

Hennings v Boxaurant LLC

2013 NY Slip Op 33699(U)

March 5, 2013

Sup Ct, New York County

Docket Number: 652385/12

Judge: Anil C. Singh

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

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

HENNINGS, JASON

INDEX NO. 652385/12

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO. 002

- v -
BOXAURANT LLC D/B/A
REDWOOD

The following papers, numbered 1 to 4 were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	1
Answering Affidavits -- Exhibits	2
Replying Affidavits	3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the annexed memorandum opinion.

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

Dated: 3/5/13

Anil C. Singh
HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X

JASON HENNINGS and DEVEILED FOODS LLC,

Plaintiffs,

DECISION AND
ORDER

-against-

Index No.
652385/12

BOXAURANT LLC d/b/a REDWOOD KITCHENETTE
AND BAR a/k/a REDWOOD, JOHN YUDER,
ANDREW YUDER a/k/a ANDY YUDER,

Defendants.

-----X

HON. ANIL C. SINGH, J.:

Defendant Andrew Yuder moves to dismiss the complaint as against him in its entirety pursuant to CPLR 3211(a)(7), 3016(b), and 3013. Plaintiffs oppose the motion and cross-move pursuant to CPLR 3025 for leave to amend the summons and complaint. Defendant opposes the cross-motion.

Plaintiffs commenced this action by filing a summons and complaint on July 10, 2012. Defendants Boxaurant LLC (“Boxaurant”) and John Yuder (“Yuder”) answered the complaint, denying its material allegations.

“Leave to amend a pleading should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party” (Natoli v. NYC Partnership Housing

Development Fund Company, Inc., 103 A.D.3d 611 [2d Dept., 2013]).

A copy of the proposed amended summons and complaint is annexed to the cross-motion as exhibit A. The Court finds no grounds for denying the application to amend the complaint. Accordingly, we will treat the pending motion as a motion to dismiss the amended summons and complaint.

The amended complaint alleges the following facts.

Plaintiff Jason Hennings is a restaurateur and restaurant consultant. Hennings, who currently operates three restaurants, is the principal of plaintiff Deviled Foods LLC.

Defendants John and Andrew Yuder are members, owners, and interest holders of defendant Boxaurant LLC, which conducts business under the trade name Redwood Kitchenette and Bar.

In late 2010, Yuder, allegedly on behalf of himself and Andrew Yuder, approached Hennings to inquire whether Hennings would be interested in becoming Yuder's business partner in a joint venture to develop a restaurant to be operated at 102 Eighth Avenue in Manhattan, the location at which Yuder was involved in operating another restaurant.

Hennings agreed and, at the defendants' collective request, as voiced by John Yuder, he had the architectural drawings on file with the Department of

Buildings pulled and modified. Simultaneously, the parties engaged in further discussions regarding the respective roles, obligations, rights and benefits of each partner. The answering defendants admit that in August 2011, Hennings met with the landlord at Yuder's request. The answering defendants also admit that in August 2011, Yuder asked Hennings to sign personal guarantees with certain creditors, vendors and contractors (Answer, p. 2, para. 12).

The amended complaint alleges that Yuder with the financial assistance of his brother Andrew Yuder, would provide all capital funding for the project and consequently would own eighty percent of the membership interest in the new entity. Hennings was to be the project developer and thereafter the general manager, and would own twenty percent of the business subject to a sliding scale where for every \$50,000.00 realized in profit, Yuder would transfer five percent of the membership interest to Hennings until both members owned fifty percent of the business. There were to be no other members of the new entity until a 50/50 split had been reached, at which point Andrew Yuder would be formally admitted as a member subject to the terms that had not yet been agreed upon. In addition, Hennings was to receive a management fee of five percent of the restaurant's gross sales per week, in an amount not less than \$1,000 per week or more than \$75,000 per calendar year.

Plaintiff alleges that, despite defendants' repeated representations that Andrew Yuder was not intended to be a formal member of the business until after Hennings obtained a 50% ownership interest in the business, Andrew Yuder was nonetheless "inextricably woven into" the business development.

Plaintiff alleges that he repeatedly demanded that the parties sign an operating agreement; however, the defendants avoided all of plaintiff's attempts to "formalize" the business. Further, plaintiff contends that Yuder and Andrew Yuder had "surreptitiously" formed Boxaurant LLC to operate the restaurant to the exclusion of Hennings after he had completed designing, developing, constructing and implementing his restaurant concept that was to be named "Redwood."

According to the amended complaint, on February 27, 2012, after Hennings' continued insistence that the parties sign a formal operating agreement, the defendants told plaintiff that he was not wanted as a partner; that they were under the impression that Hennings was "just trying to help" the defendants develop a restaurant concept; and that they had no reason to believe that Hennings expected a return on his investment or the reimbursement of his actual out-of-pocket expenses.

Plaintiffs contend that they have spent \$38,567.80 on payroll for seven employees, none of which has been reimbursed by defendants; that plaintiffs have

incurred out-of-pocket expenses associated with this project, none of which have been reimbursed, in the amount of \$29,909.12; and that defendants have “intentionally and surreptitiously” interfered with the plaintiffs’ employee relations and have lured away a general manager and an executive chef employed by Deviled Foods LLC, as well as several other lower level employees that were hired by Culinary Royal Promotions LLC to staff Redwood.

The amended complaint asserts nine causes of action. The first cause of action (breach of contract) asserts that defendants entered into oral agreements requiring them to reimburse plaintiffs for out-of-pocket costs incurred. The second cause of action (breach of contract) alleges that defendants entered into oral agreements providing that Hennings would own twenty percent of the new restaurant and would receive a management fee. The third cause of action alleges fraud. The fourth cause of action alleges breach of the implied covenant of good faith and fair dealing. The fifth cause of action alleges conversion of money, proprietary information and intellectual property. The sixth cause of action alleges tortious interference with economic advantage. The seventh cause of action alleges unjust enrichment. The eighth cause of action alleges quantum meruit. The final cause of action seeks punitive damages.

Plaintiff Jason Hennings states in a sworn reply affidavit that both John

Yuder and Andrew Yuder were “heavily involved” in the project; that Andrew was to provide the financing while John dealt with more of the day-to-day details concerning the development and design of the business; and that Andrew provided all investment funds and paid for much of the equipment and supplies, but was otherwise intended to be a “background figure.” According to Hennings, Andrew was “a key figure” in the defendants’ scheme to defraud Hennings and his business, and his involvement “touched all phases of design, development and construction of Redwood.” Further, plaintiff contends that in early 2010, both John and Andrew asked him to consider a partnership opportunity; that most of the meetings were held at Andrew’s midtown office with John, Andrew and their mother in attendance; that he was told that “this was a family investment” and that “all items would be discussed as a group”; and that an agreement was reached in late December of 2010 whereby Andrew would finance the project while John and plaintiff would see to the daily operations.

Discussion

Defendants’ first contention is that amended complaint fails to state any cause of action whatsoever as against Andrew Yuder. After careful consideration, it is clear to the Court that the amended complaint – as supplemented by the sworn affidavit of Jason Hennings – sufficiently states causes of action against Andrew

Yuder for breach of contract, unjust enrichment, and quantum meruit.

Defendants' next contention is that plaintiffs fail to meet the stringent requirements for pleading fraud.

Plaintiffs in their amended complaint allege that defendants actions and statements constituted fraud, deceptive business practices and misrepresentation by: a) inducing plaintiffs into providing free expert consulting services, proprietary information and intellectual property pertaining to the design, development, construction and implementation of Redwood; b) inducing plaintiffs to provide and pay for all staffing to support the design, development, construction and implementation of Redwood; c) inducing plaintiffs into paying significant out-of-pocket costs and expenses; and d) inducing plaintiffs into providing all prospective employee hiring and training services for Redwood.

The complaint alleges further that defendants induced such actions by making false and deceptive representations to plaintiffs.

“The fraud alleged is based on the same facts as underlie the contract claim and is not collateral to the contract and no damages are alleged that would not be recoverable under a contract measure of damages” (J.E. Morgan Kniting Mills, Inc. v. Reeves Brothers, Inc. 243 A.D.2d 422 [1st Dept., 1997]). Accordingly, the fraud claim must be dismissed.

Next, defendants contend that plaintiffs fail to establish a prima facie case of conversion. Defendants point out that plaintiffs have failed to allege that Andrew himself assumed or exercised control over any of plaintiffs' personal property.

The cause of action of the amended complaint sounding in conversion asserts that defendants converted the sum of \$68,476.92 as well as valuable proprietary information, services and intellectual property.

Even if the Court assumes for the sake of argument that the conversion cause of action properly sets forth the elements of that tort, nevertheless the cause of action must be dismissed because it essentially seeks damages for breach of contract (Automobile Coverage, Inc. v. American International Group, Inc., 42 A.D.3d 405 [1st Dept., 2007]).

Defendants' next contention is that the amended complaint fails to state a cause of action for tortious interference with economic advantage.

"The use of wrongful means is a requisite element of a claim for tortious interference with prospective contractual or business relations" (72 N.Y.Jur.2d Interference section 42). "'Wrongful means' is defined as, and includes, physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (Id.).

Here, it is clear to the Court that the specific conduct alleged fails to meet the legal definition of “wrongful means.”

The fourth cause of action asserts breach of the implied covenant of good faith and fair dealing. “The claim that defendants breached the implied covenant of good faith and fair dealing [is] properly dismissed as duplicative of the breach-of-contract claim, as both claims arise from the same facts and seek the identical damages for each alleged breach” (Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 A.D.3d 423, 426 [1st Dept., 2010]).

Next, defendants assert that plaintiffs’ unjust enrichment claim and quantum meruit claims should be dismissed as duplicative of the breach of contract claims.

In short, the court declines to dismiss such claims at this early stage of the litigation, for it has not yet been determined conclusively that a valid and enforceable oral agreement exists. Under such circumstances, the Court finds that plaintiffs are permitted to plead both contract and quasi-contract claims in the alternative (Beach v. Touradji Capital Mgt. L.P., 85 A.D.3d 674 [1st Dept., 2011]).

Finally, the cause of action seeking punitive damages must be dismissed in light of the dismissal of the cause of action for fraud.

Accordingly, it is

ORDERED that the cross-motion for leave to amend the complaint is

granted; and it is further

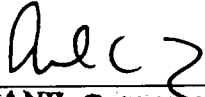
ORDERED that the motion to dismiss is granted, and the third, fourth, fifth, sixth, and ninth causes of action of the amended complaint are dismissed; and it is further

ORDERED that defendant Andrew Yuder is directed to serve an answer to the amended complaint within 20 days after service of this order with notice or entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on JUNE 26TH, 2013, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 3/5/13
New York, New York



HON. ANIL C. SINGH, Singh
SUPREME COURT JUSTICE