Lims, Inc. v 460 Old Town Rd. Owners Corp.
2015 NY Slip Op 31193(U)
July 8, 2015
Supreme Court, Suffolk County
Docket Number: 12-23626
Judge: Daniel Martin
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INDEX No. 12-23626
CAL No. 14-00540CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 8-26-14
ADJ. DATE 9-30-14
Mot. Seq. # 001 - MotD;CaseDisp.

LIMS, INC.,

Plaintiff,

- against -

460 OLD TOWN ROAD OWNERS CORP.,

Defendant.

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21 - 26; Replying Affidavits and supporting papers 27 - 30; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff LIMS, Inc., for, inter alia, summary judgment in its favor on its cause of action for breach of contract is granted to extent indicated herein, and is otherwise denied.

In this action for breach of contract, plaintiff LIMS, Inc., seeks recovery of damages it allegedly incurred when defendant 460 Old Town Road Owners Corp. (hereinafter referred to as "460 Old Town"), allegedly breached an agreement to provide property management services for a cooperative complex known as Stony Hollow. On January 30, 2008, the parties amended their existing management services agreement by extending the duration of the agreement to a period of two years, and fixing LIMS' management fees at the sum of $69,500 annually. The amendment also extended all other terms of the agreement for two years, including a termination clause which provided that either party could terminate the agreement for cause upon written notice "within 60 days from the date of the contract." Following the election of a new president to the board of 460 Old Town, by e-mail dated September 9, 2008, its attorney requested that LIMS consent to a further amendment of the parties' agreement, granting 460 Old Town the right to terminate the agreement, with or without cause, upon 30 days written notice from the board. LIMS subsequently rejected the proposed amendment, and by letter dated September 15, 2008, 460 Old Town advised LIMS that its management services would be terminated

effective October 30, 2008. Thereafter, LIMS brought this action seeking damages. By its compla nt, LIMS asserts causes of action for breach of contract, breach of the covenant of good faith and fair dealing, violation of Labor Law §198, and attorneys' fees.

LIMS now moves for summary judgment on its breach of contract action on the grounds it was within its right to reject the proposed amendment, and that it did not engage in any conduct warran ng termination of the contract. LIMS also seeks an award of compensatory damages in the sum of $92 ,666, as well as attorneys' fees and sanctions based on 460 Old Town's alleged frivolous conduct and ba faith defense. 460 Old Town opposes the motion, arguing that CPLR 4519 precludes plaintiff from offering any evidence concerning communications held with its past-president, decedent Frank DeStefano, in support of its motion. 460 Old Town also asserts triable issues exist as to whether L MS failed to comply with numerous provisions of the parties' original agreement and, if so, whether it ad the right to terminate the agreement based on such failure. Alternatively, 460 Old Town asserts, in er alia, that the termination clause contained in the original agreement permitting it to terminate LIM services "within sixty (60) days from the date of [the] contract" was unconscionable and ambiguou , and that any ambiguity in the contract should be interpreted against LIMS, which drafted the agreemen

The original management services agreement entered by the parties, dated March 1, 2007, states, in pertinent part, as follows:

> SEVENTH: (A) Either party shall have the right to terminate this contract for cause within sixty (60) days from the date of this contract, only with written notice.
>
> EIGHT: The sole compensation which the MANAGEMENT COMPANY shall receive for management services provided in this agreement shall be as stated below: Payments shall be made in equal monthly installments due and payable by the first day of each month
>
> Management Fees:
>
> From Mach 1, 2007 up to and including February 28, 2008, $68,200.00 per annum
>
> NINTH: This agreement shall constitute the entire agreement between the contracting parties and no variance or modification thereof shall be valid and enforceable, except by supplemental agreement in writing, executed and approved in the same manner as this agreement. . .
>
> ELEVENTH: Any notices given by either party under the terms of this agreement shall be in writing and mailed to the address above written for each of the parties by Certified Mail, Return Receipt Requested.

The extension agreement executed by the parties, dated January 30, 2008, provides as follows:

> FIRST: OWNER and the AGENT wish to extend all of the terms, conditions, and covenants as set forth in the original Agreement dated March 1, 2007 for a two (2) year addendum.
>
> A two year addendum is agreed upon, then the per annum management fees from March 1, 2008 through February 28, 2010 shall be $69,500.00

On a motion for summary judgment the court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; but merely to determine the existence of such issues (*see* ***Sillman v Twentieth Century Fox Film Corp.***, 3 NY2d 395, 165 NYS 2d 498 [1957]; ***Rivers v Birnbaum***, 102 AD3d 26, 953 NYS2d 232 [2d Dept 2012]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see* ***Zuckerman v New York***, 49 NYS2d 557, 427 NYS2d 595 [1980]).

Initially, the court finds, pursuant to CPLR 4519, that the evidence proffered by nonparty witness Linda Donato, president and owner of LIMS, concerning her transactions and communications with 460 Old Town's deceased past-president Frank DeStefano is inadmissible for the purpose of establishing LIMS' entitlement to summary judgment (*see* ***Phillips v Joseph Kantor & Co.***, 31 NY2d 307, 338 NYS2d 882 [1972]; ***Miller v Lu-Whitney***, 61 AD3d 1043, 876 NYS2d 211 [3d Dept 2009]; ***Acevedo v Audubon Mgmt., Inc.***, 280 AD2d 91, 721 NYS2d 332 [1st Dept 2001]). While evidence excludable at trial under the Dead Man's Statute may be considered in opposition to a motion for summary judgment (*see* ***Phillips v Joseph Kantor & Co.***, *supra* at 314; ***Marszal v Anderson***, 9 AD3d 711, 713, 780 NYS2d 432 [3 Dept 2004]), such evidence "should not be used" to support a summary judgment motion (***Phillips v Joseph Kantor & Co.***, *supra* at 313; *see* ***Acevedo v Audubon Mgt., Inc.***, *supra*; ***Friedman v Sills***, 112 AD2d 343, 491 NYS2d 794 [2d Dept 1985]; ***Moyer v Briggs***, 47 AD2d 64, 364 NYS2d 32 [1st Dept 1975]). The court, therefore, will not consider such evidence in reaching its determination.

The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*see e.g.* ***J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). "[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms" (***Vermont Teddy Bear Co. v 538 Madison Realty Co.***, 1 NY3d 470, 475, 775 NYS2d 765 [2004]). The contract "should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases" (***Bailey v Fish & Neave***, 8 NY3d 523, 528, 868 NE2d 956, 837 NYS2d 600 [2007]). Indeed, where a contract provides that a party must fulfill specific conditions precedent before it can terminate an agreement, those conditions should be enforced as written and the parties must comply with them (*see* ***A.S. Rampell, Inc. v Hyster Co***, 3

NY2d 369, 382,165 NYS2d 475 [1957]; ***Summit Dev. Corp. v Fownes***, 74 AD3d 563, 903 NYS2d 33 [1st Dept 2010]).

Moreover, "[w]hether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous" (***South Rd. Assocs., LLC v IBM***, 4 NY3d 272, 278, 793 NYS2d 835 [2005]). Therefore, when considering a contract, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (***Bailey v Fish & Neave***, *supra* at 528). Thus, "[a] contract is not rendered ambiguous simply because one of the parties attaches a different, subjective meaning to one of its terms" (***Sasson v TLG Acquisition LLC***, 127 AD3d 480, 481, __NYS2d [2d Dept 2015]; ***Bajraktari Mgt. Corp. v American Intl. Group, Inc.***, 81 AD3d 432, 916 NYS2d 771 [1st Dept 2011]). Additionally, "[t]he determination of unconscionability is a matter of law for the court to decide" (***Industralease Automated & Scientific Equip. Corp. v R. M. E. Enters.***, 58 AD2d 482, 48, 396 NYS2d 427 [1977]), and "[w]here the significant facts germane to the unconscionability issue are essentially undisputed, the court may determine the issue without a hearing" (***Scott v Palermo***, 233 AD2d 869, 870, 649 NYS2d 289 [1996]).

Here, LIMS met its prima facie burden on the motion by submitting evidence that 460 Old Town breached the parties' agreement by failing to comply with the conditions of the termination clause before it cancelled LIMS' property management service contract (*see* ***A.S. Rampell, Inc. v Hyster Co.***, *supra*; ***Kalus v Prime Care Physicians, P.C.***, 20 AD3d 452, 799 NYS2d 115 [2d Dept 2005]; ***Scudder v Black Hall Plumbing & Heating, Inc.***, 302 AD2d 848, 756 NYS2d 330 [3d Dept 2003]). Significantly, 460 Old Town failed to comply with the conditions of the termination clause by seeking to terminate LIMS' management agreement well beyond the first 60 days after the parties' extended their agreement on January 30, 2008. Further, while the termination letter purported to cancel LIMS' services for cause based on its alleged failure to "comply with numerous provisions of the contract," it failed to list any of those failures in its letter terminating the parties' agreement. Moreover, even assuming, arguendo, that such failures were listed, 460 Old Town's initial failure to comply with the requirement that it terminate the contract within the first 60 days from the date of the renewal of the agreement was a breach of the parties' contract.

In opposition, 460 Old Town failed to raise a triable issue warranting denial of the motion (*see* *Alvarez v Prospect Hosp.*, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Contrary to 460 Old Town's contention, the text of the agreement does not reveal any ambiguity, as it clearly sets forth the procedure to be followed if either party desired to terminate the agreement. Additionally, there is no textual basis for 460 Old Town's assertion that the termination agreement could be read to mean that termination was permissible at any time during the contract, upon 60 days prior written notice. There are no internal inconsistencies between the termination clause and any other part of the agreement, and the parties did not seek to alter the conditions set forth therein at the time they extended the agreement for a further two years. As stated above, "[a] contract is not rendered ambiguous simply because one of the parties attaches a different, subjective meaning to one of its terms" (***Sasson v TLG Acquisition LLC***, *supra* at 481). "When the only extrinsic evidence asserted as the basis for creating a factual issue as to the interpretation of a contract consists of a party's uncommunicated subjective intent, summary judgment is appropriate" (*see* ***Hudson-Port Ewen Assoc., L.P. v. Chien Kuo***, 165 AD2d 301, 305 566

NYS2d 774 [3d Dept 1991]). Furthermore, where, as here, there is no dispute as to whether LIMS engaged in any high pressure tactics or conduct permitting it to force 460 Old Town to agree to the conditions set forth in the termination clause, 460 Old Town fails to raise a triable issue as to whether the termination clause should be set aside based on unconscionability (*see* ***Emigrant Mtge. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012]; *compare* ***Simar Holding Corp. v GSC***, 87 AD3d 688, 928 NYS2d 592 [2d Dept 2012]). Accordingly, the branch of the motion by LIMS, Inc for summary judgment on its breach of contract claim is granted. LIMS, therefore, is entitled to $92,656, as compensatory damages for the income it lost during the 16 months that was remaining after the parties' extended contract was wrongfully terminated. As the other causes of action, although sounding in different legal theories, all seek damages in the same amount of $92,656, those causes of action are dismissed as moot.

The remaining branch of the motion for imposition of sanctions and award of attorneys' fees is considered under 22 NYCRR 130-1.1, and is denied. The Court finds that defendants did not engage in conduct which constitutes frivolous conduct as that term is defined in 22 NYCRR 130-1.1 (c) (*see* ***McGee v J. Dunn Constr. Corp.***, 54 AD3d 1009, 864 NYS2d 167 [2d Dept 2008]; *cf.* ***Palumbo v Palumbo***, 78 AD3d 1139, 911 NYS2d 665 [2d Dept 2010]; ***Mascia v Maresco***, 39 AD3d 504, 833 NYS2d 207 [2d Dept 2007])..

Dated: JULY 8, 2015

HON. DANIEL MARTIN, A.J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**