

Sharp v Bar Fluid LLC
2023 NY Slip Op 31275(U)
April 10, 2023
Supreme Court, New York County
Docket Number: Index No, 656730/2022
Judge: Suzanne J. Adams
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SUZANNE J. ADAMS

PART

39TR

Justice

-----X

FRANK SHARP,

Plaintiff,

- v -

BAR FLUID LLC, ROBERT FLUET, ALLAN PIKUS

Defendant.

-----X

INDEX NO. 656730/2022MOTION DATE N/AMOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is ordered that defendant Allan Pikus' motion is granted to the extent set forth hereinbelow. Plaintiff is a nightlife promoter who was asked in or about July 2019 by defendants Pikus and Robert Fluet to launch a new nightclub with them. Defendant Bar Fluid LLC (d/b/a The Q) ("Bar Fluid" or "The Q") is a Manhattan night club, owned primarily by defendant Fluet. Defendant Pikus is also a nightlife promoter. The Q opened for business in June 2021, with plaintiff and Pikus acting as, *inter alia*, promoters and managers. Plaintiff "was terminated on May 23, 2022, as an at will employee." Plaintiff commenced this action in June 2022, and served the Amended Verified Complaint in October 2022 alleging eleven causes of action against some or all defendants, sounding in breach of contract, breach of fiduciary duty, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, unjust enrichment, accounting, and retaliation. Pikus now moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the action as against him, and for attorneys' fees and costs. Plaintiff opposes the motion.

(In a separate motion sequence (mot. seq. 004), defendants Bar Fluid LLC and Robert Fluet also move for dismissal. This motion is being decided separately and concurrently with the instant motion.)

It is well established that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law [cite omitted].” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Under CPLR 3211(a)(7), the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. *Leon*, 84 N.Y.2d at 88 (citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)).

The causes of action asserted against Pikus are the Third, Fifth, Seventh, and Eighth Causes of Action, sounding in breach of fiduciary duty, fraudulent misrepresentation, unjust enrichment, and accounting, respectively. The record before the court does not support a basis for any of these claims. To state a claim for breach of fiduciary duty, a plaintiff “must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct [citations omitted].” *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dep’t 2011). A fiduciary relationship exists between two parties when one party is under a duty to act for or advise for the benefit of the other party upon matters pertaining to their relationship. *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). Here, there is no evidence that Pikus had any contractual obligation to plaintiff or was in any way obliged to act on plaintiff’s behalf, so as to establish a fiduciary relationship giving rise to a fiduciary duty.

Furthermore, a fraudulent misrepresentation claim requires the assertion of “a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury [citations omitted].” *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011). Plaintiff does not allege any fraudulent statements made by Pikus relating to the “Letter of Employment and Annual Salary” and the agreement plaintiff entered into with Bar Fluid (Exhibits 1 and 2, respectively, to the Amended Verified Complaint). Nor does plaintiff plead any fraudulent conduct by Pikus with particularity as per CPLR 3016(b).

The causes of action for unjust enrichment and an accounting are premised upon a fiduciary or other contractual or legal relationship between plaintiff and Pikus, for which there is no evidence in the record. Finally, the court finds no basis for an award of attorneys’ fees to Pikus, and thus this portion of his motion is denied. Accordingly, it is hereby

ORDERED that defendant Allan Pikus’ motion is granted to the extent that the Amended Verified Complaint is dismissed as against him, with prejudice; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that defendant Pikus shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein.

This constitutes the decision and order of the court.

4/10/2023

DATE

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE


SUZANNE J. ADAMS, J.S.C.