

Kocak v Dargin

2020 NY Slip Op 33121(U)

September 23, 2020

Supreme Court, New York County

Docket Number: 652072/2016

Judge: Laurence L. Love

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

-----X

ISMAIL KOCAK,

Plaintiff,

- v -

AYHAN DARGIN, BABA'S RESTAURANT, INC.

Defendant.

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INDEX NO. 652072/2016
MOTION DATE 09/15/2020
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, plaintiff's motion and defendant's cross-motion are decided as follows:

Plaintiff commenced the instant action by the filing of a Summons and Verified complaint on April 18, 2016, alleging causes of action for 1. Breach of Fiduciary Duty; 2. Fraudulent Conveyance pursuant to DCL § 274; 3. Fraudulent Conveyance pursuant to DCL § 276; and 4. Violations of New York Labor Law § 191. Issue was joined by the service of an Answer, dated June 20, 2016, containing counterclaims alleging 1. Unjust Enrichment; and 2. Seeking a declaratory judgment that plaintiff is no longer an owner of the subject property. In an Order, dated February 3, 2017, Baba's Restaurant, Inc., was added as a party defendant. Plaintiff filed a Note of Issue on January 10, 2020 and after a delay due to the closure of the courts, filed the instant motion for partial summary judgment on the issue of liability on his first, second and third causes of action and seeking statutory dissolution pursuant to BCL 1104-a on June 8, 2020. Defendants

cross-moved for summary judgment on their counterclaims and dismissal of plaintiff's action on August 21, 2020.

This action concerns a restaurant known as Sahara's Turkish Cuisine ("Sahara's"), which plaintiff purchased in 2001, and beginning in 2007, was operated through an incorporated entity, Baba's Restaurant Inc. ("Baba's"), of which he was the sole owner. Said restaurant was operated by plaintiff's brother, Huseyin "Mike" Kocak ("Mike"), as manager. In 2012, Kocak agreed to sell 75% of his shares in Baba's Restaurant to defendant Dargin for the sum of \$281,250.00, to be paid in installments, in accordance with the terms of a Stock Transfer Agreement. On the same day, the parties also entered into an employment contract whereby plaintiff agreed to be an employee of Baba's and to provide services as the Marketing and Business Development Manager in return for net monthly salary of \$2,500.00 commencing February 1, 2012. Both the Stock Transfer Agreement and the employment contract contain clauses providing that the agreements are the entire understanding of the parties hereto with respect to the subject matter contained herein and may be modified, amended or terminated only by a written instrument executed by the parties hereto or their respective successors or assigns. Following the execution of the Stock Transfer Agreement, Dargin assumed responsibility for operating Sahara's on behalf of Baba's, assumed the role of manager, was made a cosignatory (along with Kocak) of the Chase Bank account serving as the operating account for Baba's, and was added as a signatory to the lease that Baba's had with its landlord, Daniela Sarraf ("Sarraf"), at the premises located at 513 Second Avenue, New York, New York. Thereafter, a First Amendment of Lease, dated February 8, 2012 was entered into between Baba's Restaurant and Sarraf. Both Kocak and Dargin signed the Lease Amendment on behalf of Baba's Restaurant. Under the Lease Amendment, the lease term was extended for ten years, until December 31, 2021. Munzur LLC was formed by Dargin in 2014, and

was co-owned by Dargin and his sister Feliz Dargin. On or about September 14, 2014, a Lease Agreement was entered into between Sarraf as landlord and Munzur LLC as tenant, for the premises located at 513 Second Avenue, New York, New York. Feliz Dargin signed the Lease Agreement on behalf of Munzur LLC. In 2015, Dargin opened a Chase Bank account in the name of Munzur LLC, to serve as the operating account for the restaurant. Kocak was not made a signatory to the Munzur LLC account. Dargin began depositing revenues and other monies from the operations of the restaurant into the Munzur, LLC account in or around September or October, 2015, and ceased making such deposits into the Baba's Chase account, emptying said account. In or around September or October 2015, Dargin began operating Sahara's Turkish Cuisine entirely through Munzur LLC. and paid distributions from Munzur LLC to himself and Feliz Dargin beginning in 2016. In 2017, Dargin formed an entity known as Rojava LLC as the sole owner and again amended the lease, and bank accounts to the exclusion of Kocak. Following execution of the Stock Transfer Agreement in 2012, Kocak has not been paid any distribution from the profits of the restaurant (whether operated through Baba's Restaurant, Munzur LLC, or Rojava LLC).

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

“[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct.” *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 (2d Dep’t 2011). A minority shareholder in a close corporation is owed a fiduciary duty by the majority shareholders. *O’Neill v. Warburg, Pincus & Co.*, 39 A.D.3d 281, 282 (1st Dep’t 2007); *Gjuraj v. Uplift Elevator Corp.*, 110 A.D.3d 540, 541 (1st Dep’t 2013). Accordingly, following the execution of the Stock Transfer Agreement, Dargin, as the majority shareholder of Baba’s, owed fiduciary duties to Kocak, the minority shareholder. In *Gjuraj*, the Court held that “by, inter alia, distributing profits to Caldararo, an employee of the corporation, without making a 15% distribution of profits to plaintiff, as required, by relocating the corporation’s office without plaintiff’s knowledge and without giving plaintiff access to it, and by closing out the corporation’s bank account on which plaintiff was a signatory and opening another corporate account on which plaintiff was not a signatory,” defendants were liable for breach of fiduciary duty. Here it is undisputed that defendants transferred the assets of Baba’s to Munzur, LLC and subsequently to Rojava, LLC without paying any consideration to plaintiff, removed all funds from the Baba’s bank account to bank accounts controlled by Dargin and his

family and ceased all distributions to plaintiff. As such, plaintiff has established a *prima facie* entitlement to summary judgment on his Breach of Fiduciary Duties claim.

Pursuant to Debtor and Creditor Law § 273, “every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.” Pursuant to DCL § 276 “every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.” “When a transfer is made without fair consideration, a presumption of insolvency and fraudulent transfer arises, and the burden shifts to the transferee to rebut that presumption.” *Battlefield Freedom Wash, LLC v. Song Yan Zhuo*, 148 A.D.3d 969, 971 (2d Dep’t 2017). On a claim under DCL § 276, a plaintiff may “rely on ‘badges of fraud’ to support his [or her] case.” *Wall Street Assocs. v Brodsky*, 257 AD2d 526, 529 (1st Dept 1999). Factors that implicate badges of fraud include a “close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor’s knowledge of the creditor’s claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance.” *Id.* at 529. Here, it is undisputed that Dargin transferred all of the assets of Baba’s to entities controlled by him and his family without consideration, with full knowledge that plaintiff had claims against Baba’s for 25% of its assets and compensation arising from plaintiff’s employment contract. As such, plaintiff has established a *prima facie* entitlement to summary judgment on his DCL claims, together with reasonable attorney’s fees pursuant to DCL § 276-a.

The involuntary-dissolution statute (Business Corporation Law, § 1104-a) permits dissolution when a corporation's controlling faction is found guilty of “oppressive action” toward the complaining shareholders. The referee considered oppression to arise when “those in control” of the corporation “have acted in such a manner as to defeat those expectations of the minority stockholders which formed the basis of [their] participation in the venture.” *In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 74 (1984). Situations where the petitioner is “frozen out” or “squeezed out” are precisely the type of oppressive situations “ that BCL § 1104-a(a)(1) is designed to alleviate, *See, In re Wiedy’s Furniture Clearance Center Co.*, 108 A.D.2d 81, 84 (3d Dep’t 1985); *In re Rambusch*, 143 A.D.2d 605, 606 (1st Dep’t 1988; *In re Dissolution of Pickwick Realty*, 246 A.D.2d 863, 866 (3d Dep’t 1998) (finding that the lower court’s ordering of dissolution following its consideration of, inter alia, the “shareholders’ attempt at voiding petitioner’s shares” was “proper in the totality of these circumstances and fully necessary to protect petitioner’s interest”). Here, Dargin’s actions have frustrated Kocak’s reasonable expectations of remaining a shareholder of the entity operating the restaurant and to share in the profits of the business. Dargin’s conduct, as established by the record, likewise supports a finding that Dargin diverted the property and assets of Baba’s Restaurant within the meaning of BCL § 1104-a(a)(2). It is undisputed that Dargin transferred, assigned, or otherwise diverted, for no consideration, all the assets of Baba’s and that he denies that Kocak has any ownership of the disputed shares. As such, Kocak has met his burden in demonstrating the grounds for dissolution under BCL § 1104- a(a)(2), and summary judgment is warranted. *Matter of Verdeschi*, 63 A.D.3d 1084, 1085 (2d Dep’t 2009).

In opposition, defendants cross-move for summary judgment, dismissing the complaint, alleging that plaintiff has been paid more than the purchase price, that plaintiff’s claims for additional monies violate the Statute of Frauds, and that plaintiff was overpaid and did no work in

accordance with the employment contract. Defendants' entire cross-motion and opposition to plaintiff's motion would require the Court to consider parol evidence as defendants alleges that the Stock Transfer Agreement and Employment Agreement are to be read together, further alleging that defendant purchased the remaining 25% of Baba's through the payments made pursuant to the employment agreement. When there is no ambiguity in a contract provision, party is barred from relying on extrinsic evidence in an attempt to create one, *See, Veneto Hotel & Casino, S.A. v. German Am. Capital Corp.*, 160 A.D.3d 451, 75 N.Y.S.3d 4 (2018). As discussed *supra*, both agreements contain merger clauses and neither is ambiguous. The Stock Transfer Agreement transferred 75% of the outstanding shares of Baba's and the employment agreement employed plaintiff at a monthly rate of \$2,500.00, giving both parties the right to terminate said agreement, with or without cause, upon two months notice.

Defendants argue, based upon Dargin's deposition testimony that the purchase price for the restaurant as discussed with Kocak was \$375,000.00 for all of the shares and 100% ownership. The parties agreed to \$75,000.00 up front and a payment plan for the balance. The alleged payment plan included 10 consecutive monthly payments of \$20,625 and \$2,500 monthly to the plaintiff until the balance was paid in full at which point the remaining 25 shares were to be tendered to the defendant by the plaintiff. Defendants specifically argue that the employment contract was the method through which Dargin paid for the remaining shares owned by Kocak, a position that is unsupportable as both agreements are complete on their faces.

Defendant also attempts to raise as a defense that plaintiff is not entitled to judgment, asserting that plaintiff failed to take care of tax debt allegedly owed by Baba's Restaurant as of the execution of the Stock Transfer Agreement. Defendant relies exclusively on deposition testimony of Dargin in support of this theory, without submitting any documentary evidence of the alleged

tax debt, and without submitting any evidence whatsoever that to the extent there was any such outstanding tax debt as of the execution of the Stock Transfer Agreement and/or that plaintiff knew of such tax debt or fraudulently concealed the existence of such debt.

Defendant's final contention is that the parties' agreements violate the Statute of Frauds (General Obligations Law § 5-701 (a)(1)) as "it was the parole [sic] understanding of the parties that the Plaintiff would transfer his remaining 25 shares in Baba's once the balance of \$93,500.00 (\$375,000.00 - \$281,500.00 = \$93,500.00), was paid in full. Although the Defendant paid the Plaintiff \$15,000.00 more than what he was entitled to or approximately \$108,500.00, the Plaintiff rendered no work, labor and services pursuant to the Employment Contract and also failed to transfer his remaining 25 shares in stock in Baba's to the Defendant." Defendants argument is that as the \$2,500.00 monthly salary paid to plaintiff was insufficient to fully pay for the 25 shares owned by Kocak, that the contract cannot be completed within a year. As discussed *supra*, the contracts are unambiguous and the argument that plaintiff's salary is relevant to the purchase price of the restaurant is wholly without merit. It is only defendants' incorrect interpretation of the contract which would implicate GOL § 5-701. As such, defendants have failed to establish an issue of fact precluding summary judgment.

Plaintiff's motion is hereby granted in its entirety and defendants' motion is denied in its entirety.

It appearing to the court that plaintiff is entitled to judgment on liability and that the only triable issues of fact arising on plaintiff's motion for summary judgment relate to the amount of damages to which plaintiff is entitled, it is

ORDERED that the motion is granted with regard to liability on plaintiff's first, second and third causes of action; and it is further

ORDERED that defendants' second counterclaim, seeking a declaratory judgment that plaintiff is not an owner of the corporation is dismissed.

ORDERED that the sole issues for trial are liability on plaintiff's Labor Law cause of action, defendants' first counterclaim alleging unjust enrichment and damages including the appropriate remedy on plaintiff's claim for involuntary dissolution of the corporation; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

9/23/2020
DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE