

**Larner v Charity Buzz, Inc.**

2013 NY Slip Op 32151(U)

September 9, 2013

Supreme Court, New York County

Docket Number: 153308/13

Judge: Manuel Mendez

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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

JEREMY K. LARNER,  
Plaintiff,  
-against-

INDEX NO. 153308/13  
MOTION DATE 08 -21- 2013  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

CHARITY BUZZ, INC., COPPY HOLZMAN ,  
THE ART RESERVE, INC. and ELI CONSILVIO,  
Defendants.

The following papers, numbered 1 to 9 were read on this motion to Dismiss Pursuant to CPLR §3211 and Cross-Motion to Dismiss Pursuant to CPLR §3211[a],[7], [8] and CPLR §3211[c] :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5 - 6, 7 - 9</u>
Replying Affidavits _____	_____

Cross-Motion:     Yes     No

Upon a reading of the foregoing cited papers, it is ordered that defendants have met their burden of proof and established a basis to dismiss all causes of action against Eli Consilvio, Art Reserve Inc. and on the cross-motion against Coppy Holzman. Charity Buzz, Inc.'s motion filed under Motion Sequence 002, for an Order dismissing all claims against it, is granted. Plaintiff's motion to amend the complaint filed under Motion Sequence 003, is denied

The Art Reserve Inc. and Eric Consilvio's motion seeks to dismiss this action pursuant to CPLR §3211 [a],[7],[8], for failure to properly state a cause of action and for failure to obtain jurisdiction over them.

Coppy Holzman cross-moves to dismiss this action against him pursuant to CPLR §3211 [a],[7],[8] and CPLR 3211[c ], because plaintiff has not served and filed an affidavit of service. Alternatively, Coppy Holzman claims the complaint fails to state causes of action and there was no direct agreement with the plaintiff resulting in personal liability.

Charity Buzz, Inc.'s motion, filed under Motion Sequence 002, seeks an Order pursuant to CPLR §3211 [a],[7] and CPLR §3211[c], dismissing this action against it, for failure to state a cause of action.

Plaintiff opposes all of the defendants' motions and under Motion Sequence 003, seeks an Order pursuant to CPLR §3025 [a],[b],[c], amending the complaint to assert additional causes of action for unjust enrichment and for aiding and abetting breach of a fiduciary duty.

Coppy Holzman is chief executive officer and chairman of Charity Buzz, Inc., a Delaware corporation listing its principal place of business as New York. Charity Buzz, Inc. had individuals bid on items to be auctioned off for charity through its website. On February 23, 2011, Charity Buzz Inc. posted an auction to be conducted live, the post read, "liveBID! Sponsor a Shepard Fairey Mural for the Pediatrics Wing of the LA County/USC Hospital, Including Naming Rights, Meet the Artist and Attendance at the Unveiling

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

Reception.” The proceeds from the auction were to go to Art of Elysium, a Los Angeles, California, based charity. Art of Elysium works with the, “Do Good Dream Big Program,” which obtains donations for pediatric wards of hospitals in California. Art of Elysium invited renowned artists to create art for permanent donation to help raise funds.

The website required the acceptance of a User Agreement before any bid was placed. Plaintiff accepted the agreement, placed a bid for \$30,000.00, and won the bid for the Shepard Fairey mural. On March 3, 2011, plaintiff wire transferred \$30,000.00 to the Charity Buzz Inc. website and received a confirmation of receipt of payment with directions to contact Eli Consilvio. Mr. Consilvio was described in the e-mail as the “point of contact at Art of Elysium for the project.”

Plaintiff alleges that he repeatedly contacted Charity Buzz, Inc. and Mr. Consilvio throughout 2011, often with no response. He was subject to a prank call on November 15, 2011, related to Mr. Consilvio, and regarding the mural. On November 21, 2011, plaintiff received an e-mail from Mr. Consilvio which included an apology and was advised that the mural would be executed at the hospital on December 12, 2011. Plaintiff was not present to observe the mural being painted.

In May of 2012, Mr. Consilvio advised plaintiff that the unveiling reception was delayed. On June 6, 2012, plaintiff demanded the return of the \$30,000.00 paid at the auction because he was not provided with any part of the item as promised. Plaintiff's demand for the return of \$30,000.00 was rejected, and on August 16, 2012, the unveiling ceremony was held at the hospital without him. The inscription on the plaque on the patron wall reads, “Shepard Fairey with a little help from my friends, 2012 - Created through The Art of Elysium's Visual Imagery and Environmental Wellness Program and made possible by a contribution from an anonymous donor.” Plaintiff is not seeking to recover the \$30,000.00 donated to the charity or from Shepard Fairey. He is only seeking to recover any funds retained by the defendants in relation to the donation

The User Agreement posted on the Charity Buzz Inc. website, specifically states:

“...THE SITE PROVIDER IS LOCATED IN NEW YORK; THE CONTRACT OF SALE IS THEREFORE DEEMED TO BE COMPLETED IN NEW YORK, U.S.A. Buyer and seller each waive the right to bring a claim in any court located outside New York, or to argue that any Court has jurisdiction over any claim arising under or related to this agreement or any transaction consummated hereunder...”

(Charity Buzz, Inc. Mot. Seq. 002, Alex Gardner Aff., Exh. A, page 7).

“THESE CONDITIONS OF SALE AS WELL AS THE BUYER'S, THE SITE PROVIDER'S AND THE SELLER'S RESPECTIVE RIGHTS AND OBLIGATIONS HEREUNDER ARE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK....You agree that your use of this Site shall be deemed to have occurred and taken place solely in the State of New York...”

(Charity Buzz, Inc. Mot. Seq. 002, Alex Gardner Aff., Exh. A, page 9).

It is an established policy that Courts will enforce contractual provisions for choice of law and forum selection in the event of litigation (Boss v. American Exp. Financial Advisors, Inc. 15 A.D. 3d 306, 791 N.Y.S. 2d 12 [N.Y.A.D. 1<sup>st</sup> Dept., 2005] aff'd 6 N.Y. 3d 242 [2006]).

Plaintiff commenced this action based on the jurisdiction provisions of the User Agreement. Plaintiff has established a basis to obtain jurisdiction in New York over Charity Buzz Inc., and Copy Holzman pursuant to the User Agreement.

Eli Consilvio and Art Reserve Inc. seek to dismiss this action as against them pursuant to CPLR §3211[a][8], contending that there is no basis to find personal jurisdiction over them. Mr. Consilvio refers to e-mails to establish that he acted as an agent on behalf of Art of Elysium, not Charity Buzz Inc. or Art Reserve. He was not a party to the User Agreement with the plaintiff and claims he is a California domiciliary that acted on behalf of a charity located in California. Art Reserve Inc. was never named as an entity in the e-mails and has nothing to do with the alleged transaction.

Plaintiff opposes the motion contending that Eli Consilvio acted as either an agent, partner, co-conspirator, sub-contractor or fiduciary of Charity Buzz Inc.. Plaintiff also contends that although Art Reserve Inc. is not mentioned in any of the e-mails or included in the agreement, it is the corporate alter-ego of Mr. Consilvio and potentially the means by which he conducts business. There is sufficient purposeful activity to connect both Eli Consilvio and potentially Art Reserve Inc., to this action.

A motion to dismiss pursuant to CPLR §3211[a][8], is based on lack of jurisdiction over the defendant. In opposing a motion to dismiss pursuant to CPLR §3211[a][8], the plaintiff is only required to demonstrate that there are facts that may exist to establish there is personal jurisdiction (*Peterson v. Spartan Industries*, 33 N.Y. 2d 463, 310 N.E. 2d 513, 354 N.Y.S. 2d 905 [1974] and *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D. 3d 986, 845 N.Y.S. 2d 797 [N.Y.A.D. 2<sup>nd</sup> Dept., 2007]).

Pursuant to CPLR §302[a][1], proof of a single transaction taking place in New York, is sufficient to exercise personal jurisdiction over a person, pursuant to CPLR §302[a][1], even if a defendant never enters New York (*Deutsche Bank Securities, Inc. v. Montana Bd. of Investments*, 7 N.Y. 3d 65, 850 N.E. 2d 1140, 818 N.Y.S. 2d 164 [2006]). In order to establish that an individual is transacting business pursuant to CPLR 302[a][1], there must be some "purposeful activities" in the state and a relationship to the transaction sued upon (*SPCA of Upstate New York, Inc. v. American Working Collie Ass'n*, 18 N.Y. 3d 400, 963 N.E. 2d 1226, 940 N.Y.S. 2d 525 [2012] citing to, *McGowan v. Smith*, 52 N.Y. 2d 268, 419 N.E. 2d 321, 437 N.Y.S. 2d 643 [1981]).

Plaintiff has failed to state a basis to sustain jurisdiction over Eli Consilvio, there is no proof that he acted on behalf of Charity Buzz, Inc. as point of contact for Art of Elysium. Eli Consilvio did not transact or conduct purposeful activities in New York in relation to the transaction sued upon, because he provided services solely in California. Plaintiff has failed to state a claim against, and does not have jurisdiction over Art Reserve Inc.. Plaintiff's contentions concerning Art Reserve Inc. are purely speculative and based on conjecture.

A corporate officer or director is personally liable only where his actions are taken for personal reasons and not to benefit the corporation's interests (*Hoag v. Chancellor, Inc.*, 246 A.D. 2d 224, 677 N.Y.S. 2d 531 [N.Y.A.D. 1st Dept., 1998]). A cause of action seeking to hold a corporate officer personally liable, requires particularized allegations of the corporate officer's motivation for personal gain or the manner in which he acted outside the scope of employment (*Petkanas v. Kooyman*, 303 A.D. 2d 303, 759 N.Y.S. 2d 1 [N.Y.A.D. 1st Dept., 2003]).

Coppy Holzman's cross-motion seeks dismissal in part because plaintiff has not served and filed an affidavit of service. Alternatively, Mr. Holzman claims that he did not directly enter into any agreement with the plaintiff and is not personally liable.

Plaintiff has not stated potential causes of action against Coppy Holzman. Plaintiff has only asserted vague allegations of personal gain that are speculative and based on conjecture. There is no need to file the affidavit of service for Coppy Holzman, *Nunc Pro Tunc* because there is no basis for those causes of action asserted against him.

A motion to dismiss pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim. Allegations are generally deemed true, in favor of the non-moving party (*Leon v. Martinez*, 84 N.Y. 2d 83, 614 N.Y.S., 2d 972, 638 N.E. 2d 511 [1994]). Documentary evidence that contradicts the allegations, or pleadings that consist of bare legal conclusions will not be presumed to be true and are a basis for dismissal (*Morgenthau & Latham v. Bank of New York Company, Inc.*, 305 A.D. 2d 74, 760 N.Y.S. 2d 438 [N.Y.A.D. 1<sup>st</sup> Dept.,2003]). CPLR §3211[c], permits a motion to dismiss to be treated as a motion for summary judgment based on evidence presented (*Mallad Construction Corp. v. County Federal Savings and Loan Assoc.*, 32 N.Y. 2d 285, 298 N.E. 2d 296, 344 N.Y.S. 2d 925 [1973]).

Charity Buzz, Inc. under Motion Sequence 002, seeks to dismiss this action and obtain summary judgment pursuant to CPLR §3211[a] [7],[c], claiming it cannot be found liable pursuant to the User Agreement. The waiver and release provisions of the User Agreement prohibit the bringing of this action. Alternatively, Charity Buzz, Inc. contends it is not a party to the User Agreement. Only plaintiff and Art of Elysium are parties to the User Agreement and there is no basis for the breach of contract cause of action.

The User Agreement has specific provisions related to the, “Do Good Dream Big Program,” which state,

“...With regard to requested experiences including celebrity meet and greets, and other celebrity experiences and events, Buyer understands that it may take up to one (1) year for Charity Buzz to schedule same, based on availability. In addition, Buyer understands that Charity Buzz makes no guarantee whatsoever that it will secure the property and/or experience desired by Buyer. In the event that Charity Buzz has procured the property and/or experience requested and Buyer does not agree upon a date to enjoy the property and/or experience within one (1) year after the date that Charity Buzz has procured the property and/or experience, then 80% of the purchase price shall be refunded to the Buyer and 20% of the purchase price shall be retained by Charity Buzz. In the event that Charity Buzz has procured the property and/or experience, and Buyer makes no attempt to schedule a date to enjoy the property and/or experience, then Charity Buzz shall retain 100% of the purchase price...”

“The site Charity Buzz does not act as an agent for either the Buyer or Seller for any purpose...”

(Charity Buzz Inc. Mot. Seq. 002, Alex Gardner Aff., Exh. A, pages 2 and 3).

The User Agreement also specifically states;

“Because Charity Buzz is not responsible for the guarantees provided by a seller, or the descriptions of lots provided by a seller, if a dispute arises between one or more participants regarding a lot or its description you release Charity Buzz and its affiliates (and each of their directors, officers, agents and employees) from any claims, demands and damages (whether direct, indirect, incidental, punitive or consequential) of every kind and nature known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with such disputes...”

(Charity Buzz Inc. Mot. Seq. 002, Alex Gardner Aff., Exh. A, page 10).

The Courts will generally enforce waiver and release provisions in contracts that either limit or negate liability (*Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc.*, 18 N.Y. 3d 675, 967 N.E. 2d 666, 944 N.Y.S. 2d 443 [2012]). An exception is made for waivers based on



gross negligent conduct that is incidental to the parties relationship. The parties are subjected to tort liability for failure to exercise reasonable care regardless of their contractual duties (Somers v. Federal Signal Corp., 79 N.Y. 2d 540, 593 N.E. 2d 1365, 583 N.Y.S. 2d 957 [1992]). Gross negligence applies when the agreed upon limitation is found to “smack of intentional wrongdoing” and establishes, “...a reckless indifference to the rights of others. Parties are also excused from a waiver provision that is, “fraudulent, malicious or prompted by the sinister intention of one acting in bad faith” (Kalish-Jarcho, Inc. v. City of New York, 58 N.Y. 2d 377, 448 N.E. 2d 413, 461 N.Y.S. 2d 746 [1983]). Release provisions are only set aside after a party establishes claims of, “duress, illegality, fraud or mutual mistake” (Tajan v. Pavia & Harcourt, 257 A.D. 2d 299, 693 N.Y.S. 2d 544 [N.Y.A.D. 1st Dept., 1999]).

Plaintiff has failed to state a basis to maintain this action beyond the waiver and release provisions of the User Agreement. Plaintiff has not established a basis to assert a breach of contract action against Charity Buzz Inc., based on the separate provision in the User Agreement specifically addressing charitable bids for an “experience” under the “Do Good Dream Big Program,” which permitted refunds. Plaintiff relies on speculation and conjecture in stating that his delay in seeking a return of funds was based solely on the fraudulent actions of the defendants.

Plaintiff’s motion filed under Motion Sequence 003, seeks an Order pursuant to CPLR §3025, permitting him to amend the complaint to assert additional causes of action for unjust enrichment and for aiding and abetting breach of a fiduciary duty. Plaintiff annexes the proposed Amended Complaint to his motion papers and contends that there is no prejudice to the defendants since the amendments rely on the same facts as the other causes of action (Mot. Seq. 003, Exh. A). He also contends that the proposed additional causes of action are meritorious and there is a factual basis to include them in the complaint.

Defendants oppose the motion to amend the complaint contending that plaintiff has not stated any basis to do so. The cause of action for unjust enrichment is barred by the waiver and release provisions of the User Agreement. The claim of aiding and abetting a breach of fiduciary duty is conclusory and prejudices the defendants based on the lack of sufficiently stated facts.

Pursuant to CPLR §3025, leave to amend pleadings, “shall be freely granted upon such terms as may be just...” the decision to disallow the amendment is at the Court’s discretion (McCaskey, Davies & Associates, Inc. v. New York City, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983]). Leave to amend should be granted as long as there is no surprise or prejudice to the opposing party. To establish prejudice there must be a showing of hindrance in preparation of the case or the prevention from taking measures in support of a party’s position (Kocourek v. Booz Allen Hamilton, Inc., 85 A.D. 3d 502, 925 N.Y.S. 2d 51 [N.Y.A.D. 1<sup>st</sup> Dept., 2011]). Leave to amend a pleading will be denied where the proposed pleading fails to state a cause of action or is patently insufficient as a matter of law (Bishop v. Maurer, 83 A.D. 3d 483, 921 N.Y.S. 2d 224 [N.Y.A.D. 1<sup>st</sup> Dept., 2011]).

Unjust enrichment is a quasi-contract claim that only applies in the absence of an express written agreement (Zolotar v. New York Life Ins. Co., 172 A.D. 2d 27, 576 A.D. 2d 850 [N.Y.A.D. 1<sup>st</sup> Dept., 1991] and Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y. 2d 382, 516 N.E. 2d 190, 521 N.Y.S. 2d 653 [1987]). The plaintiff may assert a claim for both breach of contract and for unjust enrichment where the defendant prevented performance of a contract or money is owed outside the scope of the agreement (Loheac, P.C. v. Children’s Corner Learning Center, 51 A.D. 3d 476, 857 N.Y.S. 2d 143 [N.Y.A.D. 1<sup>st</sup> Dept., 2008]).

A claim of aiding and abetting a breach of fiduciary duty requires, “(1) breach by a fiduciary of obligations to another; (2) that the defendant knowingly induced or participated in the breach and (3) that plaintiff suffered damage as a result of the breach (Kaufman v.

Cohen, 307 A.D. 2d 113, 760 N.Y.S. 2d 157 [N.Y.A.D. 1st Dept., 2003]). Constructive knowledge of a breach of fiduciary duty is not sufficient to maintain a claim of aiding and abetting. A defendant can be found to have knowingly participated in the breach by providing substantial assistance. Inaction of an alleged aider and abettor is sufficient to establish substantial assistance only if there is a direct fiduciary duty to the plaintiff (Kaufman v. Cohen, 307 A.D. 2d 113, supra).

Plaintiff's proposed causes of action are patently insufficient as a matter of law. The cause of action for unjust enrichment does not survive the waiver provisions of the User Agreement.. Plaintiff relies on speculation and pure conjecture in seeking to hold the defendants liable for breach of fiduciary duty based on their affirmatively assisting in a potential scheme by non-party Art of Elysium. Having failed to assert any claims or bring an action to establish that Art of Elysium breached any duty to him, plaintiff cannot bring an action for aiding and abetting a breach of fiduciary duty.

Upon a review of all the papers submitted, this Court finds that defendants have met their burden of proof and established a basis to dismiss all causes of action against Eli Consilvio , Art Reserve Inc. and on the cross-motion against Coppy Holzman. Charity Buzz, Inc., has established a basis to dismiss all causes of action asserted against it. Plaintiff's motion to amend the complaint filed under Motion Sequence 003, is denied because the proposed amendments are speculative and patently insufficient as a matter of law.

Accordingly, it is ORDERED that THE ART RESERVE, INC. and ELI CONSILVIO's motion to dismiss this action pursuant to CPLR §3211, is granted and it is further,

ORDERED, that all causes of action asserted against ELI CONSILVIO and ART RESERVE INC., are dismissed, and it is further,

ORDERED, that COPPY HOLZMAN's cross-motion, to dismiss this action against him pursuant to CPLR §3211 [a],[7],[8] and CPLR §3211[c], is granted, and it is further,

ORDERED, that all causes of action asserted against COPPY HOLZMAN, are dismissed, and it is further,

ORDERED, that CHARITY BUZZ, INC.'s motion to dismiss this action against it pursuant to CPLR §3211 [a],[7] and CPLR 3211[c], filed under Motion Sequence 002, is granted, and it is further,


ORDERED, that, all causes of action asserted against CHARITY BUZZ, INC., are dismissed, and it is further,

ORDERED, that plaintiff's motion pursuant to CPLR §3025 [a],[b],[c] to amend the complaint, filed under Motion Sequence 003, is denied, and it is further,

ORDERED, that since all causes of action have been dismissed against each of the named defendants, the case is dismissed, and it is further,

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly.

ENTER:

  
\_\_\_\_\_  
MANUEL J. MENDEZ,  
J.S.C. MANUEL J. MENDEZ  
J.S.C.

Dated: September 9, 2013

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE