SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

I.C. INTERNATIONAL CORP.,

INDEX NO.: 024185/09

Plaintiff,

MOTION DATE:2-26-10
SUBMIT DATE:4-5-10
SEQ. NUMBER - 001 & 002

-against-

BRISTOL PROPERTIES CORP., and MARY HAUPTMAN,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 2-1-10.....1
Notice of Cross Motion, dated 2-18-10.....2
Reply and Affirmation in Opposition, dated 3-18-10....3
Reply Affirmation, dated 3-30-10.....4

Defendant's motion, pursuant to CPLR §1003, is also treated as a motion for summary judgment pursuant to CPLR §3212 on behalf of the individual defendant Mary Hauptman (Hauptman) (Seq. 001) and, as such, is granted and the complaint is dismissed as to her. CPLR §3212(b).

Plaintiff's motion for summary judgment pursuant to CPLR §3212 (Seq. 002) is granted as to the First Cause of Action in the amount of $20,586.06, plus interest from October 21, 2009, and is otherwise denied.

Plaintiff entered into negotiations to lease commercial premises in a building owned or operated by Bristol Properties Corp., (Bristol) for whom defendant Hauptman serves as President and "Manager/Broker".

The lease negotiations culminated in a written offer to lease, conveyed to Hauptman by plaintiff's agent which expressly stated "it is not to be construed as a contract and only a fully executed lease by both parties shall be considered binding."

Bristol, via Hauptman, generated a lease document which was signed by a representative of plaintiff and returned to defendants with a bank check for $20,586.07, that being the amount set forth in the lease as constituting the first months rent and a security deposit, equal to the last two months rent. (the Deposit). For reasons that are not being challenged, defendant Bristol declined to consummate the lease transaction and upon request, has refused to return the Deposit. Although the papers allude to the retention of the Deposit for purposes of reimbursing Bristol for work performed on preparing the premises for occupancy, there is no written evidence that any work was to have been performed by defendant or paid for by plaintiff, and defendants have not submitted any bills, contracts or other evidence of having performed any work at the premises under consideration. This action for a return of the Deposit ensued.

The motion by Hauptman is supported by her affidavit and documentary evidence that she acted at all times as an agent for Bristol and not in her individual capacity. Although plaintiff argues that Hauptman should be responsible for her fraudulent and tortious conduct, those arguments and causes of action as against her are without merit.

The cross motion is opposed solely by an affirmation of the attorney for Bristol and Hauptman and the original submission by Hauptman. Counsel suggests that summary judgment should be denied because discovery has not been complete. It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, defendant's attorney does not profess to possess personal knowledge of any facts asserted and has not employed his affirmation as a vehicle to refer to other competent evidence.

Although Hauptman's affidavit claims that the Deposit was required so that Bristol could start to improve the space, she offers no other support for this naked and conclusory assertion and fails to submit the proposed lease agreement.

Moreover, Hauptman fails to support her additional statement that Bristol made improvements to the space or that principals of plaintiff misrepresented material facts.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party

would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a

defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.,* 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett,* 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006). Applying the foregoing principles to the evidence submitted, yields the conclusion that Hauptman has established her entitlement to dismissal on the merits, thus shifting the burden to the plaintiff and plaintiff has established its entitlement to summary judgment as to Bristol thereby shifting the burden to Bristol.

Neither plaintiff nor Bristol have satisfied their burden of coming forward with facts sufficient to deny the motion and cross motion.

It is well settled that where as here there is a disclosed principal agent relationship and a contract relates to a matter of the agency, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to be bound *I. Kaszirer Diamonds, Ltd., v. Zohar Creations, Ltd*, 146 AD2d 492, 494 (1st Dept. 1989).

Even where an agent signs an agreement in his/her own name, there is no personal liability where the counter-party was aware that the agent was acting for a disclosed principal. *Leonard Holzer Assoc. Inc., v. Orta*, 250 AD2d 737 (2d Dept. 1998).

Here, the uncontroverted documentary and testimonial evidence establishes that in her dealings with plaintiff, Hauptman was acting on behalf of Bristol. *See Newman v. Berkowtiz*, 50 AD3d 479 (1st Dept. 2008). Moreover, there is no evidence to suggest that Hauptman abused the limited liability form in order to commit a wrong which injured plaintiff so as to warrant the piercing of the veil of limited liability in order to hold her personally liable. *Colucci v. AFC Construction*, 54 AD3d 798 (2d Dept. 2008).

Plaintiff has failed to adequately plead facts sufficient to support its claims of fraud. *Eurycleia Partners L.P. v. Seward & Kissel, LLP*, 12 NY3d 553 (2009). The claim of fraud is duplicative of the breach of contract claim since the only fraud alleged is breach of a contract to enter into a lease and that claim is not based on a duty that is separate from the contract. *Manas v. VMS Associates*, LLC, 53 AD3d 451 (1st Dept. 2008).

The cause of action for conversion is not viable because conversion requires that there be a specific identifiable piece of property over which the defendant exercises or interferes

with the rights of the plaintiff. *Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp.*, 64 AD3d 85, (2d Dept. 2009). Except in limited circumstances, not applicable here, conversion is considered an unauthorized assumption and exercise of the right of ownership over goods of another and to the exclusion of the owner's rights. *Thyroff v. Nationwide Mut. Ins., Co.*, 8 NY3d 283 (2007). A mere claim for money such as exists here, does not support a cause of action for conversion. *See generally Fiorenti v. Central Emergency Physicians, P.L.L.C.* 187 Misc.2d 805, 809 (Sup. Ct. Nassau County 2001, Austin, J.).

The claim for punitive damages has not been supported because there is no basis for determining that the conduct of defendants constituted a tort independent of a contract *Alexander v. Geico Ins. Co.*, 35 AD3d 989 (3d Dept. 2006); *See also New York University v. Continental Ins. Co.*, 87 NY2d 308, 316 (1995).

Here, the complaint and the cross motion support a claim sounding in quasi contract under the theories of unjust enrichment but not a claim for punitive damages. *Zuccarini v. Ziff Davis Media*, 306 AD3d 404 (2d Dept. 2003); *Tesser v. Allboro Equipment Company*, 302 AD2d 589 (2d Dept. 2003).

There is no competent evidence to dispute plaintiff's claim that the Deposit was conditionally delivered in contemplation of execution and return of a signed lease by Bristol, hence, there is implied an obligation to return the Deposit in the event Bristol declined what was in effect an offer to lease. *See Estate of Edward Z. Argersinger v. Ashdown*, 168 AD2d 757 (3d Dept. 1990) and *H.B.L.R., Inc., v. Command Broadcast Associates, Inc.*, 156 AD2d 151 (1st Dept. 1989).

The essence of unjust enrichment is that one party has received money or a benefit at the expense of another. A cause of action for money had and received sounds in quasi contract and arises when, in the absence of an agreement, one party possesses money that in equity and good conscience it ought not retain. Although an action for money had and received 'is recognized as an action in implied contract, the name is something of a misnomer because it is not an action founded on contract at all; it is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he or she ought not to retain and that belongs to another. *Goldman v. Simon Property Group*, 58 AD3d 208, 220 (2d Dept. 2008), internal citations and quotation marks omitted.

Based on the foregoing, summary judgment is granted in favor of Hauptman and the action is dismissed as to her and summary judgment is granted in favor of plaintiff and against Bristol on the First Cause of Action and the cross motion is otherwise denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 15, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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