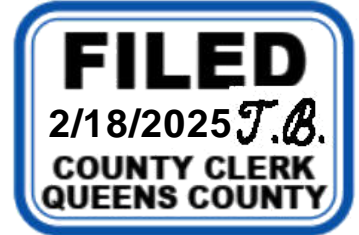


Barga v Cann
2025 NY Slip Op 35396(U)
February 14, 2025
Supreme Court, Queens County
Docket Number: Index No. 723632/2023
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY



Present: HONORABLE MAURICE E. MUIR
Justice

JOHN C. BARGA and SOTERA M. BARGA,

Plaintiff,

-against-

IVETTE C. CANN,

Defendants.

IAS Part - 42

Index No.: 723632/2023

Motion Date: 3/21/2024

Motion Cal. No. 6

Motion Seq. No. 1

The following electronically filed (“EF”) documents read on this motion by Ice Cube Inc. d/b/a Apple Ice Inc. (“Ice”), MTLR Corp. (“MTLR”) and Leon Shaw (“Mr. Shaw”) (collectively the “defendants”), for an order: (a) pursuant to CPLR §3211(a)(7) dismissing the first cause of action styled as one for "breach of a partnership agreement" contained in the plaintiffs' complaint for failure to state a claim upon which relief may be granted on the ground that an action at law may not be maintained by one partner against another for any claim arising out of the partnership, as a matter of law, unless there has been a full accounting of such business, a balance struck and an express agreement to pay; and (b) pursuant to CPLR § 3211(a)(7) dismissing the second cause of action styled as one for "breach of fiduciary duty and duty of loyalty" contained in the plaintiffs' complaint for failure to state a claim upon which relief may be granted on the ground that an action at law may not be maintained by one partner against another for any claim arising out of the partnership, as a matter of law, unless there has been a full accounting of such business, a balance struck and an express agreement to pay; and (c) pursuant to CPLR § 3211(a)(7) dismissing the third cause of action styled as one for "unjust enrichment" contained in the plaintiffs' complaint for failure to state a claim upon which relief may be granted on the ground that an action at law may not be maintained by one partner against another for any claim arising out of the partnership, as a matter of law, unless there has been a full accounting of such business, a balance struck and an express agreement to pay; and, in the

alternative, (e) pursuant to CPLR §3211(a)(7) dismissing the second cause of action styled as one for "breach of fiduciary duty and duty of loyalty" contained in the plaintiffs' complaint for failure to state a claim upon which relief may be granted on the ground that it is duplicative of the first cause of action for breach of partnership ("contract") claim since the claims are premised upon the same facts and seek identical damages in an amount to be proven at trial; and (f) pursuant to CPLR § 3211(a)(7) dismissing the third cause of action styled as one for "unjust enrichment" contained in the plaintiffs' complaint for failure to state a claim upon which relief may be granted on the ground that it arises out of the same subject matter governed by the alleged express partnership agreement ("contract") and is simply a restatement of the breach of partnership claim; and (g) granting such other and further relief as to this Court seems just and proper.

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation in Support-Memorandum of Law-Exhibits.	EF 3 – 8
Affirmation in Opposition-Memorandum of Law in Opposition.....	EF 9 – 10
Reply Affirmation.....	EF 11

Upon the foregoing papers, it is ordered that this motion is determined as follows:

The plaintiffs, John C. Barga and Sotera C. Barga, allege that the defendant, Ivette C. Cann, was originally the sole proprietor of a Filipino Restaurant called Fiestambayan. The plaintiffs further allege that, in or around May 2023, they entered into an oral and written partnership agreement with the defendant whereby, in exchange for a \$120,000 investment, they became co-owners of Fiestambayan and would receive 50% of the restaurant's profit. Furthermore, the plaintiffs set forth that, in August 2023, the defendant traveled to the Philippines; and they managed the operation of Fiestambayan. The plaintiffs allege that, during this time, they learned that there was a lack of money in Fiestambayan's bank account, making it difficult to pay employees' wages, rent, and supplies. The plaintiffs contend that, upon the defendant's return from the Philippines, they informed her that they wanted an accounting of their \$120,000 investment, a return of the money, and to leave the partnership. The plaintiffs allege that, in response, the defendant informed them, among other things, that she spent the plaintiffs' investment. The plaintiffs also allege that, despite their demands, to date, the defendant has not made an accounting of the \$120,000 that the plaintiffs invested nor of the sales, revenue, and profits earned by Fiestambayan since the parties entered into the partnership agreement in May 2023. In November 2023, the plaintiffs commenced this action against the

defendant asserting causes of action for breach of partnership agreement, breach of fiduciary duty and duty of loyalty, and unjust enrichment. The defendant now makes the instant pre-answer motion pursuant to CPLR § 3211(a)(7) to dismiss the abovementioned causes of action. The plaintiff opposes the motion.

“On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference” (*Dee v Rakower*, 112 AD3d 204, 208 [2d Dept 2013]). “The role of the court is to ‘determine only whether the facts as alleged fit within any cognizable legal theory’ ” (*Dee v Rakower*, 112 AD3d at 208, quoting, *Leon v Martinez*, 82 NY2d 83, 87-88 [1994]). “Therefore, a complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated” (*Dee v Rakower*, 112 AD3d at 208). Under the circumstances of this case, the court finds that the complaint states a cause of action for an accounting against the defendant. “ ‘The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest’ ” (*Lawrence v. Kennedy*, 95 AD3d 955, 958 [2d Dept 2012], quoting *Palazzo v. Palazzo*, 121 AD2d 261, 265 [1st Dept 1986]). Here, the plaintiffs allege that a fiduciary relationship exists insofar as the parties were co-owners of Fiestambayan and entered into a partnership agreement reflecting same. The plaintiffs also allege that the defendant breached a duty imposed by the partnership agreement in, among other things, misappropriating Fiestambayan’s funds.

With respect to the plaintiffs’ remaining causes of action, the defendant seeks dismissal on the ground that “a partner may not maintain an action at law for any claim arising out of the partnership until there has been a full accounting and a balance struck, or an express agreement to pay” (*Wiesenthal v Wiesenthal*, 40 AD3d 1078, 1080 [2d Dept 2007]). “[E]xceptions to this general rule have been recognized where the wrong alleged involves a partnership transaction which can be determined without an examination of the partnership accounts or where ‘no complex accounting is required or only one transaction is involved which is fully closed but unadjusted’ ” (*id.*, quoting *Giblin v Anesthesiology Assocs.*, 171 AD2d 839, 840 [2d Dept 1991]).

In opposition, the plaintiffs argue that the alleged wrong here involves a partnership transaction which can be determined without examination of the partnership accounts and that no complex accounting is required. However, this argument is unsuccessful insofar as the plaintiffs

allege, among other things, that the defendant misappropriated funds that should have been available to the partnership for the operation of the restaurant, which will necessarily require the inspection of books, records, and accounts of Fiestambayan and the partnership (*see Kriegsman v Kraus, Ostreicher & Co.*, 126 AD2d 489, 490 [1st Dept 1987]). As such, insofar as the parties have yet to account, those branches of the defendant's motion to dismiss the causes of action for breach of partnership agreement, breach of fiduciary duty and duty of loyalty, and unjust enrichment as premature are granted (*see 1056 Sherman Ave. Assoc. v. Guyco Constr. Corp.*, 261 AD2d 519, [2d Dept 1999]; *Wynne v. Gruber*, 237 AD2d 284, 284 [2d Dept 1997]; *see also Stark v. Goldberg*, 297 AD2d 203, 204 [1st Dept 2002]; *Kriegsman v. Kraus, Ostreicher & Co.*, 126 AD2d 489 at 490).

In light of the foregoing, the court need not address the defendant's remaining arguments.

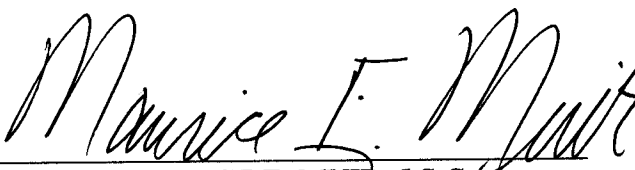
Accordingly, it is hereby

ORDERED, that the plaintiffs' complaint states a cause of action against the defendant for an accounting; and it is further,

ORDERED, that the defendant's motion is granted to the extent that the causes of action for breach of partnership agreement, breach of fiduciary duty and duty of loyalty, and unjust enrichment are dismissed as premature, without prejudice to the plaintiffs to interpose these claims in a separate action after an accounting, if an accounting is found to be warranted.

The foregoing constitutes the decision and order of the court.

Dated: February 14, 2025
Long Island City, New York


MAURICE E. MUIR, J.S.C.

