

Nouveau El. Indus. v Kabbalah Ctr. of N.Y., Inc.

2011 NY Slip Op 32223(U)

August 11, 2011

Sup Ct, NY County

Docket Number: 101568/11

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 101568/2011

NOUVEAU ELEVATOR INDUSTRIES

vs.

KABBALAH CENTRE OF NEW YORK

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

AUG 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*and PC scheduled for
10/20/2011 at 9:30 am*

Dated: AUG 11 2011

J. Gische
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Nouveau Elevator Industries, Inc.,

Plaintiff (s),

-against-

Kabbalah Centre of New York, Inc.
d/b/a The Kabbalah Centre,

Defendant (s).

-----X

DECISION/ ORDER
Index No.: 101568/11
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED

AUG 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's n/m (3211) w/SMW affirm, RS affid, exhs	1
Plt's opp w/ PJH affirm, YS affid	2
Def's reply w/SMW affirm	3
So-ordered stipulation 5/26/11	4

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action for breach of contract, unjust enrichment and an account stated arising from a service contract for two elevators at the Kabbalah Centre. Defendant Kabbalah seeks the preanswer dismissal of this action or, in the alternative, summary judgment before issue has been joined. The parties resolved the issue of the mechanic's lien that Nouveau filed. Therefore, the only issue for the court to decide pertains to the contract and quasi contract claims.

To the extent that Kabbalah seeks summary judgment, that application is denied

as there can never be summary judgment unless and until issue is joined (CPLR § 3211 [c]; Gifts of the Orient v. Linden Country Club, 89 AD2d 508 [1st Dept. 1982]). The court will proceed to decide whether the complaint should be dismissed based upon documentary evidence (CPLR 3211 [a] 1) or because it fails to state a cause of action CPLR 3211 [a][7]). Regardless of which subsection of CPLR 3211[a] a motion to dismiss is brought under, court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83, 87 [1994]).

The following facts are alleged in the complaint which Kabbalah seeks to have dismissed:

Facts and Arguments

Rachel Schwartz signed an elevator service contract dated September 29, 2008 on behalf of the Kabbalah Centre. The contract was executed by Ms. Schwartz on October 22, 2008. In relevant part, the contract provides that it may be cancelled as follows:

THE SERVICE IS FURNISHED FROM 10/1/08 FOR THE PERIOD OF TEN (10) YEARS AND WILL BE RENEWED FOR THE SAME PERIOD OF TIME UNLESS CANCELLED BY EITHER PARTY ON NINETY DAYS WRITTEN NOTICE PRIOR TO THE END OF ANY CONTRACT TERM AND ANY AND ALL OUTSTANDING INVOICES MUST BE PAID BETWEEN THE TIME THE NOTICE OF CANCELLATION IS RENDERED AND THE ANTICIPATED CANCELLATION DATE.

By letter dated September 24, 2009, Ms. Schwartz notified Nouveau that she was cancelling the contract on behalf of Kabbalah "effective today." Nouveau's

principal ("Mr. Speranza") wrote back on September 25th that the cancellation letter was a "nullity" and that it was rejected because the contract was effective until September 30, 2018. According to Mr. Speranza, the cancellation could only occur "at least 90 days prior to the expiration of the contract term." Nouveau later filed a mechanic's lien for the entire balance due on the contract which, at the rate of \$500 per month, totaled more than \$59,000.

Whereas plaintiff claims the contract is unambiguous, defendant contends it makes no sense that an elevator service company would want to tie itself down to one client at an unfluctuating monthly rate for ten (10) years. Thus, Kabbalah contends the cancellation clause has been misconstrued by Nouveau, there is an ambiguity in the contract and it should be construed against plaintiff since defendant had no part in authoring the document. According to defendant, the contract can be "CANCELLED BY EITHER PARTY ON NINETY DAYS WRITTEN NOTICE" at any time "PRIOR TO THE END OF ANY CONTRACT TERM..." Kabbalah argues that if Nouveau intended that this "could only be" cancelled "PRIOR TO THE END OF ANY CONTRACT TERM" its should have contained such language. Furthermore, Kabbalah contends if this was intended to be an automatic renewal contract governed by section 5-903 of the General Obligations Law, then the document should have been worded in such a way to comply with those requirements.

Kabbalah also seeks the dismissal of the plaintiffs' quasi contract claims on the basis that Nouveau did not service the elevator after the contract was cancelled and no bills were sent for parts, service, etc.

Discussion

The terms of a written contract between the parties should be enforced in accordance with its terms (*W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157 [1990]). The interpretation by *Nouveau* of the contract provision at issue is not supported by the very words in that particular provision or when examining the contract as a whole.

The cancellation clause indicates the contract is for a period of 10 years. It also states that it will automatically renew for another 10 years "UNLESS CANCELLED BY EITHER PARTY ON NINETY (90) DAYS WRITTEN NOTICE PRIOR TO THE END OF ANY CONTRACT TERM..." The contract does not state it can "only be cancelled on ninety (90) days written notice prior to the end of any contract term." Adopting *Nouveau's* interpretation would mean that the "ANTICIPATED CANCELLATION DATE" is the exact same thing as the "END OF THE CONTRACT." The contract does not state this and it is a condition not agreed to by the parties in writing.

The contract also has a separate provision dealing with payment of invoices. It states that:

THE COMPANY RESERVES THE RIGHT TO
SUSPEND OR CANCEL THIS CONTRACT UPON
FAILURE TO MAKE PAYMENT OF ANY
OUTSTANDING INVOICES OVER 120 DAYS, SUCH
SUSPENSION OR CANCELLATION TO BE EFFECTIVE
UPON THE MAILING OF NOTICE THEREOF...

Consequently, the contract is cancellable at other times and for other reasons.

Kabbalah provides equally persuasive arguments that the contract does not comply with the notice requirements set forth in GOL § 5-903 for leases containing

automatic renewal provisions. GOL § 5-903 provides that such automatic renewal provisions are "unenforceable" unless the renewal provision is called to the attention of the service recipient at "least fifteen days and not more than thirty days previous to the time specified..." for such renewal. Thus, this contract is not a special type of agreement but a routine contract that is mutually cancellable provided the cancelling party provides the requisite notice.

Arguments by Nouveau in opposition to the motion to dismiss, that it fully intended to be bound for the entire 10 year term of the contract and it could not be terminated sooner than that, only identify their misconception of what the contract stands for. The condition Nouveau claims to have bargained for is simply not evident in the plain language of this agreement. Evidently the parties agreed they could mutually terminate the contract on notice. Ms. Speranza's argument on behalf of Nouveau that she expected the contract to last a "minium of 10 years" is easily reconcilable with the terms of the contract. It *would* have lasted 10 years, but for the decision by Kabbalah to cancel it. It could also have been cancelled by Nouveau, however, for non-payment and also on 90 days notice.

Since Ms. Schwartz gave Nouveau notice of the defendant's intention to terminate the contract, but stated it was effective "today," Nouveau has a viable claim for 90 days worth of unpaid services from the date of her notice (i.e. 3 months at \$550 a month). The notice was not rejected by Nouveau because she failed to give 90 days notice, but because it was not 90 days before the end of the contract term (i.e. October 1, 2018). Therefore, to the extent that Nouveau has stated such a claim in the

complaint, it remains. However, to the extent that Nouveau seeks payment under the contract beyond the ninety (90) days from the date of cancellation (i.e. September, 25 plus 90 days), then the breach of contract cause of action is severed and dismissed.

The other claims are for quasi contract. Since there is a written contract, there is no basis for the plaintiff to proceed on the basis of implied contract. Those claims are, therefore, also severed and dismissed.

Nouveau has also asserted a claim for unpaid services from "July 1, 2010." Nouvea, however, states (on the now vacated) mechanic's lien that the date on which it last performed services, furnished material was December 11, 2009. The unpaid services are not pleaded with any specificity and Nouveau has not addressed Kabbalah's claim that Nouveau provided no service after they responded to her September 24th letter terminating the contract. Consequently, this claim is severed and dismissed without prejudice.

Since the parties resolved the issue regarding the mechanic's lien filed by Nouveau, that claim is severed and dismissed in accordance with the parties' so-ordered May 26, 2011 stipulation.

Conclusion

Kabbalah's motion is granted except to the extent provided. Kabbalah shall serve an answer in accordance CPLR 3211 [f] within 10 days of the date hereof.

In anticipation of issue being joined, this case is scheduled for a Preliminary Conference on **October 20, 2011** at 9:30 p.m. in Part 10. The attorneys are directed to come to the conference with authority to settle this case.

Any relief requested but not specifically addressed is hereby denied.

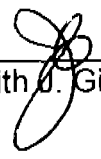
FILED

This constitutes the decision and order of the court.

Dated: New York, New York
August 11, 2011

AUG 16 2011

So Ordered: NEW YORK
COUNTY CLERK'S OFFICE



Hon. Judith J. Gische, JSC