Hsui Chao Tao v Eng-Ling Chin
2011 NY Slip Op 33247(U)
October 11, 2011
Supreme Court, Queens County
Docket Number: 2905/2011
Judge: Augustus C. Agate
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE   IA Part 24
Justice

HSUI CHAO TAO, x Plaintiff, -against- ENG-LING CHIN and JIA FU LOU RESTAURANT, INC., x	Index Number 2905 2011 Motion Date August 30, 2011 Motion Cal. Numbers 36 and 37 Motion Seqs. Nos.1 and 2

The following papers numbered 1 to 13 read on this motion by plaintiff Hsui Chao Tao for an order appointing a receiver to operate defendant Jia Fu Lou Restaurant Inc., pursuant to Business Corporation Law §1113; directing an accounting of the books and records and present financial status of defendant Jia Fu Lou Restaurant Inc.; and enjoining defendant Jia Fu Lou Restaurant Inc., and its members and/or directors from committing acts of theft, fraud, looting, wasting of corporate assets, sale, mortgaging, financing or otherwise transfer any interest or assets of said corporation, pursuant to Business Corporation Law § 1115. Defendants Eng-Ling Chin and Jia Fu Lou Restaurant Corp. separately move for an order striking plaintiff's order to show cause seeking an appointment of a receiver and other injunctive relief; dismissing the causes of action against defendant Chin in her individual capacity pursuant to CPLR 3211(a)(7); dismissing the causes of action for breach of contract, unjust enrichment, fraud, extreme and outrageous conduct, pursuant to CPLR 3211(a)(7); granting a protective order pursuant to CPLR 3103(a) staying depositions in this matter pending the determination of this motion; and awarding sanctions, costs and reasonable attorney's fees pursuant to 22 NYCRR §130-1.1(a).

	Papers Numbered
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Upon the foregoing papers it is ordered that these motions are consolidated for the purposes of a single decision and order and are determined as follows:

Plaintiff Hsui Chao Tao commenced this action on February 7, 2011 and alleges in her complaint that she met defendant Eng-Ling Chin at a Buddhist Temple in 2010 and that they entered into an oral agreement to open a Chinese food restaurant known as Jia Fu Lou Restaurant Inc., located at 25-25 Parsons Boulevard, Flushing, New York. Plaintiff alleges she invested the sum of $45,000.00 on October 15, 2010, and that she became a 15% shareholder of the restaurant corporation. Plaintiff alleges that defendants did not issue a stock certificate, that the defendants exhausted the funds she provided by January 2011, that defendants have prevented her from managing the corporation, from drawing a salary, have failed to share any portion of the corporation's profit, and have failed to provide any information with respect to the funds she invested. The complaint alleges six causes of action for breach of contract, an account stated, unjust enrichment, fraud and deceit, an accounting, and for "extreme and outrageous conduct".

Defendants have served an answer and interposed 22 affirmative defenses and seven counterclaims for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, false imprisonment, and defamation.

Plaintiff served combined discovery demands and defendants have served a response.

Plaintiff, in an affidavit in opposition to the defendant's motion and in support of her motion, states that she does not speak any English, that she is illiterate in Chinese, and that she dictated the affidavit with the help of a translator and had it read back to her to ensure its accuracy. Statements made by plaintiff in this affidavit contradict allegations in her complaint with respect to when she first met defendant Chin, and the amount of funds she initially invested, and refers to a receipt for funds written in English that does not identify the parties to the transaction, describe the transaction, or refer to the corporation. No affidavit of translation has been submitted by plaintiff. Therefore, as plaintiff admittedly relied upon a translation and is not fluent in the English language, her affidavit shall be disregarded. As plaintiff executed a verification of her complaint, in English, and as no affidavit of translation is proffered, the court will treat the complaint as

unverified.

Defendant Chin, in her affidavit, submitted in opposition to plaintiff's motion and in support of her motion, states that she and the plaintiff attend the same Buddhist Temple and that they have known each other since 2005. Ms. Chin states that she and her family assisted plaintiff and her husband with various immigration and citizenship documents as plaintiff does not speak or read English fluently. She states that Jia Fu Lou Restaurant Inc. was incorporated on September 10, 2010; that she purchased the lease to the restaurant's premises on October 5, 2010; that on October 15, 2010, plaintiff invested money in the corporation in exchange for an undetermined percentage of shares, which would be determined and distributed once the restaurant opened and the total invested tallied; that plaintiff invested $40,000.00 in increments while the restaurant's premises was renovated and remodeled and new equipment was purchased; that plaintiff's interest in the corporation is 13% and not 15%; that plaintiff was never offered a managerial position in the corporation due to her full time employment elsewhere, her illiteracy and her overall lack of desire to participate in the day to day operations of the restaurant; that plaintiff's brother-in-law was hired as the restaurant's chef; that on December 3, 2010 plaintiff and her brother-in-law had a falling out and he refused to return to the restaurant; that at Chin's request the chef returned, and the restaurant; that the restaurant opened on December 22, 2010; and that her failure to terminate the chef resulted in plaintiff's demand for the return of her investment, as well as other verbal and physical disputes between the parties.

Those branches of plaintiff's motion which seeks an order appointing a receiver to operate Jia Fu Lou Restaurant Inc., pursuant to Business Corporation Law §1113 and for injunctive relief pursuant to Business Corporation Law §1115, are denied. The appointment of a receiver and injunctive relief under these sections of the Business Corporation Law are only available where an action or special proceeding has been commenced under Article 11 for judicial dissolution of a corporation. Plaintiff's complaint does not allege a claim for judicial dissolution of the corporation. To the extent that plaintiff has submitted a petition, along with the moving papers, which seeks to maintain the status quo of the corporation, said petition does not cure this pleading defect. Furthermore, plaintiff's counsel states in his affirmation that plaintiff is not seeking judicial dissolution of the corporate defendant.

That branch of plaintiff's motion which seeks an accounting

of the corporation's books and records and financial status in order to determine its income and expenditures, is denied. Although the complaint alleges a cause of action for an accounting, plaintiff has failed to establish that she is entitled to such relief at this stage of the action.

That branch of defendants' motion which seeks to strike plaintiff's order to show cause is denied as moot.

It is well settled that "[i]n considering a motion to dismiss for failure to state a cause of action (see CPLR 3211[a][7]), the pleadings must be liberally construed (see CPLR 3026). The sole criterion is whether [from the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Leon v Martinez*, 84 NY2d 83, 87-88[1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2003]; *see also Bovino v Village of Wappingers Falls*, 215 AD2d 619 [1995]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration *(see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481[1985], *affirmed* 66 NY2d 946 [1985]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v Ginzburg, supra* at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see Guggenheimer v Ginzburg, supra* at 275; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295[2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996]; *Rattenni v Cerreta*, 285 AD2d 636, 637 2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554[1998].) "Bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (*Mayer v Sanders*, 264 AD2d 827, 828 [1999]).

Plaintiff, in her first cause of action against Chin and Jia Fu Lou Restaurant Inc. for breach of contract alleges that she was fraudulently induced to enter into an oral agreement on October 15, 2010, whereby she invested the sum of $45,000.00 in exchange for a 15% shareholder interest in said corporation. She

alleges that Chin promised to share profits from the operation of the restaurant business, and to allow her to participate in the management of the restaurant. She alleges that she was never issued a stock certificate; that the sums she contributed were deposited in a checking account in the name of the corporation; and that she was asked to pre-sign blank checks for the purpose of paying the corporation's normal business expenses, including rent, utility bills, and insurance. It is alleged that the defendant used the corporate account "for the purposes of making a profit from the restaurant business" by paying said business expenses. It is alleged that the sums in said account were depleted and that Chin closed the account in January 2011. Plaintiff alleges defendant Chin breached their agreement by failing to share the profits with the plaintiff, failing to permit her to participate in the management of the restaurant business, and barring her entry to the restaurant premises. Plaintiff seeks to recover the sum of $45,000.00, together with interest.

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendants' failure to perform; and (4) resulting damages (*Furia v Furia*, 166 AD2d 694 [1990]). In pleading these elements, a plaintiff must identify what provisions of the contract were breached as a result of the acts at issue. (*see, Noise in the Attic Productions v London Records*, 10 AD3d 303, 307 [2004]; *Chrysler Capital Corp. v Hilltop Egg Farms*, 129 AD2d 927, 928 [1987]; *Griffin Bros. v Yatto*, 68 AD2d 1009 [1979]; *Lupinski v Village of Ilion*, 59 AD2d 1050 [1977].)

A stock certificate is evidence of shareholder status, but is not necessary to its creation (see, *United States Radiator Corp. v State of New York*, 208 NY 144 [1913]; *Matter of Walsh v Somerset Group*, 45 AD2d 915 [1974). When the consideration for shares has been paid in full, the subscriber is considered a holder of the shares and is entitled to all rights and privileges thereof (Business Corporation Law § 504 [I]; *Matter of Walsh v Somerset Group, supra* at 641; *see also Matter of Dissolution of M. Kraus, Inc*., 229 AD2d 347, 348 [1996]). Here, although defendants contest the amount paid by plaintiff and the percentage of shares allocated to her, the failure of the corporation to issue the certificate is not such a substantial breach of the purchase contract as entitled plaintiff buyer to rescind the purchase (*Walsh v Somerset Group, Inc*., supra at 915-916 ; *O'Herron v Southern Tier Stores*, 9 AD2d 568 [1959]).

To the extent that plaintiff alleges that the defendants

used the sums she contributed for the payment of the corporation's business expenses, such payments do not constitute profits, and do not state a claim for breach of contract. To the extent that plaintiff alleges that the defendants failed to share profits in accordance with the alleged oral shareholder's agreement, she does not allege that the restaurant corporation realized any profits between the time she became a shareholder in October 2010 and the commencement of this action on February 3, 2011. It is undisputed that the restaurant opened for business on December 22, 2010, and plaintiff demanded the return of her investment seven days later on December 29, 2010. Plaintiff's allegations, therefore, are insufficient to state a claim against Chin for breach of contract based upon the failure to declare dividends or distribute profits. In addition, an agreement between stockholders for equal compensation from corporate earnings is not generally enforceable directly against the corporation which was not a party thereto. (see *Weber v Sidney*, 19 AD2d at 498.)

The court recognizes that in a close corporation the bargain of the participants is often not reflected in the corporation's charter, by-laws nor even in separate signed agreements. The parties' full understanding may not even be in writing but may have to be construed from their actions. Unlike their counterparts in large corporations, minority shareholders in small corporations often expect to participate in management and operations. In addition, there generally is an expectation on the part of some participants that their interest is to be recognized in the form of a salary derived from employment with the corporation. These reasonable expectations constitute the bargain of the parties in light of which subsequent conduct must be appraised. (see *Weber v Sidney*, 19 AD2d 494[1963].) To the extent that plaintiff alleges a breach of the oral shareholder's agreement based upon Chin's failure to permit her to participate in the management of the corporation, and subsequently barring her from the restaurant premises, these allegations are sufficient to state a claim for breach of contract against Chin. Therefore, that branch of the defendants' motion which seeks to dismiss the first cause of action against Chin is denied. However, as plaintiff does not allege that the restaurant corporation was a party to the oral agreement, the first cause of action is dismissed as to this defendant.

The second cause of action asserts a claim against Chin and Jia Fu Lou Restaurant Inc. for an account stated, in the sum of $45,000.00. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due"

(*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869[1993], lv denied 82 NY2d 660 [1993]; see *Sisters of Charity Hosp. of Buffalo v Riley*, 231 AD2d 272, 282 [1997]; *Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [1979]). An essential element of an account stated is an agreement with respect to the amount of the balance due (*see Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 153-154 [1975]; *Sisters of Charity Hosp. of Buffalo, supra* at 282). "An account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists" (*M. Paladino, Inc. v Lucchese & Son Contr. Corp., supra* at 516 [1998]; *see Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, 996 [1979]; *Erdman Anthony & Assocs. v Barkstrom*, 298 AD2d 981, 981-982 [2002]; *Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 485 [1991]). Here, plaintiff's demand for the return of her investment in the defendant corporation is insufficient to state a claim for an account stated defendant. Therefore, that branch of defendants' motion which seeks to dismiss the second cause of action, is granted.

Plaintiff third cause of action for unjust enrichment is dismissed. A cause of action for unjust enrichment (or quasi-contract) requires a showing that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff (*Whitman Realty Group v Galano*, 41 AD3d 590 [2007]; *Cruz v McAneney*, 31 AD3d 54 [2006]; *Clifford R. Gray, Inc. v LeChase Construction Services, LLC,* 31 AD3d 983 [2006]). The essence of an unjust enrichment cause of action is that one party is in possession of money or property that rightly belongs to another (*Clifford R. Gray, Inc. v LeChase Construction Services*, LLC, 31 AD3d at 983). Here, plaintiff simultaneously alleges that she purchased a 15 percent interest in the defendant corporation for $45,000.00, and that the identical sum constituted a loan, which was to be repaid by means of sharing profits from the restaurant, and that said sum had not been repaid despite her demands. Plaintiff, however, fails to allege that the restaurant corporation made and retained profits between the time she made the alleged loan and the commencement of this action on February 3, 2011. Moreover, plaintiff cannot be both a purchaser of shares and a lender where there is but a single transaction. Therefore, as plaintiff's allegations are insufficient to state a claim for unjust enrichment, that branch of defendants' motion which seeks to dismiss the third cause of action is granted.

Plaintiff's fourth cause of action is for fraudulent

inducement. To plead a viable cause of action for fraud, it must be alleged that the defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendant when made, for the purpose of inducing reliance, justifiable reliance on the alleged misrepresentation or omission by the victim of the fraud, and injury. (*Lama Holding Company v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). Here, the complaint simultaneously alleges that plaintiff purchased a 15 percent interest in the defendant corporation for $45,000.00, and that the identical sum constituted a loan, to be repaid out of the restaurant corporation's profits. Plaintiff alleges that Chin "made false promises, statements and representations to Plaintiff that Defendant would make future payments to Plaintiff in consideration of the $45,000.00 amount that Plaintiff advanced to defendants. Defendant Chin also made false promised [sic] to Plaintiff that in exchange of the $45,000.00 amount advanced by Plaintiff, Plaintiff would receive profits and participate in the operation of the restaurant business" and that in reliance on those promises, she advanced $45,000.00 to the defendants. It is alleged that defendants never intended to repay the money; that Chin intentionally made these false statements for the purpose of having plaintiff advance said sum; that plaintiff reasonably and justifiably relied upon Chin's statements; and that plaintiff has been damaged in the sum of $45,000.00.

"A fraud based cause of action is duplicative of a breach of contract claim 'when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract'" (*Manas v VMS Associates. LLC*, 53 AD3d 451, 454 [2008], *quoting First Bank of the Americas v Motor Car Funding*, 257 AD2d 287, 291 [1999]). Otherwise put, "[a] cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." (*Id. see also Linea Nuova, S.A. v Slowchowsky*, 62 AD3d 473 [2009]). However, a fraudulent inducement claim may be based on allegations that a defendant made "a misrepresentation of present facts [that] is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of a duty." (*First Bank of the Americas v Motor Car Funding*, 257 AD2d at 291-292. Here, the alleged misrepresentations that plaintiff would be repaid out of the profits of the restaurant corporation involve representations of future intent and not an obligation collateral to the contract. Thus, as the alleged misrepresentations are insufficient to state a claim for fraudulent inducement, that branch of defendants' motion which seeks to dismiss the fourth cause of action is granted.

Furthermore, when, as here, the damages sought in connection with the purported fraud claim are the same as those sought in connection with the breach of contract claim, the fraud claim must be dismissed as duplicative of the breach of contract claim. *Manas v VMS Associates, LLC*, 53 AD3d at 454; *see Orix Credit Alliance. Inc. v R.E. Hable Co.*, 256 AD2d 114, 115 [1998].). Accordingly, the fraudulent inducement claim must be dismissed on this ground as well.

The fifth cause of action for an accounting seeks to have defendant Chin account for the $45,000.00 received from the plaintiff. The basis for an equitable action for an accounting is the existence of a fiduciary relationship respecting the subject matter of the controversy (*Bouley v Bouley*, 19 AD3d 1049, 1051 [2005]). Such a relationship is created by plaintiff's entrusting to the defendant some money or property with respect to which the defendant is "bound to reveal his dealings" (Id). The money or property entrusted must be money or property in which plaintiff has an interest, or, money or property, which, in equity, ought to be divided between plaintiff and defendant (*Sitar v Sitar*, 50 AD3d 667, 670 [2008]). A majority shareholder in a close corporation owes a fiduciary duty to minority shareholders (*O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281 [2007]), and a minority shareholder may seek equitable relief, including an accounting, where there has been a breach of fiduciary duty by the majority shareholder(*Tierno v Puglisi*, 279 AD2d 836 [2001]). But allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually (*Abrams v Donati*, 66 NY2d 951, 953[1985]).

Here, plaintiff incorporates all of the prior allegations, including her purchase of a 15 percent interest in the restaurant corporation, and alleges that she "advanced" the sum of $45,000 to the defendants; that on December 29, 2010 she demanded that Chin account for all the money she had received from plaintiff, and that Chin refused to do so; and that defendants converted plaintiff's funds to their own use and benefit. Plaintiff further alleges that "[u]pon an accounting by defendants, they [sic] money advanced by Plaintiff, together with interest and earnings thereon, will be found owing by defendants to Plaintiff." Plaintiff's allegations are insufficient to state a claim for an accounting, as her allegations of wrongdoing by Chin amount to a wrong against the corporation. Plaintiff, however, does not allege a derivative action on behalf of the corporation. Therefore, that branch of defendants' motion which seeks to dismiss the fifth cause of action for an accounting, is granted.

The sixth cause of action seeks to recover damages for defendants alleged “extreme and outrageous conduct which was intentional”, which in essence is a claim for prima facie tort. The requisite elements of a cause of action for prima facie tort are 1) the intentional infliction of harm, 2) which results in special damages, 3) without any excuse or justification, 4) by an act or series of acts which would otherwise be lawful (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-43 [1985]). Prima facie tort is not a "catch-all alternative for every cause of action which cannot stand on its own legs" (Id). Where relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a conventional tort cause of action (Id). Here, plaintiff’s bare allegations are insufficient to state a claim for prima facie tort. Therefore, that branch of defendants’ motion which seeks to dismiss the fifth cause of action, is granted.

In view of the foregoing, plaintiff’s motion for the appointment of a receiver, injunctive relief and for an accounting is denied in its entirety.

That branch of defendants’ motion which seeks to strike plaintiff’s order to show cause is denied as moot. That branch of defendants’ motion which seeks to dismiss the complaint as to defendant Chin in her individual capacity is granted as to the second, third, fourth, fifth, and sixth causes of action, and is denied as to the first cause of action. That branch of defendant’s motion which seeks to dismiss the complaint in its entirety as against the corporate defendant is granted. That branch of the motion which seeks to impose sanctions against the plaintiff, pursuant to 22 NYCRR 130-1.1(a), is denied.

Dated: October 11, 2011

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AUGUSTUS C. AGATE, J.S.C.