Tobon v Pita off the Corner, Inc.
2022 NY Slip Op 30868(U)
March 11, 2022
Supreme Court, New York County
Docket Number: Index No. 651039/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

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ANDRES TOBON,

Plaintiff,

- v -

PITA OFF THE CORNER, INC., FALAFEL OFF THE CORNER, INC., LEOR YOHANAN, AVRAHAM YOHANNAN, SYLVIA YOHANAN, MIRIAM YOHANAN, ABC CORPORATIONS 1-3 (SAID NAMES BEING FICTITIOUS)

Defendant.

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INDEX NO. 651039/2020

MOTION DATE 01/25/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 80, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for JUDGMENT - SUMMARY.

In this action seeking, *inter alia*, damages for breach of contract, unjust enrichment, and fraud, arising from the failed sale of a Manhattan falafel restaurant, the plaintiff moves pursuant to CPLR 3212 for summary judgment on his second and third causes of action in the principal sum of $50,000.00. The defendants oppose the motion. The motion is denied.

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers." Vega v Restani Constr. Corp., supra, at 503.

In support of his application, the plaintiff submits, *inter alia*, the verified complaint; the attorney-verified answer with counterclaim; an attorney's affirmation; a transcript of an appearance by the plaintiff, by counsel, and the defendant Leor Yohanan (Leor), *pro se*, before Justice Kathryn Freed on an order to show cause filed by the plaintiff in a preceding action; and

a one-page, undated, handwritten document signed by Leor and purporting to memorialize the terms of the sale of the subject falafel restaurant to the plaintiff.

According to the verified complaint, in or around November 2015, the plaintiff orally agreed to purchase a falafel restaurant (the restaurant) owned by defendant Miriam Yohanan (Miriam) at the price of $65,000.00. At some point after the plaintiff paid $25,000.00 towards the purchase price, Leor, who claims in an affidavit submitted in opposition to the plaintiff's motion that he was the "de facto owner-operator" of the restaurant, hand-wrote certain terms of the transaction on a blank piece of paper and signed it (the writing). While the writing is highly informal and fragmented, it contains a line that reads, "upon receiving $50,000 – 100% of UES Restaurant gets transferred over." Elsewhere, the writing appears to indicate that the remainder of the purchase price as well as an $18,000.00 "deposit," purportedly comprising a security deposit due in order to assume the lease for the restaurant, "can be financed over time." The plaintiff alleges in the verified complaint that he paid $50,000.00 to Leor as of January 9, 2016, but that the defendants did not transfer any interest in the restaurant to him. In May 2016, the defendants created a corporation (the corporation) that the restaurant could be transferred to, in which the plaintiff was to hold a 60% interest and defendant Miriam Yohanan was to hold the remaining 40% interest. On June 20, 2016, Leor informed the plaintiff that the restaurant had been sold to a third-party.

On September 14, 2016, the plaintiff commenced an action, captioned Tobon v Pita off the Corner, Inc., against the defendants under Index No. 654873/2016 in the Supreme Court, New York County (the 2016 action). The 2016 action sought relief virtually identical to that sought this action. On September 26, 2016, a hearing on a proposed order to show cause with temporary restraining order the plaintiff filed in the 2016 action was held before Justice Freed. At the hearing, Leor appeared, *pro se*, and gave testimony, under oath, in response to Justice Freed's questioning. Leor confirmed to the court that he had agreed to sell the restaurant to the plaintiff, that the plaintiff paid $50,000.00 to him, and that Leor subsequently sold the restaurant to an individual named Rafael Rafael. Leor also contended that there was second page to the writing that provided for a schedule of further payments, that the defendants gave control of the restaurant to the plaintiff after receiving the $50,000.00, that the plaintiff subsequently mismanaged the restaurant, and that the plaintiff failed to take over the restaurant's lease or make any monthly rental payments. While some of his testimony is somewhat unclear, Leor further expressed that the parties had agreed that the plaintiff was to set up a corporation for transfer of the restaurant and its lease and that the plaintiff never did so.

In opposition to the plaintiff's motion, the defendants submit, *inter alia*, the affidavit of Leor Yohanan. Leor acknowledges that he, as agent for Miriam, entered into an oral contract with the plaintiff for the sale of the restaurant in exchange for $65,000.00 plus $18,000.00 to reimburse a security deposit held by the restaurant's landlord. Leor states that the parties further agreed that the plaintiff was to substitute on the restaurant's lease by execution of an assignment or new lease, that the plaintiff was to open his own vendor and bank accounts and obtain a new Tax ID and food handler license, that the plaintiff was to open his own corporation to transfer the restaurant operations, and that the plaintiff was to perform other tasks necessary

for him to assume operation of the restaurant. Leor avers that "[t]he actual corporation was not being transferred to [the plaintiff][,] just the operations." After the defendants transferred operations to the plaintiff, in accordance with the agreement, Leor alleges that the plaintiff mismanaged the restaurant and caused it to lose its Kosher certification. Moreover, the plaintiff breached the parties' agreement by failing to make all required payments, failing to obtain a new lease, failing to open a new corporation, failing to open new vendor and bank accounts, and failing to pay electric and gas bills. When the defendants eventually created the corporation, with the plaintiff as majority interest holder, Leor alleges that the plaintiff operated the restaurant under such new entity for less than one month and then "abandoned the restaurant." Since the lease was never transferred and remained in the name of the defendants' original corporate entity, the defendants subsequently sold the restaurant and transferred the lease to another purchaser.

The plaintiff avers that he is entitled to recover the $50,000.00 he paid under theories of breach of contract and unjust enrichment. To successfully prosecute a cause of action to recover damages for breach of contract, the plaintiff is required to establish (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). While there is no dispute as to the existence of a contract for sale of the restaurant between the parties and the plaintiff's payment of $50,000.00 towards the purchase price, the parties' submissions raise several issues of fact as to the terms of the agreement, the parties' respective obligations thereunder, and whether the plaintiff fully performed. Most significantly, because the terms of the parties' agreement lack clarity, there remain questions as to whether the parties contemplated transfer of the restaurant's operations or transfer of the corporation under which the restaurant operated and whether the plaintiff's failure to complete payments and arrange for assignment of the lease to a corporation in his name defeats his right to recover. Accordingly, the plaintiff's motion for summary judgment under a breach of contract theory must be denied.

A cognizable claim for unjust enrichment requires a plaintiff to demonstrate that (i) the other party was enriched, (ii) at that party's expense, and (iii) "it is against equity and good conscience to permit the [other party] to retain what is sought to be recovered." Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972) (citations omitted). However, as a general rule, where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). The parties' submissions clearly indicate that all agree there was a contract between the plaintiff and Leor, as agent for Miriam, requiring the plaintiff to pay certain sums towards purchase of the restaurant. While there is substantial disagreement as to the whether the parties' agreement contained additional conditions for sale that were not met and whether the writing called for the transfer of title to the restaurant in addition to operations, among other things, no one questions the agreement's validity. The plaintiff's motion is therefore denied insofar as it seeks to recover on an unjust enrichment theory.

The court notes that the defendants' opposition papers seek relief including dismissal of the plaintiff's claims against some or all of the defendants. Since the defendants have not properly moved for such relief by notice of motion or order to show cause, the court does not consider such requests.

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment on the second and third causes of action is denied.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

3/11/2022
DATE

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