

Lee v Joo Suk Park

2023 NY Slip Op 31529(U)

May 4, 2023

Supreme Court, New York County

Docket Number: Index No. 650214/2019

Judge: Arlene Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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SIMON LEE,

Plaintiff,

- v -

JOO SUK PARK, KI YOUNG KIM, KI WAN KIM, 11 W 32,
INC.

Defendants.

INDEX NO. 650214/2019

MOTION DATE 04/07/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for SUMMARY JUDGMENT.

Defendants’ motion for summary judgment and plaintiff’s cross-motion for summary judgment are denied.

Background

This case arises out of a claim for breach of contract. Plaintiff claims that defendants ousted him as a partner in a karaoke lounge business and he wants the value of his share of the business.

In 2011, two of the defendants, brothers Ki Young Kim and Ki Wan Kim, formed another defendant, 11 W 32, Inc. and began operating Maru Karaoke Lounge located at 11 West 32nd Street in New York. Two years later, in 2013, plaintiff alleges that the Kim brothers entered into an oral agreement with him in which he would grow and manage Maru and forego any monetary compensation but if plaintiff was able to make Maru a profitable venture, then he would receive a 25% partnership interest in Maru.

Plaintiff alleges that in 2015, the business was making money and he entered into a follow-up agreement whereby he started receiving 25% of the profits of Maru. At plaintiff's request, defendant Joo Suk Park became a 25% partner as well, managing the accounting and books of Maru. Plaintiff contends that from 2015 to 2018, the parties split the profits of the business equally (25% each).

However, plaintiff alleges that in 2018, defendants decided to exclude plaintiff from the partnership and profits, and plaintiff has not received any profits from the business since that time. Nor has he received the value of his 25% interest. Seeking relief, he filed the complaint for breach of contract and unjust enrichment.

Defendants now move for summary judgment. They claim that there was no partnership and plaintiff was only hired as the general manager of the bar. Specifically, as to defendant 11 W 32 Inc., defendants contend there are no causes of action alleged against the business itself, that there is no partnership between plaintiff and 11 W 32, Inc. and that the claims for unjust enrichment are alleged against the remaining individual defendants. Additionally, there is no documentary evidence supporting any claims against 11 W 32, Inc. as plaintiff does not possess corporate shares of the business or a written document proving a transfer of shares.

As for the Kim brothers, defendants argue that no partnership was ever created and there was no agreement ever signed. Moreover, defendants assert that plaintiff does not show that he ever made any capital contributions to the purchase or construction of the bar. Defendants contend that plaintiff was an employee of Maru, not a part owner, and plaintiff held himself out as such, including on his tax returns, his divorce filing, and loan applications.

If a partnership was created, however, defendants assert it is a partnership at will which can be terminated at any time at the will of the other partners. Defendants argue that they were

entitled to dissolve the partnership and are not liable for a breach of contract arising out of the dissolution. Furthermore, defendants assert that plaintiff testified that he was adequately compensated for his time while working at Maru, a fact that does not lend itself to plaintiff being a member of a partnership.

Finally, as to defendant Park, defendants argue that plaintiff's complaint cannot establish that a cognizable contract existed between plaintiff and Park. Defendants contend Park was brought on to work at Maru as an employee and would have no authority to contract with plaintiff on behalf of the business. Additionally, an unjust enrichment claim against Park is improper as Park was only an employee at Maru.

In opposition and in support of his cross-motion for summary judgment, plaintiff contends the defendants' arguments are contradicted by their testimony and a recorded audio conversation between the parties. Plaintiff asserts the audio tapes were shared with defendants, and because they are all in Korean, plaintiff translated the tapes and made English transcripts that were produced after his deposition. Plaintiff further argues that none of the defendants' affidavits are based on personal knowledge of the events, as at least one of the defendants was previously found to not have enough firsthand knowledge of the operation of Maru.

Additionally, plaintiff contends he is entitled to summary judgment on his breach of contract claim as the parties' statements on the audiotape clearly demonstrate an oral agreement to enter into a partnership, plaintiff's capital contribution based on his "sweat equity" in working for 8 months without compensation and turning the failing business into a profitable one, and plaintiff's sharing in the profits of Maru. As for his unjust enrichment claim, plaintiff asserts he performed his services for the business with the expectation he would receive an equal share of the profits, and that the defendants were happy with his work and have previously testified he is

justified in believing his compensation should be 25% ownership in Maru. Finally, plaintiff contends he is entitled to summary judgment against the corporate defendant because it refused to answer any questions at its deposition and it is part of a separate partnership wherein the Kim brothers share profits and losses of other corporations, necessitating piercing the corporate veil.

In reply to plaintiff's opposition, defendants argue the audio tape translation was improperly included in plaintiff's responses. According to defendants, plaintiff is not a certified translator and did not follow proper CPLR procedure to include the translation, compelling defendants to question the authenticity of the translation itself. Additionally, defendants assert plaintiff's only argument for summary judgment against the corporate defendant is based on the corporate defendant invoking its Fifth Amendment right against self-incrimination. Defendants argue that this refusal to answer questions did not prevent plaintiff from obtaining relevant information and there are no particular allegations against the corporate defendant in the Complaint that are supported by discovery. Furthermore, defendants contend there is no factual support of plaintiff's statement that he shared in the profits and losses of the business and maintain that plaintiff has failed to raise a triable issue of fact precluding defendants from summary judgment.

In reply to defendants' opposition to plaintiff's cross-motion for summary judgment, plaintiff maintains that the translation of the audio tapes is proper. Plaintiff contends he provided the audio recordings early on in this litigation and none of the defendants denied the accuracy of the of the recordings themselves; even if the defendants claim not to know English, their attorney is fluent in both English and Korean. Moreover, the defendants could not point to a single specific error in plaintiff's translation of the recordings other than a vague opposition to the translation in general. Plaintiff further argues the translations should not be precluded as courts

have found numerous instances in which audio recordings can be authenticated based on a participant's testimony, clear proof that the recording is genuine and unaltered, and the language proficiency of the translator.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court denies the motion and cross-motion for summary judgment. As an initial matter, this Court declines to exclude the transcript of the audio recordings on this motion. First,

it is not the only evidence; it merely purports to corroborate plaintiff's sworn testimony. Second, plaintiff and the individual defendants all speak and understand Korean and there is no doubt that defendants' attorney is fluent in both. Defendants had plenty of time to object to the contents of the transcript and they did not. If defendants believed any part of the transcript was substantively inaccurate, they never raised that issue in their papers. Plaintiff has a recording of the parties meeting, conversing, and admitting to certain things. Defendants have not pointed to any requirement that there be an official/certified translator, nor have defendants identified who issues such certifications or makes it "official". This Court will not exclude this evidence, which is not the only evidence, solely because plaintiff's affidavit does not include technical phrasing that the transcript is accurate, especially when the parties are fluent in Korean.

There is no dispute that plaintiff worked for eight months without compensation. The question for a fact finder is why that occurred. Plaintiff says he did it because he wanted an interest in the business once he proved he could turn it profitable and that he made a deal for a 25% interest in Maru. On the other hand, defendants claim plaintiff was merely an employee, but do not offer a reason why they did not pay him for so long and fail to show payroll records once they started to pay him weekly. Alternatively, defendants claim that plaintiff worked for free for a share of the profits, not a share of the business. And he did receive a share of the profits until that agreement was terminated and he stopped working there.

Certainly, payroll records are critical because paying an employee off-the-books and in cash is not a legal arrangement in New York (*see* CLS Labor § 195[3]). There are unanswered questions about the significant amount of cash distributions. Moreover, depending on the nature of plaintiff's employment at Maru, plaintiff may also retain a cause of action for unjust

enrichment against the corporate defendant to recover the salary and the value of other benefits he allegedly never received and other promised interests.

In summary, there are issues of fact as to the nature of the parties' agreement. Was it an agreement for 25% of the value of the business, as plaintiff argues? In that event, he is still entitled to the value of his 25% as of the date he left. Or is it as defendants argue, that eventually plaintiff bargained for a salary of 25% of the profits, which ended when he left. The factfinder must decide who and what to believe. The factfinder may believe that plaintiff, an experienced entrepreneur in the "club" business, was brought in to make the business profitable and was promised a piece of the business once he accomplished that goal and that is why he worked for free for eight months: because he believed it would pay off in the end. Or the factfinder may believe what the defendants generally assert, that plaintiff was an off-the-books employee and made plenty of money by getting a 25% share in the profit in cash while he was working there but is entitled to nothing more.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment and plaintiff's cross-motion for summary judgment are denied.

5/4/2023
DATE


ARLENE BLUTH, 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