

Christou v Koureli Rest. Group, Inc.

2013 NY Slip Op 33217(U)

December 18, 2013

Sup Ct, NY County

Docket Number: 651839/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 651839/2013
CHRISTOU, ERINEOS
vs.
KOURELI RESTAURANT GROUP, INC.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE 11/25/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 19-28

Answering Affidavits — Exhibits _____ No(s) 29-33

Replying Affidavits _____ No(s) 36-37

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM.
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: _____

SHIRLEY WERNER KORNREICH

J.S.C.

J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 54

-----X
 ERINEOS CHRISTOU and
 EFTHIMIOS PAPANASTASOPOULOS

Index No.: 651839/2013

DECISION & ORDER

Plaintiffs,

-against-

KOURELI RESTAURANT GROUP, INC.,
 CONSTANTINOS YOUSISS, SPIRO MENEGATOS,
 and DINO GOURMOS,

Defendants.

-----X
 SHIRLEY WERNER KORNREICH, J.:

Defendants Koureli Restaurant Group, Inc., Constantinos Youssis, Spiro Menegatos, and Dino Gourmos move to dismiss the Amended Complaint (the AC) pursuant to CPLR 3211. Defendants' motion is granted for the reasons that follow.

I. Factual Background & Procedural History

The court assumes familiarity with its order dated October 29, 2013 (the October Order), which denied the preliminary injunction motion of plaintiffs Erineos Christou and Efthimios "Tim" Papanastasopoulos (Tim). The October Order sets forth the factual background. As this is a motion to dismiss, the court only relies on facts alleged in the AC and the documentary evidence, such as the Shareholders Agreement that governs the parties' relationship.

In short, plaintiffs commenced this case to recoup Tim's shares and stop the forfeiture of Christou's shares, forfeited by virtue of their termination based on alleged breaches of the Shareholders Agreement. The original complaint was filed on May 21, 2013. Plaintiffs filed their injunction motion on June 17, 2013, which was denied in the October Order. On July 1,

2013, plaintiffs filed the AC, which contains 17 causes of action. On August 5, 2013, defendants filed the instant motion to dismiss the entire AC. In opposition, plaintiffs only defended five causes of action: (1) breach of contract; (2) specific performance; (3) breach of fiduciary duty; (4) tortious interference with contract; and (5) unjust enrichment. Plaintiffs abandoned the other twelve causes of action.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a

matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Plaintiffs’ causes of action for specific performance, breach of fiduciary duty, tortious interference with contract, and unjust enrichment are dismissed as duplicative of the breach of contract claim and because they are insufficiently pled.¹

As for the breach of contract claim, since plaintiffs’ termination occurred approximately one year before the restaurant opened, forfeiture of their shares was warranted. As discussed in the October Order, the Shareholders Agreement provides for complete forfeiture if valid termination occurs before the restaurant opens. Plaintiffs’ only possible argument is that the basis for their termination does not fall within the enumerated grounds set forth in the Shareholders Agreement. However, this claim fails because the Shareholders Agreement permits termination due to “Misconduct”, defined to mean “any intentional act or omission ... not in the best interests of the Corporation.” Termination on this ground was duly effectuated with the votes of the required 140 shares. Ergo, defendants validly terminated plaintiffs for their actions, discussed in the October Order, which were unquestionably not in the best interest of the restaurant (i.e. overpaying Tim, inadequately managing subcontractors, etc.). To be sure, had termination on this ground not occurred until after the restaurant opened, the number of shares subject to forfeiture (at least with respect to Christou) might be different. However, as plaintiffs

¹ A court does not grant specific performance of an employment agreement [*Am. Broad. Cos. Inc. v Wolf*, 76 AD2d 162, 174 (1st Dept 1980)], no extra-contractual fiduciary duty is alleged [*Laub v Faessel*, 297 AD2d 28, 30 (1st Dept 2002)], no facts supporting tortious interference are alleged [*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996)], and the written Shareholders Agreement precludes the unjust enrichment claim [*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 (2005)]. It also should be noted that the claim for unjust enrichment relating to Tim’s work fails because he was paid the amount owed.

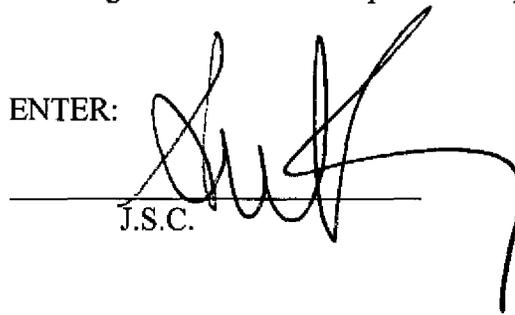
were terminated in July 2012, and the restaurant did not open until 2013, plaintiffs' Misconduct renders 100% of their shares subject to forfeiture.

Finally, since plaintiffs have no claim, their contention that the Shareholders Agreement's notice provision was not strictly complied with is inconsequential because plaintiffs suffered no resulting damages. *See Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Accordingly, it is

ORDERED that the motion to dismiss the Amended Complaint by defendants Koureli Restaurant Group, Inc., Constantinos Youssis, Spiro Menegatos, and Dino Gourmos is granted, and the Clerk is directed to enter judgment dismissing the Amended Complaint with prejudice.

Dated: December 18, 2013

ENTER:



J.S.C.