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

PRESENT: HON JOAN A. MADDEN Justice

PART 11

Index Number : 603179/2008

HARLEM SUITES

VS.

231 NORMAN AVENUE

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE 3-12-09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + order.

FILED
JUL 16 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: July 13, 2010

_____ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:PART 11

HARLEM SUITES, LLC,

Plaintiff,

-against-

231 NORMAN AVENUE, LLC, DCI, USA, INC., DAVID YERUSHLMI, JOSEPH GOPIN, JONATHAN RIGBY and JONATHAN ILAN OFIR,

Defendants.

INDEX NUMBER 603179/2008
Motion Sequence 001
DECISION & ORDER

JOAN A. MADDEN, J.:

Defendants move to dismiss the second cause of action for unjust enrichment, as against them in the complaint, pursuant to CPLR 3211(a)(7). Plaintiff cross-moves for summary judgment in its favor on the complaint.

Factual Background

On March 4, 2005, plaintiff and defendants 231 Norman Avenue, LLC (231 Norman), owned entirely by DCI, USA, Inc. (DCI),[1] and Joseph Gopin became members of 231 Norman Avenue Property Development, LLC (the company) under an operating agreement (Exhibit A attached to Affidavit of Amir Yerushalmi in Support of Plaintiff's Cross-Motion [Amir Support Affidavit]) intending to convert the building at 231 Norman Avenue, Brooklyn, N.Y. (the building), into a residential condominium building.[2] On the same day, plaintiff and defendants

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[1]DCI seems to have no independent role in this action.

[2]The verified complaint ¶ 8 (Exhibit I attached to Notice of Motion) states "a commercial condominium building," but the verified first amended complaint ¶ 8 (Exhibit XII attached to Notice of Motion) states "a residential condominium building." This inconsistency does not appear to be a material difference in this action.

231 Norman, Gopin, David Yerushlmi,[3] Jonathan Rigby (actually Rigbi) and Jonathan Ilan Ofir entered into a construction agreement (Exhibit B attached to Amir Affidavit) to perform the work for converting the building into a residential condominium. Plaintiff provided the company $1.75 million under the operating agreement and the construction agreement. A guaranty and security undertaking (the guaranty) (Exhibit B attached to Amir Affidavit) was executed simultaneously with the operating agreement and the construction agreement, whereby the defendants jointly and severally guaranteed that the funds would be returned to plaintiff within four years with accrued interest at the rate of 10% per year. The terms of the guaranty were also found in the operating agreement sec. 3.4 and the construction agreement sec. 3.9.

On September 5, 2007, the company refinanced the project debt with North Fork Bank (North Fork), paying off prior debt to Washington Mutual Bank (WAMU) and $917,000 to plaintiff. Two signed undated versions of a refinancing agreement are produced by the parties. Exhibit H attached to Affidavit of Amir Yerushalmi in Further Support of Cross-Motion (Amir Further Support Affidavit) (also Exhibit B attached to Ofir Affidavit in Opposition to Cross-Motion), signed by Ofir, David, Rigbi, Amir and his brother Oren, provides that all obligations and guarantees among the parties remain in place upon the change of lender from WAMU to North Fork. Exhibit A attached to Ofir Affidavit in Opposition to Cross-Motion, signed by Ofir, David, Rigbi and Amir, provides that the net proceeds of refinancing or profit distribution as available go to, in order, WAMU, plaintiff and defendants (except Gopin, who apparently assigned his interests to Ofir prior to the refinancing, and signed neither refinancing agreement). In November 2007, an additional $45,000 was paid to plaintiff.

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[3]While the caption of the summons, the original verified complaint and the verified first amended complaint all name David "Yerushlmi," defendant's name is David Yerushalmi and plaintiff usually uses the correct version at other places in its papers. David Yerushalmi (David) and Amir Yerushalmi (Amir) are not related. Amir is plaintiff's managing member.

The verified first amended complaint (Exhibit XII attached to Notice of Motion) alleges that defendants have not paid plaintiff $1,525,759 due on March 4, 2009, resulting in breach of contract (first cause of action), and the unjust enrichment claim.

Defendants' Motion to Dismiss the Second Cause of Action

Plaintiff does not oppose the instant motion, and the second cause of action shall be deemed abandoned and dismissed from the complaint.

Plaintiff's Cross Motion for Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People ex rel. Spitzer v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002).

Plaintiff submits copies of the operating agreement, the construction agreement, the guaranty and one version of the refinancing agreement, along with copies of the two checks and an electronic funds transfer received from defendants in the total amount of $962,000. Additionally, it submits a spreadsheet (Exhibit E attached to Amir Support Affidavit) supporting its claim to $1,525,759 owed. It argues that it has made a prima facie case of breach of contract by showing the following four elements: (1) existence of a valid contract; (2) plaintiff's

performance of the contract; (3) defendant's material breach of the contract; and (4) resulting damages. *See e.g. Noise in Attic Productions, Inc. v London Records*, 10 AD3d 303 (1st Dept 2004); *Furia v Furia*, 116 AD2d 694 (2d Dept 1986).

Defendants do not contest the existence of any of these agreements, noting only that Gopin was not party to the refinancing agreement, having assigned his interests to Ofir. They argue that the agreements plaintiff is seeking to enforce have been modified, terminated or are subject to novation, and that triable issues of fact remain as to any breach in light of these changes. Specifically, defendants claim that the day before the North Fork closing, David and Amir exchanged e-mail messages (Exhibit C attached to Ofir Affidavit) on the distribution of the anticipated proceeds, and that Ofir informed Amir's brother Oren, "the real decision maker" for plaintiff, in a telephone call, that plaintiff would receive around $900,000, and have priority on future sales proceeds of the project. However, the substance of the guaranty and the associated encumbrance had to be abandoned in order to protect the closing, according to defendants. The closing went as planned; Amir attended, Oren did not. Ofir attended by telephone "at certain times." Ofir Affidavit para. 24.

Ofir asserts that he told David and Rigbi that they had no further personal guaranty obligations to plaintiff, as he and Oren has settled the matter. *Id.* Ofir also states that he subsequently lent the company $62,000 which was paid to plaintiff, and that he paid about $770,000 to a European project involving plaintiff and the brothers Yerushalmi. Rigbi's Affidavit para. 4, and David's Affirmationt para. 4, repeat Ofir's conversation with them regarding the discontinuance of any personal guaranty to plaintiff. Gopin states that he "understood" from Ofir, Rigbi and David that he no longer had any interest in the company or personal obligation to plaintiff. Gopin Affidavit para. 3.

In brief, defendants' opposition to the motion for summary judgment is grounded on

undocumented conversations that they allegedly abandoned critical elements in their agreements with plaintiff without leaving their own paper trail. The e-mails between David and Amir right before the North Fork closing are inconclusive at best, and the last one presented, from Amir to David, says "I need to confirm that we are getting the Equity + Interest as agreed to before I can execute the mortgage docs tomorrow," which seems to confirm the status quo.

The operating agreement is 19 pages long, plus exhibits; the guaranty is six pages long; the construction agreement is 17 pages long, plus exhibits. "A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 (1990). The operating agreement, sec. 2.4.3.2, requires "[u]nanimous written consent of all the Members" for any amendment to the agreement; the construction agreement, at sec. 10.1, requires "the written unanimous consent of the Members" for any amendment to the agreement; the guaranty, sec. 7.1, states: "Only by a written consent signed by all of the Secured Parties may a Guarantor be relieved to the extent expressly provided in such consent from compliance with any agreement or requirement contained herein, or may any provisions hereof be modified or amended."

Defendants ask the court to replace key conditions repeated throughout those documents, regarding the repayment of funds to plaintiff, by their version of one telephone conversation between Ofir and Oren and their account of some conversations among themselves. Their binding agreements preclude this. Moreover, if informal communications were relied upon, as defendants urge, the last apparent e-mail exchange between the parties came from Amir, at 3:04 P.M. New York time, 10:04 P.M. in Israel where Ofir and Oren were located, stated, "I need to confirm that we are getting the Equity + Interest as agreed before I can execute the mortgage docs tomorrow." The recent submission of the deposition of Oren, conducted on June 3, 2010, offers

nothing to supplant his brother's words.

The presence of two different refinancing agreements is immaterial, even if the absence of a date on each is ignored. One states that refinancing changes nothing in the underlying agreements; the other provides that plaintiff is next in line to be paid after WAMU. Neither suggests that a new regime for repaying plaintiff has been put in place, replacing the guaranty. This is not an issue of credibility; it is simply the weighing of undisputed documentary evidence against defendants' conclusory excuses and rationalizations. Under these circumstances, plaintiff's motion for summary judgment in its favor on the breach of contract cause of action is granted.

Moreover, there is no merit to defendants' argument that the impairment of collateral beyond $12,000,000 is a modification of the written agreements. Contrary to defendants' position, the original agreements do not contain restrictions on the amount of financing. Thus, the refinancing was not an indisputable modification of the written agreements.

As to damages, Ofir's statement in his affidavit in opposition to plaintiff's cross-motion for summary judgment that he "also paid plaintiff and Yerushalmi through financing a major project in Europe for an amount of 500,000 Euros (approximately 700,000 U.S. dollars)" can be read to challenge the amount owed to plaintiff. However, absent a written agreement or other documentary evidence this statement is insufficient to create a triable issue of fact as to plaintiff's calculation as to the amount owed under the agreements.

Accordingly, it is

ORDERED that defendants' motion to dismiss the second cause of action as against them for unjust enrichment in the verified first amended complaint, pursuant to CPLR 3211(a)(7), is granted; and it is further

ORDERED that plaintiff's cross motion for summary judgment in its favor on the

remaining cause of action for breach of contract is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Harlem Suites, LLC, and against defendants 231 Norman Avenue, LLC, DCI, USA, Inc., David Yerushalmi, Joseph Gopin, Jonathan Rigbi, and Jonathan Ilan Ofir in the sum of $1,525,759, with interest as prayed for allowable by law at the rate of 10% per annum from the date of September 5, 2009, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements as taxed by the Clerk.

DATED: July 13, 2010

J.S.C.

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE