

Bencosme v Rodriguez
2013 NY Slip Op 31786(U)
August 1, 2013
Sup Ct, New York County
Docket Number: 150352/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FENMAN
Justice

PART 12

Index Number : 150352/2011
BENCOSME, JOHN
vs.
RODRIGUEZ, EUGENIO
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 150352/11
MOTION DATE
MOTION SEQ. NO. 002

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 21-28, 29, 32
Answering Affidavits — Exhibits No(s) 33-34
Replying Affidavits No(s) 36-39

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 8/1/13

[Signature] 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 : IAS PART 12

-----X
JOHN BENCOSME and KING CONSTRUCTION
GROUP, LLC,

Index No. 150352/11

Mot. seq. no. 002

Plaintiffs,

DECISION AND ORDER

- against -

EUGENIO RODRIGUEZ,

Defendant.

-----X
EUGENIO RODRIGUEZ, KING CONSTRUCTION
GROUP, LLC, and KING OF THE EASTSIDE
MAINTENANCE AND CONSTRUCTION CORP.,

Index No. 150507/11

Mot. seq. no. 001

Plaintiffs,

- against -

JOHN BENCOSME,

Defendant.

-----X
BARBARA JAFFE, J.:

For Rodriguez:
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New York, NY 10017
212-686-7644

For Bencosme:
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Rodriguez, as defendant in the first action, Index No. 150352/11, moves pursuant to CPLR 3211 for an order dismissing the first through eleventh causes of action asserted against him by plaintiffs Bencosme and King Construction Group, LLC (King) (collectively, plaintiffs Bencosme). Plaintiffs Bencosme oppose and cross-move for an order consolidating the action with *Rodriguez et al. v Bencosme*, Index No. 150507/11, granting them discovery to obtain

information necessary to oppose Rodriguez's motion to dismiss, and granting them summary judgment. Rodriguez opposes the cross motion.

Bencosme, as defendant in the second action, Index No. 150507/11, moves for an order: (1) consolidating the second action with the first action; (2) pursuant to CPLR 3211, dismissing plaintiffs' first through eighth causes of action on various grounds; and (3) pursuant to CPLR 3212, granting summary judgment in his favor and other relief. Plaintiffs Rodriguez, King, and King of the Eastside Maintenance and Construction Corp. (Eastside) (collectively, plaintiffs Rodriguez) oppose.

The motions are consolidated for disposition.

I. MOTION TO CONSOLIDATE

Absent any legal ground upon which to deny consolidation of the two actions, and as they are clearly related, the motion to consolidate is granted.

II. DEFENDANT RODRIGUEZ'S MOTION TO DISMISS

By amended summons and complaint dated December 8, 2011, plaintiffs Bencosme assert the following causes of action against Rodriguez: (1) fraud in the inducement as to Bencosme; (2) breach of contract as to Bencosme; (3) conversion as to King; (4) conversion as to Bencosme; (5) breach of fiduciary duty as to King; (6) breach of fiduciary duty as to Bencosme; (7) fraudulent inducement as to both plaintiffs; (8) breach of contract as to both plaintiffs; (9) an accounting; (10) conversion of King's assets for personal use; and (11) defamation as to Bencosme. (Bencosme NYSCEF 22,¹ Exh. 1).

¹ As two actions are addressed here, electronically filed documents (NYSCEF's) are additionally referenced with the particular plaintiff's name.

A. Standing/lack of capacity to sue

Rodriguez argues that Bencosme lacks standing or capacity to sue on an individual basis for claims which would inure to King's benefit, namely, the fourth (conversion), sixth (breach of fiduciary duty), seventh (fraudulent inducement), eighth (breach of contract), and ninth (an accounting) causes of action. (Bencosme NYSCEF 23). Bencosme asserts that he has been injured individually and directly by Rodriguez's actions, and that as a 50-percent member of the two-person King company, he has standing to sue derivatively on behalf of King. (Bencosme NYSCEF 34).

To the extent that Bencosme is suing derivatively on behalf of King, he has standing and/or legal capacity to do so. (*Tzolis v Wolff*, 10 NY3d 100 [2008]; *see also Gottlieb v Northriver Trading Co., LLC*, 58 AD3d 550 [1st Dept 2009] [members of LLC may seek equitable accounting under common law]).

However, whether or not Bencosme's claims are direct or derivative, as they are not pleaded with sufficient clarity to determine whether they are made individually or derivatively, they are dismissed with leave to replead. (*Abrams v Donati*, 66 NY2d 951 [1985] [complaint in which allegations confuse shareholder's derivative and individual rights will be dismissed but leave to replead may be granted]; *Yudell v Gilbert*, 99 AD3d 108 [1st Dept 2012]; *DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635 [2d Dept 2009] [same]).

B. Pre-suit demand requirement

Rodriguez contends that Bencosme's third, fifth, seventh, eighth, ninth, and tenth claims must be dismissed absent an allegation in the complaint that Bencosme demanded that King commence a lawsuit against Rodriguez and King failed to do so or that a demand would have

been futile. (Bencosme NYSCEF 22). Bencosme argues that as he and Rodriguez were each 50 percent members of King, making a demand upon King to sue Rodriguez would have been futile. (Bencosme NYSCEF 34).

Here, Bencosme sufficiently alleges that Rodriguez diverted corporate funds and assets for his own personal use, and that as he and Rodriguez are the only members of King, he has sufficiently established that a demand on King to sue Rodriguez would have been futile. (*See eg Hu v Shen*, 57 AD3d 616 [2d Dept 2008] [allegations that defendant shareholders were directly interested in and personally benefitted from alleged bad acts demonstrated that demand would have been futile]; *Malkinzon v Kordonsky*, 56 AD3d 734 [2d Dept 2008] [demand is futile, and thereby excused, when company directors incapable of making impartial decision as to whether to bring suit]; *Lewis v Akers*, 227 AD2d 595 [2d Dept 1996], *lv denied* 88 NY2d 813 [demand unnecessary if complaint alleges acts for which majority of board may be held liable and plaintiff reasonably concludes board would not be responsive to demand]).

C. Failure to state a claim

1. Fraud claim

a. Claim related to hiring of general contractor

In his seventh cause of action, Bencosme alleges that as a result of Rodriguez's mismanagement of King, he wanted to hire a general contractor to manage King's daily operations, but that Rodriguez persuaded him to not to do so by promising to personally fund renovation projects in certain circumstances, that he relied on Rodriguez's promise to his detriment, and that Rodriguez's representation was false and made with the intent to induce him to rely on it. He maintains that Rodriguez convinced him not to hire the general contractor based

on his promise to take such future action, which promise Rodriguez had no intention of carrying out.

It is well-settled that

[a]bsent a present intent to deceive, a statement of future intentions, promises or expectations is not actionable on the grounds of fraud. A complaint based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement. Moreover, any inference drawn from the fact that the expectation did not occur is not sufficient to sustain the plaintiff's burden of showing that the defendant falsely stated his intentions.

(*Lanzi v Brooks*, 43 NY2d 778 [1977]; see *Papp v Debbane*, 16 AD3d 128 [1st Dept 2005]

[representations of future intent non-actionable absent allegation that would support inference that representations were made with present intention that they would not be carried out]; see also *Brown v Lockwood*, 76 AD2d 721 [2d Dept 1980] [“where the defendant makes a promise as to future action for the purpose of inducing the plaintiff to enter into a contract and does not fulfill that promise, a party who relies thereon to his detriment may recover for fraud where he can prove that at the time the promise was made the defendant had no intention of carrying it out”]). However, “[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim [of fraud].” (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]).

Moreover, “in order to establish a fraud claim in addition to a breach of contract claim, plaintiff must show misrepresentations that are misstatements of material fact or promises with a present, but undisclosed, intent not to perform, not merely promissory statements regarding future acts.” (*Venables v Sagona*, 85 AD3d 904 [2d Dept 2011], quoting *Mora v RGB, Inc.*, 17 AD3d 849 [3d Dept 2005]; see also *Schulman v Greenwich Assocs., LLC*, 52 AD3d 234 [1st Dept

2008] [if party wishes to assert both fraud and breach of contract claims, alleged misrepresentations must be promises made with present, but undisclosed intent not to perform them]).

Here, Bencosme alleges Rodriguez's contemporaneous intention not to fulfill his promise. (*Compare J.M. Builders & Assocs., Inc. v Lindner*, 67 AD3d 738 [2d Dept 2009] [fraud claim dismissed as complaint failed to allege that defendants harbored present intent to deceive plaintiff]; *see also Braddock v Braddock*, 60 AD3d 84 [1st Dept 2009] [whether defendant ever intended that promise would be fulfilled is question of fact that should not be decided on motion to dismiss fraud claim]). Thus, he sufficiently states a claim for fraud.

b. Claim related to loan to King

Bencosme contends that he made a loan to King based on Rodriguez's representation that King would repay him and that if it failed to do so, Rodriguez would repay him, and that Rodriguez instead used the money for his personal use and refused to permit King to repay him. Rodriguez argues that he may not be held liable for this claim as the loan was given to King and King was obligated to repay it. (Bencosme NYSCEF 34).

Bencosme's claim that Rodriguez fraudulently induced him to extend the loan to King sufficiently states a claim for fraud. (*See Indosuez v Barclays Bank PLC*, 181 AD2d 447 [1st Dept 1992] [plaintiff stated fraud cause of action based on allegation that defendant's misrepresentations induced it to extend loan to non-party corporation]; *see also Sterling Nat. Bank v Ernst & Young LLP*, 62 AD3d 584 [1st Dept 2009] [plaintiff raised triable issue as to fraud claim based on allegations that defendants' fraudulent misrepresentations induced plaintiff to extend credit to nonparty]).

2. Breach of contract as to Bencosme

Rodriguez argues that an alleged oral promise by him to answer for King's debt is not actionable absent a writing signed by him guaranteeing repayment of the loan. (Bencosme NYSCEF 23). Bencosme contends that the loan was made for Rodriguez's benefit and that Rodriguez used the proceeds to pay his personal debts, and that as he made the promise to pay Bencosme before and at the time the loan was requested, the statute of frauds is inapplicable. (Bencosme NYSCEF 34).

Here, as Bencosme alleges that the loan constituted new consideration, that the money went to Rodriguez and was used to further his interests, and that the parties intended that Rodriguez be liable for repayment of the loan, the statute of frauds does not bar this claim. (*Nazarov v Abrahamovich*, 85 AD3d 883 [2d Dept 2011] [statute of frauds does not bar claim for repayment of loan to corporation, which was supported by plaintiff-shareholder's promise to repay it, as money given to plaintiff for his benefit and in furtherance of his interests and parties' intent was that he would be primarily liable for debt]).

3. Claim for slander

a. Sufficiency of pleading

To plead a defamation claim adequately, a party must include the "particular words complained of" (CPLR 3016[a]), the time, place, and manner of publication, and the person to whom it was published (*Glazier v Harris*, 99 AD3d 403 [1st Dept 2012]; *Epifani v Johnson*, 65 AD3d 224 [2d Dept 2009]; *Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]). To state a claim for defamation, a party must allege "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence

standard, and . . . caus[ing] special harm or constitut[ing] defamation per se.” (*O’Neill v New York Univ.*, 97 AD3d 199, 212 [1st Dept 2012]; *Salvatore v Kumar*, 45 AD3d 560, 563 [1st Dept 2007], *lv denied* 10 NY3d 703 [2008]).

Here, Bencosme stated in his amended complaint the words allegedly spoken by Rodriguez, when they were made, and to whom they were made, and thus the claim is sufficiently pleaded.

b. Qualified common interest privilege and actual malice

Rodriguez asserts that the allegedly slanderous statements are privileged as he made them in discharging his duties as King’s member and shareholder and to King’s clients, and that Bencosme does not sufficiently plead actual malice. (Bencosme NYSCEF 23). Bencosme denies that they are privileged as they were not made in furtherance of King’s business but rather to influence the clients’ opinions of Bencosme and to take away business from Bencosme. (Bencosme NYSCEF 34).

A qualified common interest privilege applies to a communication “made by a person with a legitimate interest in making or a duty to make the communication, and the communication is sent to a person with a corresponding interest or duty, even though with the privilege the communication would be defamatory.” (14 NY Prac, New York Law of Torts § 1:51 [2012]). Even if the privilege applies, however, there exists a rebuttable presumption of good faith, and the plaintiff must show two things to defeat the presumption: (1) that the statement was false, and (2) that the defendant abused the qualified privilege by acting with spite or ill will or malice. (*Id.*).

Here, even assuming that Rodriguez’s statements were subject to a qualified common

interest privilege (*but see Silverman v Clark*, 35 AD3d 1 [1st Dept 2006] [privilege did not apply to employer's letters to former clients advising them of alleged deficiencies of former associate; observing that defamation of competitor for prospective business advantage not protected by qualified privilege]), Bencosme has alleged that the statements were false and that Rodriguez acted with ill or malice in making them, and thus dismissal of the defamation claim on this ground is not warranted (*see eg Kotowski v Hadley*, 38 AD3d 499 [2d Dept 2007] [defamation claim not dismissed pursuant to CPLR 3211 as plaintiff alleged that certain communications were made with malice and were false, and that defendant published them solely to discredit plaintiff and injure plaintiff's good name and reputation to cause termination of plaintiff's employment; plaintiff not required to show evidentiary facts to support allegations of malice on motion to dismiss]; *Gay v Affourtit*, 76 F Supp 2d 517 [SD NY 1999] [qualified immunity would not apply to employees who allegedly circulated rumors within airline community about plaintiff's competence to fly airplane safely if allegations were false and disseminated solely out of malice]).

Moreover, Bencosme's claim of actual malice is sufficiently pleaded. (*See Weiss v Lowenberg*, 95 AD3d 405 [1st Dept 2012] ["defamation complaint should not be dismissed on a pre-answer motion to dismiss based on qualified privilege claim where, as here, the content and context of the alleged defamatory statements in the complaint or supporting materials on the motion 'are sufficient to potentially establish malice' or are such that malice can be inferred"]).

c. Statements of pure opinion

Bencosme's allegations that Rodriguez told others that he was a thief and stole contracts and business and money from Rodriguez and other contractors are not statements of pure

opinion. (See *Epifani v Johnson*, 65 AD3d 224 [2d Dept 2009] [allegation that employer told other employees that employee was terminated because she was stealing from employer stated claim for defamation]; *Zulawski v Taylor*, 63 AD3d 1552 [4th Dept 2009] [defense of privilege not shown sufficiently where defendant allegedly commented to vendors in plaintiff's industry that plaintiff scammed people to avoid paying business debts]; *Rossi v Attanasio*, 48 AD3d 1025 [3d Dept 2008] [purchaser's statements about developer while developer was talking to potential customer, including calling developer crook and shyster and warning customer not to do business with developer as he was liar and thief, constituted actionable mixed statements of opinion and fact]; see also *Suarez v Angelet*, 90 AD3d 906 [2d Dept 2011] [dismissal of libel claim for failure to state claim inappropriate absent more complete record as to circumstances surrounding making of statement; defendant referred to plaintiff as a thief in e-mail to others]).

4. Punitive damages

As Bencosme alleges that Rodriguez breached his fiduciary duty to him and did so intentionally or deliberately, his claim for punitive damages is viable. (*Kleinerman v 245 E. 87 Tenants Corp.*, 105 AD3d 492 [1st Dept 2013]; *Bishop v 59 W. 12th St. Condominium*, 66 AD3d 401 [1st Dept 2009]; see also *Stein v McDowell*, 74 AD3d 1323 [2d Dept 2010] [punitive damages recoverable for breach of fiduciary duty claim where plaintiff alleged that co-shareholder usurped his ownership interested in corporation]; 48 NY Prac. Com. Litig. in New York State Courts § 83:52 [3d ed 2012] [court will uphold awards for punitive damages where corporate assets were squandered through fraud]).

III. DEFENDANT BENCOSME'S MOTION TO DISMISS

By summons and complaint dated March 15, 2012, plaintiffs Rodriguez, King, and

Eastside (collectively, plaintiffs Rodriguez) assert the following claims against defendant Bencosme: (1) breach of agreement; (2) breach of fiduciary duty; (3) unfair competition; (4) breach of an expense agreement and making other unauthorized expenses; (5) breach of agreement related to the severance of the parties' business relationship; (6) an accounting related to a joint venture agreement with another company; (7) breach of the duty of good faith and undivided loyalty; and (8) negligent performance of supervisory and administrative duties related to King. (Rodriguez NYSCEF 32, Exh. C).

A. Failure to state claim - breach of contract/agreement

Defendant Bencosme's objections to this cause of action rely on factual and credibility determinations, which may not be resolved or considered on a motion to dismiss for failure to state a claim. (*See eg Leo v Mt. St. Michael Academy*, 272 AD2d 145 [1st Dept 2000] [credibility of parties not proper consideration for court weighing sufficiency of pleadings]; *see also Emigrant Bank v UBS Real Estate Securities, Inc.*, 49 AD3d 382 [1st Dept 2008] [premature to dismiss breach of contract claim as there was question of fact as to whether defendant breached contract]).

B. Breach of fiduciary duty and faithless servant doctrine

One who owes a duty of loyalty to a principal and who is faithless in the performance of his or her services is generally not entitled to recover compensation. (52 NY Jur 2d, Employment Relations § 148 [2013]). The duty of loyalty is not limited to employer-employee relationships (*see G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95 [2d Dept 2007] [faithless agent must forfeit compensation due with respect to services provided for benefit of principal as to whom agent was disloyal]), and defendant Bencosme has not established, as a matter of law, that such a claim may

not be maintained against a partner in a limited liability corporation (*see eg Phansalker v Andersen Weinroth & Co., L.P.*, 344 F3d 184 [2d Cir 2003] [applying faithless servant doctrine to plaintiff even though he was denominated as partner in defendant limited partnership]; *see also In re Gupta*, 38 AD3d 445 [1st Dept 2007] [as there was no evidence to conclude that 30 percent shareholder in corporation was dishonest or otherwise breached fiduciary obligations to corporation, faithless servant doctrine did not apply]).

C. Second, fifth, and sixth claims and derivative claims

As a partner in King, plaintiff Rodriguez has standing to sue derivatively on behalf of King. (*Tzolis v Wolff*, 10 NY3d 100 [2008]).

D. Third, fourth, seventh, and eighth causes of action and pre-suit demand requirement

Plaintiffs Rodriguez's allegations sufficiently establish that any pre-suit demand on King to sue Bencosme would have been futile. (*See eg Hu*, 57 AD3d 616 [allegations that defendant shareholders were directly interested in and personally benefitted from alleged bad acts sufficiently demonstrated that demand would have been futile]; *Malkinson*, 56 AD3d 734 [demand is futile, and thereby excused, when company directors incapable of making impartial decision as to whether to bring suit]).

E. Third, fourth, seventh, and eighth causes of action and authority to commence action

Defendant Bencosme cites no authority for the proposition that a 50 percent partner in a limited partnership may not maintain a direct action on behalf of the partnership.

F. Fourth cause of action for breach of fiduciary duty by Eastside and statute of limitations

As plaintiffs Rodriguez allege that defendant Bencosme breached his fiduciary duty to Eastside in 2002 and 2003, and again from 2001 to 2007, this claim is barred by the applicable

three-year statute of limitations. (CPLR 213, 214; *see Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003] [where claim for breach of fiduciary duty seeks money damages, three-year statute of limitations applies]).

IV. BENCOSME'S MOTIONS FOR SUMMARY JUDGMENT

As no answers have been filed in these two actions, nor has any discovery been exchanged, plaintiffs Bencosme's cross motion and defendant Bencosme's motion for summary judgment are denied as premature.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Rodriguez's motion to dismiss under Index No. 150352/11 is granted solely to the extent of dismissing plaintiff Bencosme's fourth (conversion), sixth (breach of fiduciary duty), seventh (fraudulent inducement), eighth (breach of contract), and ninth (an accounting) causes of action with leave to replead them either derivatively or directly; it is further

ORDERED, that plaintiffs Bencosme's cross motion under Index No. 150352/11 is granted solely to the extent of consolidating the action with *Rodriguez et al. v Bencosme*, Index No. 150507/11 for the purposes of joint trial and discovery; it is further

ORDERED, that within 30 days from entry of this order, counsel for plaintiffs Bencosme shall serve a copy of the order with notice of entry upon the Clerk of the Trial Support Office (Room 158); it is further

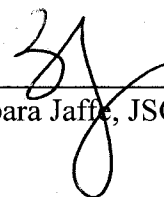
ORDERED, that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for joint trial; it is further

ORDERED, that plaintiffs Bencosme's cross motion for summary judgment is denied;
it is further

ORDERED, that defendant Bencosme's motion to dismiss under Index No. 150507/11 is
granted solely to the extent of dismissing plaintiffs' fourth cause of action as to Eastside; and it is
further

ORDERED, that defendant Bencosme's motion for summary judgment under Index No.
150507/11 is denied in its entirety.

ENTER:



Barbara Jaffe, JSC

DATED: August 1, 2013
New York, New York