

**Scirica v Colantonio**

2013 NY Slip Op 32098(U)

August 29, 2013

Sup Ct, New York County

Docket Number: 651699/2011

Judge: Melvin Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER  
*Justice*

PART 45

Index Number : 651699/2011  
SCIRICA, DAVID  
vs  
COLANTONIO, CIRO  
Sequence Number : 011  
DISMISS

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). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion *is to dismiss defendant's counterclaims is DENIED in part, and GRANTED in part per the attached Decision and Order.*

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

Dated: August 29, 2013

*Melvin L. Schweitzer*  
**MELVIN L. SCHWEITZER**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: .....MOTION IS:  GRANTED  DENIED *in part*  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 45

-----X	
DAVID SCIRICA and JENNIFER METALLO	:
	:
Plaintiffs,	:
	:
-against-	:
	:
CIRO COLANTONIO, PATRICK LIMA, 772 NINTH	:
RESTAURANT CORP., CAP RESTAURANT CORP.,	:
DPNC RESTAURANT CORP., 166 EAST 82 <sup>ND</sup> BISTRO	:
INC. CORNER 47 <sup>TH</sup> RESTAURANT CORP and	:
RACHEL ON NINTH CORP.,	:
	:
Defendants.	:
-----X	

Index No. 651699/2011  
DECISION AND ORDER  
Motion Sequence No. 011

**MELVIN L. SCHWEITZER, J.:**

This case involves an allegedly fraudulent scheme by defendants, in which plaintiffs bought an ownership interest in defendants’ restaurant venture.

In response to the complaint, defendants brought counterclaims in their amended answer for breach of contract, breach of fiduciary duty, accounting, and a constructive trust.

Plaintiffs move for an order, pursuant CPLR 3211 (a) (1) and (a) (7) to dismiss the counterclaims. For the reasons discussed below, plaintiffs’ motion is granted in part and denied in part.

**Background**

The following facts are taken from the defendants’ amended answer.  
In September 2010, David Scirica (Mr. Scirica) and his two brothers (collectively, the Scirica brothers) met with Ciro Colantonio (Mr. Colantonio) and Patrick Lima (Mr. Lima), in reference to purchasing a restaurant that operated under the corporate name of 772 Ninth Restaurant Corp. (772). Mr. Scirica and the Scirica brothers negotiated an agreement with

defendants for the purchase of fifty percent of the restaurant. The agreement was memorialized in writing as an Agreement to Sell Stock in 772 Ninth Restaurant Corp. (Agreement).

The parties executed the Agreement and the payments to be made, and responsibility for operating the business were referenced therein. It was agreed that after the closing and approval of plaintiffs as owners by the State Liquor Authority, the plaintiffs would be elected as the officers and directors of 772.

Beginning on October 1, 2010, plaintiffs were acting as the owners and operators of 772. After the Agreement was signed, it was discovered that the Scirica brothers would be ineligible to be on the liquor license. The Scirica brothers then offered up their new partner, defendant Jennifer Metallo (Ms. Metallo), to be on the liquor license for Flavor Lounge, LLC, the new name of the restaurant. At the request of Mr. Scirica, Ms. Metallo was placed on the liquor license as the representative of Flavor Lounge, LLC.

Plaintiffs were to pay \$75,000 upon execution of the Agreement. \$30,000 of this amount, which was made by check, was not paid by the issuing bank. Of the \$30,000, plaintiffs only covered \$5,000, thereby failing to pay \$25,000 in accordance with the Agreement.

In November 2010, a meeting was held with Mr. Scirica, Ms. Metallo, Mr. Colantonio, and Mr. Lima at which an incomplete accounting for Flavor Lounge was presented and defendants demanded replacement checks for the \$25,000. Plaintiffs advised defendants that they would pay defendants and that they also wanted to purchase the remaining outstanding shares of 772. Defendants thought this was a good idea, as they no longer wanted to be partners with plaintiffs.

Defendants allege that in accordance with the Agreement, plaintiffs continued to operate the restaurant, had full access to all books of the business, the bank accounts of the business, and

the credit line of the business. Defendants allege that they were denied access to the books of the business and did not receive a single payment from plaintiffs from November 2010 until May 2011 when plaintiffs vacated the premises.

Defendants assert that they have fulfilled all their obligations under the Agreement by placing Flavor Lounge, LLC on the liquor license, placing plaintiffs as signatories on the business bank accounts, allowing plaintiffs full control of all day to day operations of the restaurant, and listing plaintiffs as the officers and directors of 772.

#### Breach of Contract Counterclaim

Plaintiffs seek to dismiss the first counterclaim for breach of contract pursuant CPLR 3211 (a) (1) and CPLR 3211(a) (7) for failure to state a claim.

A party may move to dismiss an action if “a defense is founded upon documentary evidence.” CPLR 3211 (a) (1). On a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence needs to resolve “all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” *Fontanetta v Doe*, 73 AD3d 78, 83 (2d Dept 2010); *see Leon v Martinez*, 84 NY2d 83, 88.(1994) (“a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law”). The contents of the documents must also be “essentially undeniable” to qualify as proper “documentary evidence.” *Id.* at 85.

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff’s complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether “from the [complaint’s] four corners[,] ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” *Gorelik v*

*Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

Plaintiffs argue that no contract was executed and, therefore, there can be no claim for breach of contract. To support this contention, plaintiffs present three contract drafts that were not signed by either party. Defendants have submitted a contract with signatures of all parties for the sale of 50% of the ownership interest in 772. Defendants argue that the breach of contract claim is based on the contract submitted by the defendants and not the contract drafts for the sale of 100% of the ownership interests in the corporation. Plaintiffs' submitted contract drafts do not provide a defense for defendants' claim. Plaintiffs have not submitted documentary evidence that would resolve "all factual issues as a matter of law and conclusively disposes [ ]" the claim. *Fontanetta*, 73 AD3d at 83.

Defendants have pled sufficient factual allegations to support a cause of action for breach of contract. Defendants present the court with an Agreement executed by both sides, and detailed factual allegations that plead their own performance under the Agreement and plaintiffs' alleged breach of the Agreement.

Plaintiffs' motion to dismiss defendants' counterclaim for breach of contract is denied.

#### Breach of Fiduciary Claim

Plaintiffs motion to dismiss defendants' counterclaim pursuant CPLR 3211 (a) (7) for failure to state a cause of action for breach of fiduciary duty is granted as defendants' breach of fiduciary duty counterclaim is duplicative of their breach of contract counterclaim.

Defendants' set forth factual allegations to the effect that plaintiffs were majority shareholders and had full control of the day-to-day operations of the restaurant. They say this

established a fiduciary duty to defendants. “Directors of a corporation and in some cases stockholders who dominate and control a corporation . . . may be held accountable in equity for detriment to the corporation caused by their breach of fiduciary obligation arising from that relationship.” *Sager Spuck Statewide Supply Co. Inc. v Meyer*, 273 AD2d 745, 748 (3d Dept 2000). In addition, courts have also “recognized the existence of a fiduciary duty between the shareholders of a close corporation, a duty based on the theory that the relationship between such shareholders is akin to that between partners.” *Sager*, 273 AD2d at 748. Defendants and plaintiffs are both shareholders in a close corporation, with plaintiffs being the alleged day-to-day operating officers and managers of the corporation.

Defendants’ breach of fiduciary duty counterclaim is dismissed as duplicative of the breach of contract claim. *Brooks v Key Trust Co. Nat. Ass’n*, 26 AD3d 628, 630 (3d Dept 2006). The allegations of plaintiffs’ failure to pay the New York State Sales Tax and alleged failure to produce substantial revenue from the inventory that the restaurant purchased are either expressly raised in the defendants’ answer or encompassed within the contractual relationship. The contract presented by defendants contains all the obligations plead in the counterclaim for breach of fiduciary duties. Defendants have not set forth allegations that are different from the terms of the contract. *Id.*

#### Accounting

Plaintiffs’ motion to dismiss defendants’ counterclaim for an accounting pursuant CPLR 3211 (a) (7) is denied.

“The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest.” *Ctr. for Rehabilitation and Nursing at*

*Birchwood, LLC v S & L Birchwood, LLC*, 92 AD3d 711, 713 (2d Dept 2012) (quoting *Palazzo v Palazzo*, 121 AD2d 261, 264 (1st Dept 1986)). For reasons stated above, defendants have established a fiduciary relationship between the plaintiffs and defendants. Defendants also allege that “plaintiffs purchased over \$70,000 in inventory that should have produced \$800,000 in sales for the business but the plaintiffs never provided any accounting for any kind of monies received by the restaurant.” Defendants also allege that plaintiffs took the proceeds from the restaurant owned by 772 for personal gain and did not use the monies received by 772 in the best interest of the corporation and its shareholders, therefore, breaching their fiduciary duty with respect to 772. Defendants have adequately pleaded a cause of action for an accounting of 772's assets.

#### Constructive Trust

Plaintiffs' motion to dismiss defendants' counterclaim for a constructive trust pursuant CPLR 3211 (a) (7) is granted.

Defendants seek to impose a constructive trust over the money, property, and assets of Mr. Scirica and Ms. Metallo and the business entities to which they have allegedly diverted funds from 772. For a court to grant a constructive trust, four elements must be established: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment. *Panetta v Kelly*, 17 AD3d 163, 165 (1st Dept 2005); *see Sharp v Kosmalski*, 40 NY2d 119, 121 (1976).

The complaint does not adequately plead a cause of action to impose a constructive trust on the personal money, property, assets, and business entities of plaintiffs. First, defendants did not specify any particular assets or property to impose a constructive trust on. Defendants only provide broad allegations that plaintiffs have diverted over \$200,000 for personal home repairs



and trips but do not point to specific property or businesses for the court to impose a constructive trust on. Second, even though defendants' have established a fiduciary relationship and that plaintiffs may have been unjustly enriched by allegedly diverting corporate assets to fund "lavish home repairs and trips to Atlantic City," there was no promise or transfer in reliance on any assets by the defendants to the plaintiffs.

### Conclusion

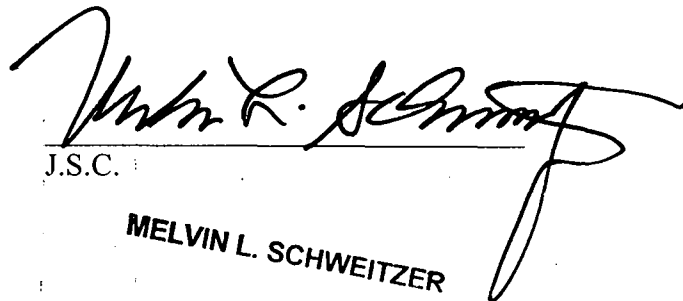
For the forgoing reasons, the court finds that plaintiffs' motion to dismiss the counterclaims for breach of contract and an accounting is denied. Plaintiffs' motion to dismiss defendants' counterclaims for breach of fiduciary duty and for a constructive trust is granted.

ORDERED that plaintiffs' motion to dismiss defendants' counterclaims for breach of contract and an accounting is denied; and it is further

ORDERED that plaintiffs' motion to dismiss defendants' counterclaims for breach of fiduciary duty and for a constructive trust is granted.

Dated: August 29, 2013

ENTER:

  
J.S.C.  
MELVIN L. SCHWEITZER