Lieberman v Pappas
2015 NY Slip Op 31401(U)
July 24, 2015
Supreme Court, New York County
Docket Number: 651402/2012
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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JON SCOTT LIEBERMAN and PIXEL LLC,

Plaintiffs,

Index No. 651402/2012

-against-

DECISION AND ORDER

TIMOTHY A. PAPPAS, PAPPAS ENTERPRISES, INC., BLACK SWAN RACING, LLC and TRANS SPORT RACING LLC,

Defendants.

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Saliann Scarpulla, J.:

In this action for breach of an oral contract, defendants Timothy A. Pappas ("Pappas"), Pappas Enterprises, Inc. ("Pappas Enterprises"), Black Swan Racing, LLC ("Black Swan") and Trans Sport Racing LLC ("Trans Sport") (collectively "defendants") move pursuant to CPLR 3212, for summary judgment to dismiss the complaint filed by plaintiffs Jon Scott Lieberman ("Lieberman") and Pixel LLC ("Pixel") (collectively "plaintiffs") in its entirety.

Background

Lieberman and Pappas, friends from college, met up socially in November or December of 2006. During this meeting, and in subsequent telephone conversations, emails, and text messages, Lieberman and Pappas discussed the possibility of Lieberman becoming financially involved in a sports car racing team which Pappas was organizing to participate in the 2007 season of the American Le Mans Series ("ALMS"), a sports car

racing series. Lieberman decided to participate in the racing venture, and on March 14, 2007, arranged for a transfer of $275,000.00 from his company, Pixel, to the bank account of nonparty Pappas Industrial Parks, Inc., a Massachusetts corporation, which was designated by Pappas to receive the funds.

On July 13, 2007, Lieberman transferred an additional $50,000.00 from nonparty Ailiant, Inc., directly to a Trans Sport bank account, designated by Pappas; on July 31, 2007, Lieberman transferred another $50,000.00 from Ailiant, Inc. to the same Trans Sport bank account. The certificate of organization of Trans Sport, an LLC organized under the laws of Massachusetts, indicates that Pappas was its manager.

Lieberman claims these three transfers were loans to Trans Sport, meant to be paid back with an additional return. He also claims that Pappas solicited the monies from him, by explaining that he needed more money than he expected to operate the racing team. According to Lieberman, the two agreed that the loans would be secured by a Porsche RSR race car which Pappas was driving in the races, although Lieberman never perfected a security interest in the Porsche RSR or in any other property or assets of Trans Sport. The terms of the agreement, pursuant to which Lieberman provided these funds, were oral, and never reduced to writing. As alleged in the complaint, "pursuant to the agreement, at the end of the race season, the car would be sold and plaintiffs would be repaid in full, whatever the sale price for the car."

Defendants dispute plaintiffs' claims that the money provided by plaintiffs was a loan, and further deny that plaintiffs had any security interest in any assets of Trans Sport, "or with respect to the Porsche RSR, which in any event was never owned by any of the defendants, but was instead owned by nonparty Taja Realty Trust."

Trans Sport operated the Porsche RSR and participated in the 2007 season of the ALMS, which lasted from March 17, 2007 to October 20, 2007. After the close of the 2007 season, Lieberman declined to participate in another racing venture being organized by Pappas. Trans Sport was ultimately not profitable. The team was disbanded after the 2007 season of the ALMS, and Trans Sport was administratively dissolved on April 30, 2009.

In 2011, the relationship between Lieberman and Pappas degraded, and Lieberman demanded that Pappas repay the funds he had provided to Trans Sport. Plaintiffs allege that the loans were due to be repaid in December 2007, when the race car was sold, but that defendants did not repay the money. However, Lieberman testified during his deposition that he agreed to be involved in a long-term venture, and that the 2007 season was simply meant to be a learning year, with his financial involvement to be rolled over into a team that would participate in the 2008 season.

On April 27, 2012, plaintiffs filed a summons with notice, and on July 27, 2012, filed a complaint alleging three causes of action: (1) breach of contract; (2) an accounting, in the alternative; and (3) unjust enrichment. In the complaint, plaintiffs allege that

during 2006 and early 2007, they "advanced approximately $370,000 to Pappas for himself, and for the benefit of Enterprises and Trans Sport, so that Pappas and his companies could operate a race car during 2007 ALMS season." Plaintiffs further allege that Pappas misrepresented the true facts about the endeavor: "although unknown to plaintiffs at the time, Pappas was not operating a professional race team. Instead, Pappas was using monies acquired from plaintiffs and others to enable Pappas himself to drive race cars, even though he was not a professional race car driver. In short, Pappas conned Lieberman into supporting his hobby."

Defendants maintain that the dispute before the court is whether the $370,000 provided by plaintiffs to Trans Sport in 2007 was in the nature of a loan or an investment. Defendants argue that the funds were provided as a form of sponsorship in the team, and thus, were not intended to be repaid unless the team was profitable, which it was not. In their motion, defendants argue that: (1) the plaintiffs' breach of contract claim fails as it is barred by the statute of frauds, (2) plaintiffs have not demonstrated a right to an accounting, and (3) there is no factual support for plaintiffs' causes of actions against any defendant other than Trans Sport.

Plaintiffs oppose the motion, arguing, among other things, that the statute of frauds defense was waived, that Pappas was personally liable for the loan, and plaintiffs were entitled to an accounting.

In their reply, defendants seek leave to file an amended answer asserting the additional affirmative defense of statute of frauds in the event I deny any part of the summary judgment motion.

At the January 7, 2015, oral argument on the motion, I granted defendants' summary judgment to the extent of dismissing the complaint as against Pappas Enterprises and Black Swan; and denied the motion for summary judgment as against Trans Sport, for the reasons stated on the record. I reserved decision on the motion with respect to defendant Pappas individually, which is addressed herein.

Discussion

Under CPLR 3212 (b), summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

There is no dispute that Trans Sport is Limited Liability Company, organized under the laws of Massachusetts. The Massachusetts Limited Liability Company Act provides that ". . . the debts, obligations and liabilities of a limited liability company, whether arising in *contract*, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be personally liable, . . . for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company." ALM GL ch. 156C, § 22. *See* also *CMI Assocs., LLC v. Reg'l Fin. Co., LLC*, 775 F. Supp. 2d 281, 288 (D. Mass. 2011) (finding that Mass. Gen. Laws ch. 156C, § 22 is "fatal" to claims against individual defendant for actions taken "his official capacity as owner and principal of [defendant] LLC); *Chambers v. Gold Medal Bakery, Inc.*, 2009 Mass. Super. LEXIS 344 (Mass. Super. Ct. Sept. 17, 2009) ("Under Massachusetts law, a corporate officer is not ordinarily liable for a corporation's breach of contract").

Similarly, New York Limited Liability Company Law ("LLCL") provides that "[n]either a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company . . . is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, *contract* or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating

(as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company." NY LLC § 609(a). *See also Retropolis, Inc. v. 14th St. Dev. LLC*, 17 A.D.3d 209, 210 (1st Dep't 2005) (individual defendant "cannot be held liable for the company's obligations by virtue of his status as a member thereof") (citing LLCL §§ 609,610); *Oseff v Scotti*, 2015 N.Y. App. Div. LEXIS 5991, 2015 NY Slip Op 06123 (2d Dep't July 15, 2015) ("the Supreme Court properly directed the dismissal of the cause of action alleging breach of contract insofar as asserted against [individual defendant], since the record demonstrated that [he] signed the contract of sale in his capacity as an officer of [corporate defendant] and not individually and, thus, he had no personal liability for any breach of the contract"); *W. Joseph McPhillips, Inc. v Ellis*, 278 A.D.2d 682, 683 (3d Dept 2000) ("A corporate officer is not normally liable in his or her personal capacity on contracts executed on behalf of the corporation unless the officer expresses some intention to be personally bound, for the officer is in effect an agent of the corporate principal").

As these statutes make clear, Pappas may not be held personally liable for Trans Sports' debt. Defendants argue that the evidence shows that the subject transaction took place between plaintiffs and defendant Trans Sport only. Further, defendants argue that because plaintiffs fail to allege that any funds were sent personally to Pappas, or transferred in his name, there are no grounds to sustain any claims against him individually.

In opposition, plaintiffs argue that Pappas is individually liable because the subject transaction took place between Pappas and Lieberman, as individuals. Plaintiffs maintain that Pappas and Lieberman met in New York socially and discussed the transaction, and that the two later spoke by phone, at which time Pappas requested that Lieberman transfer the funds. Plaintiffs also claim that Pappas designated where the money was to be sent, and that Lieberman then transferred the funds to those accounts. Plaintiff asserts that Lieberman loaned money to a friend, who in turn spent it as he saw fit.

In his affidavit in opposition, Lieberman states that he reached an agreement with Pappas, whereby plaintiffs would led money to "Pappas and his companies, defendants Pappas Enterprises Inc. . . . and Trans Sport Racing LLC . . . , to help finance his car operations . . . . During 2006 and early 2007, Pixel and I advanced approximately $370,000 to Pappas for himself, and for the benefit of Enterprises Inc. and [Trans Sport]. He used that money to race the car but never returned it to me." However, Lieberman also acknowledged that he never transferred any money into Pappas' personal account.

During his deposition, when asked why he sued Pappas personally, Lieberman stated "[b]ecause ultimately he made all of these representations to me, and it was never clear what entity does what, whether it's him personally or not."

Through the evidence submitted on this motion, defendants have made a *prima facie* showing that Pappas was acting in his capacity as manager of Trans Sport in his dealings with plaintiffs, and therefore cannot be held personally liable. When Lieberman

agreed to transfer the monies to Pappas, he was told by Pappas to wire it to an account held by Pappas Industrial Parks, Inc., and the second and third payments were wired into the account of Trans Sport. Lieberman further testified that at the time he wired the funds, it was his understanding that the money was going to a Trans Sport account. Significantly, no money was ever transferred to Pappas individually.

In opposition, plaintiffs fail to demonstrate the existence of an issue of material fact as to whether Pappas may be held individually liable. Plaintiffs' argument that Pappas and Lieberman met in person to discuss the transaction, as well as subsequently speaking about the deal by telephone, is not sufficient to raise a triable issue of fact. As I noted at oral argument on this motion "there was no doubt that the documents show that the transaction occurred between two LLCs. You can't deal with an LLC, you have to deal with someone from the LLC. So the fact that you deal with Mr. Pappas doesn't save your claim against him. . . . A human being has to speak for an LLC."

Plaintiffs claim that "Lieberman did not know where this money was being transferred and had never heard of TSS. He simply loaned money to a friend who in turn spent it as he saw fit," is belied by Lieberman's deposition testimony that at the time he transferred the funds, he understood that the account belonged to Trans Sport. Lieberman

also testified that he was repeatedly told by Pappas that Trans Sport owned the race car at issue.[1]

As plaintiffs offer nothing more than concluosry allegations, I find that plaintiffs fail to raise a material issue of fact as to whether Pappas may be personally liable to plaintiffs. *See S. J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 342 (1974) ("a shadowy semblance of an issue," and "[b]ald conclusory assertions, even if believable, are not enough to defeat summary judgment") (citations omitted). Therefore, I dismiss the complaint against Pappas individually.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by defendants Timothy A. Pappas, Pappas Enterprises, Inc., Black Swan Racing, LLC, and Trans Sport Racing LLC,

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[1] Plaintiffs also submit an email exchange between Lieberman and Pappas in further support of their claim that it was unclear whether Pappas was acting in his individual capacity. A May 8, 2008 email from Pappas in response to Lieberman's email suggesting that they "get together and close this out . . . ," states, in part:

> As far as our deal, if you are interested, I would love to put you into the Palmer deal (my race project). . . I think I can get you a very good return on the investment you made, instead of a loss. You will not have to put up any additional funds and I will round your investment up to a $500,000 investment unit . . . If not interested, a break up could take place between us financially in June (that is the earliest I will have A. the cash B. the final accounting of the company).

This 2008 email exchange submitted by plaintiffs is also insufficient to create a triable issue of fact. Contrary to plaintiffs' argument, nothing in the email exchange suggests that Pappas personally borrowed money from plaintiffs.

to dismiss the complaint of plaintiff Jonathan Scott Lieberman and Pixel, LLC, is denied only as against Trans Sport Racing, LLC; and it is further

ORDERED that the motion for summary judgment is granted to the extent of dismissing the complaint as against Pappas Enterprises, Inc. and Black Swan Racing, LLC, for the reasons stated on the record on January 7, 2015, and as to Timothy Pappas, for the reasons set forth herein, and the action is severed and dismissed as against these defendants; and it is further

ORDERED that the Clerk of the Court is to sever the complaint against these defendants and enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the application by defendants to amend their answer to add an affirmative defense of statute of frauds is granted, and an amended answer in conformity with this order shall be served and filed within thirty (30) days of this decision and order; and it is further

ORDERED that the parties shall appear for a Pre-Trial Conference on September 30, 3015 at 2:15pm, Room 208, 60 Centre Street, New York, New York 10007.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 24, 2015

ENTER:
Saliann Scarpulla, J.S.C.