New York Univ. v International Brain Research Found., Inc.
2017 NY Slip Op 31934(U)
September 11, 2017
Supreme Court, New York County
Docket Number: 652954/2013
Judge: Andrea Masley

Index No.: 652954/2013 Motion Seq. No. 005

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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NEW YORK UNIVERSITY and NEW YORK UNIVERSITY SCHOOL OF MEDICINE,

Plaintiffs,

-against-

INTERNATIONAL BRAIN RESEARCH FOUNDATION, INC.,

Defendant.

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Index No.: 652954/2013

Mot. Seq. No.: 005

DECISION AND ORDER

ANDREA MASLEY, J.:

Relief Sought

Plaintiffs, New York University (NYU) and New York University School of Medicine (NYU SOM) move, pursuant to CPLR 3212, for summary judgment on their breach of contract and unjust enrichment claims.

Factual Background

This action arises out of the failure of defendant, International Brain Research Foundation, Inc. (IBRF) to make grant payments pursuant to a 2010 unrestricted grant agreement (Grant Agreement), the third in a series of grants awarded to plaintiffs by IBRF. The Grant Agreement, executed by defendant's president and CEO, Dr. Philip DeFina, committed IBRF to pay plaintiffs $300,000 annually for three years, beginning May 1, 2010 and ending April 30, 2013, to support the traumatic brain injury (TBI) research of professor Dr. Max Hilz. In return, plaintiffs committed to fund Dr. Hilz's research from the proceeds of the IBRF grant, to provide IBRF with regular progress reports, and to credit IBRF's funding support in any scientific presentations, abstracts, or publications resulting from Dr. Hilz's research. Under the Grant Agreement, plaintiffs agreed to accept the provisions of IBRF's Research Grants Policy.

Specifically at issue in this action is IBRF's failure to make the following three payments under the Grant Agreement: (1) for the second year of the grant (May 1, 2011 to April 30, 2012), IBRF failed to pay $23,487.21 of its $75,000 first quarter payment; (2) for the third year of the grant (May 1, 2012 to April 30, 2013), IBRF failed to pay its entire $75,000 third quarter payment; and (3) for the third year of the grant, IBRF failed to pay its entire $75,000 fourth quarter payment. Thus, the total amount sought by plaintiffs is $173,487.21.

Procedural Background

Plaintiffs commenced this action on August 22, 2013 asserting claims for breach of contract and unjust enrichment. On November 25, 2013, IBRF filed an amended answer and interposed counterclaims. In a decision and order dated March 14, 2016 (the 2016 Decision), the court granted plaintiffs' motion to dismiss IBRF's counterclaims having found that each counterclaim was legally deficient on its face, and contradicted by clear documentary evidence.[1]

In December 2016, defendant moved for an order to compel compliance with disclosure requests, and sought documentation to determine whether plaintiffs complied with the terms of the Grant Agreement. This disclosure request included payroll checks for Dr. Hilz and his assistant. The court denied the motion on the ground that defendant failed to show that it was entitled to what amounts to an accounting, a counterclaim that was previously dismissed on plaintiffs' prior motion. Plaintiffs now move for summary judgment.

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[1] The counterclaims dismissed included: (1) breach of contract; (2) breach of fiduciary duty; (3) accounting; (4) conversion; (5) negligence; and (6) fraudulent inducement.

Summary Judgment Standard

"CPLR 3212 (b) requires movant to demonstrate the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses" (*Aimatop Rest., Inc. v Liberty Mut. Fire Ins. Co.*, 74 AD2d 516, 516 [1st Dept 1980]). CPLR 3212 (b) states: "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof . . . . The affidavit shall be by a person having knowledge of the facts . . . . The motion shall be granted if . . . the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once a prima facie showing has been made, the burden shifts to the party opposing the motion to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Discussion

The elements of a breach of contract claim include "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, the record demonstrates that the Grant Agreement was an express agreement between plaintiffs and IBRF, and that plaintiffs performed their obligations under the Grant Agreement. In that regard, plaintiffs argue that "there is no documentary evidence that IBRF ever disputed NYU's performance under the Unrestricted Grant Agreement," or that it employed Dr. Hilz throughout the grant period, compensated Dr. Hilz with the proceeds from the grant, or provided regular progress reports to IBRF. Indeed, IBRF admits to breaching the agreement by not paying $173,487.21 out of the $900,000 amount to which it agreed in the Grant Agreement (*see* NYSCEF Docket No.

100, Def.'s Rule 19-a Counter-Statement of Material Facts, ¶ 17). Therefore, plaintiffs have established prima facie entitlement to summary judgment with regard to their breach of contract claim.

However, defendant objects that plaintiffs have not submitted any sworn statements, and that the materials plaintiffs proffered in support of their motion do not satisfy the requirements of CPLR 3212 (b). IBRF also points out that plaintiffs have failed to provide a copy of all the pleadings as required by CPLR 3212 (b), and that plaintiffs' attorney's accompanying affirmation is insufficient to meet these requirements. These arguments are unavailing.

A "motion for summary judgment, supported by [an] attorney's affirmation and adequate documentary evidence, [is] legally sufficient" (*Prudential Sec. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999], *lv denied*, 94 NY2d 752). "The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form,' e.g., documents, transcripts" (*Zuckerman v City of New York*, 49 NY2d 557, 565 [1980]). Here, the materials attached to plaintiffs' attorney's affirmation are relevant documentary evidence, and are critical to this court's decision.

Defendant next disputes plaintiffs' performance under the Grant Agreement. It claims that the Grant Agreement specifically required plaintiffs to use the grant funds under specific conditions: (a) that the funds be used for TBI research; (b) that the funds support the TBI research of Dr. Max Hilz; (c) that the research be conducted at NYU SOM; (d) that quarterly progress reports be provided to IBRF; (e) that Dr. Hilz and NYU SOM collaborate with IBRF; (f) that NYU will incorporate Dr. DeFina in research efforts

as a collaborator, and acknowledge IBRF's collaboration such that defendant could build on the studies for future studies and funding; and (g) that 90% ($272,700 per year) of the grant be used for direct costs and 10% ($27,300 per year) be used for indirect costs.

I. Points (a) and (b)

Defendant's complain that Dr. Hilz did not allocate an appropriate amount of his time to TBI research, particularly given the fact that plaintiffs terminated Dr. Hilz, and, thus, he could not have devoted 85% or 90% of his time towards TBI research. Plaintiffs counter that Dr. Hilz was employed during the grant period and his contract was not renewed because IBRF failed to make the payments for the last two quarters of the third year of the grant period. In fact, Dr. Hilz's employment is demonstrated through documentary evidence, including budgets from 2010 and 2011. Further, IBRF admits that plaintiffs employed Dr. Hilz as a professor during "some portion" of the time of the grant period (Def.'s Rule 19-a Counter Statement of Material Facts, ¶ 11). The Grant Agreement is silent as to limits on Dr. Hilz's research, and does not restrict with whom Dr. Hilz may work.

The court finds that IBRF's claim that the grant monies were not used to support Dr. Hilz's TBI research is conclusory and contradicts clear documentary evidence. Under these circumstances, defendant has failed to raise a triable issue of fact regarding the scope of Dr. Hilz's work and the unrestricted use of the grant funds (*see Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 234 [1st Dept 1994] [factual claims that are clearly contradicted by documentary evidence are not entitled to consideration]).

II. Point (c)

Defendant next claims that the research had a geographical limitation restricting the research to NYU. In its 2016 Decision, the court found that there is no geographical limitation of Dr. Hilz's research in the Grant Agreement. Therefore, defendant failed to raise a triable issue of fact regarding a geographical limitation concerning Dr. Hilz's research.

III. Point (d)

Next, defendant attempts to raise a factual issue by claiming that plaintiffs failed to comply with the Grant Agreement's provision requiring them to submit quarterly progress reports. Plaintiffs insist that regular progress reports were sent to IBRF. Indeed, in an email to NYU dated June 6, 2013, Dr. Hilz confirmed that he sent regular quarterly reports to IBRF. In his February 2017 affidavit, Dr. DeFina admits to receiving some progress reports.

There is nothing in the record showing that defendant raised this issue with plaintiffs during the course of the three-year term of the Grant Agreement. In fact, in paragraph 20 of his affidavit in opposition, Dr. DeFina merely provides the vague assertion that, "at best, only a few reports were received." Moreover, defendant asserted a breach of contract counterclaim in its Second Amended Counterclaims, but that counterclaim was dismissed by the court in its 2016 Decision because "IBRF fail[ed] to allege sufficient facts to support its claim that NYU SOM breached either the Grant Agreement or the Draft Policy. The Second Amended Counterclaims do not refer to any specific provisions of either document, and merely plead conclusory allegations in support of IBRF's claim of breach." At no time did defendant claim that any alleged failure by plaintiffs to provide quarterly reports was the basis for its decision to withhold the Grant Agreement payments at issue in this litigation. More importantly, at this

juncture, any claim that defendant may have had pertaining to plaintiffs' alleged failure to provide quarterly reports has been waived.

"Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned," and "[s]uch abandonment [can] be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 104 [2006] [internal quotation marks omitted]). "[W]aiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection" (*id.* [internal quotation marks omitted]). Here, by waiting to raise this issue until it opposed plaintiffs' motion for summary judgment, defendant clearly manifested its intent to relinquish its contractual right to quarterly reports from plaintiffs. Therefore, defendant is deemed to have waived such arguments.

Further, even if this Court were to consider defendant's argument that plaintiffs failed to perform under the contract by not providing quarterly reports, that alleged breach does not constitute a material breach of the Grant Agreement. For a breach to be considered material, it must go to the root of the agreement (*Donovan v Ficus Invs., Inc.*, 20 Misc 3d 1139(A) [Sup Ct, NY County 2008], citing *Frank Felix Assocs. Ltd v Austin Drugs Inc.*, 111 F3d 284, 289 [2d Cir 1997]). Further, allegations of a breach that are de minimis in nature are not considered material and do not render the agreement void (*Restoration Realty Corp. v Robero*, 58 NY2d 1089, 1091 [1983]; *Liza Co. v Mark Hellinger Theatre, Inc.*, 19 AD2d 288, 294 [1st Dept 1963] [noting that "[m]inor and technical" breaches do not destroy agreements], *affd* 14 NY2d 891 [1964]). On the other hand, a breach is material when it is substantial enough to defeat the parties' objectives (*Alberts v CSTV Networks, Inc.*, 96 AD3d 447, 447 [1st Dept 2012]).

Here, defendant has failed to raise a factual issue that missing some, not all, quarterly progress reports is a material breach of the Grant Agreement. Indeed, IBRF has failed to raise a factual issue that the absence of some of the quarterly progress reports undermined the objectives set forth in the Grant Agreement. In fact, in his June 1, 2012 letter to Dr. Hilz, Dr. DeFina indicated that he was satisfied with the agreement between the parties, and that he was "very pleased" with the research, as well as the collaboration between plaintiffs and IBRF. Additionally, defendant's failure to set forth which specific progress reports were missing undercuts its claim that the progress report provision was a material condition of the Grant Agreement. Thus, the record demonstrates that the failure to provide such reports was not "substantial enough to defeat the parties' objectives in making the contract" (*Alberts*, 96 AD3d at 447). Under these circumstances, the progress report provision in the Grant Agreement does not go to the root of the agreement, but, instead–as the undisputed facts demonstrate–it was "minor and technical" in nature, and plaintiffs' alleged failure to send some of the reports does not relieve IBRF of its obligations under the Grant Agreement.

Moreover, even if plaintiffs' alleged failure to provide the reports were considered a material breach, it still would not raise an issue of fact concerning plaintiffs' breach of contract claim. Defendant cannot rely on plaintiffs' failure to provide quarterly reports to avoid its obligations under the Grant Agreement given that defendant never sought to terminate the contract based on that alleged breach *(see Blackstone Advisory Partners L.P. v Gupta*, 121 AD3d 411, 411 [1st Dept 2014]). "When a party materially breaches a contract, the nonbreaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the default" (*Awards.com v Kinko's, Inc.*, 42 AD3d

178, 188 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). There is nothing in the record to indicate that defendant ever raised the issue of the quarterly progress reports with plaintiffs until plaintiffs commenced this action for breach of contract.

IV. Points (e) and (f)

Next, defendant asserts that plaintiffs failed to fulfill their obligation to incorporate Dr. DeFina and IBRF into their research efforts, and acknowledge the parties' collaboration. This assertion is without merit. An email dated June 6, 2013 between Dr. Hilz and Anthony Carna, Director, Sponsored Programs Administration at NYU SOM, includes a list of Dr. Hilz's research involving, but not limited to, TBI. Contrary to defendant's assertion, that document demonstrates that Dr. DeFina and IBRF were credited in connection with at least fifteen of Dr. Hilz's research projects from the start of the applicable grant period. The Grant Agreement, moreover, does not set a minimum amount of Dr. Hilz's research projects for which Dr. DeFina and IBRF were to be credited. Indeed, IBRF admitted that Dr. Hilz credited some of his research to IBRF and its CEO, Dr. DeFina (Def.'s Rule 19-a Counter Statement of Material Facts, ¶ 14).

V. Point (g)

Lastly, defendant states that the grant was for 90% ($272,700 per year) of the direct costs, and 10% ($27,300 per year) for indirect costs (Def.'s Rule 19-A Counter Statement of Material Facts, ¶ 5). Plaintiffs contend that the Grant Agreement was unrestricted, and therefore the fund disbursement was at plaintiff's discretion.

Contrary to defendant's contention, the Grant Agreement is clearly labeled "Unrestricted." Further, defendant's reliance on its "Research Grant Policy" to demonstrate otherwise is misplaced given that the document is clearly denominated as a "DRAFT," and, as such, cannot be binding on plaintiffs with respect to the

disbursement issue (*see O'Connor-Goun v Weill Cornell Med. Coll. Of Cornell Univ.*, 956 F Supp 2d 549, 553 [SDNY 2013] [applying New York law in holding that when a document is clearly labeled draft the parties involved in the agreement reserve the right not to be held to it]). In any event, this argument rests on the notion that the Grant Agreement obligated plaintiffs to provide an accounting to defendants. It does not. In fact, the court denied defendant's motion to compel plaintiffs to produce disbursement information because defendant failed to show that it was entitled to what amounts to be an accounting, a counterclaim asserted by defendant which was previously dismissed.

Accordingly, based on the foregoing, plaintiffs' motion for summary judgment on their breach of contract cause of action is granted.

Plaintiffs' motion for summary judgment is denied as to the cause of action for unjust enrichment, as that claim is duplicative of the breach of contract action (*see NYAHSA Servs., Inc., Self-Ins. Tr. v. Recco Home Care Servs., Inc.*, 141 AD3d 792, 796 [1st Dept 2016]). For that reason, plaintiffs' unjust enrichment claim is dismissed in spite of the fact that defendant did not ask for that relief (CPLR 3212 [b] ["If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."]).

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted as to their cause of action for breach of contract; and it is further

ORDERED that plaintiffs' motion is denied as to their cause of action for unjust enrichment, and that claim is dismissed; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment in favor of plaintiffs and against defendant in the amount of $173,487.21, with interest at the

statutory rate for the period of August 22, 2013 until the date of decision of this motion, and thereafter at the statutory rate as calculated by the Clerk of the court, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

This memorandum opinion constitutes the decision and order of the court.

Dated: 9/11/17

ENTER:

HON. ANDREA MASLEY, J.S.C.

HON. ANDREA MASLEY