Clip Barber Salon Inc. v Solaymanov
2020 NY Slip Op 32243(U)
July 9, 2020
Supreme Court, Kings County
Docket Number: 521136/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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CLIP BARBER SALON INC., ET AL,

Plaintiff, Decision and order

- against - Index No. 521136/18

AVE SOLAYMANOV ET AL,

Defendants, July 9, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved seeking to compel discovery, to extend the time to file a note of issue or to strike the defendant's answer. The defendants have cross-moved seeking to dismiss the complaint on the grounds it fails to state a cause of action. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The complaint alleges that in May 2018 the plaintiff Yuri Yakubov and the defendant Ave Solaymanov entered into an oral agreement whereby they would each be a fifty percent owner of a barber shop and hair salon in Park Slope Brooklyn. The complaint states that the plaintiff would provide all the input, knowhow, expertise and management and the defendant would provide the capital. They secured a location, purchased the necessary equipment and tools, negotiated a lease and commenced operations. The complaint further alleges that on the third day of operations the defendant basically threw the plaintiff out of the business. The plaintiff sought a reconciliation, however, such efforts

proved fruitless. The plaintiff instituted the within lawsuit alleging that a partnership existed and that he was a fifty percent member. Thus, the complaint contains nine causes of action including declaratory relief, an injunction, a constructive trust, breach of fiduciary duty, tortious interference, return of chattel, unjust enrichment, breach of contract and an accounting.

The defendants have now moved seeking to dismiss the lawsuit on the grounds the complaint fails to state any valid cause of action.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

Generally, a constructive trust may be imposed when property

has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein (Plumitallo v. Hudson Atl. Land Co., 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). It is well settled that in order to impose a constructive trust the following four elements must be proven. There must be a confidential or fiduciary relationship, a promise, a transfer in reliance of the promise and unjust enrichment (Sharp v. Kosmalski, 40 NY2d 119, 386 NYS2d 72 [1976]). These elements are not applied rigidly but flexibility is employed, especially to promote and satisfy the demands of justice (Sanxhaku v. Margetis, 151 AD3d 778, 56 NYS3d 238 [2d Dept., 2017]). Essentially, as expressed by Justice Cardozo in Beatty v. Guggenheim Exploration Co., 225 NY 380, 122 NE 378 [1919], "a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" (id).

Concerning the first element, it is well settled that an alleged partner of a joint venture gives rise to a fiduciary relationship and if the all the remaining elements have been satisfied can create a constructive trust (see, Plumitallo v. Hudson Atlantic Land Company LLC, 74 AD3d 1038, 903 NYS2d 127 [2d Dept., 2010]). The defendant asserts that no such relationship

existed and the parties never formally decided to become partners. Specifically, the defendant argues that "there was never any intention of sharing in the losses for this alleged partnership/business" (see, Notice of Cross-Motion to Dismiss, ¶18). However, there are questions of fact whether any partnership or joint venture has been created. First, the plaintiff's name appears on a lease entered into between the parties. Even though the lease has not been executed the plaintiff has certainly raised questions whether his inclusion there is indicative of an intent to include him as a partner. Further, the plaintiff has presented two tax documents for the company Clip Barber that both contain the plaintiff's name and signature. The defendant dismisses those documents as forgeries, however, that only further highlights the questions of fact that exist that cannot be resolved on a motion to dismiss. The defendant further asserts there is no record of such documents being submitted to the Internal Revenue Service. That may be true but it does not resolve the question whether there was an intent to form a partnership. Thus, there are questions of fact whether such relationship existed. In any event, the remaining elements of a constructive trust must now be examined. The remaining elements require a promise made, a transfer of an asset in reliance upon the promise and unjust enrichment flowing from the breach of the promise (Mei Yun Chen v. Mei Wan Kao, 97 AD3d

730, 948 NYS2d 426 [2d Dept., 2012]). Thus, the plaintiff must demonstrate that it transferred property to the defendants in reliance on a promise and that such property is being held whereby a trust should be imposed (Kalmon Dolgin Affiliates Inc., v. Tonacchio, 110 AD3d 848, 973 NYS2d 304 [2d Dept., 2013]). Therefore, even if it can be established the defendant made a promise to the plaintiff, there is no evidence at all the plaintiff transferred to the defendant any asset as a result of such promise (Swartz v. Swartz, 145 AD3d 818, 44 NYS3d 452 [2d Dept., 2016]). Indeed, the complaint merely asserts the plaintiff is entitled to fifty percent of the profits and losses by virtue of his input and management abilities. However, if true, that does not create a constructive trust because there is no "asset" that was given by the plaintiff to the defendant. The plaintiff asserts that he dedicated time and talent to develop the business on behalf of the corporation and he should justly be compensated for those efforts. While that might present claims for breach of contract as will be discussed, that is not an asset that was transferred in reliance upon a promise. Therefore, the plaintiff cannot establish a constructive trust and consequently the motion seeking to dismiss that cause of action is granted.

Turning to the breach of contract cause of action it is well settled that to state a claim for breach of contract one must allege the existence of a contract, the plaintiff's performance

under the contract, the defendant's breach of the contract, and lastly resulting damages (Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 AD3d 804, 921 NYS2d 260 [2d Dept., 2011]). There is no dispute the contract in this case was oral thus the plaintiff asserts a joint venture was created, which need not be in writing, and is consequently enforceable.
It is well settled that a partnership or joint venture need not be in writing to be enforceable (see, Blank v, Nadler, 143 AD2d 966, 533 NYS2d 891 [2d Dept., 1988]). Moreover, the existence of an oral agreement is generally a question of fact which cannot be summarily determined on a motion to dismiss (see, Martin v. Cohen, 17 Misc3d 1116 (A), 851 NYS2d 64 [Supreme Court Suffolk County 2007]).

The defendants dispute the existence of a joint venture and argue there was never an intention on the part of the defendant to enter into such arrangement with the plaintiff. However, those are mere factual disputes which cannot be resolved on a motion to dismiss when all the facts of the complaint must be deemed true. Thus, at this juncture, the plaintiff has raised valid claims a contract existed and that defendant breached the contract. The motion seeking to dismiss that cause of action is denied.

Concerning the cause of action for unjust enrichment, it is well settled that a claim of unjust enrichment is not

available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). The unjust enrichment claims are duplicative of the breach of contract claims. Consequently, the motion seeing to dismiss the unjust enrichment claim is granted.

Concerning the cause of action alleging a breach of fiduciary duty, it is well settled that when a claim for breach of a fiduciary duty is merely duplicative of a breach of contract claim where they are based on the same facts and seek the same damage then the breach of fiduciary claim is duplicative (Pacella v. Town of Newburgh Volunteer Ambulance Corps. Inc., 164 AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). In this case the cause of action alleging any breach of a fiduciary duty is identical to the breach of contract claim, namely that the defendant failed to honor the terms of the partnership entered into between the parties. Consequently, the motion seeking to dismiss the breach of fiduciary duty cause of action is granted.

Next, it is well settled that "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (see, Palazzo v. Palazzo, 121 AD2d

261, 503 NYS2d 381 [2d Dept., 1986]). In this case there is clearly a confidential relationship and as noted there are questions whether the plaintiff maintains an interest in the barber shop. Consequently, the motion seeking to dismiss this cause of action is denied.

The complaint seeks an injunction. It is well settled that to obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits, (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]). In this case the basis for the injunction is grounded in the fact it is alleged the defendant has breached the oral agreement in many significant ways. Of course, the defendant denies these underlying facts supporting the injunctive relief and indeed the allegations are heavily and fundamentally disputed. Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "key facts" are in dispute and the basis for the injunction rests upon "speculation and conjecture" the injunction must be denied (Faberge

International Inc., v. Di Pino, 109 AD2d 235, 491 NYS2d 345 [1st Dept., 1985]). Moreover, in order to satisfy the second prong of irreparable harm it must be demonstrated that monetary damages are insufficient (Autoone Insurance Company v. Manhattan Heights Medical P.C., 24 Misc3d 1229(A), 899 NYS2d 57 [Supreme Court Queens County, 2009]). Thus, any alleged loss which can be compensated by money damages is not irreparable harm (Family Friendly Media Inc., v. Recorder Television Network, 74 AD3d 738, 903 NYS2d 80 [2d Dept., 2010]). As noted, since the plaintiff has not alleged anything other than monetary damages the plaintiff has failed to allege any irreparable harm. Consequently, the motion seeking to dismiss the injunction cause of action is granted.

Concerning the cause of action for declaratory relief, it is well settled that "a motion to dismiss the complaint in an action for a declaratory judgment "presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration"" (DiGiorgio v. 1109-1113 Manhattan Avenue Partners LLC, 102 AD3d 725, 958 NYS2d 417 [2d Dept., 2013]). The basis for this cause of action is in part an allegation the defendant breached the oral agreement allegedly entered between the parties. Since the breach of contract cause of action survives, there are likewise questions whether the plaintiff may

be entitled to such relief. Consequently, the motion seeking to dismiss the declaratory relief claim is denied (see, Tilcon New York Inc., v. Town of Poughkeepsie, 87 AD3d 1148, 930 NYS2d 34 [2d Dept., 2011]).

Concerning the cause of action alleges tortious interference with a contract, it is well settled, the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Tri-Star Lighting Corp., v. Goldstein, 151 AD3d 1102, 58 NYS3d 448 [2d Dept., 2017]). The plaintiff has not presented any contracts between plaintiff and any third parties that defendants allegedly interfered with. Consequently, this cause of action is dismissed.

Lastly, concerning the cause of action for a return of chattel, the complaint states that the plaintiff did not contribute any capital and only contributed time, energy and management (Complaint ¶8). Thus, there are no chattels that belong to plaintiff and consequently, the motion seeking to dismiss that cause of action is granted.

Thus, the motion to dismiss all claims except for breach of contract, an accounting and declaratory relief is granted. Those

three causes of action remain.

Concerning the motions seeking discovery, the parties are now directed to engage in necessary discovery concerning the three remaining issues. The defendants motion seeking discovery is granted to that extent. All motions seeking any sanctions is denied.

So ordered.

ENTER:

DATED: July 9, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC