

Casey v Baxley

2011 NY Slip Op 33950(U)

August 8, 2011

Sup Ct, NY County

Docket Number: 115485/10

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN

PART 3

Index Number : 115485/2010
CASEY, TERRY
vs
BAXLEY, DAVID
Sequence Number : 001
DISMISS ACTION

INDEX NO. 115485/10
MOTION DATE 7/11/11
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for DISMISS / AMEND

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, and rows with numbers 1, 2, 3.

Cross-Motion: [X] Yes [] No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8-8-11

Signature of Eileen Bransten

HON. EILEEN BRANSTEN J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION
Check if appropriate: [] DO NOT POST [] REFERENCE
[] SUBMIT ORDER/ JUDG. [] SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X

TERRY CASEY,

Plaintiff,

-against-

Index No. 115485/10
Motion Date: 7/11/11
Mot. Seq. No.: 001

DAVID BAXLEY, ELAINE ROMAGNOLI, CRAZY
NANNY'S Ltd, 21 7 S LLC, JOHN DAZA, ELVIS
AREVALO, and JOHN DOE,

Defendants.

-----X

EILEEN BRANSTEN, J.:

Defendants Elaine Romagnoli ("Romagnoli") and Crazy Nanny's Ltd ("Crazy Nanny") move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action. Plaintiff Terry Casey ("Casey") cross-moves, pursuant to CPLR 3025 (b), for leave to amend his verified complaint on the ground that issue is not yet joined and that the proposed amended verified complaint does not cause surprise or prejudice and will clarify and particularize two causes of action to which the facts asserted give rise.

FACTS

Romagnoli contends that she was the sole owner and shareholder of Crazy Nanny since its creation in 1989. Crazy Nanny owned and operated several nightclubs at 21-23 Seventh Avenue, New York, New York, between 1989 and 2009.

Romagnoli met defendant David Baxley ("Baxley") in the summer of 2007. Baxley expressed an interest in purchasing Crazy Nanny. According to Romagnoli, she met with

Baxley several times. Romagnoli states that plaintiff Casey was mentioned during the meetings, but was not present. Romagnoli states that Baxley did not mention that Casey was to be an investor.

On July 18, 2007, Baxley made a written proposal to purchase 20% of Crazy Nanny for \$100,000. Baxley said that he and Casey would each pay \$20,000, and an additional \$60,000 would be spent on renovations. Baxley was to be responsible for day-to-day management. The proposal was unclear as to what role Casey would play.

The proposal provided that a \$20,000 payment would be made to Romagnoli upon signing the contract. The contract was to be executed within 10 days of the proposal. Romagnoli was to receive another \$20,000 on October 1, 2007. The proposal also provided for a gradual transfer of shares in the company to Baxley and Casey. Baxley and Casey would receive a management salary of \$1,200 for the first six months, after which the management salary would be renegotiated.

No party asserts that the contract was signed. Nonetheless, renovations on the property began in September 2007, and the club reopened in November or December 2007. Romagnoli had little involvement with the club. Baxley deposited \$20,000 into Crazy Nanny's operating account. Romagnoli denies any knowledge of whether Casey contributed any money to Crazy Nanny. No stock was issued to either Baxley or Casey, and Romagnoli denies ever having agreed to sell Casey any stock in Crazy Nanny.

The club was not successful, and closed in July 2009. Romagnoli then searched for a purchaser for the club, and sold the assets in January 2010.

Romagnoli does not offer any information on any agreement between her and Baxley and/or Casey. She acknowledges that Crazy Nanny was renovated, but does not state the conditions under which those renovations were performed or the terms under which Baxley and Casey operated Crazy Nanny.

The complaint alleges that Romagnoli verbally accepted the terms of the July 18, 2007 proposal, and that Casey performed in accordance with the terms of that proposal. The complaint states that Casey paid \$60,000 for the renovation of Crazy Nanny, and wired \$36,905.05 into Crazy Nanny's account. Casey claims that on August 30, 2007, e-mail that he received from Romagnoli affirmed the terms of the proposal. That e-mail states, "Should I sign this and fax to you or just wait until Tuesday when I am in again." Cross motion Ex. B. While the subject line states "Letter of Intent," nothing in the e-mail indicates to what Romagnoli was referring to when she asked about signing something.

The complaint asserts causes of action for fraud (first cause of action), conversion (second cause of action; fourth cause of action in amended complaint), unjust enrichment (third cause of action; fifth cause of action in amended complaint) and for an accounting (fourth cause of action; sixth cause of action in amended complaint). In the proposed amended complaint, Casey adds a cause of action for breach of contract (second cause of action) and for breach of fiduciary duty (third cause of action).

DISCUSSION

Romagnoli and Crazy Nanny assert that Casey has failed to allege the necessary elements to support a cause of action for fraud, conversion or unjust enrichment. In response to the cross motion, Romagnoli and Crazy Nanny further assert that there was never a contract, but at most an agreement to agree, and that there was no constructive trust.

Cross Motion

Casey seeks leave to add a claim for breach of contract and a claim for breach of fiduciary duty claim based on Romagnoli's alleged failure to protect Casey's interest in the constructive trust for which Romagnoli was responsible.

Since defendants have had an opportunity to respond to the cross motion, the court will address the viability of those claims as well.

Fraud

In order to state a cause of action for fraud, a plaintiff must plead the cause of action with particularity. CPLR 3016 (b). The plaintiff must set forth factual allegations that the defendant knowingly made material representations that were false, made them in order to deceive the plaintiff, and that the plaintiff justifiably relied on the defendant's representations, which caused plaintiff injury. *Cohen v. Houseconnect Realty Corp.*, 289 A.D.2d 277, 278 (2d Dep't 2001).

While Casey alleges that Romagnoli and Baxley made a series of false representations that were intended to and did mislead Casey, he fails to allege specific representations that

were made, by whom they were made or when they were made, as is required. Further, if Casey is relying on the proposal letter, there is no allegation that the parties followed through on that proposal. Casey does not assert that a written contract, contemplated by the proposal, was ever drafted or executed. Nor does Casey allege that the financial terms in the proposal were carried out; if no contract was signed, there could not have been any payment at the time of signing. Similarly, Casey makes no allegation that Romagnoli was paid \$20,000 on October 1, 2007. Casey's reliance on his wiring of \$36,000 to Crazy Nanny's account does not support his cause of action. According to the proposal, Romagnoli was to be paid \$40,000 directly. The money was not supposed to go to Crazy Nanny. Thus, to the extent any agreement may exist, it does not appear to have been in conformance with the letter proposal.

Casey has failed to allege facts from which one can conclude that an agreement was reached or the terms of such an agreement. Casey's cause of action based upon fraud stemming from misrepresentations made in the course of reaching that nonexistent agreement thus cannot stand. He has failed to demonstrate misrepresentation, knowledge of the falsity, intent to deceive or justifiable reliance. Plaintiff's first cause of action for fraud is dismissed.

Breach of Contract

As discussed above, Casey has not alleged the terms of the contract that he claims was breached. If the terms were as indicated in the proposal, then no contract exists. No written

contract was executed. *Aksman v. Xiongwei Ju*, 21 A.D.3d 260 (1st Dep't 2005). If another agreement was reached, Casey has failed to set forth its terms. Plaintiff's claim for breach of contract must therefore be dismissed.

Breach of Fiduciary Duty

Casey contends that Romagnoli owed him a fiduciary duty. Casey alleged that this duty arose because she represented to him that he could purchase the shares of the club in her possession, and she knew that he was relying on her good faith as a business partner. However, as stated above, Casey has not asserted the terms of any such agreement allowing for the purchase of Romagnoli's shares in the club. Plaintiff has therefore not stated a claim for breach of fiduciary duty based upon Romagnoli's failure to abide by such an agreement, and Plaintiff's claim must be dismissed.

Conversion

In order to state a claim for conversion, a plaintiff must allege a specific and identifiable property that was allegedly converted, plaintiff's right to possession of the property, that the defendant exercised unauthorized dominion and control over the property, and that the plaintiff made due demand for the property. *See Castle v. Corn Exch. Bank*, 148 N.Y. 122, 126 (1895); *Ehrlich v. Froehlich*, 72 A.D.3d 1010 (2d Dep't 2010); *Madison v. Gross*, 54 App. Div. 129 (2d Dep't 1900).

Here, while Casey alleges that he had a right to 10% of the shares of Crazy Nanny,

he does not allege that he ever owned or possessed that stock. Without any allegation that he had legal ownership or possession of specific and identifiable property, the cause of action for conversion cannot stand. *United Sys. Assoc. v. Norstar Bank Upstate N.Y.*, 171 A.D.2d 922, 923 (3d Dep't 1991).

Casey's cause of action for conversion must also fail because he has made no assertion that he made any demand for the property, which demand was refused. *SPI Communications v. WTZA-TV Assoc. Ltd. Partnership*, 229 A.D.2d 644 (3d Dep't 1996).

Unjust Enrichment

In order to state a cause of action for unjust enrichment, a plaintiff must allege that the plaintiff conferred a benefit upon the defendant for which the plaintiff was not compensated.

Casey contends that he conferred his partial performance of the alleged agreements. However, as discussed above, Casey has failed to allege facts supporting the existence of any agreement. Further, if there were an agreement, Casey would be bound by its terms, and could not rely upon a quasi contract form of relief. Even if Casey had alleged that he conferred a benefit by investing \$36,000 into Crazy Nanny, Casey has not alleged any facts to support any contention that such an investment conferred any benefit on Romagnoli, which would be necessary in order to support a claim that she would be required to compensate Casey for that benefit. *CDR Créances S.A. v. Euro-American Lodging Corp.*, 40 A.D.3d 421,

422 (1st Dep't 2007). Plaintiff's cause of action for unjust enrichment is dismissed.

Accounting

Casey has not demonstrated that there was any agreement, or any business relationship between the parties that would support a cause of action for an accounting. The cause of action is therefore dismissed.

CONCLUSION

The court notes that, while it is true that Romagnoli and Crazy Nanny have failed to explain under what terms Casey worked for Crazy Nanny or invested money into renovations, defendants need not rebut the terms of an agreement when the plaintiff has not set forth the terms of an agreement that he claims existed. Plaintiff Casey has not alleged the terms of an agreement. Therefore, defendants need not explain the terms under which the parties engaged in business.

(Order on following page.)

Accounting

Casey has not demonstrated that there was any agreement, or any business relationship between the parties that would support a cause of action for an accounting. The cause of action is therefore dismissed.

CONCLUSION

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(Order on following page.)

Accordingly, it is hereby

ORDERED that the motion by Elaine Romagnoli and Crazy Nanny's Ltd. to dismiss is granted, and the complaint is dismissed as against Elaine Romagnoli and Crazy Nanny's Ltd. with costs and disbursements to said defendants as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the remainder of the action is severed and continues; and it is further

ORDERED that the cross motion is denied.

Dated: New York, New York
August 8, 2011

ENTER:



Hon. Eileen Bransten, J.S.C.