Supreme Court, New York County v Van Riet
2011 NY Slip Op 33898(U)
November 29, 2011
Supreme Court, New York County
Docket Number: 651437/2011
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

PAUL HETH,

Plaintiff,

-against-

CHRISTOPHER VAN RIET and VAN RIET CAPITAL LIMITED,

Defendants.

INDEX NO. 651437/2011
MOTION DATE Nov. 16, 2011
MOTION SEQ. NO. 001
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to dismiss action.

	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 accompanying decision and order.

Dated: November 29, 2011

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

--X

PAUL HETH,

Plaintiff,

-against-

CHRISTOPHER VAN RIET and VAN RIET CAPITAL LIMITED,

Defendants.

--X

VAN RIET CAPITAL LIMITED,

Counterclaim-Plaintiff,

-against-

PAUL HETH,

Counterclaim-Defendant.

--X

DECISION AND ORDER

Index No. 651437/2011

O. PETER SHERWOOD, J.:

Plaintiff/Counterclaim Defendant, Paul Heth ("Heth"), moves, pursuant to CPLR 3211, to dismiss the counterclaims of Defendant/Counterclaim Plaintiffs, Christopher Van Riet ("Van Riet") and Van Riet Capital Limited ("Van Riet Capital"). Christopher Van Riet is the sole owner of Van Riet Capital. The counterclaims allege breach of contract, unjust enrichment, constructive trust, conversion, and indemnity.

BACKGROUND

Heth is alleged to be a cinema mogul who was instrumental in expanding the Western cinema market into post-communist Russia. In the early 1990s, Heth formed a cinema company called Rising Star Media ("Rising Star"). Efforts to sell Rising Star began in early 2009. In connection with those efforts, Heth agreed to utilize the consulting services of his then friend, Christopher Van Riet. That arrangement was memorialized in an agreement signed in March 2009 ("the March

[* 3]

Agreement"). Pursuant to the March 2009 Agreement, Van Riet, through Van Riet Capital, a company of which he is the sole owner, would have been entitled to receive between 28.5% and 50% of certain benefits accruing to Heth as a result of the sale of Rising Star.

On December 31, 2009, Rising Star was sold to RSM Holdco. The parties dispute how much of a role Van Riet played in securing the sale. Heth claims that in December of 2009, shortly before the closing, Heth, on behalf of Rising Star, Van Riet entered into a new agreement (the "December Agreement") governing what benefits Van Riet would receive for his contribution to Rising Star's development and ultimate sale.

Pursuant to the December Agreement, Van Riet was entitled to, and allegedly received, (1) a transaction fee of $350,000; (2) "B" shares equaling 2% of all outstanding shares of RSM Holdco; (3) the opportunity to invest $1 million in RSM Holdco (resulting in ownership of 1/45 of the "A" shares in RSM Holdco); (4) six-figure annual compensation; (5) an advisory role with RSM Holdco related to mergers and acquisitions; and (6) a seat on the RSM Holdco board of directors.

Heth alleges that when he learned Van Riet was likely to bring suit to enforce the March Agreement, which Heth claims has been fully novated, Heth commenced this declaratory judgment action to declare that Heth owes no obligation to Van Riet under the March Agreement. In the answer, Van Riet asserts five counterclaims for breach of contract, unjust enrichment, constructive trust, conversion, and indemnity.

DISCUSSION

A. Breach of Contract

It's undisputed that the March Agreement was a valid, enforceable contract. The dispute here lies in whether the December Agreement operated as a novation of the March Agreement. The elements for a novation are: "(1) a previous valid obligation; (2) agreement of all parties to the new contract; (3) extinguishment of the old contract, and (4) a valid new contract." *(Hall v. Fireman's*

Fund Ins. Co., 118 Misc. 2d 956, 958 [Sup. Ct. Warren County 1983]). Whether a later agreement is intended as a substituted agreement is to be "deduced from the documents and the circumstances of their execution." (*Mallad Constr. Corp. v County Fed. Sav. & Loan Ass'n*, 32 NY2d 285, 292 [1973]).

Not all parties who were formal signatories to the contract memorializing the March Agreement were formal signatories to the contract memorializing the December Agreement. The December Agreement was signed by Van Riet in his individual capacity, but not by Van Riet Capital. Heth signed in his capacity as Rising Star's agent but not in his individual capacity. The December Agreement does not reference the March Agreement.

Heth relies on e-mails of Van Riet, which he alleges demonstrate Van Riet's acknowledgment that the December Agreement was a novation of the March Agreement. Van Riet responds that e-mails alone do not constitute documentary evidence sufficient to support a motion to dismiss a claim under CPLR 3211 (*see Fontanetta v John Doe* 1, 73 AD3d 78, 84 [2d Dept 2010] [noting that e-mails, depositions, affidavits and trial testimony were not the kind of documentary evidence the legislature contemplated when it enacted 3211 [a][1]). Heth cites no case dismissing a claim based on documentary evidence which consists solely of e-mails and the court's research has uncovered none. In any event, snippets from e-mail correspondence in November and December 2009 do not constitute documentary evidence, sufficient to "utterly refute" Van Riet's counter-claim (*see Goshen v. Mutual Life Ins. Co. Of New York*, 98 NY2d 314 [2002]).

As negotiations for the December 2009 agreement were occurring, Van Riet mentioned that the negotiations were part of a "settlement of [his] arrangements with [Heth]" (Mem. in Supp., Ex. D, at 1); that "[Heth] has also confirmed that he is 100% supportive of the above provided that this concludes the arrangements he agreed with me [Van Riet])" (*id.*); and that Van Riet agreed to "back-down on the level of [his] contractual entitlements with [Heth] and take a big haircut in return for future opportunity" (Mem. in Supp., Ex. E, at 1).

It appears that in November and December 2009 the parties were in negotiations to settle Van Riet's compensation for his contribution to Rising Star. Indeed, these e-mails closely resemble the terms ultimately memorialized in the December Agreement. This may suggest that Heth and Van Riet were renegotiating the March Agreement but they do not establish to a certainty that a novation occurred.

B. Unjust Enrichment

It is well-settled that the existence of a written contract governing a particular subject matter precludes recovery in quasi-contract for events arising out of the same subject matter (*see IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 [2009][unjust enrichment is a quasi-contract claim "imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned. Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded."]). Here, there can be no question that a contract governs. The dispute concerns which contract - - the March Agreement or the December Agreement - - applies. The unjust enrichment claim must be dismissed.

C. Constructive Trust

"[A] party claiming entitlement to a constructive trust must establish: (1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment." (*Wachovia Sec., LLC v. Joseph*, 56 AD3d 269, 271 [1st Dep't 2008]). There are no facts pleaded that would support a claim that the parties had either a confidential or fiduciary relationship. Further, as discussed above, there can be no unjust enrichment in this case. The constructive trust claim must be dismissed.

D. Conversion

A claim of conversion cannot be predicated on a mere breach of contract (*see Richbell Information Services, Inc. v. Jupiter Partners, L.P.*, 309 AD2d 288, 306 [1st Dep't 2003] [conversion claim properly dismissed because it was duplicative of breach of contract claim]; *Retty Financing, Inc. v. Morgan Stanley Dean Witter & Co.*, 293 AD2d 341, 341 [1st Dep't 2002] (same);

Hochman v. LaRea, 14 AD3d 653, 655 [2d Dep't 2005] ["[T]he cause of action alleging conversion should have been dismissed because a claim of conversion cannot be predicated on a mere breach of contract."]). This claim shall be dismissed.

E. Indemnity

Plaintiff argues the following in regard to the indemnity claim:

> Under New York law, an indemnity agreement such as the agreement attached to the March 2009 Agreement will not be construed to apply to claims between the parties to the agreement absent an "unmistakably clear" intent that the agreement cover such claims. *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (1989). The Indemnity between VRCL and Heth does not reflect such unmistakably clear intent and, as result, Heth is not obligated to indemnify VRCL in this litigation and Counterclaim Count V must be dismissed.

Van Riet has not responded to this argument. The claim shall be deemed abandoned (*see Gary v. Flair Beverage Corp.*, 60 A.D.3d 413 ([1st Dep't 2009]).

Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendants' counterclaims is GRANTED to the extent that counterclaims II (Unjust Enrichment), III (Constructive Trust), IV (Conversion) and V (Indemnity) are dismissed; and it is further

ORDERED that plaintiff shall serve and file his answer to the counterclaim within 20 days of service of this Decision and Order with notice of entry.

This constitutes the decision and order of the court.

DATED: November 29, 2011

E N T E R,

O. PETER SHERWOOD
J.S.C.