IRHA Invs. Ltd. v 540 W. 21st St. LLC
2023 NY Slip Op 33296(U)
September 21, 2023
Supreme Court, New York County
Docket Number: Index No. 651726/2021
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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IRHA INVESTMENT LIMITED,

Plaintiff,

- v -

540 WEST 21ST STREET LLC,540 WEST 21ST STREET DEVELOPMENT LLC

Defendant.

INDEX NO. 651726/2021

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 120

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the record before the court, discovery has confirmed that there was never a meeting of the minds as to the terms set forth in the April 10, 2020 letter (the **April 2020 Letter;** NYSCEF Doc. No. 90) and that either (i) the parties reached agreement based on the November 19, 2019 letter (the **November 2019 Letter;** NYSCEF Doc No. 92) or (ii) there was never a meeting of the minds between the parties. Either way, there are no issues of fact that the Plaintiffs are entitled to summary judgment as to their claim sounding in conversion because the Defendants have wrongfully acted to exercise dominion over the Plaintiffs' funds to the derogation of the Plaintiff's possessory rights by failing to return the funds to the Plaintiff (*Core Development Group LLC v Spaho*, 199 AD3d 447, 448 [1st Dept 2021]).

As discussed in the Decision and Order, dated January 13, 2022 (NYSCEF Doc. No. 34) and as now confirmed by the fully developed record, the Defendants in this case made an offer pursuant to the November 2019 Letter to the Plaintiff. In December 2019, the Plaintiff purported to accept the November 2019 Letter by email to the Defendants dated December 19, 2019 (NYSCEF Doc. No. 84). The problem however was that their purported acceptance did not conform with the terms of the November 2019 Letter because it was not accepted by December 13, 2019 as required (tr at 119-120, lines 23-12 [NYSCEF Doc. No. 72]). Subsequently, in January, 2020 (some four months before the April, 2020 Letter was generated and pursuant to certain emails [NYSCEF Doc. Nos. 85-89]) the parties agreed that the Plaintiffs would be allocated Units 6B and 7B (i.e., and not 7B and 8B as previously discussed) and that the additional capital contribution required of the Plaintiffs would be reduced by $500,000 as a result. Following significant prodding by the Plaintiffs as to how to proceed, the Defendants sent the April 2020 Letter. Inasmuch as it was different than the November 2019 Letter, the April 2020 Letter constituted a counter-offer. The April 2020 Letter materially changed the deal by requiring the Plaintiffs to accept a Promissory Note in place of the units if the Plaintiff did not execute the Operating Agreement of 540 W 21st Development LLC by October 12, 2020 (NYSCEF Doc. No. 90, § 2). The Plaintiffs did not accept the April 2020 Letter. Instead, they sent back the November 2019 Letter which, under the circumstances, constituted a new counteroffer (which counteroffer was consistent with the terms of the email exchange referred to above including by setting for the election for Units 6B and 7B and including the additional capital contribution indicated in the emails **sent months before the April 2020 Letter** was sent to the Plaintiffs. For their part, the Defendants accepted the money (NYSCEF Doc. No. 93, at

7)[1] and did not return it,[2] nor did they ever send the promissory note which they would be required to do pursuant to the April 2020 Letter. Thus, there simply isn't a shred of evidence that the April 2020 Letter governs this arrangement and that there as a meeting of the minds as to its terms. Accordingly, because either (x) the Defendants accepted the Plaintiff's counteroffer (the signed November 2019 Letter) and failed to deliver the required units in return for the Plaintiff's capital contribution or (y) no contract was entered into because there was never a meeting of the minds, and the Defendants improperly retained the Plaintiff's capital contribution following demand therefor (NYSCEF Doc. No. 94), the Plaintiff is entitled to summary judgment on its claim sounding in conversion (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

For completeness, the Defendants' are just wrong that the funds were comingled and therefore not subject to conversion. It is beyond question that the money at issue was a specific fund for a specific purpose (*Family Health Mgt., LLC v Rohan Devs., LLC*, 207 AD3d 136, 142 [1st Dept 2022]).

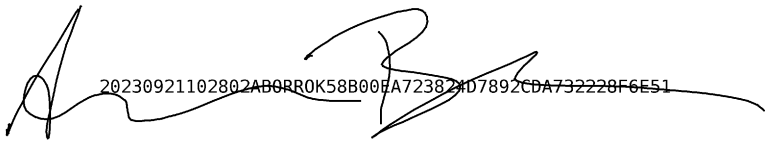
Accordingly, it is hereby ORDERED that the Plaintiff's motion (Mtn. Seq. No. 002) for summary judgment is granted; and it is further

[1] The Defendants' two principals testified that they received the money: Uri Chaitchik testified "I can confirm that we did receive $1,156,990" (tr at 130, lines 6-7 [NYSCEF Doc. No. 74]) and Noam Teltch testified "they invested 1,100,000, which is at issue here" (tr at 102-103, lines 25-2 [NYSCEF Doc. No. 73]).

[2] Mr. Chaitchik testified when asked whether the Defendants did not return the money because they spent it, "I certainly remember that we explained that the company does not have at the moment the money to return it (tr at 150-151, lines 24-3 [NYSCEF Doc. No. 74]).

ORDERED that the Defendants' motion (Mtn. Seq. No. 003) for summary judgment is denied; and it is further

ORDERED that the Plaintiff shall serve judgment on notice.



9/21/2023
DATE

ANDREW BORROK, J.S.C.

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