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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7

Justice

PARALLAX AUDIO POST, INC., WAYNE LEONE, and WILLIAM IVIE,

Plaintiffs,

- v -

POW! PIX, INC. ROBERT BARZYK and SUSAN BROOKS,

Defendants.

INDEX NO. 110913/06

MOTION DATE 2/23/07

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

The following papers, numbered 1 to 14 were read on this motion to dismiss and cross motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-C	1-2
Notice of Cross Motion— Answering Affidavits — Exhibits	3-6
Replying Affidavits	7-14

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

FILED

JUL 17 2007

COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 7/3/07

New York, New York

J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

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

----------X

PARALLAX AUDIO POST, INC., WAYNE LEONE, and WILLIAM IVIE,

Plaintiffs,

Index No. **110913/06**

- against -

Decision and Order

POW! PIX, INC. ROBERT BARZYK and SUSAN BROOKS,

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

This action involves a dispute between a commercial tenant, Pow! Pix, Inc. (Pow! Pix) and a subtenant of the previous commercial tenant, plaintiff Parallax Audio Post, Inc. (Parallax). In October 2000, Parallax subleased space for audio post-production services from non-party Betelgeuse Productions, Inc. (Betelgeuse), at annual rent of $1. The terms of Parallax's sublease provide that the provisions of Betelgeuse's lease are part of Parallax's sublease. Paragraph 3 of Betelgeuse's lease provides that, "All property permitted or required to be removed, by Tenant at the end of the term remaining in the premises after Tenant's removal shall be deemed abandoned and may, at the election of Owner, either be retained as Owner's property or removed from the premises by Owner, at Tenant's expense." Betelgeuse surrendered possession due to financial difficulties, and Pow! Pix became the new tenant pursuant to a lease dated September 15, 2005.

It is undisputed that Pow! Pix and Parallax entered into negotiations to purchase Parallax's sound equipment. Because Parallax had allegedly financed the purchase of the equipment with a loan from the Small Business Administration, Parallax insisted, among other things, that Pow! Pix pay off the SBA loan. Plaintiffs Wayne Leone and William Ivie, co-owners of Parallax, allegedly

personally guaranteed the SBA loan. According to defendants, the negotiations broke down, and no agreement was reached. Plaintiffs maintain that defendants promised to pay off the SBA loan, but they alleged reneged. Plaintiffs also contend that they were fraudulently induced into surrendering keys to Parallax's studio space. The complaint alleges causes of action for breach of contract, unjust enrichment, conversion, and fraud. Defendants counterclaim, alleging slander, injurious falsehood, and prima facie tort.

Plaintiff's motion to dismiss defendants' first, second, third, and fourth counterclaims is granted without opposition. As plaintiffs indicate, defendants' first, second and third counterclaims seek damages based upon alleged defamatory statements that plaintiffs made, but defendants fail to specify the statements allegedly uttered. The fourth counterclaim alleges a threat to interfere with a "contractual relationship," but does not allege that plaintiffs actually tortiously interfered with any prospective contractual relation or with an existing contract. Therefore, the counterclaims fail to state valid causes of action.

As to the cross motion, defendants demonstrate their entitlement to summary judgment dismissing the first cause of action, for breach of contract. As defendants indicate, plaintiffs allege an oral contract, the terms of which must be in writing as required under the Statute of Frauds. Because the alleged terms require defendants to pay off the SBA loan over a period of six years (see Cramer Affirm. ¶ 50), the agreement must be in writing as a contract that cannot be performed within a year. See General Obligations Law § 5-701 (a). According to plaintiffs, defendants agreed to pay plaintiffs $50,000 for the equipment in Parallax's studios (see Cramer Affirm. ¶ 50), but any agreement to purchase goods for the price of $500 or more must be writing. UCC § 2-201.

In opposition, plaintiffs submit emails from defendants to establish the terms of the parties'

alleged agreement. However, this evidence does not satisfy the Statute of Frauds, because the emails are not signed by defendants. Moreover, plaintiffs have taken Barzyk's October 30, 2005 email out of context. The email states, in pertinent part:

> "Hi Wayne,
> I'm back from Breeders' Cup and I've been getting reports from Susan on the progress of our construction work as well as our agreement with you and Bill regarding the build out loan.
>
> Our attorney has asked for the original loan documents to review and ensure that any agreement we reach does not breach the terms with SBA. . . . .We need full disclosure **before an agreement can be reached**."

Maher Aff., Ex L (emphasis added). Even if the Statute of Frauds did not apply, defendants are still entitled to summary judgment. "It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." Scheck v Francis, 26 NY2d 466, 469-470 (1970). "[T]there is no contract in the interim, even if the parties have orally agreed upon all the terms of the proposed contract." Chatterjee Fund Mgt., L.P. v Dimensional Media Assoc., 260 AD2d 159, 159 (1st Dept 1999) (internal citations omitted).

Plaintiffs' reliance on the doctrine of promissory estoppel, which was not pleaded in the complaint, is misplaced. "The purpose of invoking the doctrine is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another." American Bartenders School v 105 Madison Co., 59 NY2d 716, 718 (1983). Here, the facts presented raise no triable issue of unconscionability, i.e., "even if all of plaintiff's allegations were taken to be true, they would not rise to the level of reliance and unconscionability such that the doctrine would be applicable." See Steele v Delverde S.R.L., 242 AD2d 414, 415 (1st Dept 1997).

Therefore, the first cause of action of the complaint is dismissed.

Plaintiffs' second cause of action, for unjust enrichment, is also dismissed. Although "the Statute of Frauds is not an automatic bar to a cause of action for unjust enrichment" (RTC Props. v Bio Resources., 295 AD2 285, 286 [1st Dept 2002]), plaintiffs are seeking to enforce defendants' promise to pay off the SBA loan, which is otherwise barred under the Statute of Frauds. See Complaint ¶¶ 49-50. Plaintiffs are simply recasting the allegations as a cause of action for unjust enrichment to circumvent the Statute of Frauds. See J.E. Capital v Karp Family Assocs, 285 AD2d 361, 362 (1st Dept 2001); American-European Art Assoc. v Trend Galleries, 227 AD2d 170, 171 (1st Dept 1996).

Plaintiffs' fourth cause of action, sounding in fraud, is dismissed as well. Plaintiffs allege that they handed over the keys to Parallax Studios to defendants because, in early November 2005, Barzyk and Brooks allegedly represented to Leone that Pow! Pix would begin reimbursing plaintiffs for SBA loan payments immediately. See Complaint ¶ 62. According to plaintiffs, defendants did not reimburse them for SBA loan payments once defendants obtained access. See id. ¶ 63. However, "plaintiff[s] cannot avoid the bar of the Statute of Frauds by labelling the cause of action as one to recover damages for fraud where, as here, proof of a contract, void under the Statute of Frauds, is essential to maintain the action." Bernbach v Camp Wah-nee in Berkshires, 176 AD2d 304, 305 (2d Dept 1991).

As to the third cause of action, for conversion, defendants argue that plaintiffs abandoned all personal property when Betelgeuse terminated its tenancy and vacated the premises. Defendants claim that, as an indication of good faith, they returned to plaintiffs any abandoned personal property or equipment. Fortuna Affirm. ¶¶ 13, 17. Plaintiffs do not dispute that defendants returned personal

property and equipment to them. Rather, plaintiffs contend that defendants converted trade fixtures, which include sound baffles, doors, lighting, custom and stock furniture, which plaintiffs had the right to possess and remove. See Cramer Affirm. ¶¶ 69-70. Defendants argue that plaintiffs installed permanent fixtures, which cannot be removed without causing material injury to the premises.

> "Trade fixtures are articles of personal property which a tenant places upon or annexes to the leased realty for the purpose of carrying on its trade or business during the term of its lease. . . . The trade fixtures of a tenant remain personal property so far as the right of removal is concerned, subject to the limitation that 'the removal must be accomplished without substantial injury to the freehold", not "without [any] injury to said property.'"

J.K.S.P. Rest. v County of Nassau, 127 AD2d 121, 125-126 (2d Dept 1987). Assuming the items at issue are trade fixtures, plaintiffs have no viable claim against defendants.

> "For reasons of public policy, a tenant may remove trade fixtures prior to the expiration of the lease or before the tenant quits possession, unless otherwise agreed to by the parties. However, where, as here, the tenant fails to remove the trade fixtures prior to quitting possession of the premises, it is presumed that the tenant has abandoned the property and title to the property passes to the landlord."

Modica v Capece, 189 AD2d 860, 861 (2d Dept 1993). This policy is also reflected in paragraph 3 of Betelgeuse's lease (see Maher Affirm., Ex E), the terms of which were binding upon Parallax by virtue of Parallax's lease with Betelgeuse. See id., Ex F.

The items that plaintiffs claim to be trade fixtures were not removed prior to Parallax quitting possession of the space, and there is no valid agreement in place between the landlord and Parallax as to these alleged trade fixtures. Assuming the items are trade fixtures, then the property would be presumed abandoned and title would pass to the landlord, because they were not removed. Nothing in the record indicates that Parallax communicated either to the landlord or to Pow! Pix its intent not to abandon the alleged trade fixtures. The emails annexed to plaintiffs' opposition papers discuss

other, specific equipment that plaintiffs wanted defendants to return, and not trade fixtures. Plaintiffs' emails do not mention the property at issue in this litigation. None of the documents submitted in opposition is addressed to landlord. Plaintiffs overlook the fact that Betelgeuse's lease with the landlord, whose terms are part of Parallax's sublease, provides that "All property permitted or required to be removed, by Tenant at the end of the term remaining in the premises after Tenant's removal shall be deemed abandoned and may, at the election of Owner, either be retained as Owner's property or removed from the premises by Owner, at Tenant's expense." See Maher Affirm., Ex E. Thus, plaintiffs' cause of action for conversion would fail, in that plaintiffs would not be able to establish that they had not abandoned the alleged trade fixtures. Therefore, the third cause of action is dismissed.

Accordingly, it is hereby

ORDERED that plaintiff's motion to dismiss defendants' first, second, third, and fourth counterclaims is granted without opposition; and it is further

ORDERED that defendants' cross motion for summary judgment is granted, the complaint is dismissed, and the Clerk is directed to enter judgment in defendants' favor.

Dated: July 3, 2007
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED
JUL 13 2007
NEW YORK
COUNTY CLERK'S OFFICE