Family Health Mgt., LLC v Rohan Devs., LLC
2021 NY Slip Op 30079(U)
January 12, 2021
Supreme Court, New York County
Docket Number: 156905/2019
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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INDEX NO. 156905/2019

FAMILY HEALTH MANAGEMENT, LLC,
577 W 161 STREET CORPORATION,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 002

- v -

DECISION + ORDER ON MOTION

ROHAN DEVELOPMENTS, LLC,

Defendant.

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ROHAN DEVELOPMENTS, LLC,

Third-Party
Index No. 595797/2019

Third-Party Plaintiff,

-against-

K. ZARK MEDICAL, P.C., YAN FELDMAN,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 42-63, 67, 69-79 were read on this motion for summary judgment; cross motion to reargue.

In this action to recover $96,000 paid in contemplation of a commercial lease, by notice of motion dated August 6, 2020, plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment. Defendant/third-party plaintiff (defendant) opposes and by notice of cross motion, cross moves pursuant to CPLR 2221(d)(2) for an order granting it leave to reargue a decision and order dated and efiled May 1, 2020 whereby its counterclaim and third-party complaint were dismissed. (NYSCEF 37).

I. MOTION FOR REARGUMENT

As a disposition of defendant's motion for reargument must precede plaintiffs' motion for summary judgment, it is addressed first: Leave is denied.

II. MOTION FOR SUMMARY JUDGMENT

Plaintiffs' summary judgment motion is addressed solely to their first and second causes of action, for conversion and for unjust enrichment.

A. Contentions

1. Plaintiffs (NYSCEF 42-51)

In their cause of action for conversion, plaintiffs advance the facts set forth in their complaint and motion to dismiss the counterclaim and third-party complaint, and contend, via the affidavit of the managing member of plaintiff Family Health and co-owner and officer of plaintiff 577, that $96,000 was paid in contemplation of the execution of a commercial lease, that "[i]t is undisputed that the lease was not fully executed," and that no enforceable obligations had been imposed on either side (NYSCEF 43). Based on defendant's exercise of dominion and control over the $96,000 in derogation of their rights by refusing to return the funds and retaining them for its own use and benefit, plaintiffs claim that defendant is in wrongful possession of the funds and that they are legally entitled to them. They claim that they have been damaged in the sum of $96,000 plus interest from January 9, 2019.

Plaintiffs argue that defendant's use of their money by depositing the funds in a security account or using them to defray build-out costs constitutes an unlawful exercise of dominion and control over their money. And, in light of the May 1 decision and order, the lease was a nullity from which no obligations could ensue, and thus, their money should not have been utilized unless and until the lease was executed by both parties and delivered in accordance with its

terms. (NYSCEF 51).

2. Defendant (NYSCEF 57)

In opposition, defendant relies on the arguments set forth in its motion seeking leave to reargue. It also offers a text dated December 5, 2019, claiming that it constitutes the sole indication that 577 was withdrawing from the transaction ("we decided not to pursue engaging in a new lease for this space" (NYSCEF 58, at 53-54). Based on the text, defendant contends that the lease was executed and delivered over eight months earlier and that the text constitutes the "first and only notice" which does not comply with paragraph 22 of the lease governing notifications.

According to defendant, $72,000 of the $96,000 payment had been "designated" as "advanced rental" to "partially defray" costs paid to a non-party general contractor for "the buildout of the medical office requested by the Tenant." And, as the "tenant" had "defaulted in the payment of rent, permitting the application of the security deposit and the advanced rent towards the cost to [the contractor], to build out the premises as requested by [plaintiff 577]," the funds sought "no longer exist." Thus, defendant maintains that absent "an existing, specific, identifiable fund, nor any obligation to return or otherwise treat in a particular manner, the specific funds sought by Tenant," summary judgment is inappropriate. It also observes that there has been no discovery in the case.

3. Plaintiffs' reply (NYSCEF 63)

According to plaintiffs, the emails and documents relied on by defendant in opposing plaintiffs' motion to dismiss as evidence that it had relied on and partly performed the lease prove neither. Some communications were sent after January 29, 2019, the date on which plaintiffs' counsel notified defense counsel by email that 577 would not be moving forward with

the transaction, and others concerning the alleged build-out are assertedly immaterial in light of paragraph 25.4(c) of the lease. Plaintiffs thus maintain that the communications raise no material question of fact.

B. Analysis

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

1. Was the lease binding?

While the issue of whether the lease was binding was resolved in the May 1 decision and order, it is now addressed in the context of the instant motion for summary judgment.

Analysis begins with the January 29 email to defense counsel: "Due to unforeseen circumstances my client cannot move forward with this transaction. Kindly return all funds to undersigned counsel." It is undisputed that the prospective tenant, 577, had paid the funds and that the email, sent in response to defense counsel's email dated January 15, 2019, whereby he asks plaintiff's counsel for an explanation of the delay in sending an executed lease, is immediately followed by an email chain wherein the lawyers debate whether 577 had

successfully withdrawn from the transaction. The email chain, authored by lawyers who are reasonably presumed to mean what they say and say what they mean, conclusively demonstrates defense counsel's understanding that plaintiffs' counsel was unambiguously, unequivocally, and undeniably communicating that his client was withdrawing from the transaction. The same cannot be said of the December 5 text which references a "new lease" and does not otherwise reference a specific transaction or space, much less those in issue. Thus, the text raises no triable issue.

For these reasons, the January 29 email clearly communicates, *prima facie*, that 577, the prospective tenant, was exercising its option to withdraw from the transaction, and defendant raises no triable issue.

Given the dictates of paragraph 25.4(c) of the lease, that "[n]otwithstanding any provision of this lease, or any laws to the contrary, or the execution of this lease by Tenant," neither party will be bound by or benefit from the it "unless the lease is signed and delivered by" both parties, plaintiffs also demonstrate, *prima* facie, that absent at least the delivery of the lease by defendant before plaintiffs had withdrawn from the transaction, they were not bound by it. (*See* NY Jur 2d, Contracts § 14 [2020] ["where parties have agreed that delivery is essential to the making of a contract, there is no agreement without it"]). Given the requirement of delivery by both parties and absent a specific waiver of it, it was not, nor could it have been, waived. (*See e.g., Felipe v 2820 W. 36th St. Realty Corp*., 20 AD3d 503 [2d Dept 2005] ["(b)ecause the delivery requirement was a condition precedent to the formation of any binding agreement, it could not be waived by the defendant."]; *Brois v DeLuca*, 154 AD2d 417 [2d Dept 1989] [same]).

For these reasons, plaintiffs demonstrate, *prima facie*, that having withdrawn from the transaction before defendant delivered the lease, they are not bound by it, and defendant raises

no triable issue of fact.

Nor does the alleged partial performance raise an issue of fact here as partial performance cannot establish the formation of the contract in derogation of the clear contractual language by which the contract becomes effective. (*See* 28 NY Prac, Contract Law § 3:29 [2020] [as partial performance requires some actual performance of alleged contract, actions taken in anticipation of contract are not considered partial performance, such as drafting and exchanging documents]).

A party seeking such estoppel must show, *inter alia*, that it justifiably relied on the conduct of the other party. (*River Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120 [1st Dept 2005]). According to defendant's principal, the proposed lease was sent to plaintiffs in October 2018. On December 7, 2018, despite having no signed lease and no payment from plaintiffs, defendant paid a contractor to begin the buildout of the space. While defendant contends that it did so because it was required by the lease to complete the buildout by the agreed-upon lease commencement date of February 1, 2019, the lease itself permits defendant to postpone that date if the buildout was not complete by then, and it was not until January 2019 that plaintiff paid the down payment and signed the lease. (NYSCEF 57).

Thus, while defendant argues that it relied on the October 2018 proposed lease in commencing the buildout (*id.*), such reliance was neither reasonable nor justifiable. When defendant began the buildout, plaintiffs had neither signed the lease, nor paid the $96,000, and defendant had no reasonable basis for believing that plaintiffs had accepted the proposed lease and would be taking possession of the premises, especially considering that the lease specifically provided that it was not binding until it was both signed and delivered.

Essentially, therefore, defendant "jumped the gun" in building out the space before having a valid, binding lease in effect, and took the risk that there would be no binding

agreement, notwithstanding the oral representations made. That it lost money in doing so cannot be laid at plaintiffs' feet. In these circumstances, defendant cannot invoke any kind of equitable estoppel or part performance to bind plaintiffs to the lease. (*See e.g., Funk v Seligson, Rothman & Rothman, Esqs.*, 165 AD3d 429 [1st Dept 2018] [defendant did not show existence of binding agreement as agreement required that it be reduced to writing and signed before it became binding; there is no contract in interim even if parties orally agreed on all of terms of proposed contract; defendant also could not rely on equitable or promissory estoppel or part performance to establish binding agreement]; *see also King Penguin Opp. Fund III, LLC v Spectrum Group Mgt. LLC*, 187 AD3d 68 [1st Dept 2020] [plaintiff failed to plead claim for promissory estoppel as parties' agreement specifically required execution of further written agreement before either party was bound contractually; "it is unreasonable as matter of law for party to rely on other party's promises to proceed with transaction in absence of that further written agreement]; *Prospect St. Ventures I, LLC v Eclipsys Solutions Corp*., 23 AD3d 213 [1st Dept 2005] [as parties' agreement not executed as required as condition for it to be binding, promissory estoppel claim held insufficient as inclusion of condition in agreement prohibited plaintiff from alleging detrimental reliance to argue that agreement was binding, notwithstanding expenditure of time and money]). Defendant cites no apposite authority.

Defendant's reliance on the lease provision governing notices is also misplaced, given the preface to paragraph 25.4(c): "Notwithstanding any provision of this lease, or any laws to the contrary, or the execution of this lease by Tenant . . ." *Maxton Bldrs.v Lo Galbo*, 68 NY2d 373 (1986), is not to the contrary. Nor is *Justin Lerner v Newmark & Company Real Estate, Inc., et al.*, 178 AD3d 418, 419 (1st Dept 2019). There, the Court observed that "where the evidence supports a finding of intent to be bound, a contract will be unenforceable for lack of signature

only if the parties 'positive[ly] agree[d] that it should not be binding until so reduced to writing and formally executed.'" Here, the parties positively agreed that the lease would be unenforceable absent, *inter alia*, delivery by both parties, a condition that was not met before plaintiffs had effectively withdrawn from the transaction.

2. Conversion

An action for conversion of money may be made out "where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (*Thys v Fortis Sec. LLC*, 74 AD3d 546, 547 [1st Dept 2010], quoting *Manufacturers Hanover Trust Co. v Chemical Bank,* 160 AD2d 113, 124 [1st Dept 1990], *lv. denied* 77 NY2d 803 [1991]). Thus, the $96,000 paid by plaintiffs as a deposit is recoverable in an action for conversion.

Here, plaintiffs demonstrate, *prima facie*, that 577 had successfully withdrawn from the transaction, thus entitling them to a return of the entire and specifically identifiable deposit of $96,000, and that defendant wrongfully exercised dominion and control over those funds by refusing counsel's demand for their return. That defendant had the funds and then spent them is immaterial, as is defendant's alleged good faith.

3. Unjust enrichment

Having found for plaintiffs on their cause of action for conversion, the cause of action for unjust enrichment need not be addressed. In any event, "unjust enrichment is not an appropriate remedy for recovery of the expenses of a failed negotiation." (*Chatterjee Fund Mgt., L.P,. v Dimensional Media Assoc*., 260 AD2d 159, 160 [1st Dept 1999]).

III. CONCLUSION

Even had defendant specifically invoked CPLR 3212(f), it does not allege that discovery

would be of utility here, where the resolution of the issues rests on the documentation offered. As the only claims that remain are for a judgment declaring that the lease is unenforceable and that defendant cannot retain the money, and for a preliminary and permanent injunction related to the money, they are dismissed as academic.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for summary judgment on their claim for conversion is granted, and the remaining claims are severed and dismissed; it is further

ORDERED, that plaintiffs are granted judgment in their favor as against defendant in the sum of $96,000, with interest at the statutory rate from January 29, 2019 to entry of judgment in the sum of $_____, plus costs and disbursements as taxed by the clerk upon submission of an appropriate bill of costs in the sum of $_____, for a total sum of $_____; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.

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1/12/2021
DATE

BARBARA JAFFE, J.S.C.

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