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| <b>Underhill Holdings, LLC v Travelsuite, Inc.</b>                                                                                                                                                                                                               |
| 2014 NY Slip Op 31489(U)                                                                                                                                                                                                                                         |
| June 5, 2014                                                                                                                                                                                                                                                     |
| Sup Ct, New York County                                                                                                                                                                                                                                          |
| Docket Number: 652078/11                                                                                                                                                                                                                                         |
| Judge: Anil C. Singh                                                                                                                                                                                                                                             |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

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UNDERHILL HOLDINGS, LLC,

Plaintiff,

Index No. 652078/11

- against-

TRAVELSUITE, INC., V1 JETS INTERNATIONAL, INC.,  
V1 JET MANAGEMENT, LLC, ANDREW ZARROW  
and SCOTT ZEIGLER,

Defendants.

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**HON. ANIL C. SINGH, J.:**

Underhill Holdings, LLC (Underhill Holdings) moves, pursuant to CPLR 3212, for an order granting summary judgment: on the first, fourth, fifth, sixth, seventh, eighth and ninth causes of action in the complaint; dismissing the first through sixteenth affirmative defenses asserted in the answer of defendants Travelsuite, Inc. (Travelsuite), V1 Jets International, Inc. (Jets International), V1 Jet Management, LLC (Jet Management), and Andrew Zarrow (Zarrow); and dismissing the first through third affirmative defenses asserted in the answer of defendant Scott Ziegler (Ziegler and together with Travelsuite, Jets International, Jet Management, and Zarrow, defendants).

Travelsuite, Jets International, Jet Management, and Zarrow cross-move for an order granting summary judgment dismissing the first, second, fourth, fifth, sixth, seventh and eighth causes of action set forth in the complaint.

Ziegler cross-moves, pursuant to CPLR 3212, for an order granting summary judgment

dismissing the ninth cause of action.

Underhill Holdings is the owner of an aircraft. This is an action to recover damages for breach of a contract to use the aircraft. Underhill Holdings alleges that it had a written contract with nonparty Aquatica Aviation, Inc. (Aquatica), retaining Aquatica to operate and administer the aircraft. Underhill Holdings also alleges that defendants agreed to pay either Aquatica, or Underhill Holdings directly, for all obligations incurred by Aquatica to Underhill Holdings, pursuant to the written agreement.

The complaint sets forth a total of nine causes of action. The first and second causes of action are against Jets International and Jet Management for breach of contract. The third cause of action alleges third-party beneficiary status against Jets International and Jet Management, and is for breach contract. The fourth cause of action is against Jets International and Jets Management for promissory estoppel. The fifth and sixth causes of action are against Jets International and Jet Management for quantum meruit. The seventh cause of action is against Jets International and Jets Management for an account stated. The eighth cause of action is against Zarrow for unjust enrichment. The ninth, and final cause of action, is against Zeigler for unjust enrichment based on flights taken by Ziegler and his family.

Travelsuite, Jets International, Jet Managment and Zarrow's answer pleads the following 17 affirmative defenses: failure to state a claim (first); statute of frauds (second); unclean hands (third); failure of consideration (fourth); estoppel (fifth); waiver (sixth); failure to mitigate damages (seventh); failure of a material purpose (eighth); unconscionability (ninth); failure to join a party (tenth); standing (eleventh); failure of a meeting of the minds (twelfth); failure of an implied contract (thirteenth); failure of an implied promise (fourteenth); lack of a benefit

(fifteenth); lack of privity (sixteenth); and finally, plaintiffs are not third-party beneficiaries of any alleged contract (seventeenth). In apparent recognition of the true character of this case, Underhill Holdings has not moved to dismiss the seventeenth affirmative defense.

Zeigler's answer pleads the following affirmative defenses: failure to state a claim (first); lack of Supreme Court's minimal value claim jurisdiction (second); unclean hands (third); and frivolous conduct (fourth).

In support of its motion for summary judgment, Underhill Holdings alleges that Zarrow, in his capacity as President and Chief Operating Officer of Jets International, initiated the discussions and negotiations with Underhill Holdings that led to the agreement with Aquatica. Underhill Holdings argues that Jets International partially performed by paying an invoice.

In support of their cross motion for summary judgment Travelsuite, Jets International, Jet Management, and Zarrow argue that they are not parties to the fully integrated signed written contract which underlies Underhill Holdings' claims. In apparent recognition of the true nature of the underlying claim, Travelsuite, Jets International, Jet Management, and Zarrow do not move for dismissal of the third cause of action sounding in third-party beneficiary.

In support of his cross motion for summary judgment, Ziegler argues that he paid for the flights that he took, and that there is no legal basis for paying the owner of the aircraft, Underhill Holdings, for the flights.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence" to eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The "[f]ailure 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 this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

Underhill Holdings fails to meet its initial burden as movant, of tendering sufficient evidence to demonstrate the absence of a material issue of fact which would require a trial of the contract claims (first, second, and seventh causes of action). The written contract governing this dispute does not obligate the defendants to pay for use of the aircraft. The written agreement contains a broad merger clause; thus, extrinsic evidence such as the oral agreements alleged by Underhill Holdings, cannot be considered to alter, vary, or modify the written agreement (*Matter of East 51st St. Crane Collapse Litig.*, 100 AD3d 503 [1st Dept 2012]).

The fourth cause of action for promissory estoppel must be dismissed for failure to demonstrate either a clear promise, or reasonable and foreseeable reliance. Promissory estoppel requires a showing of "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on [the] promise" (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 20-21 [2d Dept 2008]).

On its seventh cause of action for an account stated, Underhill Holdings fails to

demonstrate that there was an agreement that Jets International and Jets Management would be liable for the aircraft provided to Aquatica (*Brauner Baron Rosenzweig & Klein, LLP v Roth*, 25 AD3d 333 [1st Dept 2006]).

Defendants, on the other hand, tender evidentiary materials sufficient to establish their prima facie entitlement to judgment as a matter of law. More particularly, defendants submit proof in admissible form that they had never entered into a contract with Underhill Holdings. Defendants, which are not affiliated with Aquatica, the signatory of the agreement that Underhill Holdings alleges was breached, cannot be held liable for breach of the agreement (*Stefatos v Fred-Doug Mgr., LLC*, – AD3d –, 982 NYS2d 886, 2014 NY Slip Op 2240 [1st Dept 2014]; *Chestnut Holdings of N.Y., Inc. v LNR Partners, LLC*, 106 AD3d 575 [1st Dept 2013]; *Dember Constr. Corp. v Staten Is. Mall*, 56 AD2d 768, 769 [1st Dept 1977]). There is no basis for any breach of contract claim against defendants, as they are not parties to the written agreement.

Moreover, Underhill Holdings fails to sufficiently demonstrate how defendants were either unjustly enriched (fifth, sixth, eighth, and ninth causes of action), or how Underhill Holdings had a reasonable expectation of compensation by defendants (*Farina v Bastianich*, 2014 WL 1491818, 2014 NY App Div LEXIS 2598 2014 NY Slip Op 2661 [1st Dept Apr. 17, 2014]).

Accordingly, it is

ORDERED that Underhill Holdings, LLC's motion, for an order granting summary judgment on the first, fourth, fifth, sixth, seventh, eighth, and ninth causes of action in the complaint is denied; and it is further

ORDERED that Underhill Holdings, LLC's motion to dismiss the first through sixteenth

affirmative defenses asserted in the answer of defendants Travelsuite, Jets International, Jet Management and Zarrow, is granted; and it is further

ORDERED that the first through sixteenth affirmative defenses in the answer of Travelsuite, Jets International, Jet Management and Zarrow are dismissed; and it is further

ORDERED that the motion to dismiss the affirmative defenses in the answer of Zeigler is denied as academic; and it is further

ORDERED that Travelsuite, Jets International, Jet Management, and Zarrow's cross motion for an order granting summary judgment dismissing the first, second, fourth, fifth, sixth, seventh and eighth causes of action set forth in the complaint, is granted and those causes of action are dismissed; and it is further

ORDERED that Ziegler's cross motion for an order granting summary judgment dismissing the ninth cause of action, is also granted and that cause of action is dismissed; and it is further

ORDERED that the third cause of action against Jets International and Jets Management alleging third-party beneficiary status shall continue; and it is further

ORDERED that the seventeenth affirmative defense of Travelsuite, Jets International, Jet Management and Zarrow, alleging lack of third-party beneficiary status, shall continue; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendants Travelsuite, Inc., Andrew Zarrow, and Scott Zeigler, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants Jets International Inc., and V1 Jet Management.

Dated: 6/5/14

ENTER:

  
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J.S.C.

**HON. ANIL C. SINGH  
SUPREME COURT JUSTICE**