SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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BIBI MONNAHAN,

Plaintiff,

-against-

MEYER DAVIS STUDIO, INC.,

Defendant.

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Index No.: 104125/2011

**DECISION AND ORDER**
Motions Seq. 004 and 005

**CAROL R. EDMEAD, J.S.C.:**

**MEMORANDUM DECISION**[1]

In this breach of contract action, defendant Meyer Davis Studio ("defendant") moves pursuant to CPLR 3025 for leave to amend its answer to the complaint of plaintiff Bibi Monnahan ("plaintiff") (sequence 004), and, pursuant to CPLR 3212, for summary judgment to dismiss plaintiff's complaint (sequence 005).

*Background Facts*

This action arose out of a contract for interior decorating services between plaintiff, a New York interior decorator, and defendant, an architectural design firm. In May 2007, by an email memorandum, the parties entered into a contract (the "May 2007 contract"), pursuant to which, plaintiff agreed to perform interior decorating services for the home of the Rosen family in Westport, Connecticut ("Westport project"). By the terms of this contract, the parties agreed that plaintiff's compensation will consist of the hourly billed payments and one half of the 30% "mark-up," (*i.e.*, 15%) representing the difference between the wholesale and the marked-up price of the home furnishings purchased by plaintiff for the Rosens (the "mark-up commission").

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[1] Motions sequence number 004 and 005 are consolidated for joint disposition herein.

Thereafter, but prior to the beginning of any design work, the Rosens canceled the Westport project and instead, retained defendant for the project at their apartment located at 800 Park Avenue in New York City (the "Park Avenue project").

In September 2007, plaintiff and defendant agreed that plaintiff would provide decorating services for the Rosens' Park Avenue apartment (the "September 2007 contract"). The parties understood that the contract terms of the Westport project would also govern the terms of the Park Avenue project, *i.e.*, that plaintiff would receive half of the mark-up commission. Thereafter, plaintiff began working on the Park Avenue project and received several payments pursuant to her invoices.

Sometime in July 2009, defendant renegotiated its contract for the Park Avenue project with the Rosens by modifying the terms of compensation for the interior design services. Plaintiff was unaware of this modification, until in August 2009, when she discovered, through an email exchange with defendant's "administrative assistant," that she will no longer receive the mark-up commission. Plaintiff's attempts to contact defendant regarding any change in contract terms were unsuccessful, until six months later, on February 26, 2010, defendant's principal, Gray Davis, informed plaintiff by telephone that sometime in July 2009, the Rosens refused to pay the mark-up charge on their furnishings and only agreed to a flat fee of $175,000 for all interior design work, and thus, plaintiff would continue to be paid for her time at the originally agreed billable rate, but no commission would be paid. Plaintiff refused to agree to such terms and proposed instead that the parties split the $175,000 fee, upon deducting the commission amounts plaintiff had previously received. Defendant rejected the proposal. According to plaintiff, defendant thereafter paid plaintiff $12,687, but failed to pay the balance of $74,812.53. Consequently, plaintiff commenced this action against defendant asserting three causes of action

for breach of contract, *quantum meruit* and unjust enrichment.

Defendant now moves to amend its verified answer to assert three new defenses of legal impossibility, non-occurrence of an implied condition precedent, and accord and satisfaction,[2] and simultaneously, for summary judgment to dismiss plaintiff's complaint.

In its motion to amend, defendant argues that the proposed defenses have merit; there is no prejudice to plaintiff,[3] and, therefore, plaintiff's complaint should be dismissed.

Defendant's proposed defense of *accord and satisfaction* is based on the claim that prior to learning about defendant's modification of the contract, plaintiff did not bill for all of her hours worked on the project, in the expectation of the commission payments (plaintiff transcript, pp. 75-76). Defendant argues that it subsequently "allowed" plaintiff to bill for an additional 20 hours to compensate her for the non-billed hours, with the "reasonable understanding that [ . . . ] this was in full settlement of the matter," and that by accepting the payment for the additional hours, plaintiff accepted consideration *in lieu* of the mark up commission. Defendant's principal Gray Davis attests that he never advised plaintiff "not" to bill for all of her hours in connection with her work on the Park Avenue project (Davis transcript, pp. 66, 75-76; 122-124; plaintiff transcript, pp. 74-75).

As to the remaining proposed defenses, the *non-occurrence of the condition precedent* and *legal impossibility*, defendant argues that the parties operated under the implied assumption that the Rosens would agree to pay the 30% mark-up [commission] on the furnishings, and that

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[2] Defendant seeks to substitute the proposed defenses for the defenses numbered (2), (3) and (4) in its original answer.

[3] In its motion to amend its answer, defendant only advances its arguments in support of its (fourth) proposed defense of *accord and satisfaction,* and refers the Court to its accompanying summary judgment motion for arguments in support of its second proposed defense, *legal impossibility* and the third proposed affirmative defense of *non-occurrence of the condition precedent.*

plaintiff's commission would be earned at the time of the Rosens' full or partial payment for the ordered furnishings. Since the Rosens refused to pay the mark-up, the implied condition of defendant's obligation to pay the commission to plaintiff did not occur, discharging defendant's obligation (Davis transcript, pp. 30-31; 45-47; 79-80; 86).[4] The parties did not anticipate the Rosens' refusal to pay the mark-up at the time of the September 2007 contract.

As to dismissal of plaintiff's *quantum meruit* and unjust enrichment claims, defendant asserts that plaintiff was paid in full for her services by being paid at the hourly rate, and defendant was not enriched because it did not receive any "mark-up" payments from the Rosens which were due to plaintiff.

Plaintiff opposes the motion arguing that defendant breached the contract by altering the terms of their agreement without plaintiff's knowledge or consent when defendant separately agreed with the Rosens to forgo the 30% mark-up. However, regardless of any change in terms of the defendant's contract with the Rosens, the terms of plaintiff's September 2007 contract defendant never changed; plaintiff would not agree to work on the Park Avenue project without the provision for the mark-up commission; and, after defendant's purported re-negotiation of the terms with the Rosens in July 2009, defendant nevertheless paid plaintiff the mark-up commission pursuant to her invoices submitted in June and September of 2009, and in February 2010 (exhibits 4; 5; 6).

Further, the court should deny defendant's motion to amend as the proposed defenses lack merit. Plaintiff neither expressly agreed to any new terms, nor waived her commission by submitting invoices for the time she had previously not billed. Plaintiff argues that after she

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[4] Defendant also appears to argue, although does not expressly state, that the Rosens' refusal to pay the mark-up was a failure of a material assumption of the parties, rendering the performance of the contract legally impossible.

learned that no commission would be paid to her, she began billing for all her hours to ensure that she at least received the full measure of her hourly billings before bringing a lawsuit to vindicate her rights.

In reply, defendant argues that although the plaintiff was not party to defendant's re-negotiations with the Rosens in February 2009, plaintiff does not dispute that the Rosens refused to pay the mark-up. Plaintiff is not entitled to share in the flat $175,000 fee, as it is not a mark-up commission. A party to a contract can change a term without the other party's consent when a material assumption on which the parties rely no longer exists. And even though defendant paid the mark-up commission to plaintiff on three invoices dated *after* the defendant's modification of the contract terms, two of the payments were not affected by the change, as they were for purchase orders placed earlier in the process; and the third payment may have been paid inadvertently. And in any event, by early August, (after plaintiff communicated with defendant's administrative assistant), plaintiff should have been aware that the contract was modified, even though defendant did not respond to plaintiff's inquiry about the missing commission.

*Discussion*

*Amend Pleading*

It is well settled that "[m]otions for leave to amend pleadings should be freely granted (CPLR 3025 [b]), absent prejudice or surprise resulting therefrom (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 901 NYS2d 522 [1st Dept 2010][internal citations omitted]). "[T]o conserve judicial resources, an examination of underlying merits of the proposed causes of action [or defenses] is warranted" (*Megaris Furs, Inc. v Gimble Bros.*, Inc., 172 AD2d 209 [1st Dept 1991]).

*The Second Proposed Affirmative Defense:*
*Legal Impossibility*

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an *unanticipated* event that could not have been foreseen [by the parties to] the contract" (*Kea Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 519 NE2d 295 [1987], *citing 407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 296 NYS2d 338, 244 NE2d 37 [1968]).

Defendant failed to establish that its proposed defense of impossibility has merit.

In *407 E. 61st Garage v Savoy Fifth Ave. Corp.*, plaintiff garage entered into a contract with the Savoy Hilton Hotel to furnish garage services for a period of five years to guests of the hotel and to pay Savoy 10% of its gross transient storage charges paid to the hotel's guests. The Court of Appeals held that the defense of frustration of purpose (legal impossibility) of a contract was not available to the hotel operator in suit for breach, where the purpose of plaintiff's contract to furnish garage services to hotel guests was frustrated only when *hotel operator itself made a business decision* to close hotel prior to the expiration of five-year term of agreement based on the lack of profitability, of which is was previously aware, and the frustration did not result from unanticipated circumstances.

Applying these principles, the court concludes that defendant's predicament is not within the embrace of the doctrine of impossibility (*see Kea Kim Corp. v Central Mats.*, 70 NY2d 900, 524 NYS2d 384 [1987]). Here, like in *407 E. 61st Garage v Savoy Fifth Ave. Corp.*, *supra*, the purpose of the plaintiff's contract for compensation for its interior design services was frustrated not when the Rosens refused to agree to the mark-up charges, but when defendant *itself made a business decision* go renegotiate the contract for new terms allegedly proposed by the Rosens.

And even assuming that neither party anticipated the Rosens' refusal to pay the mark-up

at the time when the parties entered into the September 2007 contract, the record shows that at least in July 2009, defendant was aware of the Rosens' refusal, failed to inform plaintiff about it, and continued to perform under the original contract terms (*see also Schroeder v Music or Record Corp.*, 43 AD2d 555, 349 NYS2d 724 [1st Dept 1973] [the refusal of a singer to make records produced by the plaintiff could not excuse a record company's breach of the employment agreement with the plaintiff producer, where the defendant record company knew of the dispute between the plaintiff and the singer at the time the agreement was executed, and there was no indication that the plaintiff had failed to abide by the agreement]).

Under the circumstances, defendant failed to establish the merit of the defense of impossibility of performance. And, defendant's proposition that a contract can be altered, without the other party's consent or even knowledge, when a material assumption on which the parties to an agreement rely no longer exists, is unsupported by any legal authority. Thus, the defense of impossibility is unavailable to defendant.

*The Third Proposed Affirmative Defense:*
*Failure of the Condition Precedent*

The court finds that defendant's argument in support of this proposed affirmative defense, *i.e.*, that its non-performance under the contract should be excused on the ground of failure of the condition precedent, is without merit. A condition precedent is an act or event which must occur before a party is obliged to perform a promise made pursuant to an existing contract (*Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 660 NE2d 415 [1995]). Such an occurrence of the event as a condition is generally expressed in "unmistakable language," *i.e.*, "if," "unless" or "until" (*id.*; Restatement [Second] of Contracts § 229, comment [a]).

Here, the parties' original written contract (email memorandum dated May 2007), which

was undisputedly adopted in their oral September 2007 contract, states in pertinent part that "[p]ayment of the 15% to Bibi Monnahan will be on placing each order *when monies are received from client*" (May 2007 contract, exhibit I). Such language has not been deemed by courts to be the "unmistakable language" of the condition precedent. For example, in *Otis Elevator Co. v George A. Fuller Co.* (172 AD2d 732, 569 NYS2d 118 [2d Dept 1991]), where a defendant general contractor claimed that its failure to pay plaintiff, the subcontractor, was excused based on the owner's refusal to pay the general contractor, the court held that "[a]bsent clear language to the contrary, a contract provision that payment is not due the subcontractor until the owner has paid the general contractor does not create a condition precedent, but only fixes a time for payment" *(Otis Elevator Co. v George A. Fuller* Co., 172 AD2d 732*; see Berto Const. Inc. v Pergament Mall of Staten Island LLC*, 2008 WL 2882051 (Trial Order)[Sup Ct, New York County 2008]; NY Jur2d Contracts § 423).

And even assuming that the Rosens' payment of the 30% mark-up on furnishings were an implied precondition to defendant's payment to plaintiff, defendant as movant failed to demonstrate how this defense excuses it from altering the terms of the contract without plaintiff's knowledge or consent. Therefore, this defense is unavailable to defendant.

*The Fourth Proposed Affirmative Defense:*
*Accord and Satisfaction*

Defendant likewise failed to establish that its proposed defense of accord and satisfaction has merit. An essential component of an accord and satisfaction is a clear manifestation of intent by the debtor tendering less than full payment of a disputed unliquidated debt, that the payment has been sent in full satisfaction of the disputed claim (*Manley v Ponteix Press,* 72 AD2d 452, 424 NYS2d 902 [1st Dept 1980]). An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the

accord discharges the original duty (Rest2d Contr §281).

The court finds that defendant's assertion in support of this defense that ". . . Defendant paid Plaintiff for *hours* she had not previously billed for her services in settlement of her claims" is deficient as a matter of law, as it fails to articulate the required "clear manifestation" of intent on the part of defendant that the payment was in full satisfaction of the disputed claim of the mark-up commission, "particularly where summary judgment is to be granted dismissing the major causes of action in the complaint" (*Manley v Ponteix Press, 72 AD2d 452*) (emphasis added). Likewise insufficient to support this defense is defendant's claim that it had a "reasonable understanding" that allowing plaintiff to bill additional hours was in full settlement of the matter. That defendant "allowed" plaintiff to bill extra hours, thereby making an "accommodation to her, in expectation of resolving the parties' dispute," fails demonstrate that *plaintiff* agreed to accept the "stated performance in satisfaction of the [defendant's] obligor's existing duty" (*Manley v Ponteix Press, 72 AD2d 452*). Thus, defendant's affirmative defense of accord and satisfaction must also fail.

*Summary Judgment*

A defendant moving for summary judgment must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). The movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d

927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

"The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

To establish a breach of contract claim, plaintiff was required to show the existence of a valid contract, breach of the contract by defendant and resulting damages *(see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009]; *Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Thus, as the movant, defendant must establish, as a matter of law, the absence of any one of these elements.

There is no dispute that the September 2007 agreement constitutes a valid and binding contract between the parties and that the terms of the September 2007 were the same as those of the written May 2007 contract (for the Westport project). The compensation of plaintiff was stated as follows: "Purchases made by client including custom pieces *will be marked up at 30% over net* and *split 15% to Meyer Davis Architects [defendant]* and 15% to Bibi Monnahan Interiors [plaintiff]. . . ." (May 2007 contract, ¶1) (emphasis added). Further, defendant does not dispute that it has not paid plaintiff the mark-up commission under the terms of the September 2007 contract. And, as the court stated above, defendant's argument that its payment obligation to a plaintiff should be excused on the account of the Rosens' refusal to pay the mark-up, theory of accord and satisfaction, or legal impossibility, is unavailing.

It is a well-settled principle of contract law that one party to a contract may not unilaterally alter its terms without the consent of all parties thereto (*Mount Vernon City School*

*Dist. v Nova Cas. Co.*, 19 NY3d 28, 968 NE2d 439 [2012]). In order to be effective as a modification, the new agreement must possess all the elements necessary to form a contract, including mutual consent to its terms (22A NY Jur2d Contracts §483; *Mindoro Realty, Inc. v 425 West End Ave. Co.*, 86 AD2d 585, 446 NYS2d 316 [1st Dept 1982][vendor could not unilaterally alter terms of agreement with purchaser for sale of real estate since the unilateral alteration of the agreement affected rights of purchaser]; *Beacon Terminal Corp. v Chemprene, Inc.*, 75 AD2d 350, 429 NYS2d 715 [2d Dept 1980][lessor who altered invoicing procedures for steam consumption but did not notify lessee that the bills were being computed by new formula failed to demonstrate lessee's consent to modification, who did not become aware that lessor had begun charging higher prices until lessor brought action to recover for sums allegedly underbilled for steam supplied prior to date of the first alteration]; *Dallas Aerospace, Inc. v CIS Air Corp.*, 352 F.3d 775 [2d Cir 2003], *applying New York law* [modification contained in purchase order, which buyer sent to seller when it wired payment to seller, was ineffective since it "materially altered" the parties' contract as to warranties, *without express consent of seller*]).

Here, the record shows that, at the time of defendant's "new agreement" with the Rosens in July of 2009, plaintiff was unaware that the structure of her compensation was changed, and thus, could not have assented to those new terms *(see Beaver Employment Agency, Inc. v Noestring, Inc.*, 160 Misc 2d 454, 609 NYS2d 509 [Civ Ct, New York County 1993][employer could not modify contract with the employment agency unilaterally and thus, was liable under the previous contract for agency's fee]).

However, the record raises an issue of fact as to whether plaintiff assented to the new contract terms by conduct (*see, Pinsley v Pinsley*, 168 AD2d 863, 564 NYS2d 528 [3d Dept 1990][modification may be proved circumstantially by the parties' conduct]; *Beacon Terminal*

*Corp. v Chemprene, Inc.*, 75 AD2d 350, 429 NYS2d 715 [2d Dept 1980]). Plaintiff's amended complaint alleges that defendant renegotiated the markup from $225,000 to $175,000, and "As a result, [defendant and plaintiff] agreed to evenly divide the renegotiated markup so that each would receive $87,500 (Amended Complaint, ¶16). However, in her affidavit and deposition testimony, plaintiff asserted that, after learning of the modification, she expressly rejected the new terms, even though she continued to perform, purportedly under the original contract.

Furthermore, the evidence in the record that defendant paid plaintiff the mark-up commission *after* the modification of the original terms in July 2009, indicates that plaintiff had basis to believe that she would be receiving the mark-up commission. As such, the record does not conclusively manifest the required mutual assent, so as to establish as a matter of law that plaintiff consented to the new compensation terms by conduct.

Based on the above, defendant failed to demonstrate that plaintiff's breach of contract claim has no merit, sufficient to warrant the court as a matter of law to direct judgment in its favor (CPLR §3212[b]; *Bush v St. Claire's Hosp.*, 82 NY2d 738; *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, *supra*).

*Quantum Meruit and Unjust Enrichment*

As to plaintiff's claims for *quantum meruit* and unjust enrichment, plaintiff alleges that defendant "retained Plaintiff to perform interior design work at the Rosen residence [and that] [t]his design work included selecting and purchasing furnishings, accessories, and finishes (collectively, "Pieces") throughout the apartment" (Amended Complaint, ¶7). Further, "*as consideration for Plaintiff's services*, [defendant] agreed to pay, and Plaintiff agreed to accept, $150 per hour for time spent sourcing Pieces with the client *plus one half of an agreed 30% markup over the cost of the Pieces*" (Amended Complaint, ¶8). Allegedly, "Over the course of

two years, Plaintiff worked with the Rosens in selecting and purchasing furnishings, including lighting, rugs, art pieces, and furniture (all of which constitute "Pieces" for the purpose of Plaintiff's compensation arrangement) for the Manhattan apartment (Amended Complaint, ¶13). Plaintiff alleges that the "original budget for the purchase of Pieces was $750,000, which would have yielded a markup of $225,000. *This markup was to be split evenly between Plaintiff and Debtor and would have resulted in a fee to Plaintiff of $112,000.*" (Emphasis added). The 15% markup also allegedly constituted remuneration for plaintiff's services, and defendant renegotiated its agreement with the Rosens to accept a flat fee of $175,000 for all the work being performed at the New York residence. Defendant failed to establish that its payment to plaintiff thus far compensated plaintiff in full for the services plaintiff allegedly performed, and that it was not enriched at plaintiff's expense by charging the $175,000.00 flat fee to the Rosens. Thus, the court declines to dismiss plaintiff's claims for *quantum meruit* and unjust enrichment.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that defendant's Meyer Davis Studio's motion pursuant to CPLR 3025 for leave to amend its answer to plaintiff Bibi Monnahan's complaint (sequence 004), is denied; and it is further

ORDERED that defendant's Meyer Davis Studio's motion pursuant to CPLR 3212 for summary judgment to dismiss plaintiff's complaint (sequence 005) is denied. And it is further

ORDERED that counsel for defendant shall serve the copy of this order with notice of entry upon plaintiff's counsel within 20 days of this order.

This constitutes the decision and order of the court.

Dated: October 2, 2012

Hon. Carol Robinson Edmead, J.S.C.