SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63
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Flower Publishing Group LLC,

Plaintiff,

Index Number:

-against-

161385/2013

APOC, Inc., d/b/a The Copacabana, 760 8th Ave. Rest., Inc., d/b/a The Copacaban, 268 West 47th Rest., Inc. d/b/a The Copacabana and John Juliano, individually,

Defendants.
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Ellen M. Coin, J.:

Plaintiff moves pursuant to CPLR 3212 for summary judgment on its complaint. Defendants cross-move for summary judgment dismissing plaintiff's complaint against John Juliano (Juliano).

Underlying Allegations

Plaintiff states that it is a company that publishes and distributes free tourist guide books (the Guide Books) in English, Japanese and a multi-language version, that the Guide Books are placed in hotels and museums, that they have an approximate circulation of 300,000 and that they contain advertising, which it sells to clients, for a variety of venues (Flower Aff., ex.G, Flower EBT at 15, 23-24, 27). It asserts that on or about September 12, 2011, it entered into two separate agreements (the Contracts) with the Copacabana for advertising in

the Guide Books for a period of 12 months, commencing October 1, 2011, for a monthly fee of $1850 and $5642, for a total of $7492, to be paid in exchange for gift certificates (the Gift Certificates) usable at the Copacabana restaurant and nightclub (*id.* at 19-22, 41-42, 49-50; Flower affidavit, §§ 5-7). Plaintiff states that it made no representations as to how many customers would be attracted to the Copacabana by the advertisements (Flower EBT at 25-26, 28-29).

Plaintiff states that it ran the advertisements, in accordance with the terms of the Contracts, that the advertising in the Guide Books and the form of the Gift Certificates had been approved by the Copacabana's general manager, Glee Ballard (Glee) or its marketing vice-president, Mark Neiman (Mark), but that the Gift Certificates were rejected when customers tried to use them (Flower affidavit, §§ 8, 14-20; Quigley affidavit; Flower EBT at 30-34, 42-44, 51-53). Plaintiff further states that approximately $700-800 worth of the Gift Certificates were honored, that it had to spend $1150 to reimburse clients who were unable to redeem the Gift Certificates, and that it had to buy back the Gift Certificates it sold to other companies (Flower affidavit, §§ 14, 23-25; Flower EBT at 59-60, 79-80).

Plaintiff contends that since it ran the advertisements in the Guide Books and the Gift Certificates were not honored, defendants breached the Contracts, or alternatively, that

defendants were unjustly enriched by receiving the advertising in the Guide Books.

Defendants state that APOC, Inc., 760 8th Avenue Restaurant Inc. and 268 West 47th Restaurant Inc. (together, the Copacabana) are companies that operate a restaurant and nightclub, located at 268 West 47th Street, New York, New York, known as the Copacabana (Juliano affidavit, § 5; Juliano EBT at 9, 12, 15). Juliano, former one-third owner of the Copacabana, was involved in running it in its prior incarnation before it reopened, and he was a manager, primarily involved in marketing and advertising (*id.* at 12-13, 15, 19).

Defendants assert that Juliano signed the Contracts in a representative capacity as manager of the Copacabana; that prior to execution of the Contracts, he crossed out all of the fine print that included terms such as attorneys' fees and a personal guarantee; and that he was verbally assured regarding the amount of business that advertising in the Guide Books would generate (Juliano affidavit, §§ 7-15; Juliano EBT at 26-27, 29-31). They assert that the Gift Certificates and the advertisements in the Guide Books had to be approved by Juliano prior to their appearance, but that plaintiff never sent them to Juliano for approval nor did they receive his approval (Juliano affidavit, §§ 16-22; Juliano EBT at 39-40, 49-51, 53, 67, 69, 105, 107-109). Defendants do not dispute that the advertisements ran in the

Guide Books for 12 months, that the Gift Certificates were redeemable in trade on a dollar for dollar basis, and that the Copacabana refused to accept them. They assert that due to plaintiff's breach of the requirement for Juliano's prior approval, they were under no obligation to honor the Gift Certificates.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Contract Interpretation

Generally, "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Unjust Enrichment

"[U]njust enrichment is not a catchall cause of action to be used when others fail [but] [i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). "The essence of unjust enrichment is that one party has received money or a benefit at the expense of another which, in good conscience, ought to be returned" (*Carriafielio-Diehl & Assoc., Inc. v D&M Elec. Contr., Inc.*, 12 AD3d 478, 479 [2d Dept 2004]). However, "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello*, 18 NY3d at 790; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]).

Tortious Interference With Contract

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *see also Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 594 [2012]; *Capin & Assoc., Inc. v 599 W. 188th St. Inc.*, 139 AD3d 634, 635 [1st Dept 2016]).

Individual Liability of a Corporate Officer

The general rule is that a person who signs a contract as an officer on behalf of a corporation is not personally liable, unless there is clear and explicit evidence of his intention to bind himself personally (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]; *Weinreb v Stinchfield*, 19 AD3d 482, 483 [2d Dept 2005]). This is so because in a modern commercial context "[t]here is great danger in allowing a single sentence in a long contract to bind individually a person who signs only as a corporate officer [and, consequently, there must be] ... some direct and explicit evidence of actual intent" (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]). The inclusion of a single sentence purporting to

bind an agent personally is insufficient to establish such intent (*id.*; *Herman v Ness Apparel Co.*, 305 AD2d 217, 218 [1st Dept 2003]).

Discussion

Since plaintiff is seeking summary judgment, it has the burden of establishing its entitlement to judgment as a matter of law on its claims; where the factual assertions are in conflict, the court must accept the non-movants' version for the purposes of deciding the motion (*see Branham*, 8 NY3d at 932).

On plaintiff's claim for breach of contract, it asserts that the fine print of the Contracts are binding, that it was given approval for the advertisements in the Tour Guides and the form of the Gift Certificates by employees of the Copacabana, and that the Copacabana's refusal to honor the Gift Certificates breached the Contracts. Defendants' version of the execution and the terms of the Contracts differs in many material aspects. They assert that Flower gave verbal guarantees as to the amount of business that the advertisements would generate, that the fine print in the Contracts was crossed out prior to execution and therefore was not part of the parties' agreement, and that the advertisements and the Gift Certificates required Juliano's approval. The court notes that the Contracts plaintiff presents in support of its motion do have the fine print crossed out, and are marked "VOID" (Falcon Aff., ex. I). The conflict regarding

the terms of the Contracts, including whether the fine print was crossed out prior to execution and whether the advertisments and the form of the Gift Certificates were properly approved, require denial of the portion of plaintiff's motion on its breach of contract cause of action. Since plaintiff has not established a breach of the Contracts, it has not shown tortious interference with contract or that the alleged breach was without justification (*Oddo*, 19 NY3d at 594; *Lama*, 88 NY2d at 424).

Defendants' cross-motion for summary judgment dismissing plaintiff's complaint against Juliano is granted. There is no "direct and explicit evidence of actual intent" to bind Juliano, as the Contracts indicate that he signed in his capacity as manager (*Salzman*, 10 NY2d at 67; *see also Georgia Malone*, 86 AD3d at 408).

However, with regard to the unjust enrichment cause of action, plaintiff has shown without dispute that it ran the advertisements in the Tour Guides for 12 months. The provision of advertising for the Copacabana is not something that could reasonably be expected to be provided without remuneration. Therefore, plaintiff has shown its entitlement to summary judgment on this claim (*see Carrafielio-Diehl*, 12 AD3d at 479). The reasonable value of this service is also a factual matter, more properly resolved by a finder of fact.

Order

It is therefore

ORDERED that plaintiff's motion for summary judgment is granted to the extent of granting judgment on liability on its cause of action for unjust enrichment and is otherwise denied; and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing plaintiff's complaint against John Juliano is granted and the complaint is dismissed against said defendant in its entirety, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for defendants is directed to serve a copy of this order with notice of entry upon the County Clerk (Room 141-B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

Dated: June 6, 2017

ENTER:

Ellen M. Coin, A.J.S.C.