

**Greuner v Center for Specialty Care, Inc.**

2016 NY Slip Op 32343(U)

November 21, 2016

Supreme Court, New York County

Docket Number: 653194/2016

Judge: Gerald Lebovits

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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

DAVID GREUNER, M.D.,

Plaintiff,

-against-

CENTER FOR SPECIALTY CARE, INC.,

Defendant.

Index No.: 653194/2016  
**DECISION/ORDER**  
Motion Sequence No. 1

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant’s motion to dismiss under CPLR 3211 (a) (1) and 3211 (a) (7) and plaintiff’s cross-motion to amend its complaint under CPLR 3025 (b).

<b>Papers</b>	<b>Numbered</b>
Defendant’s Notice of Motion .....	1
Defendant’s Affirmation in Support .....	2, 3
Defendant’s Affidavit in Support.....	4
Defendant’s Memorandum of Law in Support.....	5
Plaintiff’s Memorandum of Law in Opposition.....	6
Plaintiff’s Notice of Cross-Motion to Amend the Complaint.....	7
Defendant’s Reply Memorandum in Support of Motion.....	8

*Kirschenbaum & Kirschenbaum, PC*, New York (Caroline Wallitt of counsel), for plaintiff.  
*Manatt, Phelps & Phillips, LLP*, New York (Ronald G. Blum of counsel), for defendant.

Gerald Lebovits, J.

Plaintiff, David Greuner, commenced this action against defendant, Center for Specialty Care, Inc., regarding the potential sale of multispecialty Ambulatory Surgical Center (ASC) from defendant. According to the terms of the negotiation, plaintiff had to relocate ASC by mid-July 2016. Plaintiff hired a consultant at defendant’s suggestion to expedite the process of meeting that relocation requirement. According to plaintiff’s complaint, defendant was unjustly enriched because it accepted money even though plaintiff never bought ASC. Plaintiff alleges that defendant accepted plaintiff’s payment of \$250,000 knowing that it would be nearly impossible for the site to meet defendant’s relocation requirement. (Defendant’s Notice of Motion, Exhibit A at ¶¶ 30-38.)

Defendant moves to dismiss plaintiff’s complaint on two grounds: (1) under CPLR 3211 (a) (1) in that CSC’s defense is founded on documentary evidence and (2) under CPLR 3211 (a) (7) in that plaintiff fails to state a cause of action. According to defendant’s motion to dismiss, defendant alleges that plaintiff has no cognizable claim for unjust enrichment because plaintiff understood that his payment of \$250,000 was a non-refundable option payment. Defendant

further argues that plaintiff agreed to pay the fee in exchange for keeping negotiations exclusive. (Defendant's Memorandum of Law, at 4-5.) Defendant also argues that plaintiff does not make a cognizable claim of unjust enrichment. According to defendant, plaintiff cannot claim both unjust enrichment and breach of contract for the same subject matter. (Defendant's Memorandum of Law, at 6.)

Plaintiff opposes the motion and cross-moves under CPLR 3025 (b) to amend his complaint to include a breach of contract cause of action.

For the reasons that follow, defendant's motion to dismiss plaintiff's complaint under CPLR 3211 (a) (1) and 3211 (a) (7) is denied. Plaintiff's cross-motion under 3025 (b) to amend his complaint is granted.

#### I. Defendant's Motion to Dismiss

To prevail on a CPLR 3211 (a) (1) motion to dismiss, a defendant has the "burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002]; accord *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Blonder & Co. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006].) The documentary evidence must provide a complete picture of the parties' interactions. (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 439 [1st Dept 2014] [finding cause of action for unjust enrichment properly denied because the documentary evidence presented only a partial picture of the interactions between the parties].)

To be considered "documentary," the evidence must be unambiguous and of undisputed authenticity. (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014].) Written contracts, leases, mortgages, and judicial records are documentary evidence. (*See Fontanetta v Doe*, 73 AD3d 78, 84 [2d Dept 2010] [explaining cases where written materials were characterized as documentary evidence]; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22.) Affidavits and summary notes do not constitute documentary evidence within the meaning of the statute; they raise issues of credibility for a jury to decide. (*Art & Fashion Group Corp.*, 120 AD3d at 438; *Holman v City of N.Y.*, 19 Misc 3d 600, 602 [Sup Ct, Kings County 2008].) Emails are generally not considered documentary evidence if they represent an overview of testimony. (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [finding a three-page email narrative not documentary evidence because it consisted only of an overview of defendant's testimony and viewed it as the whole of defendant's testimony].)

Defendant's CPLR 3211 (a) (1) motion is denied. Defendant provides email correspondence and text messages that cannot be characterized as documentary evidence. The information defendant provides regarding the terms of the parties' contract agreement raise issues of credibility for a jury to decide. The emails and text messages present the correspondence of each party's position throughout the series of negotiations, and their discussions about terms. The emails and text messages defendant submits can best be

characterized as letters or summaries of the parties' conclusions. Defendant may not prevail under CPLR 3211 (a) (1).

Even if both the text messages and emails are considered documentary evidence, they do not conclusively establish a defense to plaintiff's claim for unjust enrichment. An unjust-enrichment claim is a quasi-contract theory of recovery and an obligation imposed to prevent injustice in the absence of an actual agreement between the parties. (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 406 [1st Dept 2011].) A cause of action for unjust enrichment is stated when "plaintiffs have properly asserted that a benefit was bestowed . . . by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor." (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119 [1st Dept 1998] [internal citation omitted].) A plaintiff may recover for unjust enrichment when it relies to its detriment on a defendant's actions. (*Farash v Sykes Datanronics*, 59 NY2d 500, 503 [1983] [allowing a quasi-contract claim to defeat a motion to dismiss to proceed because plaintiff merely sought to recover expenditures plaintiff made in reliance on statements made by and at the request of the defendant].)

A contract is ambiguous if "on its face [it] is reasonably susceptible of more than one interpretation." (*NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 61 [1st Dept 2008] [finding that because the terms of a contract were ambiguous, a court could not interpret the contract as a matter of law]; *accord Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986].) When a contract term is ambiguous, a court may not automatically dismiss a claim without examining the underlying circumstances. (*China Privatization Fund (Del), L.P. v Galaxy Entertainment Group Ltd.*, 95 AD3d 769, 770 [1st Dept 2012]; *Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010].)

The evidence defendant provides does not resolve all the factual issues in plaintiff's complaint. Defendant does not provide a complete picture of the parties' interactions; there were additional discussions by phone and in person meetings that defendant does not submit as evidence on this motion. Defendant alleges that there was no unjust enrichment because defendant and plaintiff agreed to an options contract. Defendant alleges that plaintiff paid defendant in exchange for keeping negotiations exclusive and therefore that defendant kept its promise because it did not negotiate with any other party. The evidence defendant provides asserting that an options contract was formed does not conclusively resolve plaintiff's contention that defendant was unjustly enriched.

Further, ambiguities prevent a dismissal at this stage because both parties assert different theories of contract claims. Plaintiff asserts a claim of unjust enrichment, which can be established only absent a contract, while defendant asserts that there was an options contract. The provision defendant purports to be plaintiff's assent to an option agreement was not crafted in a manner that eliminates significant ambiguities, and neither party can establish that its interpretation is correct as a matter of law. For example, defendant provides a set of terms in a text message, and immediately afterward, defendant's representative said "please ignore." Defendant's representative continued to provide information about other terms, both through text message and email, and plaintiff responded "that is all fine." (Defendant's Affidavit in Support of Motion to Dismiss, Exhibit A.) A dismissal without further investigation of the facts giving rise to the ambiguity is inappropriate.

Under a CPLR 3211 (a) (7) motion to dismiss, the court determines only whether the facts, as a plaintiff alleges, fit within any cognizable legal theory. (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007] [“When documentary evidence is submitted by a defendant “the standard morphs from whether the plaintiff stated a cause of action to whether it has one”]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014].) A court must accept as true the facts alleged in a complaint and give a plaintiff the benefit of every possible favorable inference. (*Nannon*, 9 NY3d at 827; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976] *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006].) A court may also consider a plaintiff’s affidavits to remedy any defects in the complaint. (*Rovello*, 40 NY2d at 635; *Basis Yield Alpha Fund (Master)*, 115 AD3d at 144-145.) A party is not entitled to these considerations if the complaint states factual allegations that consist of bare legal conclusions or which are inherently incredible. (*Leder*, 31 AD3d at 267.)

Defendant’s motion to dismiss under CPLR 3211 (a) (7) is denied. The facts plaintiff alleges fit within a cognizable legal theory for unjust enrichment. (*See Nannon*, 9 NY3d at 827). Plaintiff raised factual issues in its complaint concerning the circumstances between plaintiff and defendant: Plaintiff alleges that he detrimentally relied on information defendant provided in that he relied on defendant’s representation that the relocation requirement could be met, and plaintiff seeks recovery for expenses as a result of detrimental reliance. Plaintiff alleges that defendant is unjustly enriched because the sale was not completed. In support of its claim, plaintiff alleges that an injustice has occurred warranting the court to step in because four other entities have withdrawn from negotiations with a representative of defendant and therefore that the representative knew it would be nearly impossible for defendant to meet the relocation requirement at the site. (Plaintiff’s Complaint, at ¶ 33.) These facts give rise to a sufficient cause of action for unjust enrichment.

In its motion to dismiss, defendant also alleges that because plaintiff knew that the fee was nonrefundable, plaintiff cannot claim unjust enrichment. But a plaintiff may not be barred from bringing an unjust enrichment claim merely because it agreed to pay a non-refundable fee. (*Goshen*, 98 NY2d at 326 [finding that where a term stated a fee paid to defendant was nonrefundable, the fee was in fact refundable under a theory of products liability].) A payment is non-refundable only when a defendant provided consideration and used commercially reasonable efforts to perform and if the term non-refundable may be disregarded if there is a finding of willful or grossly negligent acts. (*Soroof Trading Dev. Co. v GE Microgen Inc.*, 2013 WL 5827698, at \* 12 [SD NY 2013].) Even though plaintiff clearly acknowledged in his correspondence with defendant that the fee was nonrefundable, the use of the term “non-refundable” has no bearing on a party’s ability to allege unjust enrichment, nor does it bar plaintiff’s allegation that there was unjust enrichment.

If the court accepts as true the facts as plaintiff alleges in its complaint, and giving plaintiff the benefit of every possible favorable inference, plaintiff has a cause of action for unjust enrichment against defendant. Defendant’s motion to dismiss under CPLR 3211 (a) (7) is denied.

## II. Plaintiff's Cross-Motion to Amend

Plaintiff's cross-motion to amend its complaint under CPLR 3025 (b) is granted. Under CPLR 3025 (b), "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court." A court has broad discretion to grant a motion for leave to amend a pleading. (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] ["It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party. Mere delay is insufficient to defeat a motion for leave to amend. Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.'"] [internal citations omitted]; *Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008] ["[T]he drafters of the Civil Practice Law and Rules believed it appropriate to provide expressly for a liberal standard" under CPLR 3025 (b)].) Plaintiff moves to amend its complaint in the pleadings stage to add a breach of contract claim because a dispute arose about whether a contract exists. Defendant is therefore not surprised or prejudiced.

In the pleadings stage, a plaintiff may proceed even if it alleges both breach of contract and quasi-contract if a bona fide dispute over whether a contract exists. (*Farash*, 59 NY2d at 503; *Foster v Kovner*, 44 AD3d 23, 29 [1st Dept 2007] [finding that a plaintiff's allegation in both contract and quasi contract could survive a motion to dismiss where a dispute arose about the adequacy of compensation defendants allegedly promised].) Plaintiff argues a claim of unjust enrichment, which is asserted in the absence of a contract, while defendant argues that an options contract was formed. The parties have a bona fide dispute about whether a valid contract exists. Plaintiff's cross-motion to amend its complaint to add a breach of contract cause of action is granted.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that plaintiff's cross-motion to amend its complaint to add a cause of action for breach of contract is granted; and it is further

ORDERED that the amended complaint in the form annexed to plaintiff's Notice of Cross-Motion, Exhibit B, shall be deemed to have been served upon service by plaintiff of a copy of this order with notice of entry upon defendant; and it is further

ORDERED that plaintiff shall serve a copy of the order with notice of entry on the County Clerk's Office and the General Clerk's Office, which are directed to amend their records accordingly; and it is further

ORDERED that defendant shall serve an answer to the amended complaint within 20 days of said service; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 7, Room 583, at 111 Centre Street, on February 1, 2017, at 10:00 a.m.

This opinion is the court's decision and order.

Dated: November 21, 2016



J.S.C.

**HON. GERALD LEBOVITS**  
J.S.C.