

Bowery Hotel LLC v Callimanopoulos

2017 NY Slip Op 32488(U)

November 20, 2017

Supreme Court, New York County

Docket Number: 651209/17

Judge: Richard F. Braun

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

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THE BOWERY HOTEL LLC DBA THE BOWERY
HOTEL,

Index No. 651209/17

Plaintiff,

OPINION

-against-

PERRI CALLIMANOPULOS AKA PERCILES
CALLIMANOPULOS, AARON OMAR-OLVERA
MONROY,

Defendants.

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RICHARD F. BRAUN, J.:

This is an action for damages for breach of contract, unjust enrichment, account stated, and quantum meruit. Defendant Aaron Omar-Olvera Monroy (Monroy) moves to dismiss plaintiff's complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7). Plaintiff The Bowery Hotel LLC d/b/a The Bowery Hotel (Hotel) cross-moves for leave to replead its complaint, pursuant to CPLR 3211 (e).

On a motion pursuant to CPLR 3211 (a) (7), a complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *BMW Group LLC v Castle Oil Corp.*, 139 AD3d 78, 80 [1st Dept 2016]). However, if the allegations consist of bare legal conclusions, then the allegations are not entitled to any such consideration (*see Simkin v Blank*, 19 NY3d 46, 52 [2012]; *David v Hack*, 97 AD3d 437, 438 [1st Dept 2012]). The court may receive affidavits from the plaintiff for the limited purpose of remedying defects in a complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

In order to plead a breach of contract cause of action, Hotel must allege that there was a contract with Monroy and set forth the terms and conditions of the parties' agreement; that Hotel performed pursuant to the contract; and that Monroy breached the contract, which resulted in Hotel being damaged (see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011]; *Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-446 [1st Dept 2016]). The complaint does not allege that Hotel entered into an agreement with Monroy or that Monroy was a signatory to an agreement (see *Feigen v Advance Capital Mgt. Corp.*, 146 AD2d 556, 557 [1st Dept 1989]). No terms are set forth or any other indicia of a contract. Regarding defendant Perri Callimanopoulos a/k/a Perciles Callimanopoulos (Callimanopoulos), in his affidavit Kirk Wilson, Hotel's general manager, states that "Callimanopoulos stated that his Landlord would be paying for his stay." It was Callimanopoulos who provided Monroy's credit card. No facts are alleged in the complaint or even in the proposed amended complaint that Hotel had any contact with Monroy.

In order to plead an account stated claim, the court in *Shaw v Silver* (95 AD3d 416 [1st Dept 2012]) explained:

'[W]here an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown' (citations omitted).

Hotel's complaint does not plead the requisite elements of an account stated claim. Hotel does not allege that Monroy, as a party to a contract, received bills or invoices, which Monroy did not protest within a reasonable time. Hotel does not allege facts that Monroy received any notice of the balance claimed due, which is an element of an account stated claim (see *Russo v Heller*, 80 AD3d 531, 532 [1st Dept 2011]).

With respect to the elements of Hotel's claim for unjust enrichment, the court in *Castellotti v Free* (138 AD3d 198, 207 [1st Dept 2016]), stated:

To establish unjust enrichment, the plaintiff must show that the defendant was enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (citation omitted).

Monroy notes that there are no facts alleged that any purported benefit conferred on Monroy was unjust. The complaint merely alleges that a sum is owed.

In *Fulbright & Jaworski, LLP v Carucci* (63 AD3d 487, 488-489 [1st Dept 2009]), the Court noted:

To state such a cause of action (for quantum meruit), plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (citation omitted).

Hotel fails to allege facts that Monroy accepted Hotel's services to Callimanopulos, or that the sum requested is a fair and reasonable value for the services allegedly provided. There are no allegations that services were provided to Monroy.

In order to address the deficiencies in its complaint, Hotel seeks to replead. However, the proposed amended complaint suffers from the same defects as the original complaint. The only actor is Callimanopulos, who used Monroy's credit card without any showing of authorization by Monroy. There is no evidence that Monroy is indebted to Hotel. Thus, leave to replead was not granted (*cf. Steiner Sports Mktg., Inc. v Weinreb*, 88 AD3d 482, 483 [1st Dept 2011] ["The court did not abuse its discretion in declining to grant Weinreb leave to replead, given Weinreb's inability to state what additional facts would be pleaded."]; *Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27 [2nd Dept 2008] [As to requests for leave to replead, the Court stated that the standard is equivalent to that of a motion to amend: that "motions for leave to amend pleadings

should be freely granted absent prejudice or surprise to the opposing party, unless the proposed amendment is devoid of merit or palpably insufficient (citations omitted).”)].

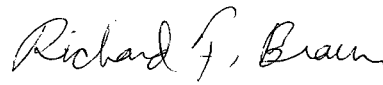
The critical allegation that is missing from Hotel’s complaint and amended complaint as to the breach of contract cause of action is that Hotel had any interaction with Monroy. Hotel does not allege that there was a meeting of the minds, or any agreement with Monroy, so Monroy could not have breached a contract with Hotel. There is no allegation that Callimanopolus was authorized to use Monroy’s credit card.

Hotel does not allege that invoices were provided to Monroy, so there is no account stated claim sufficiently pled against Monroy. Hotel does not allege that there was any relationship between Hotel and Monroy, or that Monroy asked Hotel to perform any service, and thus there is no valid unjust enrichment claim. Hotel does not allege that Monroy accepted the services provided to Callimanopolus, and therefore a quantum meruit claim is not adequately pled against Monroy.

The liberal standard does not aid Hotel. The facts alleged do not show that there is any claim against Monroy under any cognizable theory of law.

Accordingly, by separate November 16, 2017 decision and order, the motion was granted to the extent of dismissing each of Hotel’s causes of action against Monroy. Hotel’s cross motion was denied. This constitutes the opinion of the court.

Dated: New York, New York
November 20, 2017



RICHARD F. BRAUN, J.S.C.