Oink Ink Radio, Inc. v One Destiny Prods. Inc.
2023 NY Slip Op 32286(U)
June 29, 2023
Supreme Court, New York County
Docket Number: Index No. 650021/2016
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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OINK INK RADIO, INC., and W. DANIEL PRICE,

Index No. 650021/2016

Plaintiffs

- against -

DECISION AND ORDER

ONE DESTINY PRODUCTIONS, INC. d/b/a CREATIVE MEDIA DESIGN, and MICHAEL ZIRINSKY,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

The parties' dispute relates to an agreement for defendant One Destiny Productions, Inc., doing business as Creative Media Design, to sublet an office on the 12th floor of 37 West 37th Street to plaintiff Oink Ink Radio, Inc., for a recording studio. The entities signed a sublease, but Oink Ink Radio never received possession of the premises. Oink Ink Radio and its President, plaintiff Price, sue Creative Media Design and its Chief Executive Officer, defendant Zirinsky. Plaintiffs allege defendants' breach of the sublease in three separate claims, misrepresentation and fraud, unjust enrichment, in that defendants sublet the premises to another tenant for more rent and profited unjustly at plaintiffs' expense, and Zirinsky's defamation of Price and seek punitive damages and attorneys' fees

as well as compensatory damages. Defendants counterclaim for fraudulent and negligent misrepresentation against Price, for breach of contract against both plaintiffs in three separate claims, and for indemnification under the sublease against Oink Ink Radio and under a guaranty against Price.

Defendants now move for summary judgment dismissing all claims in the amended complaint and on plaintiffs' liability for defendants' first, third, fourth, sixth, and seventh counterclaims. C.P.L.R. § 3212(b). Plaintiffs cross-move for summary judgment on defendants' liability for plaintiffs' claims. Id.

II. PROCEDURAL DEFECTS

A. Defendants' Statement of Undisputed Material Facts

Plaintiffs ask the court to deny defendants' motion because defendants did not timely submit timely statement of undisputed material facts as required by 22 N.Y.C.R.R. § 202.8-g. According to defendants, the omission was a filing error, which they corrected March 10, 2022, as soon as they discovered it and before the return date for the motion March 25, 2022. NYSCEF Doc. 174. Plaintiffs raise no other issue regarding the document, nor seek to respond to the statement. Since plaintiffs identify no prejudice from the delay in filing, the court overlooks this minor defect. C.P.L.R. §§ 2001 and 2101(f). In fact the rule subsequently was amended to apply only if the court

so directs.

B. Zirinsky's Affidavit

Plaintiffs also ask the court to disregard Zirinsky's affidavit sworn outside New York without a certificate of conformity as required by C.P.L.R. § 2309(c). That statute gives "an oath or affirmation taken without the state" the same effect as an oath taken within the state if the oath includes a certification of the type required to record a deed in New York that was acknowledged outside New York. N.Y. Real Prop. Law § 309-b(1) and (2). Defendants contend that the Zirinsky affidavit's acknowledgment is an acceptable certificate of conformity, substantially similar to the requirements for a deed. Id. The Zirinsky affidavit's notary acknowledged that on December 16, 2021, Zirinsky, "personally known to me or proved to me on the basis of satisfactory evidence to be the individual described in and who executed the foregoing affidavit, and acknowledged that (s)he executed the same." Aff. of Michael Zirinsky, NYSCEF Doc. 127, at 6.

New York Real Property Law (RPL) § 309-b(1) provides a sample satisfactory certificate:

> On the _____ day of _____ in the year _____ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the

individual(s) acted, executed the instrument.
(Signature and office of individual taking acknowledgment.)

The Zirinsky affidavit's certificate is sufficiently close to the sample certificate that the court considers the affidavit to include the required certificate of conformity and accepts the affidavit in support of defendants' motion.

C. Price's Deposition

Finally, plaintiffs insist that defendants may not rely on Price's deposition because they never forwarded the deposition transcript to plaintiffs for his review, correction, and signature. C.P.L.R. § 3116(a). Plaintiffs never explain why they failed to raise their nonreceipt of the transcript to defendants, whose attorney attests that he mailed it to plaintiffs' attorney and, having received no changes, assumed defendants were entitled to rely on the unchanged testimony. Id. Nor do plaintiffs identify what corrections Price would have made or suggest that he denies any part of his testimony on which defendants rely. In fact, as demonstrated below, while plaintiffs rely on Price's deposition, defendants' use of his deposition is inessential to their motion and opposition to plaintiffs' cross-motion. Therefore the court permits both sides' use of Price's deposition. Singh v. New York City Hous. Auth., 177 A.D.3d 475, 475 (1st Dep't 2019); Tsai Chung Chao v. Chao, 161 A.D.3d 564, 564 (1st Dep't 2018); Shackman v. 400 E. 85th St. Realty Corp., 161 A.D.3d 438, 438 (1st Dep't 2018).

D. Plaintiffs' Excessive Cross-Motion

Defendants in turn point out that both plaintiffs' memorandum of law and their attorney's affirmation in opposition to defendants' motion and in support of plaintiffs' cross-motion violate 22 N.Y.C.R.R. § 202.8-b because each exceeds the word count limit. Both are extraordinarily repetitive and thus unnecessarily excessive: precisely what the word count limits are intended to prevent. Only after defendants responded did plaintiffs request permission to file the oversize documents. At that point, plaintiffs already had prejudiced defendants by requiring them to respond to the excessive cross-motion. Had plaintiffs eliminated all their repetition, they likely would have complied with the work count limits. Therefore, while the court does not condone plaintiffs' noncompliance, since defendants already responded, the court considers each of plaintiffs' points, whether made once or multiple times, as well as defendants' response.

III. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, the moving parties must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence eliminating all material factual issues. C.P.L.R. § 3212(b); Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d 173, 179 (2020); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v.

Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014). If the moving parties fail to make this evidentiary showing, the court must deny the motion. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Dorador v. Trump Palace Condo., 190 A.D.3d 479, 481 (1st Dep't 2021). Only if the moving parties meet this initial burden, does the burden shift to the non-moving parties to rebut that prima facie showing by producing admissible evidence sufficient to require a trial of material factual issues. Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d at 179; De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008). In evaluating the evidence for purposes of a summary judgment motion, the court construes the evidence in the light most favorable to the non-moving parties. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d at 475; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503.

IV. BREACH OF CONTRACT CLAIMS
(First, Fifth, and Eighth Claims and Third and Fourth Counterclaims)

Although plaintiffs refer to their amended complaint's first, fifth, and eighth claims as distinct breach of contract claims, they are merely different components of one claim. Plaintiffs' first claim alleges that defendants breached the sublease by failing to deliver possession of the leased premises to plaintiffs. Their fifth claim alleges that Creative Media Design negligently, recklessly, and intentionally breached the sublease by failing to supervise the corporation's officers or employees. Plaintiffs' eighth claim alleges their damages from defendants' breach: expenses preparing the premises for plaintiffs' occupancy and use, their lost opportunity to use that space or to find alternate space, and the cost of their eventual alternate space.

To establish breach of a contract, a party must demonstrate a contract, that party's performance, another party's breach, and damages from the breach. Alloy Advisory, LLC v. 503 W. 33rd St. Assocs., Inc., 195 A.D.3d 436, 436 (1st Dep't 2021). Plaintiffs and defendants do not dispute that there was an agreement between them to sublease the premises, memorialized in the sublease. The parties dispute whether the sublease is enforceable and which, if any, parties performed their obligations pursuant to that agreement or breached it. Defendants contend that the

overlandlord's consent to the sublease was a condition precedent for the sublease to become binding. Based on Zirinsky's affidavit that the overlandlord did not consent before January 15, 2015, the deadline set by the sublease, defendants maintain that the sublease is unenforceable, excusing their performance.

Price testified at his deposition, however, that the overlandlord approved the sublease in an email from Michael Moorin of Newmark Grubb Knight Frank, the overlandlord's agent, to Zirinsky December 23, 2014, which Zirinsky forwarded to Price. Price's affidavit clarifies that Moorin advised the overlandlord would approve the sublease "first thing after the new year," Aff. of W. Daniel Price, NYSCEF Doc. 146, ¶ 27; Aff. of Brian Kimmel Ex. B, NYSCEF Doc. 149, at 1, but also attests that, in these emails, Zirinsky himself indicated the overlandlord would approve the sublease, Price Aff. ¶ 22, and defendants were "moving forward with the subleasing of the premises to Oink Ink." Id. ¶ 28.

Plaintiffs contend that the overlandlord further indicated its approval by sending a draft consent to sublease form to plaintiffs, fulfilling the sublease's requirement for overlandlord consent. Finally, Price attests that the overlandlord provided the final formal consent forms January 21, 2015, a de minimis six days late, obligating Creative Media Design to perform under the sublease. Id. ¶ 36.

The sublease provides that:

> Should the Sublessor fail to receive the Overlandlord's consent to this agreement on or before January 15, 2015, then this agreement shall be null and void and neither party shall have any further recourse against the other (other than Sublessor returning any security deposit and advance rental payment by Subtenant, if any).

Zirinsky Aff. Ex. E (Sublease), NYSCEF Doc. 133, ¶ 22. Unlike MHR Capital Partners LP v. Presstek, Inc., 12 N.Y.3d 640, 645 (2009), on which defendants rely, here the agreement does not specify how the nonparty overlandlord must manifest consent or even that it be in writing. At minimum, the overlandlord's email to Zirinsky December 23, 2014, raises a factual issue whether the overlandlord timely consented to the sublease and thus whether the sublease is enforceable against defendants.

Based on Zirinsky's affidavit that plaintiffs failed to provide proof of insurance or a security deposit plus the first month's rent to defendants, defendants alternatively contend that, if the sublease is enforceable, plaintiffs' breach of contract claims fail because plaintiffs breached the sublease first. Therefore defendants were never obligated to deliver possession of the premises to plaintiffs.

Paragraph 11 of the sublease required Oink Ink Radio to provide proof of insurance to Creative Media Design before Oink Ink Radio took possession of the premises. Oink Ink Radio does not deny that it did not provide that proof of insurance, but Price authenticates emails among his staff showing it was

preparing to do so in December 2022. Kimmel Aff. Ex. P, NYSCEF Doc. 163. Most significantly, plaintiffs never took possession of the premises. Since the only deadline by which Oink Ink Radio was to provide proof of insurance was before taking possession of the premises, which defendants never permitted plaintiff to do, their failure to provide proof of insurance hardly may be considered a material breach of the sublease.

Paragraph 4 of the sublease provides that plaintiffs were not liable for rent until they were in possession of the premises, as long as any delay in taking possession was due to renovations. Defendants do not dispute that plaintiffs never took possession, nor do defendants show that the renovations were complete so that the premises were ready for plaintiffs' possession.

Paragraph 6 of the sublease required plaintiffs to pay a security deposit to Creative Media Design upon the signing of the sublease. Again plaintiffs do not dispute that they never paid the security deposit. Price attests that Creative Media Design acted as if the signed sublease was valid without the security deposit, which plaintiffs cast as ratifying the sublease and indicating that their failure to deliver the deposit was not a material breach. They further insist that standard commercial real estate practice allowed a tenant to provide a security deposit after execution of a lease, as long as the tenant

provided the deposit before the tenant took possession of the premises, so for this reason as well plaintiffs' delay in providing the deposit was not a material breach of the sublease.

For a failure to perform a contractual obligation to constitute a material breach of the contract, the obligation must be so essential to the agreement that the obligation's omission defeats the parties' object in entering the contract. Feldmann v. Scepter Group, Pte. Ltd., 185 A.D.3d 449, 450 (1st Dep't 2020); Bisk v. Cooper Sq. Realty, Inc., 115 A.D.3d 419, 419 (1st Dep't 2014). "[T]he mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract." ADC Orange, Inc. v. Coyote Acres, Inc., 7 N.Y.3d 484, 489 (2006) (quoting Ballen v. Potter, 251 N.Y. 224, 228 (1929)). Under these standards, Oink Ink Radio's delay in providing the security deposit was not a material breach of the sublease that excused Creative Media Design's performance.

Since defendants fail to establish as a matter of law either that the sublease was void due to the absence of a condition precedent or that plaintiffs materially breached the sublease first, the court denies defendants' motion for summary judgment dismissing plaintiffs' first, fifth, and eighth claims for Creative Media Design's breach of the sublease. C.P.L.R. § 3212(b). Since plaintiffs nowhere indicate any basis on which Zirinsky may be liable under the sublease, however, the court

grants defendants' motion for summary judgment dismissing plaintiffs' first, fifth, and eighth claims for breach of the sublease against Zirinsky. C.P.L.R. § 3212(b) and (e). The court also denies defendants summary judgment on plaintiffs' liability for breach of the sublease due to their nonpayment of a security deposit and the first month's rent, alleged in defendants' third counterclaim, and due to Oink Ink Radio's failure to provide proof of insurance, alleged in defendants' fourth counterclaim. C.P.L.R. § 3212(b).

Based on Zirinsky's nonliability and the factual issues whether the sublease is enforceable against Creative Media Design, the court also denies plaintiffs' cross-motion for summary judgment on defendants' liability for breach of the sublease. Since defendants do not dispute that the deadline for proof of insurance was before plaintiffs took possession of the premises, and defendants never permitted plaintiffs' possession, the court searches the record of defendants' motion on their fourth counterclaim and grants plaintiffs summary judgment dismissing that counterclaim even though they did not cross-move for that relief. Id.; Otto v. Otto, 192 A.D.3d 517, 518 (1st Dep't 2021). See Dunham v. Hilco Constr. Co., 89 N.Y.2d 425, 429-30 (1996).

V. MISREPRESENTATION AND FRAUD CLAIMS
(Second and Third Claims and First Counterclaim)

A. Plaintiffs' Claims

Misrepresentation is not a tort, but negligent misrepresentation is. To succeed on a negligent misrepresentation claim, plaintiffs must establish that they shared a special relationship, like privity, with defendants, imposing a duty on them to provide accurate information to plaintiffs; that defendants provided inaccurate information to plaintiffs; and that plaintiffs reasonably relied on the information. Pope Invs. II LLC v. Belmont Partners, LLC, 214 A.D.3d 484, 485 (1st Dep't 2023); Pruss v. AmTrust N. Am. Inc., 204 A.D.3d 620, 620 (1st Dep't 2022). The special relationship must predate the transaction in which defendants made the misrepresentation. Gregor v. Rossi, 120 A.D.3d 447, 448 (1st Dep't 2014). See Balanced Return Fund Ltd. v. Royal Bank of Canada, 138 A.D.3d 542, 542 (1st Dep't 2016). Plaintiffs fail to show that the parties shared a special relationship rising to the level of privity before their sublease transaction. Pruss v. AmTrust N. Am. Inc., 204 A.D.3d at 620. See Balanced Return Fund Ltd. v. Royal Bank of Canada, 138 A.D.3d at 542. Therefore the court grants defendants' motion for summary judgment dismissing plaintiffs' second claim and that part of their third claim that alleges negligent misrepresentation and denies plaintiffs' cross-motion for summary judgment on these claims. C.P.L.R. § 3212(b).

To succeed on a fraudulent misrepresentation claim, plaintiffs must establish "misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." Dembeck v. 220 Cent. Park S., LLC, 33 A.D.3d 491, 492 (1st Dep't 2006). See Genger v. Genger, 152 A.D.3d 444, 445 (1st Dep't 2017); R. Vig Props., LLC v. Rahimzada, 213 A.D.3d 871, 872 (2d Dep't 2023). To support their third claim, Price attests that Zirinsky advised plaintiffs the overlandlord had not consented to the sublease, and he repeatedly misrepresented to plaintiffs that defendants were trying to convince the overlandlord to agree, all the while knowing the overlandlord already had consented. Price further attests that plaintiffs detrimentally relied on defendants' misrepresentations by wasting time and resources to prepare the premises for Oink Ink Radio to move into the premises when ultimately it was not allowed to take possession. This reliance in continuing to renovate the premises in the hope of moving in, based on defendants' misrepresentations that the overlandlord had not consented to the sublease, however, was unreasonable. Plaintiffs admit they were being advised the overlandlord had not granted consent, yet they knew the overlandlord's consent was required for Oink Ink Radio to take possession of the premises.

Plaintiffs claim a second misrepresentation by defendants: that they were actively trying to obtain the overlandlord's

consent. Even assuming this active attempt was in fact a misrepresentation, it raises only a tentative possibility that plaintiffs would be allowed to take possession of the premises. A tentative possibility still does not justify reliance on that possibility so as to charge defendants with the risk plaintiffs took in expending time and resources on renovation of the premises.

The final misrepresentation by defendants that plaintiffs claim, that the overlandlord ultimately decided not to approve the sublease, fails because plaintiffs neither allege nor present any evidence of any action taken in reliance on that claimed misrepresentation. Any claim based on this last misrepresentation, moreover, duplicates plaintiffs' breach of contract claim. Therefore the court grants defendants' motion for summary judgment dismissing plaintiffs' third claim for fraud and denies plaintiffs' cross-motion for summary judgment on defendants' liability for fraud. C.P.L.R. § 3212(b).

B. Defendants' Counterclaim

Defendants first counterclaim alleges Price's fraudulent representation when, as Zirinsky attests, he confronted Price with evidence of his prior bankruptcies and tax liens, and Price misrepresented Oink Ink Radio's financial history to Zirinsy to reassure defendants. Zirinsky further attests that defendants then relied on those misrepresentations in proceeding with the

sublease.

Applying the same standards applied to plaintiffs' fraudulent misrepresentation claim, defendants do not establish justifiable reliance on any alleged misrepresentations by Price because, even after defendants obtained contradictory information from their independent research, they continued their negotiations regarding the sublease. Therefore the court denies defendants' motion for summary judgment on their first counterclaim, searches the record, and grants plaintiffs summary judgment dismissing the first counterclaim even though plaintiffs did not cross-move for that relief, as the first counterclaim, like the fourth, is the subject of defendants' motion for summary judgment. C.P.L.R. § 3212(b); Otto v. Otto, 192 A.D.3d at 518. See Dunham v. Hilco Constr. Co., 89 N.Y.2d at 429-30.

VI. UNJUST ENRICHMENT
(Fourth Claim)

Plaintiffs' fourth claim alleges that any profits defendants realized in subletting the premises to another subtenant at a higher rent constitute unjust enrichment: if the sublease is unenforceable because defendants delayed or discouraged the overlandlord's approval, for example, and then reaped the benefits of plaintiffs' renovations and another subtenant's higher rent. To succeed on an unjust enrichment claim, plaintiffs must establish that defendants were enriched at plaintiffs' expense, and "it is against equity and good

conscience to permit [defendants] to retain what is sought to be recovered." Columbia Mem. Hosp. v. Hinds, 38 N.Y.3d 253, 275 (2022).

Zirinsky attests that the subsequent subtenant actually paid less than Oink Ink Radio would have under the sublease at issue. Zirinsky Aff. ¶ 19. Plaintiffs respond that they requested any subsequent sublease during disclosure, but defendants failed to produce any. Plaintiffs therefore ask for an adverse inference from defendants' failure to produce a subsequent sublease: that it would reflect a higher rent than the rent to which plaintiffs and defendants agreed.

Although plaintiffs' attorney affirms that plaintiffs requested subsequent subleases, he does not present or even quote the disclosure demands. Kimmel Aff., NYSCEF Doc. 145. Defendants contend that no disclosure order required them to produce those documents that, according to defendants, would evidence their financial damages as alleged in their counterclaims. Reply Aff. of Mark B. Stumer, NYSCEF Doc. No. 177, ¶¶ 26-27, Exs. C-D, NYSCEF Docs. 181-82. Defendants do not deny they possess the subsequent sublease, which they implicitly acknowledge is relevant to plaintiffs' unjust enrichment claim by offering Zirinsky's affidavit about the subsequent sublease's contents. Because his recitation of the document's contents is hearsay, however, the court denies defendants' motion for summary

judgment dismissing plaintiffs' unjust enrichment claim. C.P.L.R. § 3212(b); People v. Slade, 37 N.Y.3d 127, 140 (2021).

Because plaintiffs fail to show they requested the document in disclosure, on the other hand, the court denies an adverse inference at this juncture and denies their cross-motion for summary judgment on this claim based on the adverse inference. Ange v. Holley-Ange, 121 A.D.3d 595, 596 (1st Dep't 2014). Nor are plaintiffs entitled to summary judgment on any other basis, as they fail to present evidence that defendants did sublet the premises to a nonparty tenant for a higher rent. C.P.L.R. § 3212(b). Moreover, the unjust enrichment claim survives only as an alternative to plaintiffs' claim for breach of the sublease, in the event the sublease is unenforceable.

Nevertheless, if at trial plaintiffs pursue this alternative claim and show they requested the subsequent sublease, defendants shall be precluded from introducing it, C.P.L.R. § 3126(2); Wyatt v. Sutton, 185 A.D.3d 422, 422 (1st Dep't 2020); Crooke v. Bonofacio, 147 A.D.3d 510, 510-11 (1st Dep't 2017); Vandashield Ltd v. Isaacson, 146 A.D.3d 552, 556 (1st Dep't 2017); Mehta v. Chugh, 99 A.D.3d 439, 439 (1st Dep't 2012), and plaintiffs shall be entitled to an instruction to the factfinder that it may infer the subsequent sublease was for a higher rent than the rent to which plaintiffs and defendants agreed. Ortega v. City of New York, 9 N.Y.3d 69, 76 (2007); Alleva v. United Parcel Serv.,

Inc., 112 A.D.3d 543, 544 (1st Dep't 2013); Strong v. City of New York, 112 A.D.3d 15, 24 (1st Dep't 2013); Suazo v. Linden Plaza Assoc., L.P., 102 A.D.3d 570, 571 (1st Dep't 2013). If plaintiffs requested the document, defendants' withholding it is unexcused, regardless of the absence of a specific order. Violation of an order is not required for penalties pursuant to C.P.L.R. § 3126. Dabrowski v. ABAX Inc., 213 A.D.3d 451, 451 (1st Dep't 2023); Shchukin OU v. Iseev, 195 A.D.3d 431, 432 (1st Dep't 2021); Maxim, Inc. v. Feifer, 161 A.D.3d 550, 552 (1st Dep't 2018).

VII. PUNITIVE DAMAGES CLAIMS
(Fifth and Sixth Claims)

Plaintiffs allege two claims for punitive damages. One, the fifth claim, seeks punitive damages for defendants' breach of the sublease. Because punitive damages are intended to protect the public, they are available based on a breach of contract claim only when plaintiffs show "wanton dishonesty" and a "high degree of moral turpitude" directed at the public. Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603, 613 (1994) (quoting Walker v. Sheldon, 10 N.Y.2d 401, 405 (1961)); Macy's Inc. v. Martha Stewart Living Omnimedia, Inc., 127 A.D.3d 48, 58 (1st Dep't 2015); Leighton v. Lowenberg, 103 A.D.3d 530, 530-31 (1st Dep't 2013). See Eisenberg v. Weisbecker, 190 A.D.3d 549, 550 (1st Dep't 2021); International Plaza Assoc., L.P. v. Lacher, 63 A.D.3d 527, 528 (1st Dep't 2009). Since defendants

demonstrate that their conduct was not wantonly dishonest or highly immoral and in any event was directed only at plaintiffs, and plaintiffs' evidence fails to meet either applicable standard, the court grants defendants' motion for summary judgment dismissing that part of plaintiffs' fifth claim seeking punitive damages and denies plaintiffs' cross-motion for summary judgment awarding punitive damages for defendants' breach of the sublease. C.P.L.R. § 3212(b); Macy's Inc. v. Martha Stewart Living Omnimedia, Inc., 127 A.D.3d at 58; Leighton v. Lowenberg, 103 A.D.3d at 530-31.

The sixth claim is an independent claim for punitive damages, which is not legally cognizable. Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d at 616; Jean v. Chinitz, 163 A.D.3d 497, 498 (1st Dep't 2018). Therefore the court also grants defendants' motion for summary judgment dismissing plaintiffs' sixth claim and denies plaintiffs' cross-motion for summary judgment on this claim. C.P.L.R. § 3212(b).

VIII. DEFAMATION CLAIM
(Seventh Claim)

To succeed on a claim for defamation against Zirinsky, plaintiffs must show that he made a false statement tending "to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [plaintiff] in the minds of right-thinking persons, and to deprive [plaintiff] of their friendly intercourse in society." Foster v. Churchill, 87 N.Y.2d

744, 751 (1996); 3P-733, LLC v. Davis, 187 A.D.3d 626, 627 (1st Dep't 2020). Plaintiffs claim Zirinsky falsely stated to other persons that Price had petitioned for bankruptcy protection, that there were outstanding tax liens against him, and that Oink Ink Radio owed debts to other recording studios.

Defendants move for summary judgment dismissing the claim based on the affidavit by Zirinsky that he never made those statements and that, if he made them, they were true, as corroborated by Price's own deposition and by federal court records. Zirinsky Aff. ¶ 21; Aff. of Mark B. Stumer Ex. D, at 44-45, 49-52, 57-60, Ex. G, NYSCEF Docs. 132, 135. Zirinsky's attestation that he never made any such statements establishes a prima facie defense supporting summary judgment dismissing plaintiffs' defamation claim.

Plaintiffs present no admissible evidence that Zirinsky did make those statements. Plaintiffs rely only on Price's affidavit that "I was . . . informed by some of the other guys at Hyperbolic Audio that Zirinsky had bad mouthed both Oink Ink and me personally . . . ." Price Aff. ¶ 100. Price's recitation of the account from the unidentified "guys at Hyperbolic Audio" constitutes hearsay, People v. Slade, 37 N.Y.3d at 140, and therefore, on its own, fails to raise a factual issue whether Zirinsky made the alleged defamatory statements. No corroboration of Zirinsky's unrebutted testimony is necessary to

entitle defendants to summary judgment. Therefore the court grants defendants' motion for summary judgment dismissing plaintiffs' defamation claim and denies plaintiffs' cross-motion for summary judgment on this claim since plaintiffs fail to establish a defamatory statement. C.P.L.R. § 3212(b).

IX. ATTORNEYS' FEES CLAIMS
(Ninth Claim and Sixth and Seventh Counterclaims)

Attorneys' fees are "incidents of litigation" and are not recoupable by the prevailing party unless recovery is provided by a contract, statute, or court rule. Sage Sys., Inc. v. Liss, 39 N.Y.3d 27, 31 (2022). Plaintiffs concede that neither the sublease at issue nor RPL § 234, which applies only to residential tenancies, provides a basis for granting plaintiffs attorneys' fees. Although plaintiffs concede that they pleaded their claim pursuant to any pertinent contract or statute, now they claim they are entitled to attorneys' fees based on defendants' bad faith, yet cite no contract, nor statute, nor other authority that entitles plaintiffs to attorneys' fees. Therefore the court grants defendants' motion for summary judgment dismissing plaintiffs' ninth claim for attorneys' fees and denies plaintiffs' cross-motion for summary judgment on that claim. C.P.L.R. § 3212(b).

Defendants counterclaim that, if the sublease is enforceable, Oink Ink Radio is liable under the sublease, and Price is liable under his guaranty, for defendants' costs,

including attorneys' fees, in defending this action and seeking remedies pursuant to the sublease. Zirinsky Aff. Ex. E ¶ 5. Although it does not provide for attorneys' fees incurred by the subtenant, it does provide for attorneys' fees incurred by the sublandlord. Since factual issues remain whether the sublease is enforceable, however, and defendants have not yet prevailed in enforcing it, the court denies their motion for summary judgment on these counterclaims. C.P.L.R. § 3212(b).

X. CONCLUSION

For the reasons explained above, the court grants defendants' motion for summary judgment in part, denies their motion in part, and denies plaintiffs' cross-motion for summary judgment on their claims, but grants plaintiffs summary judgment dismissing defendants' first and fourth counterclaims. C.P.L.R. § 3212(b) and (e). The court dismisses plaintiffs' second, third, sixth, seventh, and ninth claims; fifth claim for punitive damages; and first, fifth, and eighth claims against defendant Zirinsky. Plaintiffs' first, fourth, and eighth claims and fifth claim except for punitive damages survive, but plaintiffs are not entitled to summary judgment on any of their claims. The court dismisses defendants' first and fourth counterclaims. The second, third, fifth, sixth, and seventh counterclaims survive, but defendants are not entitled to summary judgment on their third, sixth, or seventh counterclaim as their motion seeks, and

their second and fifth counterclaims survive because no party addresses them.

DATED: June 29, 2023

LUCY BILLINGS, J.S.C.

LUCY BILLINGS J.S.C