss pursuant to CPLR 3211 (a) (7) is denied; and it is further

ORDERED that counsel for defendant and plaintiff appear at 60 Centre Street, New York, NY, Courtroom 341 at 10 a.m. on April 25th, 2023, for a status conference with the Court; and it is further

ORDERED that counsel for plaintiff serve a copy of this order along with notice of entry on all parties within ten (10) days of entry.

This constitutes the Decision and Order of the Court.

4/7/2023
DATE



DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: