

Brabury v Israel

2023 NY Slip Op 33551(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 657478/2019

Judge: Melissa A. Crane

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE **PART** **60M**

Justice

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JOHN BRABURY, JBMI LLC,

Plaintiff,

- v -

MARC ISRAEL, MIT NATIONAL LAND SERVICES, LLC.,
NEWMARK PARTNERS, L.P., LUIS BERTO ANTUNANO

Defendant.

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INDEX NO. 657478/2019

MOTION DATE 10/31/2022,
10/31/2022

MOTION SEQ. NO. 007 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 204, 206, 208, 222, 224, 225, 226

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 205, 207, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 223, 227

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In this action for breach of contract, recovery of damages, and other relief, individual Defendant Marc Israel moves for partial summary judgment, pursuant to CPLR 3212, dismissing the first cause of action for breach of contract contained in the second amended complaint (Motion Sequence 007). Plaintiff opposes and moves for partial summary judgment pursuant to CPLR 3212 granting judgment on the first, fifth (breach of fiduciary duty, asserted derivatively), sixth (unjust enrichment, asserted derivatively), eighth (accounting), and ninth (looting of assets, asserted derivatively) causes of action in the second amended complaint (Motion Sequence 008). Defendant opposes.

Defendant Israel is the president of Defendant MiT National Land Services, Inc. (“MiT”) and the entity’s sole owner prior to MiT’s sale in September 2018. The individual parties in this

action had a long-standing professional relationship prior to November 28, 2013, when Defendant Israel sent Plaintiff Bradbury an email relating to a potential business venture involving real estate broker education. The parties dispute the significance of this email, but it is uncontested that an entity titled JBMI, LLC (“JBMI”) was formed on March 13, 2014 and that each party was a 50% owner of the entity. It is further uncontested that Plaintiff provided some of the materials used in the hundreds of classes taught in affiliation with JBMI, that Plaintiff owned a website (www.nyrelaw.com) JBMI utilized, that Plaintiff received commissions relating to revenues JBMI generated, that Plaintiff received the entity’s accounting documents for review, and that Plaintiff secured the use of one real estate brokerage office in New York City where JBMI could present courses.

In mid-2018, Defendant asserts that JBMI began winding down its business operations. Plaintiff received no payments after October 7, 2017. JBMI presented the last of its courses in March 2019. Defendant sold his ownership in MiT to Newmark Partners LP (“Newmark”) pursuant to a September 2018 Securities Purchase Agreement – a sale that closed in December 2018. Defendant asserts that MiT had no ownership interest in JBMI, did not own any assets or business of JBMI, and that the sale of MiT to Newmark did not meaningfully involve JBMI. However, Plaintiff alleges that Defendant effectively sold JBMI’s primary assets – the courses and attendee lists developed over the years – and that Defendant began conducting courses through Newmark utilizing these assets. Defendant denies this. Plaintiff commenced this action on December 16, 2019. Plaintiff filed the Note of Issue on April 29, 2022 requesting a jury.

Pursuant to CPLR 3212(b), a motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” and “shall be

denied if any party shall show facts sufficient to require a trial of any issue of fact.” (*see also Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019] [“the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the moving party produces the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action.”] [internal quotation marks and citations omitted]).

Defendant argues that the November 28, 2013 email did not constitute a valid offer, that Plaintiff did not properly accept, and that the email could not by itself establish a joint venture relationship between the parties. However, as this court has noted in prior motion practice, Plaintiff does not solely rely on the email itself as the basis for his breach of contract claim. Instead, Plaintiff argues that the November 28, 2013 email provided a blueprint of sorts that the parties then implemented in the years-long business relationship that followed and that the contract at the heart of the breach of contract claim can be established based upon the totality of the circumstances, rather than solely based upon the November 28, 2013 email (*see generally Brown Bros. Elec. Contractors, Inc. v Beam Const. Corp.*, 41 NY2d 397, 399 [1977] [“In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look...to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds.”]; *see also* 22 NYJur2d, Contracts, § 29 [“The manifestation or expression of assent necessary to form a contract may be by word, act, or conduct which evinces the intention of the parties to contract”]; *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 10 AD3d 671, 672 [2d Dept 2004], *affd.*, 6 NY3d 371 [2006] [“Since the evidence demonstrated that the parties operated under the terms of the agreement... the clause was enforceable despite the fact that it was unsigned”]. Further, “[w]here there is a bona fide dispute as to the existence of a contract

... a plaintiff may proceed upon a theory of quasi contract as well as breach of contract and will not be required to elect his or her remedies.” (*Kramer v Greene*, 142 AD3d 438, 441-442 [1st Dept 2016] [citation omitted]; *see also Beach v Touradji Capital Mgt. L.P.*, 85 AD3d 674, 675 [1st Dept 2011] [“Plaintiffs should have been permitted to plead both contract and quasi-contract claims in the alternative”]; *see also Skrok v Grand Loft Corp.*, 218 AD3d 702, 704 [2d Dept 2023], quoting *Amusement Bus. Underwriters, a Div. of Bingham & Bingham, Inc. v Am. Intern. Group, Inc.*, 66 NY2d 880-881 [1985] [“While the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties’ intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact”]).

Defendant appears to cite *Schnur v Martin* in support of the contention that a written agreement on the division of profits and losses is necessary, but *Schnur*’s holding actually lends support to Plaintiff’s argument that a written agreement is not strictly necessary (*see Schnur v Marin*, 285 AD2d 639, 640 [2d Dept 2001] [“a sufficiently definite agreement with respect to the sharing of profits and losses...is an indispensable element of any joint venture agreement, *oral or written*. Therefore, the plaintiff failed to establish the essential elements needed to prove the existence of *an oral joint venture agreement*.”] [citations omitted, emphasis added]; *see also Cosy Goose Hellas v Cosy Goose USA. Ltd.*, 581 F Supp 2d 606, 622 [SDNY 2008] [“[I]n order for an agreement to qualify as a joint venture, co-venturers must agree, *expressly or impliedly*, to share liability for the possible obligations, debts, and losses of the joint venture itself.”] [emphasis added]). Under the circumstances, the existence of a contractual relationship between the parties and the terms of the contract are questions of fact. Defendant’s arguments that Plaintiff’s deposition testimony obviate the need for a trial are unpersuasive.

Accordingly, even if this court assumes Defendant's arguments *arguendo* that (1) the November 28, 2013 email did not by itself constitute a valid offer, (2) that Plaintiff did not accept this invalid offer, and (3) that the email did not establish a joint venture between the parties, a reasonable jury could conclude a relationship and agreement was nonetheless established based upon the parties' actions subsequent to the sending of the email. As such, Defendant has not met his burden to demonstrate there was no contract on which to base a breach of contract claim or otherwise demonstrate entitlement to judgment as a matter of law (*see e.g. Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019]).

However, Plaintiff has not met his burden either. Plaintiff argues that he is entitled to judgment as a matter of law on the breach of contract cause of action, because Defendant's deposition testimony establishes that the parties implemented the points set forth in the November 28, 2013 email, specifically that:

- They formed an entity entitled "JBMI LLC." with Bradbury and Israel named as the initial members;
- They discussed and refined their respective roles and responsibilities;
- They developed the business and proposed certain deals together;
- They prepared, organized, and presented hundreds of real estate education courses using in part the materials Bradbury contributed;
- They registered classes with the NYS Department of State, Division of Licensing Services;
- Israel sent Bradbury (as 50% co-member of JBMI) periodic reports of JBMI's revenues and distributions;

- Israel sent Bradbury reports of JBMI's performance and analyses of commissions earned; and
- Israel sent Bradbury checks from JBMI and K-1's Schedules in 2017 and 2018 showing Bradbury's distribution as "50% Partner" of JBMI.

However, as discussed *supra*, the issue of whether the contract underlying Plaintiff's cause of action for breach of contract was formed is an issue of fact and Plaintiff has not met his burden of demonstrating that a contract was established as a matter of law (*see e.g., Brown Bros. Elec. Contractors, Inc. v Beam Const. Corp.*, 41 NY2d 397, 399 [1977]).

Even assuming *arguendo* that the parties did have a contract, Plaintiff has not established entitlement to judgment as a matter of law on all of the elements of a breach of contract claim. A claim for breach of contract consists of four elements: "the existence of a valid contract, [the] plaintiff's performance of his obligations thereunder, defendant's breach," and "resulting damages." (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). Here, the documentary evidence does not conclusively establish the specific obligations of the contract. Nor has Plaintiff established at this stage that Defendant failed to perform any of these obligations or otherwise breached the contract. The cases that Plaintiff cites in support involved clear documentation specifying obligations (*see e.g., Lembo v Rosania*, 187 AD3d 544 [1st Dept 2020]).

Contrary to Plaintiff's assertions, Defendant disputes whether the sale of MiT to Newmark effectively involved the sale of JBMI assets, and a fact-specific inquiry is necessary to establish whether this occurred. Viewing the documentation in the light most favorable to the non-movant, a reasonable jury could conclude that the sale did not include JBMI assets and that Defendant accordingly did not breach any contract.

This same deficiency also necessitates denial of Plaintiff's requests for summary judgment on the derivative causes of action for breach of fiduciary duty, unjust enrichment and looting of assets. "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]). Here, Plaintiff has not established misconduct by the defendant as a matter of law.

Similarly, in order to prevail on a cause of action for unjust enrichment, "[t]he plaintiff must show that the other party was enriched, at plaintiff's expense, and that '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 Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd sub nom. Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012], citing *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011], quoting *Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 [1972]). Here, plaintiff has not established as a matter of law that Defendant's enrichment from the sale of MiT was at the expense of JBMI. Nor can the court resolve the question of the equity in permitting Defendant to retain any enrichment as a matter of law.

Similarly, Plaintiff's cause of action for looting of assets requires that a conversion took place and "[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 [2006]). "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." (*id.*, at 50, [citations omitted]). Here, however, Plaintiff has not established that Defendant has dominion over or interfered with Plaintiff's or JBMI's property.

Lastly, the issue of the sufficiency of the accounting relevant to this matter is a fact-specific inquiry. “[M]embers of a limited liability company may seek an equitable accounting under common law.” (*Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009]). The right to an accounting has been recognized where a party “has no adequate remedy at law...[and] defendants repeatedly refused to respond to demands for access to books and records.” (*See Atlantis Mgt. Group II LLC v Nabe*, 177 AD3d 542, 543 [1st Dept 2019]). However, Plaintiff has not met his burden of demonstrating by documentary evidence that the accounting Defendant provided was insufficient or that Defendant refused to respond to demands for access to books and records such that Plaintiff is entitled to judgment on the cause of action for accounting as a matter of law.

Finally, the court notes that plaintiff has filed a note of issue requesting a jury trial. However, the only claim subject to a trial by jury is plaintiff Bradbury’s claim for breach of contract. Plaintiff is not entitled to a trial by jury on the derivative claims (*see Moyal v Sleppin*, 139 AD3d 605 [1st Dept 2016]). Nor is the claim for an accounting subject to a trial by jury (*See Horizon Asset Mgt., LLC v Duffy*, 106 AD3d 594 [1st Dept 2013]). The parties are directed to attend a conference, over Microsoft teams, on October 31, 2023 at noon, to explain to the court why this case should proceed to a trial by jury. Any requests for relief not discussed herein are also denied. Accordingly, it is hereby

ORDERED, that the relief sought in Motion Sequence 007 and Motion Sequence 008 are denied.


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<u>10/5/2023</u> DATE			<u>MELISSA A. CRANE, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE