

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

CHARLES RABINOWITZ, Individually x Index
and Derivatively on Behalf of PRP Number 25865 2006
Brooklyn Eatery, LLC,

Plaintiff, Motion
Date July 30, 2008

- against -

HANUBAL S. GOPALASWAMY, VENKAI AH Motion
DAMA and PRP BROOKLYN EATERY, LLC, Cal. Number 20

Defendants. Motion Seq. No. 3
x

The following papers numbered 1 to 10 read on this motion by defendant Hanubal S. Gopalaswamy for summary judgment dismissing the complaint asserted against him.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits.....	6-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action alleging that he is a member of defendant PRP Brooklyn Eatery, LLC (PRP Brooklyn), a limited liability company formed for the purpose of acquiring a 50% ownership interest in AFHK Brooklyn Restaurant, Inc. (AFHK), a corporation which operated a restaurant franchise in Brooklyn, New York. Plaintiff makes no specific allegation that defendant PRP Brooklyn is operated pursuant to any written agreement, but alleges that defendants Hanubal S. Gopalaswamy and Venkaiah Dama are the managing members of defendant PRP Brooklyn, and as such, have exercised complete and exclusive control of the money, property, affairs and books and records of defendant PRP Brooklyn. He further alleges that defendant PRP Brooklyn acquired a 50%

ownership interest in AFHK. According to plaintiff, defendant Gopaldaswamy breached oral guaranties in his favor and breached fiduciary duties owed to him and to defendant PRP Brooklyn. Plaintiff brought this action against defendants individually and derivatively on behalf of PRP Brooklyn.

Defendant Gopaldaswamy seeks summary judgment dismissing the complaint asserted against him. He argues that plaintiff failed properly to serve codefendant Dama with a copy of the summons and complaint, and the claims asserted against him by plaintiff are barred by the statute of frauds. He further argues that many of the allegations made by plaintiff in this case are the subject of another action brought by plaintiff against an entity named "PRP Partnership," and that plaintiff has confused the two entities in making the claims.

Plaintiff opposes the motion. Defendant PRP Brooklyn has failed to appear in relation to the instant motion. Such failure may be explained by the fact that defendant PRP Brooklyn previously moved to dismiss the second and third causes of action asserted against it in the complaint. By order dated May 14, 2007, the second and third causes of action asserted against defendant PRP Brooklyn in the complaint were dismissed. During the period the instant motion was sub judice, plaintiff moved for leave to renew the prior motion by defendant PRP Brooklyn. By order dated October 24, 2008, that branch of the motion for leave to renew was granted, and upon renewal, the motion by defendant PRP Brooklyn to dismiss the second and third causes of action was denied.

It is well established that the proponent of a summary judgment motion "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," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]) or credibility assessment (see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]).

To the extent defendant Gopaldaswamy asserts that plaintiff improperly served defendant Dama, such defense is personal and nature and may only be raised by the party improperly served (see Home Savs. of America v Gkanios, 233 AD2d 422 [1996]). It does not

constitute a basis for granting summary judgment dismissing the complaint against defendant Gopalaswamy.

The court notes that defendant Gopalaswamy failed to plead the statute of frauds as an affirmative defense in his answer. Nevertheless, plaintiff does not raise waiver of the statute of frauds defense in opposition to defendant Gopalaswamy's motion for summary judgment, but rather addresses the merits of such defense. Thus, defendant Gopalaswamy's failure to assert the defense of the statute of frauds in his answer does not constitute a waiver (see Rogoff v San Juan Racing Assn., Inc., 77 AD2d 831 [1980], affd 54 NY2d 883 [1981]), and the court shall consider its merits.

Plaintiff admits that the first and second causes of action asserted against defendant Gopalaswamy are based upon his claim that he made loans to defendant PRP Brooklyn and that to induce him to do so, defendant Gopalaswamy orally guaranteed to repay the loans personally in the event defendant PRP Brooklyn defaulted in payment of the loans upon demand by plaintiff. Plaintiff alleges that defendant PRP Brooklyn failed to repay the loans upon his demand, and that defendant Gopalaswamy has failed to pay the amounts of \$75,000.00 and \$6,666.66 under the oral guaranties. Plaintiff makes no claim that there is any written guaranty made by defendant Gopalaswamy personally to pay the debt of defendant PRP Brooklyn to plaintiff.

An oral promise to guarantee the debt of another is unenforceable pursuant to the statute of frauds (see General Obligations Law § 5-701[a][2]). Plaintiff asserts that the oral promise by defendant Gopalaswamy to repay the debt of defendant PRP Brooklyn is capable of being performed within one year, and hence, fits within an "exception" to the statute of frauds. Although it is true that an oral agreement which, by its terms is capable of being performed within one year from the making thereof, does not violate section 5-701(a)(1) of the General Obligations Law, the statute of frauds bars more than one type of oral agreement (see General Obligations Law § 5-701). Consequently, that an oral guaranty may be capable of being performed within one year, does not remove it from the separate bar of the statute of frauds pursuant to section 5-701(a)(2). That section is unconditional and provides no exceptions.

Therefore, plaintiff's claims against defendant Gopalaswamy regarding the alleged oral guaranties by defendant Gopalaswamy personally to pay the loans made to defendant PRP Brooklyn are barred by the statute of frauds (see General Obligations Law § 5-701[a][2]; Karl Ehmer Forest Hills Corp. v Gonzalez, 159 AD2d 613 [1990]). In addition, to the extent plaintiff alleges

defendant Gopalaswamy committed fraud in his personal capacity in making such oral guaranties, such claim likewise is barred, as an attempt to circumvent the statute of frauds (see Rogoff v San Juan Racing Assn., Inc., 77 AD2d 831 [1980], affd 54 NY2d 883 [1981]).

Plaintiff asserts the third cause of action derivatively on behalf of defendant PRP Brooklyn, and the fourth cause of action on his own behalf. In both causes of action, plaintiff alleges that defendant Gopalaswamy breached his fiduciary duties as a managing member of defendant PRP Brooklyn by engaging in self-dealing, commingling and diversion of funds, waste and fraud, and refusing to account to plaintiff.

Managers of a limited liability company owe a fiduciary duty both to the company and to the members of the company (see Limited Liability Company Law § 409[a]; Out of the Box Promotions, LLC v Koschitzki, ___ AD3d ___, 2008 WL 4491677, 2008 NY App Div LEXIS 7567). Members of a limited liability company may commence a derivative action on behalf of the company (see Tzolis v Wolff, 10 NY3d 100 [2008]; East Quoogue Jet, LLC v East Quoogue Members, LLC, 50 AD3d 1089 [2008]).

To the extent plaintiff alleges in his complaint that defendant Gopalaswamy diverted assets of defendant PRP Brooklyn to Gopalaswamy's personal use and benefit, plaintiff admitted during his examination before trial that he lacked a basis of knowledge for such claim, and would withdraw such allegation. Thus, defendant Gopalaswamy is entitled to summary judgment dismissing that portion of the complaint asserting breach of fiduciary duties to plaintiff and defendant PRP Brooklyn based upon diversion of assets of defendant PRP Brooklyn to Gopalaswamy.

Defendant Gopalaswamy, however, has failed to establish a prima facie case demonstrating entitlement to summary judgment dismissing the remainder of the claims based upon breach of his fiduciary duties (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Although defendant Gopalaswamy contends that plaintiff has confused the entities PRP Brooklyn and PRP Partnership, the court, in reviewing of the copy of the transcript of the examination before trial of plaintiff, finds many of the questions posed to plaintiff to have been improper, compound questions and failed to distinguish between the two entities, thereby resulting in less than clear answers.

Accordingly, the motion by defendant Gopalaswamy is granted only to the extent of granting summary judgment dismissing the causes of action asserted against him based upon breach of oral guaranties, and breach of fiduciary duties owed to defendant

PRP Brooklyn and plaintiff based upon diversion of assets of defendant PRP Brooklyn to defendant Gopaldaswamy.

Dated: November 20, 2008

J.S.C.