DTE Studio, LLC v Universal Std., Inc.
2019 NY Slip Op 32258(U)
July 26, 2019
Supreme Court, New York County
Docket Number: 655835/2018
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** — *Justice* | **PART** **IAS MOTION 7EFM**

---X

DTE STUDIO, LLC

Plaintiff,

- v -

UNIVERSAL STANDARD, INC.,

Defendant.

---X

INDEX NO. 655835/2018

MOTION DATE 04/24/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion for PARTIAL SUMMARY JUDGMENT.

Guzov LLC (Debra Joy Guzov and David J. Kaplan of counsel), for plaintiff DTE Studio, LLC
Frankfurt Kurnit Klein & Selz, PC (Tyler Emrys Kent Maulsby, Lily Nicole Landsman-Roos, and Andrew John Ungberg of counsel), for defendant Universal Standard, Inc.

Gerald Lebovits, J.:

This action arises out of a contractual dispute between plaintiff, DTE Studio, LLC ("DTE"), a creative marketing agency, and defendant, Universal Standard Inc. ("Universal"), a women's fashion brand.

In February 2018, Universal hired DTE to perform creative direction, design, and branding consulting work. The parties' agreement had a one-year term; DTE's fee under the contract of $300,000 was to be paid in monthly installments of $25,000. Several months into the term of the agreement, disputes arose between the parties about the work performed by DTE under the contract, the parties' respective obligations under the contract, and whether the contract needed to be renegotiated. DTE ceased working on Universal projects in May 2018, and Universal stopped paying DTE in July 2018.

DTE sued Universal for breach of contract and quantum meruit. Universal counterclaimed for breach of contract, unjust enrichment, and unfair competition. DTE now moves under CPLR 3212 for partial summary judgment on its breach of contract claim, and moves under CPLR 3211 (a) (1) and (a) (7) to dismiss Universal's counterclaims.

DISCUSSION

A. DTE's Motion for Partial Summary Judgment

To obtain summary judgment under CPLR 3212, the movant must establish its cause of action sufficiently to permit the court, as a matter of law, to direct judgment in its favor and "must do so by tender of evidentiary proof in admissible form." (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1066 [1979].) Where, however, the opposing party submits affidavits and other evidence that, considered in the light most favorable to the non-moving party, raise triable issues of fact, summary judgment will be denied. (*See id.*; *see also Brunetti v Musallam*, 11 AD3d 280, 280 [1st Dep't 2004].)

To prevail on a breach of contract claim, plaintiff must establish (1) the existence of an agreement between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform, i.e., defendant's breach; and (4) resulting damages. (*Meyer v N. Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d 878, 879 [2d Dept 2016]; *Furia v Furia* 116 AD2d 694, 695 [2d Dept 1986]).

Here, the parties undisputedly entered into an agreement under which DTE was to perform certain creative services for Universal in exchange for twelve monthly payments of $25,000 each. Universal undisputedly paid only the first five of those monthly installments. DTE argues the evidence establishes as a matter of law that DTE fully and satisfactorily performed its contractual obligations, and that Universal breached the agreement by ceasing its monthly payments. This court is not persuaded.

DTE's claim that it satisfactorily performed is based upon excerpts from email exchanges between February 2018 and April 2018 in which Universal employees expressed approval of DTE's work. But Universal has submitted an affidavit from its CEO stating that the parties had a much broader range of communications between each other, including in-person meetings and telephone calls, rather than just speaking via email. That affidavit also attaches additional emails beyond the excerpts submitted by DTE, which can be read to indicate that Universal had expressed dissatisfaction with different aspects of DTE's work, including quality, hours expended, and fees. And those emails also reflect that as part of an ongoing dispute between the parties, DTE ceased performing work under the contract in May 2018, prior to Universal withholding any further payments in July 2018.

Universal has thus raised triable issues of fact regarding whether DTE was fully and satisfactorily performing its obligations under the contract when Universal stopped paying DTE. DTE's motion for partial summary judgment on its breach of contract claim is denied.

B. DTE's Motion to Dismiss Universal's Counterclaims

DTE also moves under CPLR 3211 (a)(1) and (7) to dismiss Universal's first (breach of contract), second (anticipatory repudiation), third (unjust enrichment), and fourth (unfair competition) counterclaims.

A court may dismiss a claim under CPLR 3211 (a) (1) only if movant submits documentary evidence that resolves all factual issues and conclusively establishes a defense to the asserted claims. (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]; *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002].)

Dismissal under CPLR 3211 (a) (7) is proper when "the pleading fails to state a cause of action." A court considering a CPLR 3211 (a) (7) motion must determine whether the facts alleged, viewed in the light most favorable to the non-moving party, fit within any cognizable legal theory. (*See Nonnon v. City of New York*, 9 NY3D 825, 827 [2007].)

1. Breach of Contract

DTE's motion to dismiss Universal's breach of contract counterclaim is denied, largely for the reasons discussed above. Universal's allegation that DTE breached the terms of their agreement by failing to provide satisfactory work product and by ceasing work altogether on Universal projects states a cause of action; and the emails submitted by DTE do not conclusively refute Universal's contention that DTE breached the agreement before Universal stopped paying DTE.

2. Anticipatory Repudiation

DTE's motion to dismiss Universal's anticipatory-repudiation counterclaim is granted. A party asserting such a claim must establish that the subject of the claim had clearly and unequivocally communicated their intention not to perform under the contract. (*See Tenavision, Inc. v Newman*, 45 NY2d 145, 150 [1978]); *HRL Union Ave. Corp. v New York City Housing Auth.*, 223 AD2d 486, 487 [1st Dept 1996].)

Here, Universal relies on a May 2018 email from DTE's CEO to Universal's CEO. That email does not, however, support an anticipatory-repudiation cause of action.

In her email, DTE's CEO provides a list of alternative courses for DTE and Universal to take with respect to their business relationship: proceeding as originally planned under the contract; terminating the contract pursuant to its termination clause; or amending the contract to alter the scope of work to be performed by DTE under the agreement. (*See* NYSCEF No. 31.) The email also stated that DTE was halting work on the current Universal project pending further discussions between DTE and Universal and a mutual decision on which course the parties would take. (*Id.*)

Though the email thus indicated that DTE was halting work under the contract, the email also expressly stated that this stoppage was temporary; and it expressly left open the possibility that DTE would resume its work depending on the outcome of negotiations between the parties. The email thus was not an "unequivocal, definite, and final expression of [DTE's] intention not to perform its obligations" under the parties' agreement, as required for it to constitute an anticipatory repudiation of the contract. (*Children of Am. (Cortlandt Manor), LLC v Pike Plaza Assocs., LLC*, 113 AD3d 583, 585 [2d Dept 2014].)

3. Unjust Enrichment

DTE's motion to dismiss Universal's unjust-enrichment counterclaim is granted. Unjust enrichment is a quasi-contract theory of recovery; it is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties. (*Georgia Malone & Co., Inc. v Rieder,* 86 AD3d 408 [1st Dept 2011]. An unjust enrichment claim lies only where there is no enforceable contract. Here, Universal's claims undisputedly arise out of a business relationship governed by a valid and enforceable contract. Universal therefore cannot state a cause of action for unjust enrichment. (*See Bettan v Geico General Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002].)

4. Unfair Competition

DTE's motion to dismiss Universal's unfair-competition counterclaim is granted. As relevant here, to state an unfair competition claim a plaintiff must assert that the defendant acted in bad faith to misappropriate the plaintiff's skill, expenditures, labor, or goodwill. (*See Electrolux Corp. v Val–Worth, Inc.*, 6 NY2d 556, 567 [1959]; *Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690, 692 [2d Dept 2007].)

Here, Universal has alleged that DTE wrongly misappropriated Universal's goodwill by posting a "case study" webpage featuring examples of creative work that DTE performed for Universal. But the contract between DTE and Universal expressly provided that DTE would "retain the right to display any such works or deliverables in print or online for archival, marketing portfolio purposes." (NYSCEF No. 4, at 10.) Universal does not suggest that the webpage at issue displayed anything other than work that DTE actually provided to Universal. Nor does Universal explain how DTE acted in bad faith in posting this webpage, given DTE's express contractual authorization to do so. At most, Universal asserts that DTE's (putative) breach of the contract between them voided DTE's display-authorization. But DTE plainly has a contrary view regarding the continuing validity of that authorization; and Universal has not alleged that DTE arrived at its view *in bad faith*.

Universal also contends that DTE misappropriated Universal's goodwill by (putatively) suggesting falsely to its own benefit that it carried out its work under the contract with Universal to Universal's satisfaction, and that Universal endorses or recommends DTE's creative and marketing services. The "essence of the misappropriation theory," though, is not merely that the defendant gained an undeserved benefit by "reap[ing] where it has not sown," but that in doing so it "unfairly neutralized a commercial advantage that the plaintiff achieved through honest labor" — i.e., that defendant's wrongful conduct caused "actual injury" to the plaintiff. (*E.J. Brooks Co. v Cambridge Security Seals*, 31 NY3d 441, 449 & n.5 [2018] [quotation marks omitted].) Here, Universal failed to provide anything beyond a bare conclusory allegation of (unspecified) injury.

Universal asserts that it is sufficient to show merely that defendant has made a "wrongful attempt to suggest an association or connection of some sort" between plaintiff and defendant. (NYSCEF No. 33, at 22, quoting *Vaudable v Montmartre, Inc.*, 20 Misc. 2d 757, 759 [Sup Ct, NY County 1959].) But the Court of Appeals has made clear that the theory of *Vaudable* and

similar decisions is that a defendant may not appropriate a plaintiff's property right (such as commercial goodwill) "to compete unfairly against the plaintiff in New York" — in other words, to harm the plaintiff. (*ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 478 [2007].)

At bottom, Universal objects to DTE benefitting from showing off the work it performed for Universal, given Universal's asserted dissatisfaction with that work and the breakdown of the relationship between the parties. But Universal has not sufficiently alleged that DTE's display of that work has operated *to Universal's detriment*.[1]

Accordingly, it is

ORDERED that DTE's motion for partial summary judgment on its breach of contract claim is denied; and it is further

ORDERED that DTE's motion to dismiss Universal's breach of contract counterclaim is denied; and it is further

ORDERED that DTE's motion to dismiss Universal's unjust enrichment, anticipatory repudiation, and unfair competition counterclaims is granted.

7/26/2019		GERALD LEBOVITS, J.S.C.
DATE		

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
APPLICATION:	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART		[ ] OTHER	
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	

[1] To the contrary, in displaying its own work for Universal, DTE's case-study webpage emphasizes the innovative and influential character of Universal's fashion brand. (*See generally* NYSCEF No. 5.)