EO Inv., LLC v Gilroy
2023 NY Slip Op 34381(U)
December 13, 2023
Supreme Court, New York County
Docket Number: Index No. 651825/2021
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** — ***Justice*** — **PART** **14**

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EO INVESTOR, LLC, individually and derivatively on behalf of EMPLOYEES ONLY MIAMI LLC

Plaintiff,

- v -

WILLIAM GILROY, EMPLOYEES ONLY ENTERPRISES, LLC,DUSHAN ZARIC, IGOR HADZISMILJOVIC, JASON KOSMAS, HENRY LA FARGE

Defendants.

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INDEX NO. 651825/2021

MOTION DATE 12/11/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 64, 65, 66, 69, 70

were read on this motion to/for SUMMARY JUDGMENT.

Defendants' motion for summary judgment is granted.

Background

Plaintiff[1] contends that it invested in a bar in Miami Beach, Florida to be run by Employees Only Miami, LLC ("EO Miami"). EO Miami licensed a space from a hotel in Miami Beach in 2016 and began to operate a bar. Plaintiff argues that defendant Gilroy is a managing member of EO Miami.

Plaintiff alleges that Gilroy intentionally failed to ensure that EO Miami paid appropriate fees to the hotel where the bar was located and later, after a modification of the agreement with the landlord was reached in 2017, Gilroy again refused to pay the monies owed. Plaintiff insists that this resulted in EO Miami's removal from the premises and led to it losing its entire

[1] The Court previously dismissed plaintiff Investor Managing LLC from the case; the caption listed above reflects this dismissal.

investment in EO Miami. The remaining individual defendants are members of defendant Employees Only Enterprises LLC ("EO Enterprises") and plaintiff alleges that they conspired to get plaintiff to invest in the bar. EO Miami and EO Enterprises entered into a license agreement whereby EO Miami could *inter alia* use the Employees Only name (*see* NYSCEF Doc. No. 15). Defendant Gilroy testified that he "was" EO Enterprises, meaning that he controlled this entity.

In this motion, defendants move for summary judgment dismissing all of plaintiff's claims. They insist that defendant Gilroy did not engage in any actionable misconduct and that Mr. Gilroy's liability is limited to actions that constitute gross negligence, intentional misconduct or a knowing violation of law, none of which happened here. Defendants argue that the hotel where the bar was located was the party that actually violated the agreement by changing the locks. Defendants argue that the fraud claims against defendants lack any factual support. They insist that this lawsuit is a baseless attempt to recover "unfortunate" investment losses.

In opposition, plaintiff emphasizes that the bar and restaurant at the hotel operated for much of 2017 and 2018 at the Washington Park Hotel in Miami Beach. It argues that the business closed because Mr. Gilroy refused to accept a modification to the hotel agreement which would have averted the eviction from the space by the hotel. Plaintiff insists that Mr. Gilroy overlooked conflicts by serving as a managing principal for defendant EO Enterprises and managing EO Miami (the restaurant).

Plaintiff points to Mr. Gilroy's deposition for the proposition that he knew about the modification proposal from the hotel and that, for some unexplained reason, he decided not to execute this agreement which led to plaintiff losing its investment (worth over a million dollars).

In reply, defendants argue that plaintiff seemingly abandoned its tort claims. They observe that plaintiff did not address its claims for fraud and conversion and that if any of

plaintiff's claims should survive, it should be the seventh claim for breach of contract as against defendant Employees Only Enterprises, LLC.

Discussion

To be entitled to the remedy of summary judgment, 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 from the case" (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Plaintiff brings eight causes of action.

Claims against Gilroy

Plaintiff brings claims for a breach of fiduciary duty (first), conversion (second), tortious interference with contract (third) and tortious interference with prospective advantage (fourth) against Mr. Gilroy. Defendants assert that the business judgment rule precludes a finding of liability against Mr. Gilroy as a matter of law.

Plaintiff does not address the business judgment rule at all in its opposition. Instead, it claims that Mr. Gilroy is responsible for not executing an agreement with the hotel to modify the lease and ensure that EO Miami remained in the location.

The Court severs and dismisses these claims. "Under the business judgment rule, . . . absent a showing of discrimination, self-dealing or misconduct by board members, corporate directors are presumed to be acting in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. Thus, without a showing of a breach of fiduciary duty to the corporation, judicial inquiry into the actions of corporate directors is prohibited, even though "he results show that what the directors did was unwise or inexpedient" (*Jones v Surrey Co-op. Apartments, Inc.*, 263 AD2d 33, 36, 700 NYS2d 118 [1st Dept 1999]).

To the extent that the business judgment rule applies (which plaintiff does not directly contest), it shields Mr. Gilroy from liability. And, even if it does not apply in this situation, the fact is that defendants met their burden for summary judgment on each of the claims against Mr. Gilroy through his deposition testimony.

He testified that "Within a couple of months of opening we were not doing the volume of business that we hoped to do. There was an outbreak of [Zika]. People might not have realized that but right prior to opening there was an outbreak of [Zika]. And Miami Beach pretty much is a whole shut down. Not too long after that there was a hurricane also" (NYSCEF Doc. No. 60 at

76). Mr. Gilroy added that he spoke with one of plaintiff's owners (Nick Yannello) and they decided to not put any more capital in the project and asked the landlord for some consideration (*id*. at 78).

According to Mr. Gilroy, both he and Mr. Yannello told the landlord that they could not afford to pay rent (*id*. at 79) and the landlord agreed to let the restaurant remain in the space rent free (*id*. at 80). In fact, EO Miami was allowed to stay in the space rent free until December 2017 (*id*. at 82).

Mr. Gilroy observed that the landlord started charging rent in January and February of 2018 (for $20,000 per month) and that Mr. Yannello made clear at a meeting with the landlord that they did not want to "move forward unless we get a substantial reduction in rent" (*id*. at 83). Mr. Gilroy admitted that EO Miami never actually paid any rent (*id*.). He observed that in early November 2018, he (and Mr. Yannello) got an email from the landlord's attorney concerning a proposal about the restaurant (*id*. at 85-86).

Mr. Gilroy noted that the agreement was never finalized and a lock was put on the door before an agreement was executed (*id*. 86-87). Although he acknowledged that both he and Mr. Yannello liked the agreement (which would have modified the terms between EO Miami and the landlord), a proposed term that provided that "if [the landlord] terminated or sold the property it terminated our tenancy then they was [sic] to gave [sic] us $1.8 million dollars in compensation for our efforts and our ongoing business" (*id*. at 88) was unacceptable. Mr. Gilroy explained that "it went from that to a 30-day cancellation fee. Considering we're having a tough time making ends meet then it would be as if we're just running the place for them with no benefit to ourselves. I was not taking a salary. The place was not making profit. So they put a 30-day cancellation fee that was a big—like, why would we want to do this. It was clear at that point

they were looking for an exit strategy. The owner; it was clear he was looking to sell the property. We felt they were screwing us out of the 1.8 million" (*id.* at 89).

As best this Court can tell, the fact is that EO Miami was never a successful enterprise as it never could afford to pay rent. And, eventually, the landlord decided to demand that EO Miami pay rent. But the terms of a possible modification were not acceptable and before the parties could reach an agreement, the landlord changed the locks. Nothing in this account suggests that Mr. Gilroy violated a fiduciary duty, interfered with a contract or converted anything from plaintiff.

Critically, plaintiff did not submit anything in admissible form to contest Mr. Gilroy's testimony. Only an affirmation from plaintiff's attorney was included. Therefore, Mr. Gilroy's version of events is uncontradicted and that account details a failed investment, not the causes of action alleged by plaintiff.

Remaining Claims

Plaintiff also pursues an unjust enrichment claim (fifth claim) and a fraud cause of action (eighth claim) against all defendants. Defendants are entitled to summary judgment dismissing both of these claims. There is no basis to find that defendants were unjustly enriched by plaintiff's investment. Rather, plaintiff invested money in a restaurant that, according to the unrebutted testimony of Mr. Gilroy, simply did not work out. In fact, the record shows that Mr. Gilroy (and plaintiff's owner Mr. Yannello) negotiated with the landlord to get an entire year of occupancy for the restaurant without having to pay any rent. Mr. Gilroy insisted he was not taking a salary and that the restaurant could not afford to pay any rent—plaintiff did not raise an issue of fact to show how anyone was unjustly enriched from this failed business endeavor.

The Court also observes that nothing on this record comes close to fraud. Plaintiff did not identify any material misrepresentations or any reliance; and as noted above, nothing admissible from the plaintiff itself was included in this motion.

Plaintiff's seventh cause of action for breach of contract against EO Enterprises is also severed and dismissed. Essentially, plaintiff argues that EO Enterprises was supposed to perform certain tasks as set forth in the license agreement with EO Miami (NYSCEF Doc. No. 15). But Mr. Gilroy testified that he trained himself as a representative from EO Enterprises (NYSCEF Doc. No. 60 at 70).

While, certainly, the fact that Mr. Gilroy had both an interest in EO Enterprises and was working for EO Miami might create a possible conflict, that does not automatically create an issue of fact. In other words, even if there was some sort of breach by EO Enterprises failing to train employees, perform a market study or in picking a good location for EO Miami, plaintiff did not attach anything to raise an issue of fact to explain how these alleged breaches proximately caused it damages. For instance, plaintiff did not submit something in opposition to explain why the location was inadequate and therefore led to the closure of the restaurant or how the supposed lack of training or failure to do a market study has any relevance to the damages plaintiff seeks.

The amended complaint focuses exclusively on the fact that plaintiff lost its investment because the restaurant closed. But as discussed above, that failure arose out of the landlord changing the locks. Vague assertions that certain provisions of the license agreement were not satisfied is not sufficient to raise an issue of fact where plaintiff failed to adequately articulate how those purported breaches caused plaintiff to lose its investment.

The sixth cause of action for an accounting is dismissed as moot; defendants contend that they turned over EO Miami's books and records during the course of discovery and plaintiff did not deny this assertion in its opposition.

Summary

The central question on this motion is burdens. Defendants met their prima facie burden for summary judgment by pointing to the deposition testimony of defendant Gilroy. As discussed above, Mr. Gilroy details a restaurant that never turned a profit, never paid rent, and eventually closed because the landlord changed the locks. Plaintiff's sole basis for liability against Mr. Gilroy is that he did not effectuate a modification agreement with the landlord that *might* have avoided the landlord taking possession of the restaurant.

But Mr. Gilroy noted that he (along with one of plaintiff's owners) was working to reach an agreement when the landlord changed the locks. Mr. Gilroy also raised legitimate reasons why the agreement offered by the landlord was not acceptable for EO Miami, namely that the landlord could cancel the lease on 30 days notice. And plaintiff did not submit evidence (such as the deposition testimony of plaintiff or an affidavit from plaintiff) to contest Mr. Gilroy's version of events. As defendants point out, sometimes an investment does not work out. Here, it seems that EO Miami never really took off and, despite not paying rent, somehow stayed open for more than a year apparently due to the negotiating skills of Mr. Gilroy and Mr. Yannello. That the landlord eventually decided to back out of the deal does not evince a viable cause of action against defendants.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and all claims against defendants are severed and dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor defendants and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

12/13/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**