Raimo v RJLR Rest. Corp.
2024 NY Slip Op 35579(U)
December 12, 2024
Supreme Court, Westchester County
Docket Number: Index No. 55958/2024
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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CHRISTOPHER RAIMO,

Plaintiff,

– against –

RJLR RESTAURANT CORPORATION, LOUIE & JOHNNIE'S RESTAURANT, LOUIE & JOHNNIE'S RISTORANTE PRIMAVERA CORP., RRN CORP.,LLC, ROSEANN GAUDIO, and JOHN GRECO,

Defendants.

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Index No. 55958/2024

Motion Seq. No. 002

DECISION & ORDER

In this underlying action for breach of contract, tortious interference with a contract, among other claims, defendants Louis & Johnnie's Restaurant, Louie & Johnnie's Ristorante Primavera Corp. and John Greco (collectively, defendants) move, pre answer, pursuant to CPLR 3211(a) (7) to dismiss the second, third and fourth causes of action in the amended complaint.

Papers Considered **NYSCEF DOC NO. 23-32**

1. Notice of Motion/Affirmation in Support of Jacob E. Amir, Esq./Exhibits A-D/Memorandum of Law in Support
2. Affirmation of Stephen A. Cerrato, Esq. in Opposition

FACTUAL AND PROCEDURAL BACKGROUND

On January 19, 2024, plaintiff commenced the instant action by filing a summons and complaint. Plaintiff subsequently filed an amended complaint, which defendants stipulated to answer or otherwise respond to. Defendants Louie & Johnnie's Restaurant is a restaurant located in Yonkers, New York. The amended complaint states that, in 2020, defendant Roseann Gaudio was the owner and defendant John Greco was the manager. On November 4, 2020, Gaudio and plaintiff entered into an agreement where plaintiff purchased 50% of the shares of RJLR Restaurant

Corp. The agreement, entitled the Operating Agreement of RJLR Restaurant Corporation, provided that plaintiff was to contribute $75,000 as his initial contribution as shareholder. Plaintiff did so and submits a copy of the check and a copy of the operating agreement with the amended complaint. The agreement states, in relevant part, that "management of the food services of the restaurant is vested in Chris Raimo." The amended complaint alleges that, when plaintiff attempted to enter the store and take inventory, among other things, Greco prevented plaintiff from doing so, and that Greco either negligently or intentionally prevented plaintiff from performing his role under the operating agreement. Further, the "feud" between Greco and Gaudio prevented him from performing his duties, which cost him damages and lost earnings. The amended complaint states that plaintiff incurred expenses in anticipation of operating the restaurant.

Gaudio and Greco then reached an agreement whereby Gaudio sold the company to Greco. The amended complaint sets forth that, "[i]n late 2020 or early 2021, a meeting was held with Roseann Gaudio, John Greco and Plaintiff, along with their respective attorneys to discuss or negotiate the sale of the company and/or other agreement wherein John Greco would again be involved in the restaurant. Upon information and belief, Plaintiff and his counsel at the time, Laura Browne, Esq., were asked to leave the meeting at some point and were not privy to the discussions between Roseann Gaudio and John Greco." Plaintiff alleges that he only learned of the agreement after it took place and that he believed Gaudio sold the company to Greco for $1.5 million. Defendants allegedly have not acknowledged plaintiff or plaintiff's rights as 50% owner of the company. Plaintiff has not received any compensation related to the sale of the company, despite having ownership in the company.

Plaintiff's complaint sets forth four causes of action: breach of contract, tortious interference with a contract, civil conspiracy and unjust enrichment. The first cause of action is alleged against Gaudio and alleges that Gaudio breached the terms of the operating agreement by selling the company to Greco prior to consulting plaintiff. The second cause of action alleges that Gaudio and Greco intentionally and/or negligently interfered with plaintiff's contract, thereby preventing him from performing under the operating agreement. Plaintiff alleges that the defendants' conduct was malicious and done purposefully with the knowledge that plaintiff owned 50% of the restaurant. The third cause of action alleges that Gaudio and Greco entered into an agreement where Gaudio sole the restaurant to Greco, including plaintiff's 50% ownership interest, without plaintiff's knowledge or consent. Further, the conspiracy between Gaudio and Greco "was contrived in order to cause the breach of contract as well as the tortious interference with Plaintiff's contract."

The fourth cause of action alleges that Gaudio and Greco have been unjustly enriched by their actions. The amended complaint alleges that Gaudio retained 100% of the sale proceeds and Greco continues to receive profits from the restaurant. Plaintiff was purportedly deprived of both the money from the sale but also the opportunity to manage the restaurant.

Defendants have not submitted an answer and move to dismiss the second, third and fourth causes of action in the amended complaint. Defendants do not seek dismissal of the first cause of action, arguing that it was only brought against Gaudio for breach of contract. Defendants argue that the second cause of action alleging tortious interference with a contract must be dismissed as the statute of limitations has expired. The agreement was signed on November 4, 2020 and then plaintiff alleges that several days after the agreement was entered into, Greco prevented him from entering the business. The complaint was filed on January 19, 2024, allegedly more than three years after the date of the claimed interference. Defendants argue that, in the alternative, there are no allegations Greco was ever made aware of plaintiff's contractual relationship with Gaudio.

Defendants continue that the cause of action alleging civil conspiracy must fail as a necessary consequence of dismissing the tortious interference claim. According to defendants, New York does not recognize an independent cause of action for civil conspiracy, and this claim may only be asserted only in connection with another actionable tort.

Defendants argue that the cause of action alleging unjust enrichment must be dismissed as plaintiff does not sufficiently plead that Greco was enriched at plaintiff's expense. In addition, defendants assert the defense of laches, as plaintiff presumably knew for three years that Greco had been operating the restaurant, but failed to make any demands on Greco up until the time the action was commenced. They add that it would be unfair for plaintiff to seek both the sale proceeds from Gaudio and the earned monies from Greco from the operation of the restaurant arising from plaintiff's lost ability to manage and operate the restaurant.

Lastly, defendants argue that the claims should be dismissed as against Louis & Johnnie's Restaurant and Louie & Johnnie's Ristorante Primavera Corp., as no acts or damages are asserted against the business entity.

In opposition, plaintiff argues that he and Gaudio entered into a contact and that several days later Greco had knowledge of the contract and prevented him from taking possession of the restaurant. He continues that, within the next two-month time period, Greco and Gaudio allegedly concocted a scheme to sell the restaurant to Greco and cut plaintiff out. Plaintiff argues that the tort is ongoing, as defendants continue to cause damage to plaintiff by failing to acknowledge his ownership interest. As a result, the claim is timely.

Plaintiff maintains that the claim for civil conspiracy should not be dismissed, as the allegations of tortious interference continue to this day. Regarding unjust enrichment, plaintiff claims that he has been denied his rights and has been denied access to the information as to what transpired between Gaudio and Greco. While the amended complaint does assert claims for both sale proceeds and operational revenue, at this time, plaintiff is not completely aware as to what occurred. Thus, according to plaintiff, he has sufficiently alleged that defendants were enriched at plaintiff's expense.

DISCUSSION

"Upon a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail." *Esposito v Noto*, 90 AD3d 825, 825 (2d Dept 2011) (internal quotation marks and citations omitted). The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Id.*

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 (2d Dept 2016).

Tortious Interference With a Contract

The elements of tortious interference with a contract are: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff." *Nero v Fiore*, 165 AD3d 823, 825 (2d Dept 2018) (internal quotation marks omitted). A claim for tortious interference with a contract is governed by a three-year statute of limitations. CPLR 214 (4).

In this case, the amended complaint states that plaintiff was first damaged by Greco's alleged interference with the operating agreement several days after the November 4, 2020 agreement was signed. Specifically, plaintiff alleges that Greco prevented plaintiff from performing his role under the operating agreement by preventing plaintiff from taking inventory. Assuming several days would run into December, 2020, as the complaint was filed more than three years later, this cause of action is untimely. *See e.g. Spinap Corp. v Cafagno*, 302 AD2d 588, 588 (2d Dept 2003) (internal citations omitted) ("Accordingly, all of the facts necessary to the causes of action sounding in tortious interference with contract existed by August 1994, and the plaintiff could have obtained relief in court as of that date. Thus, the complaint, filed more than three years later, is time-barred").

While the amended complaint also alleges that Greco continued to interfere with the operating agreement by being involved in the sale of the restaurant and continuously preventing plaintiff from being performing his duties under the agreement, "tortious interference with contract is not a continuing tort." *Id.* Accordingly, the tortious interference with contract cause of action is dismissed as time barred.

Civil Conspiracy

"New York does not recognize civil conspiracy to commit a tort, . . . as an independent cause of action. Accordingly, a claim alleging conspiracy to commit a tort stands or falls with the underlying tort." *Dickinson v Igoni*, 76 AD3d943, 945 (2d Dept 2010) (internal quotation marks omitted). The amended complaint alleges that the conspiracy between Greco and Gaudio was contrived in order to cause the breach of contract as well as the tortious interference with contract. As a result of this decision, defendants are granted dismissal of the underlying claim of tortious interference with a contract. Accordingly, "since a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying torts," the cause of action alleging civil conspiracy is also dismissed. *Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067, 1069 (2d Dept 2012).

Unjust Enrichment

Unjust enrichment is classified as a "quasi-contract claim" and invokes "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties." *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 (2012) (internal quotation marks and citations omitted). To successfully plead a claim for unjust enrichment, "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." *Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173, 182 (2011) (internal quotation marks and citations omitted).

The amended complaint alleges that defendants have been unjustly enriched in that they entered into an agreement to sell the restaurant and plaintiff did not receive any of the sales proceeds, despite plaintiff's 50% ownership in the company. Plaintiff also alleges that, as he is an owner of the restaurant, he is entitled to profits earned by Greco. While, after discovery, it may be true that plaintiff is not entitled to proceed under one or both theories, at this time, plaintiff's allegations are adequate to state a cause of action for unjust enrichment. It is well settled that the "essence of unjust enrichment is that one party has received money or a benefit at the expense of another." *Levin v Kitsis,* 82 AD3d 1051, 1053 (2d Dept 2011) (internal quotation marks omitted). Further, "[w]hether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss." *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 589 (2d Dept 2014). Similarly, while defendants allege a defense based on laches, that affirmative defense may be asserted in the defendants' answer.

Louie & Johnnie's Restaurant and Louie & Johnnie's Ristorante Primavera Corp.

While the amended complaint demands judgment against all defendants on all causes of action, the amended complaint does not assert any actions taken by the restaurant defendants, nor are they included in any of the causes of action. For these reasons, defendants also moved to dismiss the complaint against Louie & Johnnie's Restaurant and Louie & Johnnie's Ristorante Primavera Corp. Plaintiff did not respond to this argument. Courts have held that "where the complaint names a defendant in the caption but contains no allegations indicating how the defendant violated the law or injured the plaintiff, a motion to dismiss the complaint in regard to that defendant should be granted." *Dove v Fordham Univ.*, 56 F Supp 2d 330, 335 (1999) (internal quotation marks omitted).

Accordingly, these defendants are dismissed from the action, without prejudice.

All other arguments raised on this motion by the parties in connection thereto have been considered by this court notwithstanding the specific absence of reference thereto.

CONCLUSION

Accordingly, it is hereby

ORDERED that the defendants John Greco, Louie & Johnnie's Restaurant and Louie & Johnnie's Ristorante Primavera Corp.'s motion to dismiss the amended complaint, pursuant to CPLR 3211 (a) (7) is granted to the extent that the second and third causes of action are dismissed, and the motion is also granted with respect to dismissing Louie & Johnnie's Restaurant and Louie & Johnnie's Ristorante Primavera Corp. from the action; and it is further

ORDERED that the remainder of the defendants' motion is denied; and it is further

ORDERED that the remaining claim of unjust enrichment shall continue as against John Greco; and it is further

ORDERED that defendant John Greco shall serve his answer within ten days of service of this order with notice of entry (*see* CPLR 3211[f]).

The Court will subsequently provide the parties with instructions on filing the preliminary conference stipulation.

Dated: White Plains, New York
December 12, 2024

HON. WILLIAM J. GIACOMO, J.S.C.

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