

**Partridge v Laba**

2013 NY Slip Op 31885(U)

August 9, 2013

Sup Ct, New York County

Docket Number: 654137/2012

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER  
Justice

PART 15

Index Number : 654137/2012  
PARTRIDGE, DEMETRIUS  
vs.  
LABA, REMI  
SEQUENCE NUMBER : 002  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
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). 1, 2, 3  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 4, 5, 6, 7  
Replying Affidavits \_\_\_\_\_ | No(s). 8

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

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8/9/13

 \_\_\_\_\_, J.S.C.

**HON. EILEEN A. RAKOWER**

- 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 15

-----X  
DEMETRIUS PARTRIDGE,

Index No.  
654137/2012

Plaintiff,

- against -

**DECISION  
and ORDER**

Mot. Seq. 002

REMI LABA, and GANS CONCEPT, LLC,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

This action arises from Defendants' alleged non-payment of a Promissory Note with Personal Guaranty and Security Agreement executed in conjunction with an Agreement of Sale date December 10, 2010. The Complaint alleges that on January 13, 2011, defendant Gans executed a Promissory Note, whereby Gans promised to pay Plaintiff \$250,000 at the rate of 6% per annum in monthly payments of \$18,534.00, commencing on April 1, 2011, through June 1, 2012, as well as a Security Agreement, where Gans pledged to Plaintiff certain property as security for the Note. The Complaint further alleges that defendant Leba, a managing member of Gans, personally signed a Guaranty, guaranteeing the payment of the Promissory Note. The Complaint alleges that Defendants made payments through October 2011, and failed to make any payments thereafter, leaving a balance due to Plaintiff of \$22,500.

The Complaint alleges that on or about December 10, 2010, the parties executed an Agreement of Sale whereby Plaintiff agreed to sell and Defendants agreed to purchase the assets of a business known as 69 Gansevoort Restaurant, Inc., and that Agreement of Sale refers and incorporates the Promissory Note, Personal Guaranty, and Security Agreement. Plaintiff alleges that under the Agreement of Sale, Gans, as purchaser, and Laba, as the guarantor, were obligated to pay to Plaintiff \$67,500 for the transfer of the security down payment of the lease agreement to be transferred and that Defendants failed to make the required payment. In this action,

Plaintiff alleges that it has exercised the acceleration clause of the Promissory Note and demands the total principal and interest under the Note and Agreement of Sale. The Complaint alleges four causes of action: breach of contract, promissory estoppel, unjust enrichment, and declaratory judgment.

Attached to the Complaint as exhibits is the referenced Promissory Note dated January 13, 2011, in which Gans promises to pay Plaintiff, David Graziano, Nick Neocleous, Robert Maltam and Corey Kumpulaninien, \$250,000; a Guaranty, dated January 13, 2011, executed by Leba to Plaintiff; a Security Agreement dated January 13, 2011 between Gans and Plaintiff, Graziano, Malta, Lane, and Smalls; and an Agreement of Sale.

Defendants move for an Order dismissing this action: (i) pursuant to CPLR §3211(a)(3), because Plaintiff does not have legal capacity to sue, (ii) pursuant to CPLR §3211(a)(10) because the court should not proceed in the absence of persons who should be persons, and (iii) pursuant to CPLR §3211 because Plaintiffs failed to state a cause of action and because there is a defense based on documentary evidence. Defendant submits the affidavit of Remi Laba.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
  - (1) a defense is founded upon documentary evidence; or
  - (3) the party asserting the cause of action has not legal capacity to sue; or
  - (7) the pleading fails to state a cause of action; or
  - (10) the court should not proceed in the absence of a person who should be a party.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). “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*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Defendants’ arguments that dismissal is warranted on the basis that there are other parties such as other payees besides Plaintiff listed in the Note and Guaranty, that Plaintiff lacks standing to bring this action solely in his own name. The Court finds these arguments to be unavailing. It is undisputed that Plaintiff is a party to the subject agreements, and has alleged breach of those agreements, and damages. Defendants’ contention that there are other payees named in the agreements does not warrant dismissal of Plaintiff’s action to enforce the same.

Defendants also move to dismiss the Complaint based on a failure to state a claim and documentary evidence.

The first cause of action is for breach of contract. “The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 71 A.D.3d 80, 91 [1st Dept. 2009]). Here, Plaintiffs allege that defendants breached the terms of the Promissory Note and Guaranty, and resulting damages. Accepting the allegations as true, the four corners of the Complaint state a claim for breach of contract and Defendants have not produced documentary evidence that conclusively establishes a defense as a matter of law.

The second cause of action is for promissory estoppel. “[In] order to state a viable cause of action for promissory estoppel, the following elements must be established: (1) an oral promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance.” *NYC Health and Hosp. Corp. v. St. Barnabas Hosp.*, 10 A.D.3d 489, 491 [1st Dept. 2004]. Here, Plaintiff alleges reliance on “Defendants’ promise to fulfill their obligations to pay under the Promissory Note, Personal Guaranty, Security Agreement and Agreement of Sale.” This claim pleads only a breach of contract claim, not a claim for promissory estoppel.

The third cause of action alleges unjust enrichment. To prevail on a claim for unjust enrichment, the “plaintiff must show that the other party was enriched, at plaintiff’s expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.” (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dept. 2011]). “Without sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal.” *Id.* “The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]. Here, Plaintiff alleges in a conclusory fashion, “At the expense of Plaintiff, Defendant is unjustly enriched by the outstanding amount of at least NINETY THOUSAND DOLLARS (\$90,000), plus interest.” Aside from being conclusory, this cause of action cannot be maintained because Plaintiff alleges that a contract exists covering the same subject matter.

The fourth cause of action is for declaratory judgment, and states only, “Plaintiff is entitled to and respectfully demands a judgment declaring that Plaintiff is entitled to payment of at least NINETY THOUSAND DOLLARS (\$90,000).” This is a recitation of the relief sought by Plaintiff in its breach of contract claim, and is therefore duplicative of the first cause of action.

Wherefore it is hereby

ORDERED Defendants’ motion is granted only to the extent that the second, third, and fourth causes of action of the Complaint are dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated:

2/9/13



EILEEN A. RAKOWER, J.S.C.