Aprile v Men of Invention LLC
2016 NY Slip Op 31057(U)
June 7, 2016
Supreme Court, New York County
Docket Number: 652726/13
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

GEORGE APRILE,

Plaintiff

INDEX NO. 652726/13
MOTION DATE 04-20-2016

- v -

MOTION SEQ. NO. 002
MOTION CAL. NO.

MEN OF INVENTION LLC, d/b/a SILVER LINING, JOSEPH SCHWARTZ, TERRY DIETERLE, JR., and SASHA PETRASKE,

Defendants.

The following papers, numbered 1 to 9 were read on this motion for an injunction.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-7
Replying Affidavits	8-9

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

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that Plaintiff's motion and Defendants' cross-motion are granted to the extent stated herein.

Plaintiff and Defendants Schwartz, Dieterle Jr., and Petraske formed Men of Invention, LLC, (herein "MOI") for the purpose of operating a Bar Restaurant in the basement of the premises located at 75 Murray Street, New York, N.Y. (herein "the Premises). The parties entered into an Operating Agreement on June 15, 2010, (herein "the Operating Agreement"), in furtherance of the company's formation. (Full copy of the Operating Agreement, Reply Aff. Exh. C).

In July of 2010 defendant MOI (as tenant) entered into a lease for the Premises with Bogardus, Inc.,(as owner),commencing on September 15, 2010 and expiring September 14, 2013. Plaintiff is a member of Bogardus, Inc.

Plaintiff commenced this action on July 31, 2013 against the Defendants seeking (1) judicial dissolution of MOI effective September 30, 2013, in accordance with the LLCL; (2) an order enjoining the Defendants from selling or removing any property, i.e. furniture, fixtures and equipment, from the Premises and that Plaintiff be awarded all of the property of MOI; (3) an accounting of MOI from the date of formation to the date of dissolution; and (4) damages in the amount of at least $50,000.

Plaintiff now moves for an Order pursuant to CPLR 3211 and 3212 dismissing the Defendants' counterclaims and granting summary judgment in Plaintiff's favor. Plaintiff argues that Defendants' counterclaims fail to allege causes of action, and are unfounded, baseless and without any merit. Defendants oppose the motion and cross-move for an Order pursuant to CPLR 3212 for summary

judgment in its favor dismissing the Plaintiff's complaint in its entirety. The parties stipulated on April 20, 2016, to severing the action as against Defendant Sasha Petraske, and said Defendant's counterclaims, due to Mr. Petraske's death.

Plaintiff's Motion:

In deciding a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleadings a liberal construction, accept the allegations of the pleading to be true and give the party the benefit of every possible inference. (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 832 N.E.2d 26 [2005]). "Whether a [party] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (EBC I, Inc., Supra).

A review of Defendants' Counterclaims show sufficiently stated causes of action in their first counterclaim for breach of contract, and second counterclaim for tortious interference with a contract. Defendants state with sufficient particularity that Plaintiff breached the Operating Agreement by engaging in conduct that was detrimental to the Defendants being able to run the business in a functional and profitable manner, and caused such hostility Defendants did not think it feasible or possible to attempt to renew the lease. "Every contract implies a promise that neither party will do anything that has the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (MBIA Ins. Corp. v. Credit Suisse Securities (USA) LLC, 32 Misc.3d 758, 2011 N.Y. Slip Op. 21191[Sup. Ct. N.Y. Co. 2011], Dalton v. Educational Testing Service, 87 N.Y.2d 384, 639 N.Y.S.2d 977 [1995]). A cause of action for breach of contract may stand where the [breaching party] engaged in "conduct that injures or frustrates the other party's right to receive the fruits of the contractual bargain." MBIA Ins. Corp., Supra, citing Frydman v. Credit Suisse First Boston Corp., 272 A.D.2d 236, 708 N.Y.S.2d 77 [1st Dept. 2000]).

However, Defendants' third counterclaim for compensatory damages and fourth counterclaim for consequential damages both suffered as a result of Plaintiff breaching the contract do not sufficiently state a claim upon which relief can be granted. These two counterclaims' bare assertion that Plaintiff's breach of the contract caused the Defendants to suffer $250,000.00, in each claim, for compensatory and consequential damages are conclusory allegations without offering more.

First, "damages are intended to return the parties to the point at which the breach arose and to place the nonbreaching party in as good a position it would have been had the contract been performed." Brushton-Moira Cent. School Dist. v. Fred H. Thomas Assoc., P.C., 91 N.Y.2d 256, 692 N.E.2d 551 [1998]. Defendants' third counterclaim for compensatory damages is restating the claim for damages in the first and second counterclaim, and is therefore improper.

Second, "in claims for breach of contract, a party's recovery is ordinarily limited to 'general damages which are the natural and probable consequence of the breach' (Kenford Co., Inc. v. County of Erie, 73 N.Y.2d 312, 537 N.E.2d 176 [1989]); any additional recovery must be premised upon a showing that the unusual or extraordinary damages sought were 'within the contemplation of the parties as

the probable result of a breach at the time of or prior to contracting." Brody Truck Rental, Inc., v. Country Wide Ins. Co., 277 A.D.2d 125, 717 N.Y.S.2d 43 [1st Dept. 2000], citing Kenford, Supra, quoting Chapman v. Fargo, 223 N.Y.32, 119 N.E. 76 [1918]).

There is no language or provision in the Operating Agreement that provides for recovery of consequential damages as being within the contemplation of the parties. "[C]onsequential, or special, damages do not "directly flow from the breach." Biotronik A.G. v. Conor Medsystems Ireland, LTD., 22 N.Y.3d 799, 11 N.E.3d 676 [2014]). "Proof of consequential damages cannot be speculative or conjectural." (Bi-Economy Market, Inc., v. Harleysville Ins. Co. Of N.Y., 10 N.Y.3d 187, 886 N.E.2d 127 [2008]). "Consequential damages, designed to compensate a party for reasonably foreseeable damages, 'must be proximately caused by the breach' and must be proven by the party seeking them." (Bi-Economy Market, Supra, citing 24 Lord, Williston on Contracts §64:12, at 125 [4th ed.]).

Plaintiff argues that since Defendants did not produce any documentation to support these counterclaims during discovery, summary judgment must be granted in its favor. The defendant does not raise any triable issue of fact contrary to this assertion, therefore, the third and fourth counterclaims must be dismissed.

Defendants' Cross-Motion:

Defendants argue that they are entitled to summary judgment dismissing the Complaint in its entirety.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits(Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination"(Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

Plaintiff's first cause of action seeking judicial dissolution of MOI is moot as MOI was dissolved in accordance with the terms of the Operating Agreement. The Operating Agreement provides at paragraph 17, "The company shall dissolve upon the earliest to occur of the following: (i) September 30, 2013 (ii) the termination of the lease between Bogardus, LLC and the company (iii) the unanimous consent of the members or (iv) such date upon which dissolution occurs pursuant to Section 701 of New York's Limited Liability Company Law (herein "LLCL") (Id.). Therefore, the dissolution of MOI occurred as of September 30, 2013, and defendants are entitled to summary judgment on Plaintiff's first cause of action.

As for Plaintiff's second cause of action, Plaintiff brought an Order to Show Cause on the same date of the Complaint seeking to enjoin the Defendants from selling, destroying and or removing any of the furniture fixtures and equipment from the premises. This Order to Show Cause sought the same relief requested in the second cause of action in Plaintiff's Complaint. Defendants cross-moved for an Order denying plaintiff's request and for an extension of a reasonable time beyond the termination date of the lease agreement to remove their property and trade fixtures.

In an Order dated September 13, 2013, This Court denied Plaintiff's motion to restrain the Defendants from selling, destroying and/or removing any of the furniture fixtures and equipment from the Premises, Ordered that the temporary restraining order restraining the Defendants from selling and/or removing any of the furniture fixtures and equipment from the Premises was vacated, and granted Defendants' cross-motion for an extension of two weeks past the September 14, 2013 lease termination date to remove their property and trade fixtures from the Premises. This Court's September 13, 2013 Order having resolved Plaintiff's second cause of action renders this second cause of action moot, and Defendants are entitled to summary judgment on this claim.

As for the two remaining causes of action, Plaintiff's third cause of action seeks an accounting from the date of formation to the date of dissolution of MOI, and the fourth cause of action seeks damages in the amount of $50,000.00 for Defendants' failure to re-pay a loan made by Plaintiff to the corporation, Defendants' failure to pay the Con Edison bill for the Premises, and Defendants' failure to pay Plaintiff any dividends from the corporation.

Defendants argue that the third cause of action seeking an accounting is moot because Defendants directed the Plaintiff to contact MOI's accountant for copies of the financial records originally produced by Defendants, which Plaintiff indicated he could not understand, and for additional records that Defendants were not in possession of. However, this argument is unavailing. Defendants alleging that they directed the Plaintiff to seek documents elsewhere does not equate to rendering Plaintiff's request for an accounting moot.

Defendants also argue that because the landlord of the Premises, Bogardus, is a necessary party and is not a party to this action, the claims for damages for Defendants' failure to pay Con Edison are therefore eliminated. Inasmuch as Defendants' allege that the Con Edison bills cannot be part of the damages sought

by Plaintiff because the Con Edison bill belonged to Borgardus, not Plaintiff individually, Defendants' may be correct.

In this Court's September 13, 2013 Order, it was held that the plaintiff had no standing to obtain relief on behalf of 75 Bogardus, Inc. "One choosing to use a corporation to operate a business cannot, absent special circumstances, disregard the corporate structure and obtain damages personally for harm to the corporation. Accordingly, an individual shareholder does not have standing to secure a personal recovery for an alleged wrong done to a corporation. Further the fact that an individual closely affiliated with a corporation, such as a principal shareholder or even a sole shareholder, is incidentally injured by an injury to the corporation does not confer standing on the individual to sue on the basis of either that indirect injury or the direct injury to the corporation" (14 N.Y. Jur. 2d Business Relationships § 36; Suss v. American Soc. For Prevention of Cruelty to Animal, 823 F. Supp. 181 [S.D.N.Y. 1993]; Gmerek v. Scrivener, Inc., 221 A.D. 2d 991, 634 N.Y.S. 2d 299 [4th Dept. 1995]; New Castle Siding Co., Inc., v. Wolfson, 97 A.D. 2d 501, 468 N.Y.S. 2d 20 [2nd. Dept. 1983]).

However, Plaintiff seeks relief in the form of $50,000.00 in damages based on a combination of unpaid Con Edison bills, non-repayment on a loan, and non-payment of corporation dividends. Summary judgment dismissing the third and fourth claim prior to an accounting being done, and a determination of whether Plaintiff is in fact entitled to such damages, would be improper. Defendants' remaining arguments are unavailing.

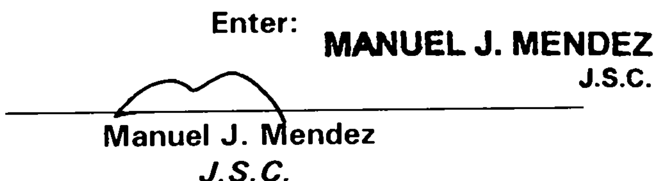
Accordingly, it is ORDERED, that Plaintiff's motion to dismiss and for summary judgment in its favor on Defendants' counterclaims, and Defendants' cross-motion for summary judgment dismissing the complaint, is granted to the extent stated herein, and it is further,

ORDERED, that Plaintiff's motion to dismiss Defendants' third and fourth counterclaim is granted, Defendants' third and fourth counterclaims are dismissed, and it is further,

ORDERED, that Defendants' cross-motion for summary judgment in its favor against Plaintiff's first and second causes of action is granted, and it is further,

ORDERED, that the first and second causes of action are dismissed.

Enter:



Dated: June 7, 2016

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE