

Marelli v Alabi

2018 NY Slip Op 33476(U)

December 21, 2018

Supreme Court, Suffolk County

Docket Number: 15-605274

Judge: Sanford N. Berland

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SHORT FORM ORDER

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6- SUFFOLK COUNTY**

PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

MARCUS MARELLI,

Plaintiff(s),

-against-

KEHINDE ALABI a/k/a KEN ALABI,
GERARD ARCERI, MARGARET ARCERI
a/k/a MARGO ARCERI, GUS SEMERTGIS,
GINO VENEROSO, GLENN BECCARELLI
a/k/a GLENN MARTIN, GEORGE
MAGLARAS, GAS 110 LLC, HAROLD KALB,
MICHAEL J. ROSENFELD and KALB &
ROSENFELD, P.C.,

Defendant(s).

**ORIG. RETURN DATE: OCTOBER 11, 2016
FINAL RETURN DATE: AUGUST 29, 2017
MOT. SEQ. #: 002 MG**

PLTF'S ATTORNEY:
Steven A. Sternlicht, Esq.
1000 Main Street
Port Jefferson, New York 11777

DEFTS' ATTORNEY:
Law Office of Eric D. Cherches, PC
Attorneys for Kehinde Alabi a/k/a Ken Alabi
220 East Main Street
Port Jefferson, New York 11777

Savitt & Krantz, PC
Attorneys for the Arceri Defendants
353 Veterans Memorial Highway, Suite 208
Commack, New York 11725

Vincent J. Trimarco, Jr., Esq.
Attorneys for Gus Semertgis, Glenn Beccarelli
and Gas 110 LLC
1038 West Jericho Turnpike
Smithtown, New York 11787

McGiff Halverson LLP
Attorneys for Gino Veneroso
96 South Ocean Avenue
Patchogue, New York 11772

Emanuel F. Saris, Esq.
Attorneys for George Maglaras
2900 Westchester Avenue, Suite 403
Purchase, New York 10577

Kalb & Rosenfeld, PC
Attorneys for Harold Kalb, Michael Rosenfeld,
and Kalb & Rosenfeld, PC
283 Commack Road
Commack, New York 11725

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant, Gino

Veneroso, dated September 16, 2016, and supporting papers; (2) Answering Affidavits made by plaintiff, dated September 30, 2016, and supporting papers; (3) Replying Affidavits made by defendant Gino Veneroso, dated October 11, 2016, and supporting papers; it is,

ORDERED that the motion made by defendant Gino Veneroso pursuant to CPLR 3211 is granted to the extent as described below; and it is further

ORDERED that the parties to the action are directed to appear for a previously scheduled compliance conference on **Wednesday, January 10, 2018 at 9:30 a.m.** in Part 6 of the Supreme Court located at One Court Street in Riverhead, New York.

This is an action for money damages brought by a participant in a nightclub venture against a number of other participants in the venture, as well as a law firm and its principals and a business-management company. The plaintiff, Marcus Marelli, alleges that on April 26, 2012, after seeing a *Craig's List* advertisement soliciting investors for the venture, "Wall Street," he had the first of a series meetings with four of the individual defendants - Gino Veneroso, Gerard Arceri, James Arceri and Kehinde (or "Ken") Alabi. Marelli further alleges that on May 7, 2012, after the third such meeting, he invested \$50,000 in the venture. On that date, Marelli also executed, (1) a document entitled "Partnership Agreement," and (2) a "Good Guy" guarantee for a ten-year lease for the premises located at 573 Nesconsett Highway in Hauppauge, New York.¹

By its explicit terms, the Partnership Agreement, which Veneroso, Alabi and James Arceri also signed, purported to create an "operating partnership" having the "firm name" of "FWEEvents Corporation" [sic] (hereinafter the "partnership") and the stated purpose of "Owning and Operating a Nightclub." The lease, which was dated "as of" February 14, 2012 and commenced on April 1, 2012, was between FWEEvents Corporation and the owner of the premises, Hauppauge Properties, LLC (the "2012 lease"). Gerard Arceri also signed a personal guarantee for the same lease on May 7, 2012, as did another individual on that date and two others on May 8, 2012. Although the stated date of the 2012 lease, February 14, 2012, antedates both the May 7, 2012 Partnership Agreement and the March 8, 2012 formation of a corporate entity also named "FWEEvents Corporation," an Assignment and Assumption of Lease, dated March 20, 2012, in which FWEEvents Corporation assigned the 2012 lease - with the premises' owner's consent - to Gas 110 LLC (which is also a defendant in this action), describes the 2012 lease as also dated March 20, 2012. The Assignment and Assumption Agreement is also accompanied by personal and Good Guy guarantees, executed on May 7 and 8, 2012 by Gerard Arceri and the same individuals who personally guaranteed the 2012 lease itself.

Among other things, plaintiff Marelli alleges a long litany of wrongs committed against him, the partnership and the corporation, including that various defendants misled him about, and withheld information from him concerning, debts and other obligations arising from

¹ Veneroso and Alabi signed the same "Good Guy" guarantee the following day, May 8, 2012, while Gerard Arceri signed a separate, but otherwise identical, Good Guy guarantee the same day that plaintiff and James Arceri did so.

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the nightclub previously operated at the same site and in which many of the defendants had been involved, which effectively encumbered the new nightclub and hampered its business; concealed from him the lease assignment to, consulting agreement with, and \$50,000 promissory note in favor of Gas 110 LLC, a business in which a number of the individual defendants were involved (the "Gas 110 defendants"); failed to make their full capital contributions to the venture, forcing him to incur expenses and costs far in excess of his agreed upon capital contribution in order to provide needed funding to the business; improperly prevented the sale of the nightclub; took money from both the partnership and the corporation to advance their own personal financial interests, and not for valid business purposes, in derogation of their fiduciary duties to him; aided and abetted one another in fraudulently concealing those activities and the liabilities and other detrimental information concerning the partnership and corporation from him; misappropriated assets of the venture; and violated ethical obligations owed both to him and to the venture. Marelli alleges that as a result of the conduct of the partnership defendants - Veneroso, Alabi and Margaret and Gerard Arceri² - and their failure to perform their respective obligations, he "lost," and is entitled to recover in this action, \$565,000.00, together with an additional \$235,000 as a result of being prevented from "selling" the premises and being required to buy out his lease guarantee, \$1,000,000 for the partnership defendants' breach of their fiduciary obligations and bad faith in doing so and in concealing their conduct from him, \$110,000 from the law firm defendant and its principals in connection with the negotiation of the 2012 lease and his execution of the Good Guy guarantee for it, another \$1,000,000 against the partnership defendants and three others for fraud, fraudulent and collusive misrepresentation, and fraudulent concealment in connection with inducing him to invest in the nightclub venture; and \$1,000,000 against Gerard Arceri for fraud and breach of fiduciary duties owed to plaintiff in concealing information from him and in inducing him to invest in the nightclub venture. In addition to compensatory and consequential damages, plaintiff also seeks interest and, except on his breach of partnership and professional duties claims, punitive damages.

The matter is now before the Court on defendant Veneroso's motion for summary judgment. Although Veneroso has asserted counterclaims against Marelli for breach of contract and unjust enrichment, his motion seeks only dismissal of Marelli's claims against him.

Veneroso's principal argument in support of his motion is that the Partnership Agreement was not that at all, but rather a shareholder agreement concerning the operation of the corporation, that "Marelli's claims are all premise[d] on the theory that he lost money as an investor in FWEEvents Corporation," and that the claims Marelli is alleging are, therefore, actually claims of the corporation, which Marelli, as an individual investor, does not have standing to prosecute in his own name and for his own benefit. Further, Veneroso asserts, even if Marelli

² James Arceri is not named as a defendant in the complaint. Rather, Marelli alleges that Gerard and Margaret Arceri "[b]ecame partners with James Arceri in a one quarter interest in the . . . Partnership."

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did have standing to prosecute the corporation's claims, those claims in any event have been obviated by an agreement, dated October 11, 2012, among FWEEvents Corporation [sic] and Veneroso and Alabi, which includes a broad indemnification and hold-harmless provision in favor of Veneroso and Alabi. That agreement - the so-called "buy-back agreement" - was executed by Marelli as Vice-President of the corporation and, by its terms, was intended to resolve an "impasse" over "operation of the corporation" by having Veneroso's and Alabi's relinquish their respective twenty-five percent interests in the corporation in exchange, inter alia, for a payment to each in the form of a promissory note from the corporation and the corporation's agreeing to remove both of them from the liquor license application for the club and endeavoring to remove them from their lease guarantees.³

Veneroso concedes that he was involved in the March 2012 formation of the corporation, that it was he who passed along the Partnership Agreement to plaintiff after Alabi drafted it, and that he, together with Alabi, James Arceri and plaintiff signed the Partnership Agreement on May 7, 2012 at the Chase Bank in Lake Grove and opened the bank account for "FWEVENTS Corp." [sic] there at that time. He claims, however, that he had no meetings with plaintiff before May 2012, made all of the initial contributions of time and money that were required of him and was removed as a shareholder because he was unable to make further monetary contributions and because Marelli was not "happy with [him] as part of the organization" and, along with James and Gerard Arceri, voted to remove him. He also claims that he had no say in or control over the corporation or the nightclub; that although he held the title of Treasurer for a time, he had no check-signing authority; and that while his understanding was that "we were to share in profits," "[t]here never was any agreement about being responsible for sharing any losses that were incurred." In his Reply Affidavit, Veneroso also avers, inter alia, that he had no involvement in the predecessor nightclub, had nothing to do with soliciting Marelli's involvement in the venture, made no representations to him concerning the lease or any debts or obligations of FWEEvents Corp. [sic] (which, he claims, had none, because it was a new corporation), that he understood that contributions to the corporation could be made in cash or by providing material or labor and that he was "regularly at the venue doing work," actively promoting the business, meeting with contractors and liquor vendors, and that he "left the business because [Morelli] kicked me out of the business."

Marelli opposes Veneroso's motion, claiming that they were co-partners subject to the rights and protections afforded to partners in a partnership and that he sustained damage both to his business interest in the venture and individually. He also takes issue with many of Veneroso's factual assertions.

³ Although the buy-back agreement also provides, inter alia, for the exchange of "mutual releases" - both in favor of and from the corporation and its individual shareholders - upon full payment of the promissory notes, neither party has provided a copy of such release, or releases, in connection with the instant motion.

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Veneroso is named in three of the complaint's six causes of action. The first and third causes of action are directed at Veneroso and the other three partnership defendants, the fifth cause of action at those same defendants as well as Gus Semertgis, George Magalaras and Glenn Beccarelli. The first cause of action is entirely conclusory, alleging "misconduct and failure of the partners to perform obligations they owed to [plaintiff] and the Partnership." The third cause of action is more fulsome, alleging that Veneroso and the other partnership defendants breached fiduciary duties owed to plaintiff, took money from the corporation and the partnership for non-business purposes, caused incessant liquor license problems, engaged in fraudulent concealment of liabilities and financial obligations detrimental to the partnership and the corporation, and acted in bad faith, aiding one another to breach fiduciary obligations to plaintiff. The fifth cause of action, the last in which Veneroso is included, alleges that the defendants, including Veneroso, made material representations to plaintiff that were false, and they fraudulently concealed from him material information concerning liabilities of the venture that "precluded it from ever getting off the ground," including the alleged payment of \$93,176.55 to the landlord to satisfy amounts due under the prior nightclub's lease, the \$50,000 note and consulting agreement with Gas 110 LLC and the assignment of the 2012 lease to Gas 110. Plaintiff alleges that the defendants, including Veneroso, knew these representations were false and made them in order to induce Marelli to invest in the nightclub venture, that he would not have done so had he known of the falsity of the representations, and that the defendants aided and abetted one another and "intentionally and knowingly colluded, and collaborated with each other in the wrongs and fraud perpetrated against" him.

To the extent that the first and third causes of action allege harms suffered by the business venture itself as a result of the defalcations, self-dealing, disloyalties and other improprieties plaintiff alleges, the legal structure of the enterprise bears on the issue of whether recovery for that harm can be pursued by plaintiff or solely by, or in the name, of the entity. Veneroso contends there was no partnership and that Marelli was solely a shareholder in a corporation, that the Partnership Agreement, despite its title, was merely a shareholder agreement among the shareholders in the corporation. Marelli, on the other hand, claims that the venture consisted certainly of a partnership - as evidenced by the executed Partnership Agreement, which in fact contains all of the provisions required for, and indicative of, the formation of a formal partnership - and also a corporation, although Marelli's attorney describes the "status" of the latter as "in issue" given that it appears that actual share certificates were not issued and that a Shareholder and Operating Agreement, denominated as such, was drafted but not executed. Although there may be some possibility that further factual development will bear out Veneroso's contention, on the current record there is at the very least a factual issue as to the structure of the venture and the conduct of the various participants, including Veneroso. Thus, while it is true that an individual shareholder in a corporation is without standing to sue, in his or her own right, for harm to or losses suffered by the corporation (*see Abrams v Donati*, 66 NY2d 951, 953, 498 NYS2d 782, 489 NE2d 751 [1985]; *Citibank v Plapinger*, 66 NY2d 90, 495 NYS2d 309, 485 NE2d 974 [1985]; *Barbaro v Spinelli*, 121 AD3d 727, 994 NYS2d 624 [2d

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Dept 2014)], even if his or her individual investment in that corporation is impacted (*see Serino v Lipper*, 123 AD3d 34, 994 NYS2d 64 [1st Dept 2014]),⁴ it is well settled that a general partner may maintain an action at law against one or more other general partners and may do so without first pursuing an accounting if the monetary issues are not complex and are completed (*see Azrawal v Razgaitis*, 149 AD2d 390, 539 NYS2d 496 [2d Dept 1989]). Thus, while so much of the third cause of action as alleges damages on account of harm to the corporate entity or that resulted from breaches of duties owed to it must be dismissed, to the extent that cause of action, like the first cause of action, involves partnership-related harm as well as individualized harm to Marelli,⁵ Marelli has standing to pursue it as well as his first cause of action. He also has standing to pursue the fifth cause of action, which alleges, inter alia, that defendants, including Veneroso, knowingly made material and materially false representations to plaintiff with the intention, and the effect, of inducing him to invest, to his detriment, in the venture. Those allegations, too, involve issues of fact that cannot be resolved on the current record.

Accordingly, defendant Gino Veneroso's motion pursuant to CPLR 3211 and 3212 is granted to the extent that so much of the Third Cause of Action of the Verified Complaint as seeks recovery against said defendant for injury to or damages suffered by the corporate entity is dismissed for want of standing on the part of plaintiff, and the motion is otherwise denied.

The remaining contentions in the moving papers are deemed moot. The parties to the action are reminded of the compliance conference on **Wednesday, January 10, 2018 at 9:30 a.m.** in Part 6 of this Court.

Dated:  2/1/2018

Riverhead, New York


 HON. SANFORD NEIL BERLAND, A.J.S.C.

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⁴ Even where an individual harm is claimed to flow from injury to the corporation, recovery for the harm suffered by the corporation is to be pursued by the corporation or in its name derivatively (*see Serino v Lipper*, 123 AD3d 34, 994 NYS2d 64 [1st Dept 2014]). Where, however, it appears that the injury to a shareholder resulted from a violation of a duty owing to the shareholder from the wrongdoer, having its origin in circumstances independent of and extrinsic to the corporate entity, an individual cause of action may exist for a shareholder of an allegedly wronged corporation (*see Fifty States Mgt. Corp. v Niagara Permanent Sav. & Loan Assn.*, 58 AD2d 177, 396 NYS2d 925 [4th Dept 1977]; *cf. Shapolsky v Shapolsky*, 22 AD2d 91, 253 NYS2d 816 [1st Dept 1964]). Hence, to the extent plaintiff's Third Cause of Action includes a claim alleging the breach of duties Veneroso and other defendants owed to plaintiff and injury to plaintiff, as distinguished from injury to the corporate entity, as a result of such alleged breach of duties, issues of fact prevent the summary disposition of such claim, as well.

⁵ See footnote 4.