Eiji Ichimura v Elkon
2020 NY Slip Op 32722(U)
August 21, 2020
Supreme Court, New York County
Docket Number: 156245/2017
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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EIJI ICHIMURA,

Plaintiff,

- v -

IDAN ELKON, ICHIDAN, LLC, D/B/A ICHIMURA,

Defendants.

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INDEX NO. 156245/2017

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 140-192 were read on this motion for summary judgment.

Plaintiff moves pursuant to CPLR 3212, for an order granting him summary judgment on defendants' counterclaims. Defendants oppose and cross move pursuant to CPLR 3212 for an order granting them summary judgment dismissing plaintiff's complaint.

I. PERTINENT BACKGROUND

A. Complaint (NYSCEF 145)

Plaintiff, a world-renowned sushi chef, seeks injunctive relief and monetary damages resulting from the violation by defendants of his right to privacy and publicity by using his name for a sushi restaurant without his consent, including after plaintiff had asked that they cease doing so. The continued use of his name, he alleges, is not only illegal but it has and will continue to cause irreparable harm to his reputation as a chef.

Plaintiff specifically alleges that on or about January 19, 2017, he entered into an oral at-will employment relationship with defendants whereby he agreed to serve as the sushi chef at a restaurant to be operated by defendants at 69 Leonard Street in Manhattan. Plaintiff gave

defendants oral permission to use his name for the restaurant while he was working there. The parties' agreement attracted positive media attention.

On or about May 27, 2017, plaintiff terminated his at-will employment relationship with defendants and, on information and belief, recognizing the value of plaintiff's association with the restaurant, defendants thereafter issued a press release stating that he was taking a leave of absence for health reasons, and that given the decrease in the quality of the food in plaintiff's absence, defendants lowered prices from $300 to $200 per customer.

Plaintiff alleges that he continues to suffer irreparable injury to his reputation as a result of having defendants' inferior product associated with his name. Upon terminating his employment relationship with defendants, plaintiff repeatedly but unsuccessfully asked that defendants cease using his name. By letter dated June 12, 2017, plaintiff's counsel informed defendants as follows:

> As [plaintiff] informed [defendant Elkon] prior to his informing me that you would represent him, [plaintiff] no longer wishes to work with [Elkon]. . . . [Plaintiff], an at will employee, will resign his employment upon receipt of his final pay.
>
> As he will no longer be affiliated with this restaurant, [plaintiff] requests that [Elkon] cease using [plaintiff's] name with respect to this venture. [Plaintiff] does not consent, in writing, to the use of his name. [Elkon], therefore, may not use it for purposes of advertising or trade, per New York& Civil Rights Law § 51. . . .

(NYSCEF 145, Exh. 2).

Defendants did not respond, nor did they respond to another letter, dated June 22, 2017, conveying the same demand. Instead, defendants knowingly and intentionally continue to violate his right to privacy and publicity by operating the restaurant in his name, to "capitalize on [plaintiff's] celebrity status in the restaurant industry."

Based on the alleged conduct, plaintiff advances a cause of action for a violation of Civil Rights Law §§ 50 and 51 and one for injunctive relief.

B. Answer (NYSCEF 146)

In their answer, defendants deny plaintiff's allegations and allege, *inter alia*, that on or about May 26, 2016, plaintiff sought to be placed on medical leave as he was ill and unable to work for the rest of the year. Defendants unsuccessfully asked that he resign. They advance five counterclaims: unjust enrichment, breach of employee loyalty, conversion, breach of contract, and defamation and disparagement of goods, based on alternative theories that plaintiff breached a joint venture agreement he had made with Elkon to open the restaurant, or that he breached his duty as an employee, and that in any event, he unjustly enriched himself by benefiting therefrom. In support of their counterclaim for conversion, defendants allege that plaintiff took fish from the restaurant for his personal use, and in support of their counterclaim for defamation and product disparagement, they allege that after plaintiff had abandoned the restaurant, he disparaged the food served there.

C. Plaintiff's verified reply to counterclaims (NYSCEF 147)

Plaintiff denies, in pertinent part, defendants' allegations concerning his alleged conversion of fish, and he advances, as an affirmative defense to the counterclaim for breach of contract, the statute of frauds, and to the counterclaim for defamation affirmative defenses based on his allegations that the alleged statements were true, privileged, and made without malice.

D. Stipulation (NYSCEF 156)

In a stipulation so-ordered on August 18, 2017, defendants agreed to remove plaintiff's name from their storefront sign, menu, and physical materials, and cease using his name in all social media. Permission was granted to defendants to continue using the internet domain name, www.sushiichimuranyc.com, unless the court directs otherwise.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A. Breach of contract

The parties agree that there is no written agreement between them. Thus, the sole issue is whether plaintiff had orally agreed to be a joint venturer with defendants. Although the parties disagree about the underlying facts, they do not dispute that their relationship was for an indefinite term. (NYSCEF 160, at p 301, NYSCEF 163, at ¶ 76).

Defendants argue that as the agreement could be carried out within a year and was partly performed, it is not governed by the statute of frauds, and that generally, the statute of frauds is inapplicable to an agreement to create a joint venture. (NYSCEF 163).

In reply, plaintiff maintains that the statute of frauds is applicable because the oral joint venture agreement was terminable at will, and defendants' argument that it does not apply fails in terms of plaintiff's post-termination liability as he terminated his relationship with defendant Ichidan LLC in May 2017 which, he maintains, defendants concede by their silence, as memorialized in counsel's June 2017 letter (NYSCEF 171). Plaintiff also denies that the alleged oral joint venture agreement is capable of being performed within one year because, according to Elkon's sworn interrogatory responses, plaintiff had committed to run the kitchen and sushi bar and serve as head chef "for years to come…" In his affidavit, however, plaintiff observes that Elkon alleges that the oral joint venture agreement had no definite term and was terminable at will. Plaintiff asks that the affidavit be disregarded as "inherently suspect." (*Id.*).

Plaintiff also asserts that the parties did not partially perform the agreement nor are their actions unequivocally referable to the agreement. Rather, the execution of the lease and building out of space may be otherwise and reasonably explained as preparatory for Ichidan's operation of the restaurant. (*Id.*).

Even assuming that he had agreed to join the venture, plaintiff argues that the termination of such an at-will agreement cannot support a claim for breach of contract, which defendants do not address and thus concede. Consequently, in the event it is determined that an oral joint venture agreement existed, plaintiff is nonetheless entitled to summary judgment. (*Id.*).

As an at-will joint venture is not subject to a breach of contract claim because it is terminable for any reason (*see Alnwick v European Micro Holdings, Inc.*, 281 F Supp 2d 629 [ED NY 2003] [partnership at will may be dissolved at will of either of partners on "moment's notice without liability for breach of contract"]; *Ebker v Tan Jay Intl., Ltd.*, 741 F Supp 2d 448 [SD NY 1990], *affd* 930 F2d 909 [2d Cir 1991], *cert denied* 505 US 853 [1991]), the statute of frauds generally does not apply to such agreements (*Foster v Kovner*, 44 AD3d 23, 27 [1st Dept 2007] [absent definite term of duration, oral agreement to form partnership or joint venture for indefinite period creates partnership or joint venture at will]; *see also Massey v Byrne*, 112 AD3d 532 [1st Dept 2013] [same]; *Prince v O'Brien*, 234 AD2d 12 [1st Dept 1996] [same]).

Here, as noted, it is not disputed that there was no definite term to the parties' agreement. Thus, to the extent that the parties entered into a joint venture, it was at will, and plaintiff cannot be held liable for breaching it. And, even if the venture was not at will, the statute of frauds would bar a cause of action for breach of contract. (*See Massey*, 112 AD3d at 533 [absent evidence that parties' oral agreement constituted joint venture or partnership, breach of contract claim barred by statute of frauds]).

For these reasons, plaintiff satisfies his burden of demonstrating that the counterclaim for breach of contract has no factual or legal basis, and defendants raise no issue to the contrary. There is no need to address the remaining contentions concerning breach of contract.

B. Unjust enrichment

Absent a valid counterclaim for breach of contract, (II.A., *supra*), there is no need to address the parties' contentions as to the alleged duplicativeness of the counterclaim for unjust enrichment.

Plaintiff maintains that the only benefit he received for his efforts was his salary, and that the restaurant was named after him was due solely due to his talent. Nor is there evidence that he unjustly benefited therefrom.

Given the possibility of a finding that there was no "express agreement" to form a joint venture, defendants assert that the counterclaim for unjust enrichment should stand.

Absent a joint venture agreement, plaintiff argues that the unjust enrichment claim must be dismissed because it is based on the same premise, that there was an agreement and that defendants do not explain how he unjustly benefitted from the salary payments he received or prove that he failed to provide services in exchange for them. Instead, they detail the services he rendered before the opening of the restaurant. In any event, he argues, the receipt of a benefit alone does not establish a cause of action for unjust enrichment.

The elements of a claim for unjust enrichment are: "(1) the other party was enriched, (2) at that party'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." (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Having demonstrated that he performed services for the restaurant for which he was compensated, plaintiff satisfies his *prima facie*, burden of proving that the counterclaim for unjust enrichment has no factual basis. Defendants raise no factual issue in response.

C. Breach of duty of loyalty

Plaintiff contends that the counterclaim for breach of employee loyalty fails as depending solely on his having spoken with a prospective employer while employed by defendants, and that there is no evidence that he diverted customers to dine at the restaurant owned by plaintiff's future employer.

Defendants allege that while an "employee," plaintiff closed the restaurant at certain times, cancelled dinner service, damaged the restaurant's good will, deprived it of revenue, and threatened restaurant employees, all actions of a faithless and disloyal employee, inconsistent with the duty of loyalty owed them which warrants the forfeiture of his right to retain the guaranteed payments paid commencing in November 2016 and other consideration paid to him, as well as the revenue he diverted from defendants or caused defendants to lose.

In reply, plaintiff argues that defendants' allegations that he improperly discounted prices, gave away food to customers, and cancelled dinner services, thereby causing a loss of revenue, are unsupported by documentation or expert evidence that discounting is not standard practice in the restaurant industry. Nor do defendants offer documentation of the cancellation of dinner service or resulting damages and thus, plaintiff claims that their allegations raise no factual issues. That plaintiff sold to a customer fish procured from the restaurant's supplier, for which defendants admit Ichidan did not pay, plaintiff contends, fails to support a claim of deprivation of sale and revenue, and as such actions were done in furtherance of customer relations, it does not constitute "disloyalty" or result in any demonstrable damages to defendants. Plaintiff alleges that defendants offer no legal authority for the proposition that negotiating a job while still employed elsewhere constitutes a breach of loyalty.

A claim for a breach of employee loyalty "is available only where the employee has acted

directly against the employer's interests," such as "improperly competing with the current employer, or usurping business opportunities." (*Bluebanana Group v* Sargent, 176 AD3d 408, 408 [1st Dept 2019], quoting *Veritas Capital Mgmt., L.L.C. v Campbell*, 82 AD3d 529, 530 [1st Dept 2011], *lv denied* 17 NY3d 778 [2011]).

Although it could not be a breach of employee loyalty to seek a new position while otherwise employed (*see Ameritrans Capital Corp. v JSB Ptners, LP*, 2008 WL 5425287 [Sup Ct, Kings County 2008] [duty does not extend to prevent employee from seeking other employment; to hold employee to such standard "better described as 'servitude' than 'employment'"]), defendants allege more and plaintiff does not dispute the other allegations beyond offering alternative explanations for them which, at most, raise competing inferences which preclude summary judgment. (*Pezzo v Mazzetti*, 202 AD2d 935 [3d Dept 1994] [court properly denied summary judgment as competing inference could be drawn from evidence]). Moreover, defendants' failure to offer supporting documentation or expert evidence does not satisfy plaintiff's burden of demonstrating, *prima facie*, that he did not breach the duty of employee loyalty. (*Cf Qosina Corp. v C&N Packaging, Inc.*, 96 AD3d 1032 [2d Dept 2012] [employer owes duty to be truthful to employer]; *Veritas Cap. Mgt., LLC v Campbell*, 82 AD3d 529 [1st Dept 2011], *lv dismissed* 17 NY3d 778 [2011] [breach of duty of loyalty claim depends on proof that employee acted directly against employer's interests, such as usurping business opportunities]; *but see Cerciello v Admiral Ins. Brokerage Corp.*, 90 AD3d 967, 968 [2d Dept 2011] [mere failure of employee to perform assigned tasks does not give rise to cause of action alleging breach of that duty; employee's misuse of employer's resources to compete with the employer generally required]).

D. Conversion

Apart from denying defendants' allegation that he had used fish from the restaurant for personal reasons and without authorization (NYSCEF 147), plaintiff argues that absent any specificity as to what fish was taken or the amount of it, and as the alleged value of the fish was between $1,000 and $1,500, it is below the court's monetary jurisdiction. He also maintains that, in any event, defendants acknowledge having deleted and failed to preserve surveillance footage from the restaurant related to the alleged removal. Consequently, plaintiff contends that the counterclaim for conversion must be dismissed.

Elkon alleges that on or before May 27, 2017, plaintiff removed fish from the restaurant and used it for personal reasons, which he was not entitled to do. (NYSCEF 163). Defendants thus assert their exclusive right of possession of the fish, with which plaintiff interfered, thereby depriving defendants of their property and they argue that they "state a claim for conversion."

In reply, plaintiff asserts that given defendants' acknowledgement that they have no knowledge of, or documents concerning, the allegedly converted fish, they fail to raise an issue of fact in opposition to plaintiff's motion for summary judgment. He claims that defendants also fail to raise an issue as to the court's lack of monetary jurisdiction over the counterclaim.

Plaintiff's denial of having converted the fish suffices to meet his *prima facie* burden. That defendants state a claim for conversion does not satisfy their burden of raising a factual issue, nor does Elkon's unsupported allegation in his affidavit.

E. Defamation and disparagement of goods

Plaintiff claims that defendants acknowledge that the allegedly defamatory statements pertaining to the quality of the restaurant after plaintiff's departure were made solely in the complaint and are directly related to the claim that plaintiff was irreparably harmed by

defendants' unauthorized use of his name for the restaurant. As such, he argues, the statements are privileged, and that while defendants acknowledge that they are required to demonstrate malice to prevail on their defamation counterclaim, defendants offer no supporting evidence.

According to defendants, plaintiff's claimed immunity from the defamation claim is baseless as the defense is available only if the statement is pertinent to the litigation. As the complaint sets forth a cause of action under Civil Rights Law §§ 50 and 51 based on the alleged improper use of plaintiff's name, the allegation of inferior food is not pertinent to the complaint. Rather, the comment was advanced solely for the malicious purpose of damaging defendants.

Plaintiff reiterates in reply that defendants admit that the alleged defamatory statements were uttered only in his complaint and that therefore, such statements are immune from liability.

Having alleged that he suffers irreparable injury to his reputation due to defendants' association of his name with their "inferior product," defendants fail to demonstrate that the allegedly defamatory statement is not "obviously impertinent" to plaintiff's cause of action relating to the unauthorized use of his name (*see Peck v Peck*, 180 AD3d 558, 559 [1st Dept 2020]). Thus, the statement is absolutely protected by the judicial proceedings privilege.

III. DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

A. Contentions

1. Defendants (NYSCEF 163, 181, 182)

Plaintiff and his wife sent Elkon a text message whereby they consented to Elkon's request that they use plaintiff's name for the restaurant. Elkon then obtained an internet domain name containing the name Ichimura (NYSCEF 163, 177). Defendants thus argue that plaintiff is not entitled to damages for the use of his name in connection with the restaurant, observing that the supporting text message contains no condition or limitation, and that counsel's June 2017

letters fail to create a limitation. Moreover, defendants observe, counsel stated in those letters that plaintiff "will resign his employment upon receipt of his final pay." (NYSCEF 171). Absent evidence of the receipt of a final payment for the period of May 22, 2017 to May 27, 2017, defendants claim that the alleged condition of resignation is unfulfilled and that plaintiff did not resign verbally or in writing. Rather, defendants allege that he claimed to be ill and needed medical leave. They also deny that plaintiff incurred damages from their use of his name and rely on evidence concerning plaintiff's employment at other restaurants.

2. Plaintiff (NYSCEF 185, 186)

To attract customers, plaintiff states that he gave Ichidan oral permission to use his name for the restaurant for the duration of his employment there, and that on or about May 27, 2017, he terminated his employment as was his right. Only upon commencing this action, did defendants agree to stop using his name. As it is undisputed that defendants continued to use plaintiff's name for the restaurant after he twice demanded in writing that they cease doing so, plaintiff claims that he is entitled to summary judgment on liability pursuant to Civil Rights Law § 51, as it is also undisputed that Ichidan used plaintiff's name for the restaurant within the State of New York for advertising or trade, namely, the promotion and operation of the restaurant. He offers Ichidan's records which reflect that revenue was generated for the restaurant from May 2017 through September 2017, while it improperly used his name even after he demanded that it cease and desist from doing so.

Notwithstanding his present inability to calculate the damages resulting from the unauthorized use of his name and reputational harm, absent a basis for finding that he suffered no damages "as a matter of law," plaintiff contends that the issue is for the jury.

Consequently, plaintiff maintains that defendants' motion should be denied, and that upon

searching the record, summary judgment should be awarded to plaintiff for the violation of Civil Rights Law § 51, with a trial to be scheduled for a determination of damages.

3. Defendants' reply

By affidavit, Elkon observes that plaintiff does not deny that he provided his unlimited written consent to the use of his name for the restaurant, instead relying on the June 2017 letters sent by counsel claiming termination of such authorization. He reiterates the arguments set forth in his first affidavit and observes that as it is undisputed that plaintiff did not receive his final pay, the claimed condition proposed by counsel regarding the use of the name has not been satisfied. Not only is plaintiff not entitled to pursue his claim under Civil Right Law § 51, given his written authorization to use his name, but Elkon states that plaintiff admits that he has no damages.

B. Analysis

To establish liability under Civil Rights Law §§ 50, 51, a plaintiff must establish, in pertinent part here, that defendants used his name without his written consent, and given the parties' contentions, the sole issue is whether plaintiff effectively withdrew his written consent to defendants' use of his name. Although defendants offer no authority for the proposition that plaintiff's attorney could not effectively withdraw the previous written consent on plaintiff's behalf, plaintiff's contention that it is undisputed that he terminated his employment with defendants is denied by defendants who allege that plaintiff sought medical leave only and refused their request that he resign. As the remaining condition set forth by plaintiff's counsel in his June letters, that plaintiff receive his final payment, is not alleged to have been satisfied, defendants demonstrate, *prima facie*, that plaintiff did not effectively withdraw his consent to the use of his name and the so-ordered stipulation entitles defendants to use plaintiff's name in its

internet domain name until the court orders otherwise. Plaintiff raises no issue of fact.

IV. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that plaintiff's motion for summary judgment is granted with respect to defendants' counterclaims for breach of contract, unjust enrichment, conversion, and defamation/product disparagement, and is otherwise denied, and defendants' counterclaim for breach of the duty of loyalty is severed and continues; and it is further

ORDERED, that defendants' cross motion for summary judgment is granted and the complaint is dismissed.

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8/21/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE