

Dan Closet Corp. v Avalonbay Communities, Inc.

2010 NY Slip Op 32401(U)

September 1, 2010

Supreme Court, New York County

Docket Number: 601985/08

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

Dan Closet Corp.

INDEX NO.

601985/08

- v -

MOTION DATE

MOTION SEQ. NO.

001

Avalonbay Communities Inc.

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion ~~to~~ for Summary Judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits

2, 2A

Replying Affidavits

3, 4

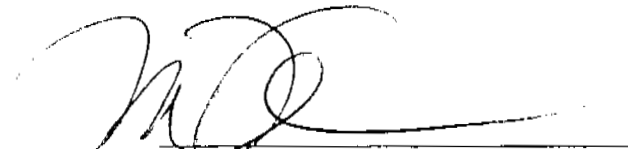
Cross-Motion: Yes No

Memorandum Law M1
FILED
SEP 03 2010

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

Dated: 9-1-10



MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

DAN CLOSET CORP. d/b/a CALIFORNIA
CLOSET COMPANY.

Plaintiff,

- against -

AVALONBAY COMMUNITIES, INC. d/b/a
AVALON RIVERVIEW and ANTHONY'S
CUSTOM CLOSETS INC.,

Defendants.

Index No.:601985/08

DECISION/ORDER

FILED
SEP 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

X

In this action, plaintiff Dan Closet Corp. ("Dan Closet") sues defendants Avalonbay Communities, Inc. ("Avalon") and Anthony's Custom Closets Inc. ("Anthony's") for breach of contract and tortious interference relating to an agreement to market custom closet upgrades to tenants in Avalon's building. Avalon moves for summary judgment dismissing the complaint.¹ Plaintiff cross-moves for an order striking defendants' answers. Although plaintiff does not expressly seek summary judgment, it requests an inquest on damages.

Plaintiff and Avalon entered into a letter agreement ("Marketing Agreement") dated July 9, 2002. (Aff. of Noah Hager [Avalon manager], Ex. F.) The agreement provided that plaintiff would install its custom closets in four model apartments in Avalon's building and, in exchange, Avalon would "market [plaintiff] exclusively for closet upgrades." (Id.) Prior to entering into

¹Although defendant Anthony's did not move for summary judgment, it submits an affirmation of its counsel Christopher Ring in support of Avalon's motion to dismiss all of the causes of action.

the Marketing Agreement with plaintiff. Avalon executed a contract with Anthony's, dated May 17, 2001, for the installation of "building standard" closets and miscellaneous shelving in the building's units. (Id., Ex. C. [Anthony's Contract]; Aff. of Robert Capocci [Anthony's CFO], ¶ 3.) The Anthony's contract provided for the work to be completed by the second quarter of 2002. (Ex. B to Anthony's Contract at 12.) In or around September 2002, Avalon had discussions with plaintiff about hiring it to install 53 custom closets in units that had not been rented. However, the negotiations broke down after Avalon told plaintiff that it wanted to increase the number of closets to be installed and plaintiff could not install that number by the deadline that Avalon required. (P.'s Cross-Motion, Exs. H, I.) Avalon subsequently entered into a change work order with Anthony's for the additional closet installation, as reflected in its October 12, 2002 invoice to Avalon for \$76,000. (Hager Aff., Ex. D.) Plaintiff claims that, to date, it installed 22 closets in model apartments for Avalon, but has not sold a single upgrade to any of its tenants.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

In order to prevail on a cause of action for breach of contract, the plaintiff must prove the existence of a valid contract, plaintiff's performance, a breach by defendant, and resulting damages. (See Morgan Stanley Altabridge Ltd. v ESE Funding SPC Ltd., 60 AD3d 497 [1st Dept 2009].)

The court holds that defendant fails to demonstrate its entitlement to summary judgment, as it does not make a prima facie showing that it marketed plaintiff's closet upgrades, as required by the Marketing Agreement. The sole evidence submitted by Avalon in support of its motion is the affidavit of Noah Hager, the former manager of the subject building, in which he attests as follows: "Avalon's staff was instructed to market Plaintiff's services to its tenants. The staff was advised that it was obligated to refer tenants to Plaintiff for closet upgrades and each staff member was specifically advised that tenants should contact Plaintiff, and not Anthony's for such upgrades." (Hager Aff., ¶ 14.) This affidavit lacks any detail as to the means by which Avalon marketed the closet upgrades and is insufficient to shift the burden to plaintiff to raise a triable issue of fact in opposition to Avalon's claim that it complied with its obligation to market the upgrades.

In so holding, the court notes that defendant submits affidavits on the reply which contain some additional detail regarding the marketing. In particular, defendant submits the affidavit of Pavel Vancura, defendant's Construction Project Manager, stating that, while he was not directly involved in distributing plaintiff's material, he did "recall seeing Plaintiff's California Closets marketing brochures on the concierge desk in the Building." (Vancura Aff., ¶ 7.) Avalon also provides an affidavit of Melissa Castrillo, a Leasing Consultant for the building from October 2002 to March 2003, explaining that "[e]very tenant who moved into the Building received a 'Welcome Packet,'" which included "information related to the availability of closet upgrades from Plaintiff." She further states that the staff also "was advised that it was obligated to refer tenants to Plaintiff California Closets for closet upgrades" and that they should instruct tenants to "contact Plaintiff for such upgrades." (Castrillo Aff., ¶ 5.) However, these affidavits are also largely conclusory and are not supported by any documentation, such as the packets that were provided to the tenants, or an explanation as to why such packets are not available. Moreover,

evidence submitted for the first time on a reply, to which the opposing party has not had an opportunity to respond, is not properly considered by the court. (See Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1982].)

Although the court holds that the branch of Avalon's motion to dismiss the breach of contract claim must be denied for the above reasons, the court finds that Avalon has demonstrated as a matter of law that Avalon did not breach the Marketing Agreement based on its contracting with Anthony's, subsequent to the Marketing Agreement, for an additional \$76,000 in closet installations. In arguing to the contrary, plaintiff confuses closet upgrades with closet installations. Contrary to plaintiff's contention, the Marketing Agreement does not state that plaintiff would be the exclusive closet company for Avalon. (Aff. of Harvey Feder [Ps. Vice President], ¶ 8.) As Mr. Feder acknowledges, plaintiff's contract only required Avalon to market plaintiff's closet upgrades exclusively, and provided that plaintiff was to sign any contract for closet upgrades "directly with the tenant." (Id., ¶ 12.) In contrast, and as Mr. Feder admits, the additional closet installations that plaintiff discussed with Avalon were separate from the Marketing Agreement, as they "would be purchased directly by Avalon." (Id., ¶ 15.) The undisputed evidence in the record shows, and the court finds as a fact (see CPLR 3212[g]), that after negotiations between plaintiff and Avalon for these additional closet installations broke down, plaintiff entered into the \$76,000 change order with Anthony's for these installations, as opposed to upgrades.

The court next turns to the branch of Avalon's motion seeking dismissal of plaintiff's claim for unjust enrichment. It is well settled that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (Clark-Fitzpatrick, Inc. v. Long Is.

R.R. Co., 70 NY2d 382, 388 [1987].) Plaintiff does not question the validity or enforceability of the Marketing Agreement, nor that its obligation under the agreement was to install custom closets in four model apartments. To the extent plaintiff claims to have installed additional personal closet accessories, Mr. Feder acknowledges that these “were provided at no charge.” (Feder Aff., ¶ 14.) Accordingly, plaintiff is precluded from recovering on an unjust enrichment theory as a matter of law and its second cause of action will be dismissed.

Plaintiff’s claim for fraud should also be dismissed. Plaintiff alleges in its complaint that Avalon “had no intention of” exclusively marketing plaintiff for closet upgrades. However, it is well settled that “allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support [a cause of action for fraud].” (New York Univ. v Continental Ins. Co., 87 NY2d 308, 318 [1995]; 767 Third Ave. LLC v Greble & Finger, LLP, 8 AD3d 75, 76 [1st Dept 2004].) Moreover, plaintiff does not submit any evidence or authority to demonstrate that Avalon breached a duty owed to it “separate and apart from the contractual duty.” (Hotel 71 Mezz Lender LLC v Mitchell, 63 AD3d 447 [1st Dept 2009].) The branch of Avalon’s motion seeking dismissal of plaintiff third cause of action will therefore be granted.

Plaintiff’s sole cause of action against Anthony’s is for tortious interference with contract. “[t]o state a cause of action for tortious interference with contractual relations plaintiffs must show that defendants intentionally and through improper means induced the breach of a contract between plaintiff and a third party.” (WFB Telecommunications, Inc. v NYNEX Corp., 188 AD2d 257 [1st Dept 1992], lv denied 81 NY2d 709 [1993] [citations omitted]. See Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 196 [1980].) This court has already found that Avalon did not breach its contract with plaintiff by contracting with Anthony’s. Further, plaintiff fails to submit any evidence to raise a triable issue of fact in opposition to Anthony’s


CFO's contention that Anthony's never "contacted any tenants for closet upgrades" nor "interfered with Plaintiff's contract or interfered with Avalon's ability to market Plaintiff to prospective tenants for closet upgrades." (Capocci Aff., ¶ 12.) Therefore, plaintiff's fourth cause of action will be dismissed.

Accordingly, it is hereby ORDERED that the motion for summary judgment of Avalonbay Communities, Inc. d/b/a Avalon Riverview is granted to the extent of dismissing the second, third, and fourth causes of action against all defendants; and it is further

ORDERED that the cross-motion for summary judgment of plaintiff Dan Closet Corp. d/b/a California Closet Company is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 1, 2010


MARCY FRIEDMAN, J.S.C.

FILED
SEP 03 2010
NEW YORK
COUNTY CLERK'S OFFICE