

**Triantafillakis v Madden**

2024 NY Slip Op 34090(U)

November 15, 2024

Supreme Court, New York County

Docket Number: Index No. 652319/2018

Judge: Lori S. Sattler

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 02M

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JOHN TRIANTAFILLAKIS, ATHANASIOS  
TRIANAFILLAKIS,

Plaintiff,

- v -

JENNIFER MADDEN, LAKI KOKOTAS, HOWARD  
ROSENBLUTH, HR POM POM, LLC, TRIAN WEST, LLC  
D/B/A POM POM DINER, ROBERT J. GANS, METRO  
LUMBER HARDWARE & BUILDING SUPPLIES,  
INC., PETER MARC STERN, ESQ. AS ESCROW AGENT  
AND STAKEHOLDER

Defendant.

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INDEX NO. 652319/2018

MOTION DATE 04/01/2024,  
05/24/2024

MOTION SEQ. NO. 010 011

**DECISION + ORDER ON  
MOTION**

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 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, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240

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

In Motion Sequence 010 of this action, defendants Howard Rosenbluth (“Rosenbluth”), HR Pom Pom, LLC (“HR Pom Pom”), Robert J. Gans (“Gans”), and Metro Lumber Hardware & Building Supplies, Inc. (“Metro Lumber”) move for summary judgment dismissing the Amended Complaint as against them pursuant to CPLR 3212. In Motion Sequence 011, defendant Peter Marc Stern, Esq. in his capacity as escrow agent (“Stern”) moves for summary judgment dismissing the Amended Complaint as against him. Plaintiffs John Triantafillakis (“JT”) and Athanasios Triantafillakis (“AT”) (collectively “Plaintiffs”) oppose both motions, which are consolidated herein for disposition.

Defendants Jennifer Madden (“Madden”) and Laki Kokotas (“Kokotas”), who are relatives of Plaintiffs, have not participated in this action since their counsel was relieved in May 2019. In June 2023, Plaintiffs moved for default judgment against them, which was denied as untimely (NYSCEF Doc. No. 167 [Kraus, J.]; *see also* NYSCEF Doc. No. 174 [Kraus, J.] [denying motion for leave to renew default motion]). With respect to the final defendant, Trian West, LLC d/b/a Pom Pom Diner (“Trian”), no affidavit of service of the pleadings has been filed and the entity has never appeared in the action.

This action arises out of a 2016 sale of the Pom Pom Diner on 11th Avenue in Manhattan (“Diner”). Before 2011, the Diner was equally owned by the two Plaintiffs and Kokotas. In December 2011, these parties agreed to transfer their one-third interests to Trian. Madden, who was Kokotas’ fiancée at the time, was the sole member of Trian. Concurrently, Plaintiffs, Kokotas and Madden on behalf of Trian signed an Option Agreement (NYSCEF Doc. No. 183, “Option Agreement”) which gave Plaintiffs and Kokotas an irrevocable option to purchase 100% of Trian at any time for \$1,000 and prohibited Madden from selling, assigning, transferring, or encumbering her interest in Trian so long as the Option Agreement was in effect.

As set forth in the Amended Complaint (NYSCEF Doc. No. 180), in 2013 JT was approached by Gans with a proposal to buy the Diner. According to Plaintiffs, Gans and Rosenbluth, who were the owner and Chief Financial Officer respectively of the nearby business Metro Lumber, formed HR Pom Pom for the purpose of acquiring the Diner. Gans, Rosenbluth, Metro Lumber, and HR Pom Pom are collectively referred to herein as “Buyers.” Plaintiffs allege that Gans and Rosenbluth negotiated with Plaintiffs, Kokotas, and Madden until Madden and Kokotas cut Plaintiffs out of the negotiations. However, Gans testified at his EBT that once he discovered that Plaintiffs had no ownership interest in Trian or the Diner he began negotiating

exclusively with Madden (NYSCEF Doc. No. 206, Gans EBT at 26-27). Trian and HR Pom Pom executed an Agreement of Sale on October 30, 2014 (NYSCEF Doc. No 184) which provided that Trian would sell the Diner to HR Pom Pom for \$1,500,000. The document states that “Jennifer Madden . . . presently is the sole member of [Trian], and owns a 100% of the Membership Interests therein” (*id.* § 10A).

In December 2014, prior to the closing, JT attempted to purchase Madden’s interest in Trian in accordance with the Option Agreement. He then commenced an action in New York County Supreme Court, *John Triantafillakis v Jennifer Madden et al*, Index No. 650120/2015 (“2015 Action”) seeking an injunction preventing the sale. The Court (Kern, J.) declined to issue a preliminary injunction, finding there was no likelihood of success on the merits (NYSCEF Doc. No. 182). In that decision, the Court held that the Option Agreement was an unenforceable restraint on alienation and that, even if it were enforceable, it did not prohibit Trian from selling the Diner (*id.* at 3). Defendant’s motion for summary judgment dismissing the complaint was granted in 2016 for that reason (NYSCEF Doc. No. 188, 189 [Plaintiff’s claims in this action to enforce the option agreement fail because the option agreement is “unenforceable as a matter of law as an unreasonable restraint on alienation”]).

The closing between Trian and HR Pom Pom occurred on December 15, 2016. Concurrently, an Escrow Agreement was signed and \$250,000 of the net sale proceeds were placed into escrow with Trian’s attorney, Defendant Stern (NYSCEF Doc. No. 190, Escrow Agreement). The Escrow Agreement did not include any provisions related to the Option Agreement or Plaintiffs and Kokotas.

Plaintiffs commenced this action seeking to recover the shares of the sale proceeds to which they claim they are entitled. They allege that they, Kokotas, and Trian signed the Option

Agreement with the understanding that “Madden was to be the owner of Trian/the Diner in name only, and that Plaintiffs and Mr. Kokotas were the true owners with each entitled to 1/3 interest in the Diner” (NYSCEF Doc. No. 180, Amended Complaint ¶ 15). To that end, Plaintiffs further assert that they had an understanding with Madden, Trian, and the Buyers that they and Kokotas would each be entitled to one-third of the sales proceeds.

Plaintiffs cite an August 20, 2014 letter from HR Pom Pom’s counsel on the sale to Stern, Trian’s counsel on the sale, that detailed the contemplated transaction (NYSCEF Doc. No. 200). The letter states that HR Pom Pom would purchase Plaintiffs’ and Kokotas’ rights under the Option Agreement and that each option holder would receive one-third of the proceeds. Plaintiffs further contend that the affidavits submitted by Madden and Rosenbluth in the 2015 Action expressed their intent to distribute one-third of the sale proceeds to the three option holders (*see* NYSCEF Doc. No. 186, Madden aff; NYSCEF Doc. No. 193, Rosenbluth aff). Madden’s affidavit stated that after disbursing certain required payments, the net “funds will be placed in escrow pending equal distribution to the three optionees under the Option Agreement, Plaintiff John Triantafillakis, Athanasios Triantafillakis and Laki Kokotas” (Madden aff ¶¶ 64, 66). Rosenbluth’s affidavit on behalf of HR Pom Pom stated: “[JT’s] only interest as an Option holder is in his fair share of the purchase price. HR Pom Pom is more than willing to put the purchase price in escrow at closing so that can happen” (Rosenbluth aff ¶ 33).

Plaintiffs’ Amended Complaint seeks recovery against the various defendants under six causes of action: breach of contract; unjust enrichment; fraud; breach of fiduciary duty; aiding and abetting breach of fiduciary duty; and corporate veil piercing/alter-ego liability. Plaintiffs also seek judgment declaring that they are each entitled to one-third of the proceeds from the sale of the Diner and directing Stern in his capacity as escrowee to provide an accounting of the

receipt and disbursement of escrow funds received, use the escrowed sale proceeds to pay the New York State tax bill related to the sale, and deposit the remaining funds with the Court. In 2022, the Court (Kraus, J.), upon Stern's motion, directed that the net escrowed funds, totaling \$51,053.06, be deposited with the Court, which was done (NYSCEF Doc. Nos. 222, 223). The Buyers and Stern now move for summary judgment on the claims asserted against them.

On a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

### **Motion Sequence 010**

The Buyers seek summary judgment dismissing the causes of action asserted against any or all of them, i.e. breach of contract, unjust enrichment, fraud, aiding and abetting breach of fiduciary duty, and corporate veil piercing/alter-ego liability.

A cause of action for breach of contract requires a plaintiff to demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010], citing *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). An enforceable contract "consists of an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Estates NY Real Estate Servs. LLC v City of New York*, 184 AD3d 56, 62 [1st Dept

2020]). The Buyers meet their prima facie burden of showing they did not have a contract requiring them to pay Plaintiffs any amount of the sale proceeds. Nothing in the record indicates that such an offer was made to Plaintiffs (*Estates NY*, 184 AD3d at 62). The letter from the Buyers' counsel on which Plaintiffs rely does not meet the requirements for a valid contract as there is no indication that it or any subsequent communications amounted to an offer and an acceptance that would be binding on any of the parties to this action (*see Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 59-60 [1st Dept 2015]).

In the alternative, Plaintiffs argue that they were intended third-party beneficiaries of either the Agreement of Sale or the Escrow Agreement. Both documents are clear and unambiguous within their four corners and evince no intent from the Buyers to confer a benefit upon Plaintiffs (*112 West 34th St. Assoc., LLC v 112-1400 Trade Properties LLC*, 95 AD3d 529, 531 [1st Dept 2012]). As Plaintiffs fail to demonstrate any issue of fact as to the existence of a contract with the Buyers or that they were third-party beneficiaries of any agreement, this branch of the Buyers' motion is granted and the breach of contract cause of action is dismissed as against them.

An unjust enrichment claim requires a plaintiff to show that the defendant was enriched at the plaintiff's expense, and that "it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotations omitted]). The record reflects that HR Pom Pom agreed to an arm's length transaction with Trian, the Diner's prior owner, as a good faith purchaser for value. Any dispute as to whether Plaintiffs should have received the sale proceeds instead of Trian is insufficient to raise an issue of fact as to whether the Buyers were unjustly

enriched at Plaintiffs' expense. This branch of the motion is therefore granted, and the unjust enrichment cause of action is dismissed.

The next branch of the motion seeks dismissal of Plaintiffs' fraud cause of action. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). As against the Buyers, Plaintiffs base this cause of action on statements made by Gans and Rosenbluth during negotiations whereby they allegedly acknowledged that Plaintiffs were its owners. They also invoke Rosenbluth's affidavit in the 2015 Action that HR Pom Pom would place the purchase funds in escrow for Plaintiffs' benefit.

The allegation that Gans and Rosenbluth acknowledged Plaintiffs' purported ownership interest in the Diner is contradicted by the record, as both testified at their depositions that during their initial negotiations with Plaintiffs they discovered that Madden was the actual owner of the Diner via Trian (*see* Gans EBT at 25; NYSCEF Doc. No. 204, Rosenbluth EBT at 38). As to Rosenbluth's 2015 affidavit, it merely states that HR Pom Pom was "willing" to place the sales proceeds in escrow for later distribution to the option holders. It contained no express promise to do so, and in any event was a representation made to the Court, not to Plaintiffs. As Plaintiffs fail to raise an issue of fact as to any material misrepresentations made by Gans or Rosenbluth, this branch of the motion is granted, and the fraud cause of action is dismissed.

To prevail on a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege that it was owed a fiduciary duty, that there was "a breach of that duty, and defendant's substantial assistance . . . in effecting the breach, together with resulting damages" (*Yuko Ito v Suzuki*, 57 AD3d 205, 208 [1st Dept 2008], quoting *Ulico Cas. Co. v Wilson, Elser, Moskowitz*,

*Edelman & Dicker*, 56 AD3d 1, 11 [1st Dept 2008]). “A fiduciary duty arises ‘between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation’” (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Plaintiffs allege that Kokotas owed them a fiduciary duty because he was their business partner and that Gans and Rosenbluth aided and abetted his breach of this duty by negotiating separately with him and Madden. However, it cannot be disputed that the Option Agreement was found unenforceable in the 2015 Action and that Trian was the sole owner of the Diner from 2011 through the time of the sale’s 2016 closing. Whatever fiduciary relationship may have existed between Kokotas and Plaintiffs prior to their transfer of the Diner to Trian did not extend to the sale to the Buyers by Trian, whose sole member is Madden. Kokotas therefore owed no fiduciary duty to Plaintiffs with respect to that sale, and accordingly Gans and Rosenbluth cannot be held liable under an aiding and abetting theory. The aiding and abetting claim is therefore dismissed.

The last cause of action seeks to hold the Buyers liable under a theory of corporate veil piercing. It is well-established that there “is no independent cause of action to pierce the corporate veil” (*Bransway Hospitality, LLC v Delshah Capital LLC*, 216 AD3d 486, 487 [1st Dept 2023]; *see also Etage Real Estate LLC v Stern*, 211 AD3d 632, 632-633 [1st Dept 2022]). As the Court has dismissed all other claims against the Buyers, it must therefore grant this branch of the motion and dismiss the veil piercing cause of action against them.

### **Motion Sequence 011**

Defendant Stern, as escrow agent, moves for summary judgment dismissing Plaintiffs’ declaratory judgment claims against him. This cause of action seeks a declaratory judgment

directing Stern to provide an accounting of the receipt and disbursement of escrow funds received, use the sale proceeds in the escrow account to pay the New York State tax bill related to the sale of the Diner, and deposit the remaining escrow funds with the Court. Stern contends that he is entitled to summary judgment dismissing this claim because he has provided an accounting of the escrow funds, provided supporting documentation, and answered all inquiries in relation to their disposition. In opposition, Plaintiffs argue that issues of fact remain as to how Stern distributed the escrow funds and whether he breached his obligation to release the funds to them as intended beneficiaries.

Stern's motion for summary judgment is granted. It is beyond dispute that Stern has provided an accounting of the escrow funds and their disbursement, along with supporting documentation (NYSCEF Doc. No. 234, Affidavit and Accounting; NYSCEF Doc. No. 229). Furthermore, for the reasons discussed herein, Plaintiffs were not intended beneficiaries of the Escrow Agreement and therefore are not entitled to declaratory judgment as to distribution of the escrow funds.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment of Defendants Howard Rosenbluth, HR Pom Pom, LLC, Robert Gans, and Metro Lumber, Hardware & Building Supplies, Inc. (Motion Sequence 010) is granted in its entirety, and the Amended Complaint is dismissed against the aforesaid Defendants; and it is further

ORDERED that the motion for summary judgment of Defendant Peter Marc Stern, Esq. (Motion Sequence 011) is granted in its entirety, and the Amended Complaint is dismissed as against him; and it is further

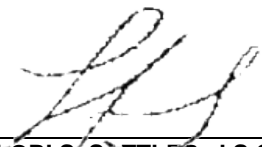
ORDERED that the New York City Department of Finance, Treasury Division, Client Services, located at 1 Centre Street, Room 2200, New York, New York 10007, is directed, upon receipt of a certified copy of this order, a Certificate of Deposit duly issued by the Department of Finance upon the deposit with the Court of funds by Defendant Peter Marc Stern, Esq., and any other forms required by the Department, to turn over to said Defendant the funds deposited with that Department constituting the funds deposited with the Court by said Defendant as reflected in the Certificate, less the fee of the Department; and it is further

ORDERED that upon receipt of said funds, Defendant Peter Marc Stern, Esq. is directed to release said funds in accordance with Section 4(b) of the Escrow Agreement; and it is further

ORDERED that, the Court having previously denied judgment as to Madden and Kokotas and the Amended Complaint having never been served on Trian, the action is disposed.

This constitutes the Decision and Order of the Court.

11/15/2024  
DATE

  
LORI S. SATTLER, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE