320 W. 115 Realty LLC v Avant Capital 318-320 W. 115th St. LLC
2019 NY Slip Op 33864(U)
December 30, 2019
Supreme Court, New York County
Docket Number: 654838/2018
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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320 WEST 115 REALTY LLC

Plaintiff,

- v -

AVANT CAPITAL 318-320 WEST 115TH STREET LLC,

Defendant.

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INDEX NO. 654838/2018

MOTION DATE 03/20/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29

were read on this motion to/for DISMISSAL.

The plaintiff, 320 West 115 Realty LLC (320 West), seeks to recover $1,037,208.33 in penalties paid to the defendant, Avant Capital 318-320 West 115th Street LLC (Avant), and alleges causes of action for breach of contract and unjust enrichment and pursuant to Uniform Commercial Code § 3-108. Defendant Avant moves, pre-answer, for dismissal pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, CPLR 3211(a)(1) based upon the submission of documentary evidence, and dismissal of the unjust enrichment claim pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The plaintiff opposes the motion. The motion is denied.

On November 25, 2014, 320 West borrowed $4,650,000.00 from Avant for the development of real property located at 318-320 West 115th Street, New York, New York 10026. The loans became due and payable by 320 West on the maturity date of May 31, 2016. On August 17, 2017, Avant claims that 320 West submitted a falsely certified draw request on the building loan thereby defaulting on the loan. On May 24, 2016, 320 West claims that the parties agreed to two three-month loan extensions. Avant claims that no agreement was ever signed or entered into, and that 320 West further defaulted by failing to repay the loans on May 31, 2016. 320 West maintains that pursuant to the terms of the loan agreement and agreement by the parties, it would not be considered in default unless and until Avant provided a written notice of default and an opportunity to cure, and further claims to have not received any notice of default

through October 23, 2017 at which time Avant sent 320 West a letter containing a loan payoff information for the construction project including $1,037,208.33 as a default interest penalty accruing from August 17, 2015. 320 West states that it paid the default interest penalty "without prejudice to such reservation of rights, pursuant to Uniform Code § 1-308 and relevant caselaw" because Avant would not permit closing on the construction project without the payment. This action ensued.

"Although the ultimate burden of proof regarding personal jurisdiction rests with the plaintiff, to defeat a CPLR 3211(a)(8) motion to dismiss a complaint, the plaintiff need only make a prima facie showing that the defendant is subject to the personal jurisdiction of the court." Whitcraft v Runyon, 123 A.D.3d 811, 812 (2014); see also Weitz v Weitz, 85 AD3d 1153 (2011); Cornely v Dynamic HVAC Supply, LLC, 44 AD3d 986 (2007). The plaintiff meets this burden. The plaintiff alleges, and the defendant concedes that New York law governs the claims for breach of contract and unjust enrichment. Instead, the defendant claims that, because the LLC has already been dissolved, and dissolution of an LLC is an 'internal affair' such that it falls under Delaware law, the certificate of cancellation must be attacked in the Delaware Court of Chancery before the suit may proceed. The defendants rely primarily upon to Tratado de Libre Comercio, LLC v Splitcast Tech. LLC, 2018 NY Slip Op 30116[U] at *3 (Sup. Ct. NY County Jan. 11, 2018), for the proposition that New York lacks personal jurisdiction over Avant because it has already dissolved under Delaware law. However, the plaintiff maintains that the defendant's dissolution was a bad faith attempt to avoid suit in New York. According to the plaintiff, the defendant had been made aware that the plaintiff intended to pursue an action to recover the default interest payment, and then filed for dissolution within two weeks of that notification, continued to conduct business in New York, filed a Satisfaction of Mortgage in New York almost four months after filing for dissolution and is still listed as 'active in the New York foreign business registry.

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002). That is not the case here. The plaintiff relies in large part upon an affidavit by Adam Luysterborghs, the manager of Avant, to support its argument that 320 West defaulted on the terms of the building loan agreement by failing to disclose the existence of a second contractor agreement and increase to the hard costs budget. It is well settled that affidavits do

not constitute documentary evidence for the purposes of CPLR 3211(a)(1). See Amsterdam Hosp. Group, LLC v Marshall-Alan Assocs., Inc., 120 AD3d 431 (1st Dept. 2014); Kappa Dev. Corp. v Queens College Point Holdings, LLC, 95 AD3d 1178 (2nd Dept. 2012); Fontanetta v Doe, 73 AD3d 78 (2nd Dept. 2010). To the extent that the defendant relies upon the building loan agreement, loan note, contractor agreements, certificate of cancellation and other documents, these documents, considered alone or together, do not conclusively dispose of the plaintiff's claims. Thus, dismissal is not warranted under CPLR 3211(a)(1).

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977). To establish a cause of action for unjust enrichment a party must show that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 (2011). Here, 320 West sufficiently states a cause of action for unjust enrichment by alleging that Avant was enriched at 320 West's expense by receipt of the penalty payments to which it was not entitled since Avant never provided notice of default or an opportunity to cure, and that it is against good conscience and equity for Avant to retain the payments. The court is not unaware of the general rule that, where, as here, a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). However, while the unjust enrichment claim may ultimately be dismissed on that basis, it is sufficient for pleading purposes

and may be pleaded in the alternative. Therefore, dismissal under CPLR 3211(a)(7) is not warranted.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is denied in its entirety, and it is further,

ORDERED that the defendant shall serve and file an answer to the complaint within 30 days, and it is further,

ORDERED that the parties shall appear for a preliminary/settlement conference on March 5, 2020, at 3:00 p.m..

This constitutes the Decision and Order of the court.

12/30/2019
DATE

NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

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