Gerard v Mexma LLC
2018 NY Slip Op 31369(U)
January 12, 2018
Supreme Court, New York County
Docket Number: 651231/2017
Judge: David B. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** 58
Justice

----------X

PAUL GERARD,

Plaintiff,

- v -

MEXMA LLC D/B/A BELLE REVE RESTAURANT, VINCENT VITEK, WILLIAM GILROY, PATRICK FAHEY

Defendant.

INDEX NO. 651231/2017

MOTION DATE 5/8/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

----------X

The following e-filed documents, listed by NYSCEF document number 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31

were read on this application to/for Dismiss .

Upon the foregoing documents, it is

Decided that the motion to dismiss is granted in part to the extent set forth below and denied in part. The cross-motion for the appointment of a receiver over Mexma LLC ("Mexma") is denied. The Complaint alleges that plaintiff, together with Vincent Vitek, William Gilroy and Patrick Fahey (combined the "Member Defendants") entered into an agreement, as partners, to open a restaurant called Belle Reve. The Complaint alleges in exchange for plaintiff's experience, celebrity status, time and labor to open and manage the operations of the restaurant, he would receive a 20% interest in the restaurant. Plaintiff alleges that on or about November 20, 2012, the parties entered into an operating agreement that set forth his 20% interest and that plaintiff then invested considerable time and energy into the restaurant. Plaintiff's work included

attending to customers, opening and closing the restaurant, contacting vendors, drafting the restaurant's mission statement, engaging in the businesses public relations & marketing and all aspects related to the successful establishment and operation of the business. Although the Complaint initially states that plaintiff did not receive any compensation for this work, plaintiff later acknowledged receiving some compensation, but less than fair market value and never receiving partnership proceeds or draw. Plaintiff further alleged that the Member Defendants "persistently engaged in wrongful and unlawful conduct, which not only adversely affected the business and its profitability, but also violated plaintiff's rights as a Restaurant member." As examples, plaintiff alleged the Member Defendants employed persons with substance abuse problems and also appointed an office manager without notice to, or approval of, plaintiff. This new manager refused to give plaintiff access to Mexma's books and records.

In addition, the Complaint contains a separate cause of action against defendant Vitek personally for libel per se. The Complaint states that Vitek sent emails and other forms of written correspondence, which contained defamatory and false statements of and concerning plaintiff. The Complaint specified two instances where Vitek allegedly published defamatory material.

The Complaint contains seven causes of action: 1) breach of contract against Mexma; 2) breach of contract against the Member Defendants; 3) breach of fiduciary duty against the Member Defendants; 4) conversion of plaintiff's membership rights against all defendants; 5) unjust enrichment against Mexma; 6) application of a constructive trust; and 7) libel against Vitek.

Defendants appeared via the instant motion to dismiss. Defendants argue for dismissal pursuant to CPLR 3211(a)(7) claiming that plaintiff has not stated a cause of action on any of his

claims. Defendants' argument essentially is that the Complaint has several contradictory statements, is inadequate and conclusory, and that plaintiff failed to attach any proof to support his claims. In support of the motion, defendant has not attached any documents. Plaintiff filed its opposition and a cross-motion seeking the appointment of a receiver. In support of its cross-motion, plaintiff attached the affidavit of plaintiff as well as numerous exhibits.

When deciding a motion to dismiss pursuant to CPLR §3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Associates, P.C. v. Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept 2002]. Under CPLR § 3211(a)(7), the court "accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 A.D.3d 192, 199 (1st Dept 2013) (quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001])). It is true that "[t]he court [] is not required to accept factual allegations, or accord favorable inferences, where the factual assertions are plainly contradicted by documentary evidence" (*Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006]).

Under New York law, "[t]he elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage" (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d

478 [1st Dept 2007]). Here, plaintiff alleges that on or about December 20, 2014[1] the parties entered into an operating agreement that set forth their agreement. In support, plaintiff attaches a copy of an unexecuted operating agreement for Mexma. Plaintiff claims that he cannot find a copy of the executed agreement but that the attachment is a copy of the agreement entered into on December 20, 2014. The operating agreement submitted by plaintiff purporting to be the final agreement contains a schedule listing the various members but does not include plaintiff. Further, in support of its motion for a receiver, plaintiff submitted an email chain as exhibit O. In this email, plaintiff states "In hopes of making everything clear, I suggest we get everything in writing. It's not that I don't trust in all of our "old-school" handshake agreements, or that I have any doubt in your, my, and Billy's ability to hold up a covenant of good faith, its that we need roles, rules, regulations clearly defined." Later in the email, plaintiff wrotes "[N]ow, [I]n hopes of moving past all that, let's get everything clearly in writing, on paper and signed by all. We should've done this from the beginning, but as I said, your word on the 20% for the 3 principal partners is good enough for me... We cannot operate successfully without an operating agreement." From the plain language of this email, plaintiff has acknowledged that there was no writing or operating agreement that he was a party to. However, in defendant Gilroy's responsive email, it is similarly obvious that defendant Gilroy and defendant Gahey had come to some type of agreement with plaintiff for a partnership.

The first cause of action is for breach of contract against Mexma directly. That cause of action is dismissed. The Complaint makes no allegation that the restaurant entity entered into any contractual relationship with plaintiff for compensation for services. The documentary

[1] Although the Complaint alleges a November 2012 date, the affidavit of plaintiff states a November 2014 date for the initial discussions and then states definitively that on December 20, 2014, the parties entered into an operating agreement.

evidence also shows that plaintiff was not a party to the operating agreement. Even assuming the plaintiff acquired a 20% interest in Mexma and was entitled to a partnership draw, plaintiff has not stated any facts that any agreement was made as to how much plaintiff was to be paid for his work. To the extent that plaintiff seeks a fair compensation for services rendered, such relief is not based upon a contractual relationship. Thus, the first cause of action is dismissed

The motion to dismiss the second cause of action is denied. Taking all the allegations as true and giving plaintiff the benefit of every inference, although it would appear that the parties may not have finalized each and every detail in writing, it would appear that parties did have an agreement amongst each other and the complaint properly alleges a breach of contract against the Member Defendants.

The third cause of action for breach of fiduciary duty is dismissed. The Complaint alleges that by hiring and retaining employees known to have substance abuse issues, who also consumed alcohol and drugs during work hours, and ignoring multiple complaints regarding the issue, the Member Defendants breached a fiduciary duty to one another. The Complaint further alleges that said employees were hired without plaintiff's consent and contrary to the agreement of the parties. However, hiring employees is a business decision and not a breach of a fiduciary duty. The fact that the employees had substance abuse issues does not convert the decision into a breach of fiduciary duty. Further, the fact that said employees were hired without plaintiff's consent and allegedly contrary to the agreement of the parties, is duplicative of the breach of contract cause of action. A cause of action alleging breach of fiduciary duty is subject to dismissal where it is duplicative of a cause of action alleging breach of contract (*Parker Waichman LLP v Squier, Knapp & Dunn Communications, Inc.*, 138 AD3d 570 [1st Dept 2016]; *Kaminsky v FSP Inc.*, 5 AD3d 251 [1st Dept 2004]).

The fourth cause of action for conversion is also dismissed. Conversion requires either tangible personal property or an action involving infringement of property rights by virtue of misappropriating tangible property (*Sporn v MCA Records, Inc.*, 58 NY2d 482 [1983]). The conversion of intangible property is not actionable (*Sun Gold, Corp. v Stillman*, 95 AD3d 668[1st Dept 2012]). In any event, the facts alleged for this conversion cause of action are similarly duplicative of plaintiff's cause of action for breach of contract (*see Sebastian Holdings, Inc. v Deutsche Bank, AG.*, 108 AD3d 433 [1st Dept 2013] [conversion claim was properly dismissed as duplicative of breach of contract claim]).

The fifth cause of action is for unjust enrichment. for unjust enrichment, the plaintiff must prove "that (1) the defendant was enriched, (2) at plaintiff's expense, and (3) 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*, 19 NY3d 511, 516 [2012]). Giving plaintiff the benefit of every inference, plaintiff has properly stated this cause of action.

The sixth cause of action seeks that a constructive trust is established. A party claiming entitlement to a constructive trust must establish: "(1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment" (*Wachovia Sec., LLC v Joseph*, 56 AD3d 269, 271 [1st Dept 2008] *citing Bankers Sec. Life Ins. Socy. v. Shakerdge,* 49 NY2d 939 [1980]). Plaintiff did not make any transfer when it allegedly relied on the Member Defendants' statements. Therefore, this cause of action is dismissed.

The last cause of action is for libel against defendant Vitek. The elements of libel "are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or

constitute defamation per se (Restatement of Torts, Second § 558). CPLR 3016(a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made" (*Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]). Plaintiff has stated with enough particularity the statements, the date the method of publication and the exhibit attached shows the person the defamation was made to. For these reasons, the motion to dismiss the libel cause of action is denied.

Plaintiff cross-moved seeking that a receiver be appointed pursuant to CPLR 6401 which provides "[U]pon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." This matter seeks damages for breach of contract, unjust enrichment and libel. Plaintiff seeks monetary compensation and does not seek the return of partnership interest. A receivership is not appropriate in this matter. In any event, plaintiff has not demonstrated that there is danger that the property will be removed from the state, or lost, materially injured or destroyed. Thus, the cross-motion is denied. Accordingly, it is

ORDERED, that defendants' motion to dismiss is granted only to the extent that the first, third, fourth. fifth and sixth causes of action are dismissed; and it is further

ORDERED, that plaintiff's cross-motion for a receiver is denied.

1-12-2018
DATE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE