

Branic Intl. Realty Corp. v City of New York
2010 NY Slip Op 34005(U)
June 25, 2010
Supreme Court, New York County
Docket Number: 110466/09
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

BRANIC INTERNATIONAL REALTY CORP.,

Index No. 11046/09

Plaintiff,
-against-

Motion Date: 3/9/10
Motion No.: 002
Calendar No.: 27

THE CITY OF NEW YORK, and THE CITY OF
NEW YORK HUMAN RESOURCES
ADMINISTRATION/DEPARTMENT OF
SOCIAL SERVICES,

AMENDED DECISION
AND ORDER

Defendants.

BARBARA JAFFE, JSC:

For plaintiff:
Ronald J. Rosenberg, Esq.
Rosenberg, Calica & Birney LLP
100 Garden City Plaza, Ste. 408
Garden City, NY 11530
516-747-7400

For defendants:
Adam DiLeo, Esq.
Roy A. Esmard, SACC
Michael A. Cardozo
180 Water St., 17th Fl.
New York, NY 10038
212-331-5151

By notice of motion dated December 7, 2009, plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment on its complaint, awarding it damages of \$60,450, and setting the matter down for an inquest to determine the rest of its damages. Defendants oppose the motion and, by notice of cross-motion dated January 12, 2010, move for an order summarily dismissing the action with prejudice.

I. BACKGROUND

Plaintiff is the owner and operator of premises located at 216 West 133rd Street in Manhattan, which was designated as an Emergency Housing Facility by defendant City of New York Human Resources Administration (HRA). (Affidavit of Hank Fried, dated Dec. 4, 2009 [Fried Affid.]). By Memorandum of Understanding dated December 16, 2004 (MUO), plaintiff and defendants agreed that, for a two-year period, plaintiff would set aside rooms at its facility

for occupancy by HRA clients referred to it as needing emergency housing and being eligible for a public assistance shelter allowance (eligible persons). (Fried Affid., Exh. A). After admitting an eligible person to the facility, plaintiff agreed to have the person sign a daily registration log to verify that he or she was an occupant at the facility and to submit the log to HRA on a daily basis to verify that person's continued occupancy. (*Id.*) Paragraph D provides that "in the absence of a daily signature log, and without proper explanation, HRA will assume that the client has left the facility, and no payment is due for the client." (*Id.*)

In the event that plaintiff was unable to obtain the eligible person's signature on the daily log, it was "advised to contact [HRA] within 48 hours to determine whether the individual has been relocated from the Facility." (*Id.*) Plaintiff also agreed to notify HRA, upon learning that the eligible person was no longer occupying his or her room, and to submit claims for payment on behalf of eligible persons only for the number of nights they actually occupied a room. (*Id.*)

In article two, section B, HRA agreed to pay, on behalf of each eligible person placed at the facility during the MUO's term, a nightly rate of \$65 from the first night the eligible person registered at the facility until either the day that the person left the facility with plaintiff's knowledge or two weeks after the person left without plaintiff's knowledge. (*Id.*) Pursuant to paragraph D of the MUO, plaintiff agreed to submit monthly billing requests. Finally, pursuant to article three, section A, either party could terminate the MUO upon 30 days' written notice and if terminated, the billing methodology would remain in effect as long as an eligible person remained in occupancy at the facility.

HRA's client, Phillip Pitt, has continuously resided at the facility since 2001 or 2003, having been referred to plaintiff pursuant to a prior Memorandum of Understanding. (Fried



Affid.). Until on or about June 27, 2005, Pitt signed the daily registration log which plaintiff submitted to HRA. (*Id.*, Exh. B). Thereafter, Pitt refused to sign the registration log. (Fried Affid.). Plaintiff's employee informed an HRA employee that Pitt refused to sign the log and that he continued to live at the facility. (Affirmation of Ronald J. Rosenberg, Esq., dated Jan. 29, 2010 [Rosenberg Aff.], Exh. B). From 2003 through May 2007, defendant paid plaintiff's monthly invoices for Pitt's occupancy, including invoices for those months when Pitt refused to sign the log. (Fried Affid., Exh. E).

By September 2006, Pitt was the only HRA client at tenant's facility as he refused to be relocated. (*Id.*). By letter dated April 17, 2007, headed "Cancellation/Room Closure Verification," defendants informed plaintiff that HRA had been notified that Pitt no longer resided at the facility and that payments would stop as of April 17, 2007. (Rosenberg Aff., Exh. D).

From mid-May 2007 to the present, defendants have not paid plaintiff's monthly invoices for Pitt's occupancy. (*Id.*, Exhs. D, E). Pitt continues to occupy a room at the facility. (Fried Affid.).

Sometime in 2009, plaintiff unsuccessfully attempted to evict Pitt by commencing a holdover proceeding. (*Branic Intl. Realty Corp. v Pitt*, 24 Misc 3d 940, 943 [Civ Ct, New York County 2009]).

On August 21, 2009, plaintiff served a notice of claim on defendants. (Fried Affid., Exh. H). On or about September 23, 2009, plaintiff served an amended verified complaint on defendants, asserting breach of contract and unjust enrichment. (*Id.*, Exh. E). On or about October 13, 2009, defendants served their verified answer, alleging that plaintiff had materially



breached the MUO and that they thus had no obligation to pay it, and that plaintiff's tax liens render it ineligible to receive payment from defendants or any City agency. (*Id.*, Exh. C).

By cancellation letter dated December 15, 2009, defendants informed plaintiff that they would no longer pay for Pitt's occupancy as of January 10, 2010. (Rosenberg Aff., Exh. G).

II. CONTENTIONS

Plaintiff argues that it is entitled to judgment as it performed under the MUO by providing housing to Pitt and submitting monthly invoices to HRA, that HRA breached the MUO by failing to pay for Pitt's continued occupancy since May 2007, and that it has incurred damages. (Plaintiff's Memorandum of Law, dated Dec. 7, 2009 [Plaintiff's Memo.]).

In opposition to plaintiff's motion and in support of their cross-motion, defendants allege that the MUO expired by its own terms in 2006 and that they thus have no remaining obligation to plaintiff, observing that the MUO requires them to continue to pay only if the MUO is terminated by either party, not if it expires by its own terms. (Affidavit of Matthew Brune, dated Jan. 12, 2010 [Brune Affid.]; Defendants' Memorandum of Law, dated Jan. 12, 2010 [Defendants' Memo.]). They contend that although they continued to pay plaintiff notwithstanding its failure to submit the log for Pitt, their April 2007 letter put plaintiff on notice that they required the log going forward, and they deny that Pitt has resided continuously at the facility. Defendants also observe that as plaintiff owes the City taxes, it is ineligible to receive any payments from them. (Brune Affid., Exhs. F, G).

In opposition to defendants' motion, plaintiff argues that the MUO requires defendants to pay for Pitt's occupancy until he leaves the facility, and that the obligation survives the expiration of the MUO. It observes that having attempted to terminate the MUO in April 2007,

defendants thereby admit that it did not expire in 2006, and that Pitt's signing of the registration log was not a condition to HRA's payment for his occupancy. It also contends that defendants waived any objection to plaintiff's failure to submit the log by paying for Pitt's occupancy for two years after Pitt stopped signing the log, and that defendants may not rely on Pitt's frustration of the registration procedure to avoid liability. Plaintiff also argues that the April 2007 letter constitutes the 30-day notice of termination provided for in the MUO. (Affirmation of Ronald J. Rosenberg, Esq., dated Jan. 29, 2010 [Rosenberg Aff.]).

Relying on Pitt's affidavit in the holdover proceeding and its employees' affidavits, plaintiff asserts that there is no factual issue as to Pitt's continued occupancy (Rosenberg Aff., Exhs. B, C, E), and that its tax liens have been vacated (*id.*, Exh. D), but that in any event, the liens do not constitute a defense to defendants' liability.

In reply, defendants argue that even if they waived compliance with the registration requirement between 2005 and 2007, their April 2007 letter put plaintiff on notice that they intended to enforce the requirement from that date. (Reply Affirmation of Adam DiLeo, Esq., dated Feb. 18, 2010]). They also deny that Pitt's refusal to sign the sheets is attributable to them.

III. ANALYSIS

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept.2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has



the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 537 [1980]).

A. Breach of contract

To establish a breach of contract, a plaintiff must show that: 1) it entered into an agreement with the defendant; 2) it performed pursuant to the contract; 3) the defendant failed to perform; and 4) it sustained damages as a result. (*See Furla v Furla*, 116 AD2d 694 [2d Dept 1986]).

1. Did plaintiff perform?

Plaintiff has submitted proof that since 2001 it has housed Pitt pursuant to the parties' MUO, that Pitt has resided continuously at plaintiff's facility, and that since June 2005, Pitt has refused to sign the registration log. It has also demonstrated that once it was unable to obtain Pitt's signature on the log, it immediately informed an HRA employee that Pitt refused to sign the log despite continuing to reside at the facility, and that it submitted monthly billing invoices to defendants. Plaintiff has thus established, *prima facie*, that it performed its obligations under the MUO.

In opposition, defendants fail to offer any evidence suggesting that Pitt has not lived continuously at the facility since 2001 and have not denied that HRA was notified of Pitt's refusal to sign the log or that he continued to reside at the facility. Not only is the MUO silent as to what measures plaintiff must take if it is unable to obtain the signature of an eligible person, but it advises, without requiring, that plaintiff contact HRA in such circumstances. The absence of any remedy for plaintiff's failure in this regard ought not inure to defendants' benefit as it would unjustly result in plaintiff housing defendants' client at no cost to defendants for over



three years. (See *eg Lowy and Donath, Inc. v City of New York*, 98 AD2d 42 [1st Dept 1983] [contract construction which places one party at mercy of other should be voided if possible]).

Moreover, a party is not required to fulfill a condition of a contract that is incapable of fulfillment by no fault of that party, as long as the party has made a good-faith effort to fulfill it. (22 NY Jur 2d, Contracts § 334 [2010]). Thus, in *Lunning v 10 Bleecker St. Owners Corp.*, 160 AD2d 178 (1st Dept 1990), *lv denied* 76 NY2d 710, the plaintiff was not required to obtain financing despite a condition requiring her to do so as her financial circumstances had changed due to no fault of her own and she was unable to obtain financing. (See also *Gagliardi v Staten Island Univ. Hosp.*, NYLJ, May 13, 1999, at 32, col 2 [Sup Ct, Richmond County] [as corneal transplant was not medically possible and could not be completed, any obligation to perform transplant was excused]).

Here, plaintiff attempted to obtain Pitt's signature on the log but was unable to do so. Thus, the requirement that plaintiff provide defendants with a signed registration log was incapable of fulfillment through no fault of plaintiff. While defendants' purpose in requiring a registration log is understandable, that concern is immaterial as they were informed that Pitt was still occupying a room at plaintiff's facility and that the absence of the signed log resulted only from Pitt's refusal to sign it.

In any event, the MUO relieves defendants from paying plaintiff only in the absence of an explanation for the failure to submit the registration log. As plaintiff explained to defendants its failure to submit the log, and as defendants apparently accepted the explanation, having paid plaintiff for Pitt's occupancy for two years thereafter, defendants have thus failed to raise any triable issues as to whether plaintiff failed to perform its obligations under the MUO.



2. Did defendants fail to perform?

The MUO obligates defendants to pay for Pitt's occupancy from the first night that Pitt registered at the facility to the day that he departs from the facility even if the agreement is terminated by either party. Defendants' argument that the MUO expired on its terms in 2006 is undermined by their letters of April 2007 and December 2010 which reflect their belief that plaintiff was entitled to continued payments.

Even if the MUO expired in 2006, the parties continued performing pursuant to its terms, thereby establishing the existence of an implied contract. (See 22 NY Jur 2d, Contracts § 229 [2010] [when agreement expires by its terms, and without more, parties continue to perform, implication arises that they have mutually assented to new contract containing same provisions as old]; see also *Watts v Columbia Artists Mgt., Inc.*, 188 AD2d 799 [3d Dept 1992] [parties' conduct after expiration of written contract, including defendant's continued rendition of services, plaintiff's acceptance of those services and payment of commissions in accordance with terms of written contract, established contract implied in fact]; *Empire State Fuel Corp. v Warbasse Cogeneration Tech., Partnership, L.P.*, 26 Misc 3d 1215[A], 2007 NY Slip Op 52665[U] [Sup Ct, New York County 2007] [even if agreement expired, its renewal was implied by parties continuing to do business; plaintiff performed services and sent invoices for at least two more years]).

Thus, as it is undisputed that defendants failed to pay plaintiff for Pitt's occupancy from May 2007 to the present, there is no triable issue as to their breach of the MUO.

3. Did plaintiff suffer damages?

Finally, it is undisputed that plaintiff suffered damages, and defendants do not contest



plaintiff's calculation of its damages to date.

B. Unjust enrichment claim

An action to recover on a theory of unjust enrichment is based on the equitable principle that a party is not permitted to enrich itself unjustly at the expense of another. (*Waldman v Englishman Sportswear, Ltd.*, 92 AD2d 833, 836 [1st Dept 1983]). Where a contract has been terminated or rescinded, a party may recover on an implied promise to pay for benefits conferred thereunder. (*Id.*). To prevail on an unjust enrichment claim based on services rendered, the plaintiff must show: (1) the performance of the services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services. (*Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103 [1st Dept 2002]).

Even if the MUO expired in 2006, plaintiff established that it continued to house Pitt, that defendants accepted plaintiff's services by not attempting to find other housing for Pitt and by paying for the room until May 2007, that it expected compensation from defendants by billing them monthly, and that the reasonable value of its services was \$65 a night. (*See eg Capital Heat v Buchheit*, 46 AD3d 1419 [4th Dept 2007] [plaintiff entitled to recover as defendant did not dispute that plaintiff performed work in good faith or that work was of acceptable quality, and by issuing invoices, plaintiff established expectation of payment and invoices established the reasonable value of services]; *Waldman*, 92 AD2d at 836 [plaintiff asserted unjust enrichment claim for services rendered after agreement terminated]; *Gromley v Atlantic Recording Corp.*, NYLJ, Jan. 30, 2009, at 26, col 1 [Sup Ct, New York County] [plaintiff stated claim for payment for period after contract expired]).



In opposition, defendants failed to raise any triable issues as to plaintiff's unjust enrichment claim. Defendants' failure to pay plaintiff notwithstanding the services it rendered to defendants' client would result in defendants being unjustly enriched at plaintiff's expense.

IV. CONCLUSION

For all of these reasons, it is hereby

ORDERED, that plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$60,450.00, representing plaintiff's damages from May 2007 to November 30, 2009, together with interest at the rate of 9% per annum from the date of November 30, 2009 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; it is further

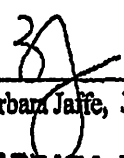
ORDERED, that an assessment of damages against defendants is directed as to plaintiff's damages since November 30, 2009; it is further

ORDERED, that plaintiff serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and statement of readiness and the payment of proper fees, if any, to place this action on the

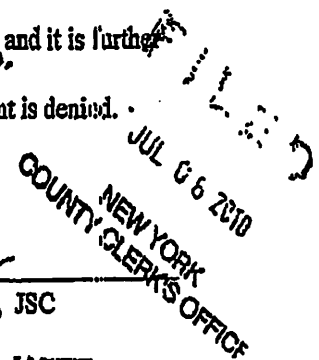
appropriate trial calendar for the assessment hereinabove directed; and it is further
Note of Issue to be Filed by August 13, 2010.

ORDERED, that defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: June 25, 2010
New York, New York


NEW YORK COUNTY CLERK'S OFFICE
JUL 6 6 2010