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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: FAVIOLA SOTO PART 7
Justice

Emanuel Hirsch

-v-

Food Resources, Inc.

INDEX NO. 602964/04
MOTION DATE 2/10/05
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3,4,5
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: February 23, 2005

FAVIOLA SOTO J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS Part 7

EMANUEL HIRSCH, ARTHUR HIRSCH and THE ESTATE OF SEYMOUR HIRSCH,
Plaintiffs,
-against-
FOOD RESOURCES, INC. d/b/a EASTERN MEATS and GERALD HIRSCH,
Defendants.

INDEX NO. 602964/04

DECISION & ORDER

HONORABLE FAVIOLA A. SOTO, J.:

Defendants move to dismiss the complaint pursuant to CPLR (a)(1) and (7). Plaintiffs oppose. Prior to their appearance on February 10, 2005, the parties were urged to resolve this dispute between themselves. This decision follows.

Background

In 1992, plaintiffs, who are brothers, and their brother, Sol Hirsch, now deceased (owner of eighty-three and one-third percent of the issued and outstanding stock), entered into a four page agreement entitled "Corporate Agreement of Food Resources, Inc." (the Agreement or the 1992 Agreement) with defendant Food Resources, Inc. d/b/a Eastern Meats (referenced as the Company in the complaint and the Corporation in the Agreement), with its principal offices located at 446 West 14th Street.

Paragraphs 1 and 2 provide for the redemption of stock owned by plaintiff Emanuel Hirsch, owner of sixteen and two-thirds of the issued and outstanding share of stock. Paragraph number 3 of that Agreement, entitled deferred compensation, provides:

> [u]pon the sale of the real estate known as 450 West 14th Street by the Corporation, the Corporation shall pay, within 30 days after the closing as deferred compensation, an amount equal to twelve and one- half (12 ½ %) percent of the net proceeds of sale of the said real estate to EMANUEL HIRSCH, SEYMOUR HIRSCH and ARTHUR HIRSCH, each, or their estates.

The Agreement further provides, in paragraph 4, that in "the event that any terms of prior agreements between the parties conflict with the terms of this Agreement, then this Agreement shall be construed as controlling the intention of the parties and shall supercede such other agreement and revoke any other agreements which may be contrary to this Agreement". The Agreement provides that it is binding on and shall inure to the benefit of the parties and their heirs. The Agreement was signed by the Corporation (by its President, Sol Hirsch), and by Emanuel Hirsch, Seymour Hirsch, and Arthur Hirsch; while the copy before the court does not contain his signature, a signature line was also provided for Sol Hirsch.

By 38 page document with exhibits entitled "Net Lease" and dated June 1, 2004, 450 West 14th Street Corp., as landlord, entered into an agreement with High Line Development LLC, as tenant (the Lease). The Lease provides for, inter alia, a rental term for 49 years for the premises located at 450 West 14th street, with tenant paying an annual rent, for the first year, of $900,000.00, in equal monthly installments, and, thereafter, paying an annual rent increasing at 3%, with a free rent credit(s) in the amount of $450,000.00, to be applied as set forth in the Lease, and additional rent as specified in the Lease. The Lease further provides for tenant's payment of $977,676.00, to be paid at various times, representing the first full month's net rent and the net rent due for the last three months of the term.

Additionally, the Lease provides for: the Premises to be delivered to tenant "as is"; payment of a deposit for impositions or insurance premiums; utilities; use consistent with zoning, provided that without landlord's prior written consent, the premises shall be used only for prime retail and first class office use; damage by fire; waiver of jury trial; a no waiver clause;

indemnity; assignment and subletting; quiet enjoyment; notices; access to the premises; conditions of limitations (default); alterations; repairs; insurance; and landlord's right of re-entry. The Lease additionally provides for payment of a security in the sum of 2 million dollars, in the form of a letter of credit, and tenant's right of first refusal in the event the landlord desires to sell the premises to a non-affiliate.

The Complaint

By summons and complaint dated September 10, 2004, plaintiffs assert five causes of action against defendant Food Resources, Inc. d/b/a Eastern Meats (the Corporation) and defendant Gerald Hirsch, their nephew, arising from the Agreement and the lease agreement.

The complaint first recites the history of the Company, the history of the family's relationships, and the rise of property values in the meat packing area where the Company is located. Plaintiffs assert that the "understandings, intentions and agreements at issue in this case involve Plaintiffs' rights to the proceeds from a disposition of certain real property owned" by the Company at 450 West 14th Street (450 Property) , and are based on "a long-time understanding among the four Hirsch brothers-ultimately memorialized in a written agreement shortly before the death of Sol Hirsch-[whereby] each Plaintiff is entitled to receive from Food Resources a payment equal to 12.5% of the proceeds from any disposition of the 450 Property".

Plaintiffs then assert that defendant Gerald Hirsch "orchestrated an ill-conceived scheme to deprive" them of the brothers' intentions and the written agreement, and "appropriate[d]" for himself the millions of dollars rightfully belonging to them. Plaintiffs term the Lease a "sweetheart 49-year lease", and refer to a non-refundable $4 million deposit, an option to buy in 10 years for an additional $8 million, and the creation of a zoning parcel merger permanently

conveying the development rights.

The complaint proceeds to provide the facts and circumstances of the claims, and then alleges five causes of action. Three are against the Corporation: for breach of oral contract, breach of the Agreement, and breach of the covenant of good faith and fair dealing. The fourth cause of action, for tortious interference with contract, is against defendant Gerald Hirsch. The fifth cause of action in unjust enrichment is against both defendants.

The Motion to Dismiss

Defendants now move to dismiss the complaint based upon documentary evidence and for failure to state a cause of action. They rely upon the terms of the 1992 Agreement and the Lease, and argue, inter alia, that the action must be dismissed, as no sale has occurred and the causes of action are invalid as a matter of law. In their supporting memorandum, they argue that: any prior agreement was merged into the Agreement; the Agreement's use of term "sale"is clear and is not ambiguous; extrinsic parol evidence may not be introduced to alter or expand upon the clear and express terms and scope of the Agreement; the deferred compensation term is unenforceable by reason of the rule against perpetuities; the claim for breach of an implied duty of good faith and fair dealing does not give rise to an independent cause of action separate from the breach of contract claim; plaintiffs failed to set forth a cause of action for tortious interference and for unjust enrichment.

In opposition, plaintiffs submit three affidavits and one affirmation. The three affidavits are from a former accountant from Food Resources, an independent real estate developer and consultant, and plaintiff Emanuel Hirsch. The affirmation is from one from plaintiffs' original attorneys, who attaches a letter he states is from Gerald Hirsch to Emanuel Hirsch dated October

30, 2001.

The three affidavits recount, inter alia, the 1992 Agreement and prior conversations or dealings with Sol Hirsch, the history of the business, the history of the leasing of 450, affiants' understanding or "estimation" of Sol Hirsch's intent, and conversation(s) with Gerald Hirsch as to evaluating different arrangements or strategies for development and disposition of the property and alleged statements made by him.

Emanuel Hirsch's affidavit further states that the redemption price set forth in the Agreement was steeply discounted so as to not include the 450 Building value, and he and his brothers "entered into the 1992 Agreement with the expectation and understanding that Food Resources was required to sell the 450 Building when it could, and that Food Resources did not have the unilateral right to decide not to sell the building". He proceeds to assert that he "never would have agreed to redeem" his stock at a discounted value unless the Company was required to sell the building so that he would be paid the full value of his stock. He further asserts that Gerald Hirsch, on several occasions, "reaffirmed and acknowledged" orally and in writing, the Company's obligation to pay him and his brothers "a percentage of the proceeds from any disposition of the 450 Property-i.e. sale, long-term lease or refinance and redevelopment".

Attached to the attorney affirmation is a letter, on company letterhead, addressed to Emanuel Hirsch; no name is listed or typed, a signature or initial is provided but it is not clear. The letter states that in "reviewing your request for additional funds to alleviate your current financial burden", the author provides that: he will send a check for $500 for each week for the next 460 weeks; "this amount, if paid in full, is equal to two hundred thirty thousand($230,000) or the same sum that was agreed to acquire your interest in the net proceeds from the sale" of

450, with the sums to "be treated as deferred compensation as previously agreed by you and shall be credited towards that purchase price". The letter further advises that there is no pending transaction to sell or lease the building, and that the sums are advanced "in anticipation of a future transaction". The letter further provides that notwithstanding "the unknown of this future transaction, the weekly payments shall be considered an advance ...towards the agreed price of two hundred thirty thousand dollars ($230,000) for your interest in the net proceeds of a sale of the building", and the payments shall end upon early death with the balance payable to his estate at "such time as a sale or leasing of the building has occurred".

In their opposing memorandum, defendants argue that they do not assert that the term "sale" in the agreement is ambiguous, or that the Lease is a sale. Rather, they argue that pursuant to the oral agreement and the subsequent 1992 Agreement, plaintiffs have an unconditional right to the 12 1/5% deferred compensation proceeds, the Company was obligated to sell the building within a reasonable time, and t the Company breached the oral and written agreement by leasing and not selling 450 and by not making the deferred compensation payments to plaintiffs upon the lease. They further argue that the deferred compensation provision does not violate the Rule Against Perpetuities, the 1992 Agreement was modified by post-execution conduct, and the complaint states claims for breach of the covenant of good faith and fair dealing, for tortious interference with contract, and for unjust enrichment.

In their reply memorandum, defendants argue that plaintiffs conceded in their memorandum that the term "sale" in the 1992 Agreement is not ambiguous, and, therefore, that the Agreement has not been triggered. They argue that, therefore, there is no dispute that the claims set forth in the first and second causes of action for damages arising from an alleged sale

should be dismissed. They further argue that plaintiffs have failed to defeat their showing that the remaining claims must be dismissed.

Discussion

Dismissal of a complaint is warranted where the documentary evidence resolves the factual issues as a matter of law. Goldman v. Metropolitan Life Insurance Company, 13 A.D.3d 289. Where the documentary evidence flatly contradicts the complaint's factual allegations or legal conclusions, the complaint's allegations are not presumed to be true and are not accorded favorable inference. Ark Bryant Park Corp. v. Bryant Park Restoration Corp., 285 A.D.2d 143. The "interpretation of an unambiguous contract is a question of law for the court, and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint". Taussig v. Clipper Group, L.P., 13 A.D.3d 166.

Applying those standards herein, the motion to dismiss the contract claims based on documentary evidence is granted. Contrary to plaintiffs' allegations, the terms of the unambiguous Agreement provide that plaintiffs receive the 12 ½ % upon the "sale" of the property. There has been no sale here. Nor may plaintiffs rely upon an alleged prior oral agreement, or on parole evidence, to contradict the clear terms of the Agreement. Similarly, their recitations in the complaint or elsewhere as to their and the other parties' intent or prior oral agreement are flatly contradicted by the clear terms of the Agreement, and the Agreement itself provides that it is controlling in the event of conflict.

As here it is the intent and obligations of the parties as ascertained by the Agreement's language that govern, and as the Agreement does not state that the property must be sold, or that plaintiffs' receive their 12 ½ % upon any disposition of the property, or upon the leasing of the

property, plaintiffs' first and second causes of action must be dismissed.

Nor does the remaining complaint withstand dismissal for failure to state a cause of action. The complaint does not state a valid separate cause of action for breach of the covenant of good faith and fair dealing. There can be no unjust enrichment claim where the defendants had the right to act as they did pursuant to the contract, where the unjust enrichment claim hit is redundant of the breach of contract claim, and where there exists a valid and enforceable written contract. See Brown v. Brown, 12 A.D.2d.3d 176; Katz v. American Mayflower Life Insurance Company of New York, 788 N.Y.S. 2d 15. The cause of action alleging tortious interference with contract fails for these reasons as well, and because plaintiffs have failed to set forth the requisite elements, including the commission of an independent tort. See John Hanson & Co. v. Everlast World Boxing Headquarters Corp., 296 A.D.2d 103, 109-110.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) is granted, and the Clerk shall enter judgment dismissing the complaint in favor of defendants and against plaintiffs, with costs and disbursements; and it is further

ORDERED that defendants shall serve notice of entry with a copy of this decision and order upon the County Clerk and the Trial Support Office within thirty days of entry.

Dated: New York, New York
February 23, 2005

FAVIOLA A. SOTO, J.S.C.

Copies mailed