

Manhattan Telecom. Corp. v Ashkenazy
2013 NY Slip Op 33045(U)
December 2, 2013
Supreme Court, New York County
Docket Number: 152410/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 152410/2012
MANHATTAN TELECOMMUNICATIONS
vs.
ASHKENAZY, BEN
SEQUENCE NUMBER : 001
STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

is decided in accordance with the annexed decision.

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

Dated: 12/2/13

CRK, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
MANHATTAN TELECOMMUNICATIONS
CORPORATIN d/b/a METTEL,

Index No.152410/2012

Plaintiff,

-against-

DECISION/ORDER

BEN ASHKENAZY,

Defendant.

-----X
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced this action asserting claims for money due and owing, conversion and attorney's fees. Plaintiff now moves for an order striking the defendant's pleadings; granting it leave to amend its complaint; and granting sanctions against defendant. Defendant cross-moves for an order pursuant to CPLR § 3212 granting him summary judgment dismissing plaintiff's complaint on the ground that this action cannot be maintained against him in his individual capacity. For the reasons set forth below, plaintiff's motion is denied and defendant's cross-motion is granted in part.

The relevant facts are as follows. Plaintiff Manhattan Telecommunications Corporation d/b/a MetTel ("MetTel") is a telecommunications and internet provider. Starting in or around 2010, plaintiff began providing telecommunication services to the building located at 656 Sixth Avenue, New York, NY, known as the "Limelight Marketplace" (referred to herein as the "Premises" or

“Limelight”). The Limelight project was affiliated with the corporate entity Magjic I LLC (“Magjic”), which held a sublease for the Premises. Defendant Ben Ashkenazy and non-party Jack Menshe were partners in Magjic. Plaintiff was allegedly retained to provide services to the Premises pursuant to a signed services quote (the “Agreement”). The Agreement was signed by Mr. Menshe on behalf of Magjic.

Starting sometime in June or July 2011, plaintiff alleges that Limelight failed to pay to plaintiff the charges due for the telecommunication services being provided. As a result, plaintiff discontinued services to Limelight. Thereafter, defendant contacted plaintiff to resolve the matter and an agreement was allegedly reached wherein Magjic agreed to pay \$24,000 in arrears in twelve monthly installments of \$2,000 per month. Accordingly, on or about July 1, 2011, Magjic issued to plaintiff twelve post-dated checks dated for the first of each month from July 1, 2011 to August 1, 2012. The checks clearly state that they are issued on behalf of Magjic. At that same time, plaintiff alleges that defendant personally represented to plaintiff that once service was restored, he would personally pay all current and future charges incurred by Limelight. Plaintiff bases this allegation on an email written by defendant to plaintiff on July 14, 2011, which states:

Thank you and iam [sic] embaraced [sic] that they sent the wrong amount. Tomorrow chung will arrange to give you 11 checks per your e mail. The total amount will be paid in full. An additional 500\$ check will be sent as well tomorrow.

I think you can trust me (now that I took over) for 24k.

Thereafter, in or around October of 2011, the parties’ relationship allegedly deteriorated once again and, as a result, plaintiff again terminated services to Limelight and Magjic cancelled the remaining outstanding checks.

Plaintiff has now commenced the instant action seeking to recover the allegedly outstanding

payments due to it for providing services to Limelight. In its amended complaint, plaintiff asserts four causes of action: (1) money due and owing based on the cancellation of the checks; (2) conversion; (3) money due and owing for further outstanding charges incurred by plaintiff for providing services to Limelight; and (4) attorney's fees. Plaintiff now moves to strike defendant's answer on the ground that defendant has violated two orders of this court dated September 12, 2012, 2012 and April 9, 2013, by failing to timely and properly respond to its discovery requests. Additionally, plaintiff also seeks to amend its amended complaint to assert an additional cause of action for abuse of process against defendant. Defendant cross-moves for an order granting him summary judgment dismissing plaintiff's complaint on the ground that he cannot be held personally liable as he was never a personal signatory of any alleged debts owed to plaintiff and can have absolutely no personal liability herein.

The court first turns to defendant's cross-motion for summary judgment. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, defendant is entitled to summary judgment dismissing plaintiff's first and third cause of action for money due and owing as said claims are barred by the statute of frauds as a matter of law. Pursuant to the New York Statute of Frauds § 5-701:

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: . . . 2. Is a special promise to answer for the debt, default or miscarriage of another person.

In the present case, there is no agreement in writing wherein defendant promised to individually answer for the debts of Magjic or Limelight. While plaintiff relies on the July 14, 2011 email sent to it by defendant, such reliance is without merit as nowhere in that email does defendant agree to be held individually liable for any past or future debts of Magic or Limelight. On the contrary, defendant only states that the debt will be paid tomorrow and arranged for the checks to be issued. Simply put, there is no written document in the record to satisfy the statute of frauds and impose individual liability on defendant for Magjic or Limelight's alleged debts.

Additionally, defendant's motion for summary judgment dismissing plaintiff's fourth cause of action for attorney's fees is granted. "It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule." *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597 (2004). Here, plaintiff has failed to identify any statute, agreement or court rule pursuant to which it is entitled to attorney's fees in this action if it were to prevail.

However, defendant's motion for summary judgment dismissing plaintiff's second cause of action for conversion is denied. "The rule is clear that, to establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question...to the exclusion of the plaintiff's rights." *Fiorenti v. Central Emergency Physicians*, 305 A.D.2d 453, 454 (2d Dept 2003), citing *Independence Discount Corp. v. Bressner*,

47 A.D.2d 756, 757 (2d Dept 1975); *see also Fitzpatrick House III, LLC v. Neighborhood Youth & Family Servs.*, 55 A.D.3d 664 (2d Dept 2008). Here, defendant fails to specifically address the merits of plaintiff's conversion claim in its moving papers. Instead, defendant presents only the broad argument that plaintiff's complaint must be dismissed as defendant cannot be held personally liable as he was not in privity with plaintiff and never personally guaranteed to pay the debts of Magjic and/or Limelight, and, in any event, any liability for such alleged guarantee is barred by the statute of frauds. However, these arguments are without merit as to plaintiff's claim of conversion as plaintiff may still maintain a cause of action against defendant for conversion regardless of privity of contract or the statute of frauds. Accordingly, plaintiff has failed to make out his *prima facie* entitlement to summary judgment dismissing plaintiff's conversion claim.

The court now turns to plaintiff's motion. As an initial matter, plaintiff's motion to amend its complaint is denied. Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit. On a motion for leave to amend, [the party] need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or devoid of merit." *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted).

In the instant case, plaintiff's motion for leave to amend its amended complaint to assert a fifth cause of action for abuse of process based on defendant's assertion of a counterclaim for malicious prosecution is denied as the proposed amendment is patently devoid of merit. To state a claim for abuse of process, a party must plead the following elements: (1) a regularly issued process, either civil or criminal; (2) intent to do harm without excuse or justification; and (3) use of the

process in a perverted manner to obtain a collateral objective. *See Curiano v. Suozzi*, 63 N.Y.2d 113 (1984). It is well settled that to satisfy the first element, “the process used must involve an ‘unlawful interference with one’s person or property.’” *Id.* (quoting *Williams v. Williams*, 23 N.Y.2d 592, 596 (1969)). Additionally, plaintiff must allege the “‘gist of the action for abuse of process,’ which is ‘the improper use of process after it is issued.’” *Id.* (internal quotations omitted). Here, plaintiff fails to allege any process by defendant that involved an unlawful interference with plaintiff’s person or property as plaintiff’s claim is based solely on defendant’s assertion of a counterclaim in its answer. Moreover, plaintiff fails to allege that defendant has misused his counterclaim after it was issued.

Additionally, the remainder of plaintiff’s motion for sanctions against defendant and to strike defendant’s answer is denied as the conduct complained about simply does not rise to the level warranting sanctions or the striking of a party’s claim or pleading. Indeed, as defendant had responded to plaintiff’s discovery requests, albeit not to the satisfaction of plaintiff, “the proper course for defendant, rather than moving to strike the [answer] pursuant to CPLR 3126, was first to move to compel further discovery pursuant to CPLR 3124.” *Double Fortune Prop. Invs. Corp. v. Gordon*, 55 A.D.3d 406 (1st Dept 2008). To the extent any discovery is still needed in regards to the remaining claim for conversation, all parties are to appear for a compliance conference in Room 432 at 60 Centre Street on ~~MARCH 11~~, 2014, at 11 a.m. to resolve this matter.

Based on the foregoing, plaintiff’s motion is denied in its entirety and defendant’s cross-motion is granted to the extent that plaintiff’s first, third and fourth causes of action are hereby dismissed. This constitutes the decision and order of the court.

Dated: 12/2/13

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.