SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PJAM PRODUCTIONS, LLC, Index No.: 652409/2018

Plaintiff, **DECISION & ORDER**

-against-

M LIGHT, LLC, d/b/a/ "Myth Live",

Defendant.

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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3211, defendant M Light, LLC (Myth) moves to dismiss five of the seven causes of action in the amended complaint (Dkt. 19 [the AC]). Plaintiff PJAM Productions, LLC (PJAM) opposes the motion. The motion is granted.

Factual Background & Procedural History[1]

PJAM sponsors live music events. Myth owns an event venue in Maplewood, Minnesota (the Venue). In a License and Operating Agreement dated April 12, 2017 (Dkt. 43 [the Agreement]), Myth granted PJAM a license to use the Venue to host music events on the nights of February 2 and February 3, 2018 – the two nights before the Super Bowl was to be played in Minneapolis. PJAM wanted to capitalize on the influx of people, including athletes and celebrities, that would descend on the area during Super Bowl weekend. PJAM claims to have contemplated licensing space for the event in

[1] The facts are drawn from the AC and are assumed true unless conclusory or refuted by documentary evidence.

Minneapolis, near the stadium, but ultimately decided, allegedly based on certain assurances, that its planned event could be viably held in the nearby suburb of Maplewood. According to PJAM, its principal concern was the ability to keep the party going until 4:00 a.m., especially since it knew that, at the time, local law would have required them to shut down by 2:00 a.m. PJAM claims that significant revenue was expected to be made during these two wee hours of the morning.

PJAM claims Myth's principal, Michael Ogren,[2] made certain oral representations about his ability to obtain permission from the City of Maplewood to keep the venue open until 4:00 a.m., and that PJAM relied on such representations in deciding to enter into the Agreement. Specifically, PJAM alleges that:

> During the course of the negotiations between the parties in February 2017 Ogren told representatives of the Plaintiff that he knew that Myth Live would "without question" obtain permission from the City of Maplewood to stay open and would be allowed to continue serving alcoholic beverages until 4:00 AM during Super Bowl 2018 weekend. Ogren repeated this representation without qualification several times. ***Ogren stated that there would be "no problem" because the authorities of the City of Maplewood "love me" and that he has good "connections" with the City government and the "police", and because Ogren's and Myth Live have a "great reputation" in Maplewood***. Ogren represented several times that he would only need to ask for permission to stay open until 4:00 AM and his request would be granted by the Maplewood City Council (AC ¶ 25 [emphasis added]).

[2] Ogren was named as a defendant in the original complaint. The AC, however, does not assert any claims against him because PJAM withdrew those claims without prejudice after Ogren moved to dismiss for lack of personal jurisdiction. The caption is amended to reflect that he is no longer a party.

These representations, along with PJAM's allegedly essential need to stay open until 4:00 a.m., are not referenced in the Agreement. Paragraph three of the Agreement provides that PJAM may host an event in the Venue during the "nights" of February 2 and 3 but does not indicate the times the event would start or end (Dkt. 43 at 2). By contrast, the parties saw fit to mention specific times in paragraph four, which governs the duration of the license – January 29 at 9:00 a.m. to February 5 at 6:00 p.m. (*see id.*).[3] In paragraph 19(c), Myth warranted that it:

> ***maintains*** all permits and government authorizations necessary or customary for the execution of the Event, including public assembly permits for a capacity of not less than 3,500 persons (based on an unfurnished interior), ***hours of operation consistent with this License***, permits for the sale of alcoholic beverages and use of necessary equipment (*id.* [emphasis added]).

Nowhere does the Agreement set forth that the "hours of operation" would extend to 4:00 a.m. Indeed, it is undisputed that, at the time of contracting, the law did not authorize service of alcohol until that time. Likewise, nowhere in the Agreement does Myth agree or represent that it has the capacity to successfully lobby the government to change the then-currently applicable law mandating that the event shut down at 2:00 a.m. – a law PJAM admits it was aware of.

Paragraph five provides that PJAM would pay a fee of $240,000 as consideration for the license (*see id.* at 3). Paragraph 18 states that PJAM:

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[3] The duration of the license was longer than the "Primary Event Period" of February 2-4 so that PJAM could set up and clean up the Venue.

> shall hold all concession privileges for the Event, including food and beverage and merchandise sales, shall have full control thereof, and shall retain all proceeds therefrom, and (subject to applicable laws and regulations) shall be responsible for the cost of inventory sold and sales and income taxes applicable thereto (*id.* at 7).

While the event was to be held in Minnesota, the parties agreed that the Agreement would be governed by New York law and consented to jurisdiction in this court for all disputes arising out of the Agreement (*see id.* at 8).

On January 10, 2018, less than a month before the event, Myth notified PJAM that the event would have to end each night no later than 2:00 a.m. because the City of Maplewood did not change the law or grant a variance. As of that date, all but $50,000 of Myth's fees were due to be paid (the balance was due on January 15). After learning that the event would not be able to legally stay open until 4:00 a.m., PJAM did not invoke the force majeure clause in paragraph 13(a), which permits performance under the Agreement to be excused when it "is prevented by operation of law" (*see id.* at 6),[4] and proceeded with the event.

PJAM complains that the event was not as profitable as it initially hoped, purportedly due to having to shut down each night at 2:00 a.m. It also alleges that Myth "refused to return unsold inventory of liquor belonging to [PJAM] worth in excess of $125,000" (AC ¶ 58). Myth, moreover, purportedly "refused to remit to [PJAM] over $17,000 of cash refunds from vendors of alcoholic beverages for product which was

[4] Presumably, PJAM did not avail itself of this option because it would only have been entitled, at most, to withhold the remaining $50,000 that remained unpaid (*see* Dkt. 43 at 6).

purchased and paid for by [PJAM] but never delivered by the vendors" that "were sent by the vendors to [Myth]" (¶ 59). "Instead of remitting the funds to PJAM which paid for the undelivered liquor, [Myth] has simply kept the money for itself" (*id.*). Additionally, Myth "refused pay to [PJAM] cash receipts from concession sales which occurred at the event for food and beverages which belong to [PJAM] in an amount in excess of $100,000" and, "[i]nstead, [Myth] has simply kept [PJAM's] money for itself (¶ 60).

PJAM commenced this action in May 2018 and filed the AC months later in September. The AC contains seven causes of action against Myth: (1) fraudulent inducement;[5] (2) breach of contract, seeking reimbursement of the $240,000 fee; (3) breach of contract, seeking PJAM's lost profits under the Agreement; (4) breach of contract, seeking the amounts being withheld by Myth addressed in paragraphs 58-60 of the AC; (5) breach of the covenant of good faith and fair dealing; (6) breach of contract, seeking attorneys' fees under paragraph 26 of the Agreement (*see* Dkt. 43 at 9); and (7) unjust enrichment. Myth moves to dismiss all but the fourth and sixth causes of action.

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from those facts (*Amaro v*

[5] Though PJAM seeks lost profits on this claim, even if the cause of action was viable, they would not be recoverable (*see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] ["damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained.... [T]here can be no recovery of profits which would have been realized in the absence of fraud"]). Likewise, the fraud claim cannot be based on the lost opportunity to book another venue, which is impermissibly speculative (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 422 [1996]).

Gani Realty Corp., 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If the defendant seeks dismissal of the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

The second and third causes of action for breach of the Agreement, based on Myth's failure to obtain government approval to permit the event to stay open until 4:00 a.m., are dismissed. The Agreement does not expressly require Myth to obtain any governmental approvals. More fundamentally, it does not expressly provide that the Venue must have the ability to stay open until 4:00 a.m. All the Agreement sets forth, in paragraph 19(c), is that Myth

> ***maintains*** all permits and government authorizations ***necessary or customary for the execution of the Event***, including public assembly permits for a capacity of not less than 3,500 persons (based on an unfurnished interior), ***hours of operation consistent with this License***, permits for the sale of alcoholic beverages and use of necessary equipment (*id.* [emphasis added]).

That the Agreement does not define "hours of operation" or provide a nightly ending time for the event does not render it ambiguous. The court must infer that the parties contemplated compliance with the law (*Dolman v U.S. Tr. Co. of N.Y.*, 2 NY2d 110, 116 [1956] ["unless a contract provides otherwise, the law in force at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein"], *see Burns v Burns*, 163 AD3d 210, 214 [4th Dept 2018] ["when parties enter into an agreement authorized by or related to a particular statutory scheme, the courts will presume—absent something to the contrary—that the terms of the agreement are to be interpreted consistently with the corresponding statutory scheme"]; *see also Rosenkrantz v Rosenkrantz*, 184 AD2d 478, 479 [1st Dept 1992] ["the parties are deemed to have incorporated all provisions of law in effect ***as of the time the agreement was executed***"] [emphasis added]).

When the Agreement was executed in April 2017, the parties all knew that local law required the event to end by 2:00 a.m. Myth's warranty that it "maintains" or has all necessary permits, as a matter of law, could not mean that it represented that it had the ability to operate until 4:00 a.m. as that authority did not exist then and was not later legally permitted. The plain meaning of "maintain," which presupposes an existing ability, is inconsistent with PJAM's unreasonable interpretation as requiring Myth to lobby the government to change the law (*China Privatization Fund (Del), L.P. v Galaxy Entm't Grp. Ltd.*, 95 AD3d 769, 770 [1st Dept 2012] ["a contract is ambiguous if on its face it is ***reasonably*** susceptible of more than one interpretation"] [emphasis added]; *see*

In re Lipper Holdings, LLC, 1 AD3d 170, 171 [1st Dept 2003] ["A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties."]). Had the parties intended to agree that the venue was required to stay open until 4:00 a.m. or that Myth was obligated to expend commercially reasonably efforts to lobby the government to change the law, they would have so provided. They did not. The Agreement's merger clause (¶ 28) precludes implying these unstated obligations (*see Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013] ["where a contract contains a merger clause, a court is obliged 'to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing'"], quoting *Primex Intl Corp. v Wal-Mart Stores, Inc.*, 89 NY2d 594, 599-600 [1997] ["A completely integrated contract precludes extrinsic proof to add to or vary its terms"]).

Nor can the implied covenant of good faith and fair dealing be invoked as an end run around the merger provision by reading requirements into the Agreement that did not contain them. While the implied covenant is "[i]mplicit in all contracts" and includes "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]), it "cannot be used to create terms that do not exist in the writing" (*Vanlex Stores, Inc. v BFP 300 Madison II, LLC*, 66 AD3d 580, 581 [1st Dept 2009]; *see Fesseha v TD Waterhouse Inv'r Servs., Inc.*, 305 AD2d 268 [1st Dept 2003] [the implied covenant "cannot be construed so broadly as effectively to nullify other express terms of a contract,

or to create independent contractual rights"]). Read as a whole, the Agreement does not warrant that the Venue could stay open longer than legally permissible, nor does it promise that Myth would try to change or succeed in obtaining an exception to that legal limit. Thus, the implied covenant claim fails and the fifth cause of action is dismissed.

Next, the seventh cause of action for unjust enrichment is dismissed because the parties agree that the Agreement governs their rights regarding all of their disputes about the event (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). The allegations in paragraph 58-60 of the AC state a claim for breach of the Agreement, and indeed, a quite plausible one. Because there is no "genuine dispute over the existence of the contract" (because the court is dismissing the fraud claim), PJAM cannot plead unjust enrichment in the alternative (*Goldin v TAG Virgin Islands, Inc.*, 149 AD3d 467, 468 [1st Dept 2017]; *see Panattoni Dev. Co. v Scout Fund 1-A, LP*, 154 AD3d 555, 557 [1st Dept 2017] ["No one claims that the [agreements] do not cover the parties' dispute. Therefore, the court properly dismissed the unjust enrichment claim."]).[6]

Finally, PJAM has not stated a claim for being fraudulently induced to enter into the Agreement based on Myth's representations about being able to lobby the government to permit the event to stay open until 4:00 a.m. "To allege a cause of action

[6] To the extent Myth later takes the position that the amounts set forth in paragraphs 58-60 of the AC do not expressly fall within the scope of the Agreement, even if the court were to agree, the court would still permit PJAM to amend to assert a claim under the implied covenant to fill any gap in the Agreement about Myth's right to retain what clearly belongs to PJAM. The court cannot, however, sustain the implied covenant claim as currently pleaded for the reasons set forth above and because its scope clearly does not include the amounts withheld by Myth (*see* AC ¶¶ 86-92).

based on fraud, plaintiff must assert a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). "In the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim. Moreover, these misrepresentations of present fact must be collateral to the contract and [must have] induced the allegedly defrauded party to enter into the contract" (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015]). Where the fraud claim "is based upon a statement of future intention," the plaintiff "must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement" (*Cronos Grp. Ltd. v XComIP, LLC*, 156 AD3d 54, 72 [1st Dept 2017]).

Myth allegedly lied about a then-present fact--sufficient connections with the local government that would allow it to successfully lobby to keep the event open later--and its future intention to engage in such lobbying. The latter allegation does not state a claim for fraud because PJAM does not plead any facts permitting a reasonable inference of scienter – that is, a factual basis to infer that when Myth promised to lobby, it had no intention of doing so. That Myth allegedly failed to lobby as promised is not a basis to infer scienter (*see Cronos*, 156 AD3d 72, citing *Lanzi v Brooks*, 54 AD2d 1057, 1058 [3d

Dept 1976] ["any inference drawn from the fact that the expectation did not occur is not sufficient to sustain the plaintiff's burden of showing that the defendant falsely stated his intentions"], *affd* 43 NY2d 778 [1977]).

As for the claim that Myth lied about its connections to local politicians, all of the alleged representations amount to mere puffery that, when read in context, clearly are inactionable predictions of future performance (*see GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C.*, 168 AD3d 563, 564 [1st Dept 2019] ["the alleged promise is not a misrepresentation of fact but a nonactionable statement of prediction or expectation"], citing *Naturopathic Labs. Intl, Inc. v SSL Americas, Inc.*, 18 AD3d 404 [1st Dept 2005] [statements about what defendant "would envision" and "a statement allegedly made by [defendant] ... that financing 'would be no problem' ... amount to no more than statements of prediction or expectation, and as such are not actionable"]). A representation about one's ability to achieve an outcome is simply an opinion (*see FMC Corp. v Fleet Bank*, 226 AD2d 225 [1st Dept 1996] ["The bank officer's phrasing that it 'felt' that the line of credit would be adequate to cover PCO's debt to plaintiff constituted, at most, nonactionable opinion, a prediction as to future performance and not a statement of existing fact"]). Myth could not have known how the government was going to respond to its lobbying and, thus, the essential element of scienter is missing (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Grp., LLC*, 19 AD3d 273, 275 [1st Dept 2005] [pleading scienter requires knowingly false "prediction as to some future event"]).

In that regard, justifiable reliance is absent as a matter of law as well because the question of whether the government will change a law or act in a particular manner is inherently speculative (*see Starr Found. v Am. Intl Grp., Inc.*, 76 AD3d 25, 28 [1st Dept 2010]). There is no basis, moreover, upon which PJAM could justifiably rely on Myth's representations about the law. PJAM took the quite foreseeable risk that a suburb, even during the Super Bowl, would not want there to be drinking and live music until 4:00 in the morning. There is no way for PJAM to prove that had Myth lobbied harder or had better connections, the suburb would have ultimately come to a different conclusion about whether to change the law or allow an exemption.[7]

In the end, PJAM is complaining about not receiving the fruits of a bargain that it never incorporated into its integrated Agreement. It must live with the Agreement that it actually signed. Consequently, with the exception of the possible implied covenant claim noted earlier, dismissal with prejudice and without leave to amend is warranted. PJAM already had the opportunity to cure pleading deficiencies identified in an earlier motion to dismiss that Myth made, which was directed at the original complaint. PJAM does not identify any additional facts that could possibly cure its current pleading deficiencies; thus, any amendment is futile (*see Mendoza v Akerman Senterfitt LLP*, 128 AD3d 480,

[7] PJAM does not claim to have conducted any due diligence on Myth's supposed connections and lobbying abilities (*see UST Private Equity Invs Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 88 [1st Dept 2001]). Had it done so, there is no reason to believe it would not have learned of Ogren's background.

483 [1st Dept 2015]; *Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 749 [1st Dept 2015]).

Accordingly, it is

ORDERED that Myth's motion to dismiss the first, second, third, fifth, and seventh causes of action is granted, and said causes of action are hereby dismissed with prejudice; and it is further

ORDERED that this action shall now bear the following caption:

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PJAM PRODUCTIONS, LLC, Index No.: 652409/2018

Plaintiff,

-against-

M LIGHT, LLC, d/b/a/ "Myth Live,"

Defendant.

----------X; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 15, 2019 at 11:30 a.m. and they shall file their joint letter at least one week beforehand.

Dated: July 3, 2019

ENTER:

Jennifer G. Schecter, J.S.C.