

Valcap Advisory Servs. LLC v Fresh Mat, Inc.

2019 NY Slip Op 30295(U)

February 6, 2019

Supreme Court, New York County

Docket Number: 651942/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 651942/2018

VALCAP ADVISORY SERVICES LLC and VALMIKI CAPITAL
MANAGEMENT,

MOTION DATE 02/05/2019

MOTION SEQ. NO. 003

Plaintiffs,

- v -

THE FRESH MAT, INC. and JOHN BUTLER,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37, 39, 40, 41, 42, 43

were read on this motion to/for REARGUMENT/RECONSIDERATION

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for leave to reargue defendants' motion to dismiss the complaint is GRANTED; and it is further

ORDERED that, upon reargument, the Court vacates its prior order, dated August 31, 2018, and the motion to dismiss, pursuant to CPLR 3211(a) (7), the third cause of action for unjust enrichment is GRANTED, and the motion to the extent that it seeks to dismiss the complaint against defendant John Butler pursuant to CPLR 3211(a) (7) and (8) is DENIED; and it is further

ORDERED that the prior order dated August 31, 2018 to the extent that it dismissed the complaint in its entirety against

Jennifer Ozanne and directed that the complaint be amended to reflect same and denied the motion to dismiss the complaint against defendant The Fresh Mat, Inc. is REINSTATED; and it is further

ORDERED that defendant John Butler shall serve and file and his answer to the complaint pursuant to CPLR 3211(f); and it is further

ORDERED that counsel are directed to appear for a preliminary conference in IAS Part 59, 60 Centre Street, Room 331, on March 12, 2019, 9:30 AM.

DECISION

On the prior motion, both sides' papers were incomplete, as although each side referred to the affidavit of service of the complaint and the complaint, no copy of either was attached to the motion papers. In the interest of judicial economy, upon oral argument, the court judicially noticed both documents in the clerk's electronic files, to which neither counsel voiced any objection.

On the motion to reargue at bar, the parties have provided the court with a complete set of papers, including the affidavit of service, the complaint and the underlying papers on the initial motion.

Since plaintiff does not challenge the prior order with respect to dismissal of the complaint against defendant Ozanne, the court shall adhere to the order to that extent. Though

defense counsel did not appear for Ozanne, in his supporting papers he noted that no affidavit of service of the complaint upon Ozanne had ever been filed. The court held that, in any event, as against her, the complaint was insufficiently pled pursuant to CPLR 3103, and cited Abrahmi v UPC Construction Co., Inc., 170 AD2d 180 (1st Dept. 1991). The court noted that as in such case, the instant complaint contains no "specific or particular" factual allegations against the individual defendant Jennifer Ozanne, let alone any factual allegations against her "from which it could be inferred that [she] had agreed or entered into an understanding with [either or both plaintiffs]" to accept services or that she personally benefitted from such services. Pursuant to CPLR 3211(a)(7), the court dismissed the complaint in its entirety against defendant Ozanne.

On the other hand, as to defendant Butler, the complaint alleges, in pertinent part, "In early 2015, Butler requested that Valmiki assist him in creating Fresh Mat by proving funding and know how". On that basis, it sufficiently stated a claim against such individual defendant. The court found that moreover, the complaint is sufficient to set forth a basis for long-arm jurisdiction against both the individual defendant Butler and the corporate defendant, as it asserts that defendants contracted with plaintiffs to perform commercial activities in New York for such defendants' benefit. See

Courtroom Television Network v. Focus Media, Inc., 264 AD2d 351 (1st Dept. 1999).

However, as argued by the plaintiff, in such prior decision and order, the court misapplied the applicable law when it found that because defendant Butler was present in New York to appear for the court sponsored mediation in Butler v. Suria, 17 CV 3077 (U.S. Court, SDNY) on April 25, 2018 when the process was delivered to him, he was immune, as an individual, from such service. This court misread and misapplied the controlling law in See Chase Nat. Bank of the City of New York v Turner, 269 NY 397 (1936), in finding that although the allegations of the complaint were sufficient to confer long arm jurisdiction in this court over defendant Butler, jurisdiction had not been achieved because of the immunity. In fact, given that long arm jurisdiction was sufficiently pled, defendant Butler was not immune from service of process under controlling precedent.

Defendant corporation has not established that the complaint should be dismissed based on a prior action pending pursuant to CPLR 3211(a)(4), as neither of the plaintiffs at bar nor defendant French Mat, Inc. are named as parties in Butler v Suria. Finally, contrary to defendants' argument, the court finds that the causes of action of breach of contract, quantum meruit, and account stated are adequately pled. However, this court agrees with defendants that the allegations of the

complaint are insufficiently pled to state a meritorious cause of action for unjust enrichment. See Doel v Ramachandran, 11 AD3d 783, 791 (2d Dept. 2013).

2/6/2019
DATE

Debra A. James, J.S.C.
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE