

Mathews v Kuddage III, Inc.
2024 NY Slip Op 35173(U)
August 22, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 621738/2023
Judge: James Hudson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVI
Memorandum Decision**

P R E S E N T:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE: 5/31/24
SUBMIT DATE: 6/26/24
Mot. Seq. #: **003 – MotD**

-----X

ROBERT MATHEWS,

Plaintiff,

HULSE McNULTY PLLC
Attorneys for the Plaintiff
295 North Country Road
Sound Beach, NY 11789

-against-

KUDDAGE III, INC., ind & dba TOAST
COFFEEHOUSE; TERENCE SCARLATOS,

CERTILMAN, BALIN, ADLER &
HYMAN, LLP
Attorneys for the Defendants
100 Motor Parkway, Suite 156
Hauppauge, NY 11788

Defendants.

-----X

Terence Scarlatos requests an order pursuant to **CPLR 2221 (d)**, granting partial reargument of the April 23rd, 2024 decision and order; and upon reargument, dismissing the First, third, fourth, and sixth causes of action in the verified complaint as against him.

This action concerns the ownership of a Long Island restaurant known as Toast Bay Shore. Terence Scarlatos, is the owner of several restaurants which operate as Toast Coffeehouses. Each is owned by a different entity. Kuddage III, Inc. owns and operates Toast Bay Shore.

Robert Mathews was an employee of Kuddage, Inc., which operates Toast Port Jefferson, and Kuddage II, Inc., which operates Toast Patchogue. During 2018, Mr.

Matthews v Kuddage

621738/2023

Scarlatos formed Kuddage III, Inc., which employed Mr. Mathews as chef. Mr. Mathews alleges that he is a minority owner of Kuddage III, Inc./Toast Bay Shore.

On July 26th, 2023, Mr. Scarlatos terminated Mr. Mathews after learning of his plan to open a similar restaurant in Sayville, NY. Shortly thereafter, Mr. Scarlatos filed suit which seeks a declaratory judgment that he is a fifteen (15%) per cent minority shareholder in Kuddage III, Inc. and for the issuance of a stock certificate and for an accounting and distribution of dividends.

The Court grants the request for reargument and in its discretion, will examine the April 23rd, 2024 order (“Order”) and consider whether it overlooked or misapprehended controlling facts or law in refusing to dismiss the first, third, fourth, and sixth causes of action which Mr. Mathews alleges against Terence Scarlatos (*A.R. Connelly, Inc. v. New York City Charter High Sch. for Architecture, Eng’g & Constr. Indus.*, 206 AD3d 787, 788-789, 170 NYS3d 571 [2d Dept 2022]).

In examining its decision not to dismiss the noted causes of action upon documentary evidence (**CPLR 3211 [a] [1]**), the Court notes that this defense is founded upon documentary evidence and may only be granted if that documentary evidence utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*M.J. Lilly Associates, LLC v. Ovis Creative, LLC*, 221 AD3d 805, 806, 200 NYS3d 403 [2d Dept 2023]).

Mr. Scarlatos argues that the Court failed to consider “. . . the Protective Agreement (Docket No. 7) that was executed by the parties, confirming that [the] plaintiff is not a shareholder of defendant Kuddage III, Inc. (“Kuddage III”) and that he is an at-will

Matthews v Kuddage

621738/2023

employee” (NYSCEF Doc. No. 55, P. 4). As noted by counsel in opposition, that agreement is not executed by Mr. Mathews and was prepared for Mr. Scarlatos. He neither utterly refutes Mr. Mathews’ claim nor conclusively establishes Mr. Scarlatos’ defense. A partially executed written agreement is not proof of an agreement (*see Priceless Custom Homes, Inc. v. O’Neill*, 104 AD3d 664, 960 NYS2d 455 [2d Dept 2013]). It may be enforceable provided there is objective evidence establishing that the parties intend to be bound, but in of itself, it is not sufficient (*see Gould v. Decolator, Cohen & DiPrisco, LLP*, 197 AD3d 1242, 153 NYS3d 562 [2d Dept 2021]). As the Court noted in the Order, the documentary evidence must resolve all factual issues as a matter of law and conclusively dispose of a claim (*B&A Realty Management, LLC v. Gloria*, 192 AD3d 851, 852, 144 NYS3d 443 [2d Dept 2021]). The partially executed agreement is not sufficient to satisfy the requirements to justify dismissal of any noted cause of action.

Counsel next argues that the submitted 2019, 2020 and 2021 Form W-2 Wage and Tax Statements which Kuddage III, Inc. issued to Mr. Mathews are documentary proof that he was an employee and not a partner. In the Order, the Court addressed Mr. Mathews’ allegations that he was employed as the chef for Toast Bay Shore and was verbally promised by Mr. Scarlatos that he would receive a fifteen (15%) per cent interest in Kuddage III, Inc. Mr. Mathews states that he received a salary and bonus and that he relied upon that promise of ownership to his detriment and never received the promised stock in Kuddage III, Inc. Working may provide consideration for a stock interest, and the receipt of a salary as a corporate employee does not eradicate the consideration for a stock interest (*Capizola v. Vantage Intern., Inc.*, 2 AD3d 843, 844, 770 NYS2d 395 [2d Dept 2003]).

Matthews v Kuddage

621738/2023

The existence of the noted W-2 forms does not resolve the allegation that forms the basis of the complaint, nor of any cause of action raised therein.

Counsel further argues that the employee handbook submitted as evidence of Mr. Mathews' status as an at-will employee was not discussed by the Court in the Order. The Order states, in discussion of the employee handbook:

The documents offered as proof are two (2) signed acknowledgments of Toast policy statements and [Mr. Mathews] having received an employee handbook. The first is dated April 5th, 2017, which pre-dates the matter at bar. the second is undated and does not reference either Kuddage III, Inc. or Toast Bay Shore, only "Toast Coffeehouse" (NYSCEF Doc. No. 51, P. 4).

The Court did not find that the employee handbook was sufficient documentary evidence to warrant dismissal of the verified complaint. The Court stated:

The documentary evidence offered by Mr. Scarlatos is not sufficient to dismiss the allegations made against him personally by Mr. Mathews in his complaint. . . The documents do not resolve the allegations made against Mr. Scarlatos as a matter of law. The Court will not dismiss the complaint as against Mr. Scarlatos upon those documents (NYSCEF Doc. No. 51, P. 5).

The Court did not overlook any matter of fact or law in the Order with regard to the documentary evidence necessary to dismiss the first, third, fourth and sixth causes of action as against Terence Scarlatos pursuant to **CPLR 3211 (a) (1)**.

Moving to its decision not to dismiss the noted causes of action for failure to state a cause of action (**CPLR 3211 [a] [7]**), the Court, in its Order, cited the consideration which must be accorded in a dismissal motion alleging failure to state a cause of action:

For the purpose of the instant motion, the Court must accept the allegations made in the complaint as true, accord them the

Matthews v Kuddage

621738/2023

benefit of every reasonable inference, and determine only whether the allegations support any cognizable legal theory (*Connolly v. Long Island Power Authority*, 30 NY3d 719, 728, 70 NYS3d 909, 94 NE3d 471 [2018]). The criteria is whether Mr. Mathews has a cause of action, not whether one has been stated (*Maddicks v. Big City Properties, LLC*, 34 NY3d 116, 123, 114 NYS3d 1, 137 NE3d 459 [2019] . . . The Court will also consider whether Mr. Mathews can succeed upon any reasonable view of the stated facts (*Aristy-Farer v. State*, 29 NY3d 501, 509, 59 NYS3d 877, 81 NE3d 360 [2017]). Dismissal will only be warranted if an asserted material issue of fact is not one, and no dispute exists regarding that assertion (*Houtenbos v. Fordune Association, Inc.*, 200 AD3d 661, 160 NYS3d 57 [2d Dept 2022]). In his opposition to the motion, Mr. Mathews has no obligation to demonstrate evidentiary facts to support the complaint (*Stuart Realty Co. v. Rye Country Store, Inc.*, 296 AD2d 455, 456, 745, NYS2d 72 [2d Dept 2022]). The Court will not [on a dismissal motion] consider whether the complaint will survive a summary judgment motion or whether Mr. Mathews will be able to prove his claims (*Redwood Property Holdings, LLC v. Christopher*, 211 AD3d 758, 177 NYS3d 895 [2d Dept 2022] (NYSCEF Doc. No. 51, P. 3)).

Mr. Scarlatos first argues that Mr. Mathews fails to state a claim for affirmative relief. His counsel avers that the Order correctly determined that the complaint states the elements of a breach of a fiduciary duty claim but “. . . misapprehends this law and the underlying facts in the conclusory findings that Plaintiff alleged ‘oppressive conduct by Mr. Scarlatos’ . . .” (NYSCEF Doc. No. 55, P. 5). Second, he argues that the Order “makes the conclusory finding that plaintiff sufficiently alleged damages, but fails to state the damages that plaintiff (never actually) claims, separate and apart from his declaratory judgment claim to be an owner of 15% of Kuddage III” (NYSCEF Doc. No. 55, P. 6,7).

Mr. Scarlatos in reargument, does not recognize nor address the criteria applied by the Court in the Order. He instead repeats his previously denied argument.

Matthews v Kuddage

621738/2023

Counsel for Mr. Mathews argues in opposition that, having been denied dismissal in the Order, Mr. Scarlatos is improperly attempting to repeat his arguments. He notes that reargument is not designed to provide an unsuccessful party with successive opportunities to present its previously denied arguments (*Pryor v. Commercial Land Title Insurance Company*, 17 AD3d 434, 793 NYS2d 452 [2d Dept 2005]).

In its Order, the Court analyzed and evaluated each cause of action in contest and determined each to be plead sufficiently to avoid dismissal. The factual allegations contained in each are subject to significant dispute. In the Order, the Court specifically found the first, third, fourth and sixth causes of action to be adequately plead as to Mr. Scarlatos in his individual capacity. Mr. Scarlatos in reargument has not demonstrated that any alleged material fact is not a fact (*Marinelli v. Sullivan Papain Block McGrath & Cannavo, P.C.*, 205 AD3d 714, 715-716, 169 NYS3d 90 [2d Dept 2022]).

Upon reargument, the Court did not misapprehend any matter of fact or law in its analysis of the first, third, fourth and sixth causes of action in the complaint to eventuate dismissal of any noted cause of action as against Terence Scarlatos, pursuant to **CPLR 3211 (a) (7)**.

The Court has carefully considered the balance of the defendants' arguments, which are denied.

Accordingly, it is

ORDERED, that the motion (seq. no. 003) by Terence Scarlatos, which requests, pursuant to **CPLR 2221 (d) (2)** reargument of the April 23rd, 2024 Order is granted; and it is further

Matthews v Kuddage

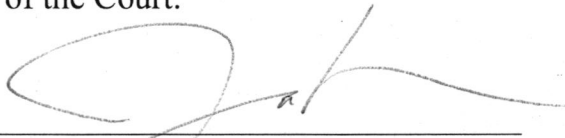
621738/2023

ORDERED, that the request, pursuant to CPLR 3211 (a) (1), (7), to dismiss the First, third, fourth, and sixth causes of action in the verified complaint as against Terence Scarlatos is denied; and it is further

ORDERED, that upon due consideration, the Court adheres to its previous decision and Order.

This memorandum also constitutes the Order of the Court.

Dated: August 22nd, 2024
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court