

Mirchandani v Chaman

2024 NY Slip Op 32628(U)

July 25, 2024

Supreme Court, New York County

Docket Number: Index No. 157901/2019

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SABRINA KRAUS PART 57M

Justice

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RAJU MIRCHANDANI, RAJU MIRCHANDANI, ON BEHALF OF LEXINGTON BAR AND BOOKS, LTD., NEW YORK HOSPITALITY GROUP, INC. D/B/A LE BATEAU, RAJMAR HOLDINGS, INC. D/B/A HUDSON BAR AND BOOKS, DM 31 HOSPITALITY LLC,

Plaintiff,

INDEX NO. 157901/2019

MOTION DATE 06/19/2024,
06/30/2024,
07/04/2024

MOTION SEQ. NO. 005 006 007

- v -

CHIRAG CHAMAN, AICHME HOLDINGS LLC, NEW YORK HOSPITALITY GROUP, INC., D/B/A LE BATEAU IVE, RAJMAR HOLDINGS, INC. D/B/A HUDSON BAR AND BOOKS, LEXINGTON BAR AND BOOKS, LTD., D/B/A LEXINGTON BAR AND BOOKS,

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to/for ORDER OF PROTECTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150

were read on this motion to/for DISMISS

BACKGROUND

Plaintiff commenced this action to recover damages as against defendant Chirag Chaman, (CC), for fraud, breach of loan agreement, money had and received, and breach of fiduciary duty.

CC has proceeded *pro se* since April 2024.

PENDING MOTIONS

On June 27, 2024, CC moved for a protective order as to defendant's request for communications since April 2024 and communications with any lawyer about this case since April 2024 (motion seq. 005). Plaintiff cross moved seeking to compel the same information.

On July 8, 2024, CC moved to compel plaintiff to produce detailed documentation substantiating the claimed damages, including itemizations and the rationale for attributing them to CC, in order to establish the nature and amount of damages with reasonable certainty and to provide the specific communications between Richard Feldman and Arun Mirchandani and between Raju Mirchandani and Arun Mirchandani (motion seq 006). Plaintiff, by counsel, cross moved seeking a protective order in regard to the requested communications.

On July 12, 2024, CC moved to dismiss pursuant to CPLR 3211(a)(1) and (a)(7). The motions are consolidated below for disposition.

DISCUSSION

CC's motion to dismiss pursuant to CPLR 3211(a)(1) is denied as untimely

CPLR § 3211(a)(1) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: a defense is founded upon documentary evidence.”

The Court of Appeals has held that a CPLR §3211 dismissal may be granted where “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Leon v. Martinez*, 84 N.Y.2d 83, 88).

CPLR § 3211(e) states that a motion to dismiss a cause of action under CPLR § 3211(a) be made before service of the responsive pleading “is required.”

All motions under CPLR § 3211 are to be made “[a]t any time before service of the responsive pleading” (CPLR § 3211[e]), except that CPLR § 3211 motions may be made after service of the party's answer in three circumstances: when the motion is based upon subdivision (a)(2) subject matter jurisdiction, (a)(7) failure to state a cause of action, or (a)(10) nonjoinder of a necessary party (*see* CPLR 3211[e]). (*Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 257 [2012]).

Here CC’s motion to dismiss based on documentary evidence has been made well after the statutory time limit and therefore must be denied.

CC's motion to dismiss pursuant to 3211(a)(7) is denied

The standard on a motion to dismiss for failure to state a cause of action is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275; *Foley v. D'Agostino*, 21 A.D.2d 60, 64--65, 248 N.Y.S.2d 121.

Additionally, on a motion to dismiss a complaint for failure to state a cause of action, the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party. *See EBCI, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19; *Sokol v. Leader*, 74 A.D.3d 1180. In considering such a motion, the court must “accept the facts as alleged in the complaint as true, accord plaintiff(s) the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” *Nonnon v. City of New York*, 9 N.Y.3d 825, 827. “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*Id.*).

CC failed to establish that plaintiff failed to state a cause of action in the complaint.

Challenging the substantive merits of plaintiff's complaint is not the function of a motion to dismiss (*Engelman v. Rofe*, 194 AD3d 26, 33-34 [1st Dept. 2021]).

Motions to compel and for a protective orders

Pursuant to CPLR 3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.”

When deciding whether to compel disclosure, the court weighs the relevancy of the documents sought and their availability from other sources against the burden of production (*Cynthia B. v New Rochelle Hosp. Medical Center*, 60 NY2d 452 [1983]). The party compelling production must specify the specific request that is at issue; broad references to the request for production are not sufficient as the court must be able to match the language in the motion to compel to a specific request that has been made (*Deutsche Bank Nat. Trust Co. v Brewton*, 142 AD3d 683 [2016]).

The discovery rules promote broad “disclosure of all matter material and necessary to the prosecution or defense of an action” (CPLR 3101 [a]). “Pretrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof, including material which might be used in cross-examination” (*Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 341 [1st Dept 2007] [internal quotation marks, citation, and brackets omitted]). “The test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Nevertheless, “a party is not entitled to unlimited, uncontrolled, or unfettered disclosure” (*Lombardi v Lombardi*, 190 AD3d 964, 966 [2d Dept 2021], quoting *Geffner v Mercy Med. Ctr.*, 83 AD3d 998, 998 [2d Dept 2011]).

CC motion to compel is denied and Plaintiff's cross motion for a protective order is granted

CC requested documentation to substantiate damages claimed by plaintiff, including a justification of how this amount was calculated and documents or evidence the plaintiff will rely on to rationalize the damages drawing relevance to the causes of action. Plaintiff responded stating they had previously produced to defendant's prior counsel all checking account statements including copies of checks for the time period requested, as well as payroll records for each of the entities, the credit card statements, the banking records, the profit and loss statements and tax returns for each of the entities. The bank statements record all deposits and withdrawals from which the damages are computed.

CC does not state whether he received his file from his prior counsel, he simply states that he believes this response fails to confirm the damages, specify how they have been calculated and how they are relevant to the causes of action. The court disagrees. Plaintiff provided the basis for their proof of damages in disclosing bank statements, copies of checks and other financial documents. The court finds this response to be sufficient. The court will direct plaintiff to provide courtesy copies of the documents previously provided to CC's prior counsel, if CC does not have them, within 30 days.

CC's second request is for specific communications between Arun Mirchandani and Richard Feldman and/or Raju Mirchandani pertaining to the Restaurants' finances/financial operations and/or referencing CC. Plaintiff's argue that this information is privileged based upon a settlement agreement that was entered into between those parties.

Plaintiff relies on paragraph 4 of the settlement agreement between plaintiff and Arun Mirchandani, a prior defendant in this action. That paragraph states,

4. Confidentiality. The Parties hereto agree that this Settlement Agreement, its terms and conditions and all communications related thereto, and the reasons for

the Parties to enter into this Settlement Agreement (collectively, the “Confidential Information”) shall be maintained in strict confidence and that they . . . shall not disclose, discuss or communicate in any manner whatsoever the Confidential Information with any person or entity that is not a Party to the Settlement Agreement except . . . to the extent required by applicable law, regulation or order.

Plaintiff asserts that the heart of this action involves a bitter family dispute which was resolved by the settlement agreement and that in order to obtain peace in the family, the settling parties agreed that all communications involving the settlement agreement and the disputes were to be held in the strictest confidence and deemed Confidential Information. Plaintiff asserts that CC’s request for these communications is unnecessary and is being sought by CC for improper purposes. CC argues that the relevancy of this request is to ascertain the basis of the alleged damages and prepare for trial.

CPLR 3103 (a) provides,

The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

The court finds that the request for specific communications is privileged and confidential as provided in the settlement agreement. CC has not established sufficient basis for the disclosure of the same and grants plaintiff’s request for a protective order as to these communications.

CC’s motion for a protective order is granted and Plaintiff’s cross motion to compel is denied

Plaintiff served a Notice to Produce which requested communications with attorneys after the withdrawal of former counsel. CC moved for a protective order stating that he is appearing *pro se* and that he has not retained an attorney to represent him in this action, and maintains he

has simply received legal advice. Plaintiff argues that counsel is required to file a notice of appearance even for a limited appearance. However, as CC maintains, he has not retained an attorney and is entitled to receive legal advice, which is available to all *pro se* litigants at the Office of the Self Represented. Plaintiff's motion to compel this information is denied, and CC's cross motion for a protective order is granted.

CC further requests a protective order as to plaintiff's demand to produce CC's communications with now non-party Arun Mirchandani (AM) after the plaintiff settled this case against AM. Plaintiff argues that to the extent that CC is communicating with AM, who is a former adverse party of plaintiff, such communications may lead to the discovery of admissible evidence that such testimony if offered in the trial of this action is biased. The production request is for the period after the date of the Settlement Agreement resolving the dispute between plaintiff and AM, to the present date. Plaintiff argues that there is no protectible interest in prohibiting the production of these communications. Further, CC has commenced a related lawsuit under index 155362/2024 and has named AM as a material witness.

CC argues that the communications requested pertain only as to the new action under 155362/2024 and that plaintiff's counsel is not the attorney of record for plaintiff in the new action, that the new action is for entirely separate claims and time period and that the demand is merely a fishing expedition.

The court finds that plaintiff is entitled to any communications between AM and CC from the date of the settlement agreement to the present, but only to the extent that those communications involve any of the claims asserted in this action.

WHEREFORE, it is hereby

ORDERED defendant Chirag Chaman's motion for a protective order, sequence 005, is granted to the extent that defendant is not required to provide the name of attorney offering advice; and it is further

ORDERED plaintiff's cross motion to compel, sequence 005, is granted to the extent that defendant Chirag Chaman must provide any communications between Arun Mirchandani and himself from the date of the settlement agreement to the present, but only to the extent that those communications involve any of the claims asserted in this action, within 30 days; and it is further

ORDERED defendant Chirag Chaman's motion to compel, sequence 006 is denied; and it is further

ORDERED plaintiff's cross motion for a protective order, sequence 006, as to the specific communications requested is granted; and it is further

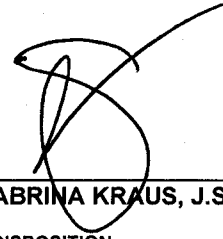
ORDERED defendant Chirag Chaman's motion to dismiss sequence 007 is denied;

ORDERED plaintiff is directed to file a Note of Issue on or before September 30, 2024 and proceed to trial; and it is further

ORDERED that, within 20 days from entry of this order, Plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

This constitutes the decision and order of the court.



7/25/2024

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE