

<b>LIK Hospitality LLC v Otway</b>
2022 NY Slip Op 32979(U)
August 31, 2022
Supreme Court, New York County
Docket Number: Index No. 651382/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

LIK HOSPITALITY LLC d/b/a FOXFACE,

Plaintiff,

- v -

LAWRENCE OTWAY, EUGENIE GILMORE, SCHEIB'S PLACE, INC. and THEATRE 80 LLC

Defendants.

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INDEX NO. 651382/2021

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

In this action arising from an agreement to operate a food concession at a Manhattan theater, the defendants move, pre-answer, to dismiss the first through fourth causes of action of the amended complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) and CPLR 3016(b). The plaintiff opposes the motion. The motion is denied.

II. BACKGROUND

In 2018, the plaintiff, by its principal, Ory Kushnir, a restaurant management professional, entered an agreement to operate a food concession within a bar, defendant Scheib's Place, Inc., which is located inside a theater on St. Mark's Place in Manhattan. Defendant Lawrence Otway is the principal of theater owner, defendant Theatre 80 LLC, and defendant Eugene Gilmore manages the bar. A sublease for the concession was allegedly drafted, but never signed, and has not been submitted to the court. The defendants rely upon a "Tenant Estoppel Certificate" and "Sub-Sub-Tenant Estoppel Certificate" ("Estoppel Certificate") allegedly signed by Kushnir and his wife, non-party Sivan Lahat, on November 11, 2019. The certificate states that it is being executed in regard to a "loan" made by non-party 80 St. Marks Place Funding LLC to defendant Scheib's Place, Inc., and that "the undersigned" (Kushnir and

Lahat), as sub-sub-tenants, were leased 200 square feet of space (“including a full kitchen”) on the ground floor of the premises and that no monthly rent was required to be paid until the costs of “turning the space into a vented white box kitchen with adequate plumbing are recouped by sub-sub-tenant” after which rent would be 8% of sales after credit card fees and taxes for two years, increasing to 10% thereafter. It also states that “sub-sub-tenant has accepted possession of the premises and all items to be performed by sub-sub-landlord have been completed, including, but not limited to, completion of construction thereof (and all other improvements required to be completed by sub-sub-landlord under the agreement).”

The amended complaint includes six causes of action – (1) fraudulent inducement (against defendants Otway, the bar and the theater), (2) breach of contract (against the bar), (3) quantum meruit (against the bar), (4) unjust enrichment (against the bar), (5) trademark infringement (against the bar), and (6) conversion (against all defendants). The plaintiff alleges that Kushnir, Otway and Gilmore first reached an agreement on a “sublease” for space in the bar in September 2018, but does not produce this purported agreement. The plaintiff claims that it never fully operated within the space. It contends that after it agreed to operate the concession, it discovered that the kitchen was not actually a functional kitchen, proper flooring was missing, and the wiring and ventilation systems required extensive repairs. The plaintiff alleges that the defendants were aware of and fraudulently concealed these poor conditions of the premises in order to induce it into entering a sublease agreement. The plaintiff further alleges that it incurred additional and unexpected costs, \$28,000.00, to repair and renovate the premises and was nonetheless still unable to fully operate the business due to the poor condition of the premises, in addition to restrictions resulting from the COVID-19 pandemic and consequent restrictions. When renovations were finally completed, the FDNY issued a safety violation for blocking an emergency exit path with a bartop, barstools and table and chairs. To cure the violation which, it alleges, the defendants had known about, the defendants removed all of the plaintiff’s dining furniture except one small table rendering the space unusable as a food concession and then sold food directly to theatergoers using the name of Foxface without permission of the plaintiff, resulting in an additional loss to the plaintiff of “hundreds of thousands of dollars in income.”

The defendants move, pre-answer, to dismiss the first through fourth causes of action of the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. In addition they assert (1) as to the first cause of action, fraudulent inducement, the grounds of

CPLR 3211(a)(1) and CPLR 3016 - a defense founded in documentary evidence and lack of particularity, and (2) as to the second cause of action, breach of contract, the ground of CPLR 3211(a)(1) and (a)(5), the Statute of Frauds. The defendants do not seek dismissal of the fifth and sixth causes of action, alleging trademark infringement and conversion. In support of the motion, the defendants submit a Memorandum of Law, the affidavit of defendant Otway and the Estoppel Certificate. The defendants argue, *inter alia*, that the complaint fails to allege that the plaintiff performed its own obligations under the parties' agreement, that the plaintiff did its due diligence in regard to the premises before entering the agreement or that, even if it was aware of the poor condition of the premises, it had a duty to disclose to the plaintiff. The defendants also argue that no one promised the plaintiff exclusivity on food sales. The plaintiff opposes the motion, submitting a Memorandum of Law, and affidavits of Ory Kushnir and Sivan Lahat, who both allege that they do not recall signing the Estoppel Certificate and that they believe their signatures were forged. The defendants reply by submitting a November 11, 2019, email of plaintiff's counsel forwarding the signed estoppel certificates to defendants' counsel.

#### 1. First Cause of Action – Fraudulent Inducement

The defendants have not established entitlement to dismissal of the fraudulent inducement cause of action, alleged against defendants Otway, the bar and the theater, on the grounds that it fails to state a cause of action (CPLR 3211[a][7]), there is a defense founded in documentary evidence (CPLR 3211[a][1]) and lack of particularity (CPLR 3016[b]).

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine 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). Where a cause of action of fraud is alleged, "the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). Contrary to the defendants' contention, however, the amended complaint is sufficiently detailed, for pleading purposes, to support a claim for fraudulent inducement. The complaint sets forth in detail the relevant events from September 2018 through December 2020, as summarized above. The plaintiff sufficiently alleges that it justifiably relied on the defendants' representations regarding the conditions and suitability of the premises for the operation of a food concession, that it would have exclusive rights to sell food at the theater, that those representations were false when made, that they were made with the purpose of inducing the

plaintiff the enter the agreement, and that the plaintiff sustained damages as a consequence of such false representations. Thus, the fraudulent inducement claim survives this motion. See Shugrue v Stahl, 117 AD3d 527 (1<sup>st</sup> Dept. 2014); Gosmile, Inc. v Levine, 81 AD3d 77 (1<sup>st</sup> Dept. 2010). Nor can it be reasonably argued that the plaintiff's cause of action for fraudulent inducement is duplicative of the breach of contract cause of action. A misrepresentation of present facts is collateral to the contract, even though it may have induced the plaintiff the sign it, and therefore involves a separate breach of duty. Gosmile, Inc. v Levine, supra.

Furthermore, dismissal under CPLR 3211(a)(1) is warranted only where 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 (1<sup>st</sup> Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1<sup>st</sup> Dept. 2014). That is not the case here. The Estoppel Certificate upon which the defendants rely, prepared in regard to a loan, does not conclusively dispose of the plaintiff's claims. This certificate, allegedly presented to the plaintiff by the defendants for signature a year after the parties' actual agreement, is unclear and appears to be an incomplete recitation of the terms of the parties' lease agreement. Indeed, the validity of the unnotarized signatures on the certificate itself is disputed.

## 2. Second Cause of Action – Breach of Contract

The amended complaint sufficiently pleads a cause of action for breach of contract against the bar by alleging : (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1<sup>st</sup> Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010). It is well settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1<sup>st</sup> Dept. 1995), aff'd 88 NY2d 716 (1996). The amended complaint alleges that the bar breached the sublease by failing to provide proper kitchen facilities and dining space to the defendant for the operation of its concession and further breached the sublease by directly selling food to its customers in violation of the exclusivity granted to the plaintiff. The absence of a signed written lease agreement between the parties does not require dismissal of this cause of action at this juncture. The existence of a binding agreement between the parties is an issue for the jury, as is the import, meaning and

validity of the estoppel certificate relied upon by the defendants. Thus, there is no basis demonstrated for dismissal of this cause of action under CPLR 3211(a)(7) or CPLR 3211(a)(5).

### 3. Third and Fourth Causes of Action - Quantum Meruit and Unjust Enrichment

The amended complaint sufficiently pleads causes of action for quantum meruit and unjust enrichment against the defendant bar as alternative theories of liability to the breach of contract cause of action. As a general rule, where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment or quantum meruit. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1<sup>st</sup> Dept. 2012); Steven Pevner, Inc. v Ensler, 309 AD2d 722 (1<sup>st</sup> Dept. 2003). That is, “[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., *supra* at 388. It is only where the validity or scope of the contract is in dispute that a plaintiff may plead a claim for unjust enrichment or quantum meruit in the alternative. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., *supra*; Henry Loheac, P.C. v Children’s Corner Learning Center, 51 AD3d 476 (1<sup>st</sup> Dept. 2008); ME Corp. S.A. v Cohen Brothers LLC, 292 AD2d 183 (1<sup>st</sup> Dept. 2002). Stated otherwise, a plaintiff is permitted to proceed in the alternative upon a quasi-contractual theory if there were a question as to whether a valid and enforceable contract exists. See Forman v Guardian Life Ins. Co. of America, 76 AD3d 866 (1<sup>st</sup> Dept. 2010). That is the case here.

The complaint meets the minimum requirements for pleading a cause of action for quantum meruit by alleging (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 service. See Fulbright & Jaworski, LLP v Carucci, 63 AD3d 487, 488-489 (1<sup>st</sup> Dept 2009); Soumayah v Minnelli, 41 AD3d 390, 391 (1<sup>st</sup> Dept 2007). The complaint also sufficiently alleges, for pleading purposes, a claim for unjust enrichment, in that it alleges that (1) the defendant was enriched, (2) at the plaintiff’s expense, and (3) “it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered.” Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972) (citations omitted).

While the plaintiff may not ultimately succeed on these claims, they are not subject to dismissal on this motion.

The court has considered and rejected the defendants' remaining contentions.

Any relief not expressly granted herein is denied.

The parties are encouraged to explore settlement.

**III. CONCLUSION**

Accordingly, upon the foregoing papers and after oral argument, it is


ORDERED that the defendants' motion is denied, and it is further

ORDERED that the defendants shall file an answer to the amended complaint within 45 days of the date of this order, and it is further

ORDERED that the parties shall appear for preliminary conference on November 10, 2022, at 12:30 p.m., and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

8/31/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE