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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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A. ORWASHER INC. and ABRAM ORWASHER,

Index No. 154295/12

Plaintiffs,

- against -

OVEN ARTISANS, INC. and KEITH COHEN,

DECISION/ORDER

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this breach of contract action, plaintiffs A. Orwasher Inc. ("AOI") and Abram Orwasher ("Orwasher") move for an order pursuant to CPLR 3212 granting them summary judgment as follows: (1) awarding AOI damages in the sum of $73,408; (2) imposing liability against defendant Oven Artisans, Inc. ("Artisans") for all payments it received for accounts receivable of AOI, and directing Artisans to provide an accounting of such receipts; (3) awarding Orwasher damages in the sum of $20,000 for services he rendered to Artisans; and (4) dismissing the three counterclaims for breach of contract, fraud, and unjust enrichment asserted by defendants Artisans and Keith Cohen ("Cohen"). Defendants oppose the motion.

BACKGROUND

Plaintiffs bring this action to recover more than $90,000 in damages from defendants for, *inter alia*, the alleged breach of an asset purchase agreement and related contracts for the acquisition of a bakery.

Orwasher is the president of AOI, a New York corporation which owned and operated Orwasher's Bakery (the "Bakery") located at 308 East 78th Street, New York, New York. In June 2006, Cohen, the president of Artisans, approached plaintiffs about purchasing the Bakery. On October 3, 2007, after some 16 months of negotiations, AOI and Artisans, represented by counsel, entered into an Asset Purchase Agreement (the "Agreement"), Promissory Note, and Sublease for the sale and transfer of the Bakery to Artisans.

The Agreement established the purchase price at $1.5 million, payable to AOI, upon closing, by bank check or wire transfer in the amount of $1.46 million and a Promissory Note in the amount of $40,000 (Exhibit "1" to the Motion, at §3.01[a]). The parties agreed to allowances for adjustments to the purchase price prior to the closing date (*id.*, §3.01[b]). The adjustments which amounted to $27,317 in expenses to be reimbursed to AOI by Artisan included $13,265.43 for transferred inventory; $2,475.26 for heating oil; $3,206 for printed bags; $352.87 for advertising; $260.17 for telephone services; $127.68 for website services; and $6,803.85 for two vans (Exhibits "8" through "14"). At the closing, the parties executed a Closing Memorandum, *inter alia*, extending the payment date of the adjustments until the next day, October 4, 2007 (Exhibit "7" to the Motion). Cohen endorsed the Agreement as president of Artisan, and also

personally guaranteed Artisans' obligations regarding a multi-employer plan (Agreement, *supra*, §3.02[c]).

In accordance with the terms of the Agreement, Artisans made a payment of $1.46 million to AOI by bank check and executed and delivered a $40,000 Promissory Note, dated October 3, 2007. The Promissory Note required Artisans to pay AOI $40,000 on April 4, 2008. In the event of a default in payment of the Promissory Note, Artisan agreed to pay AOI interest at rate of "fifteen (15%) per annum" and "reasonable fees, cost and disbursements" if the "Note is placed in the hands of an attorney for collection." (Exhibit "2" to the Motion). Artisans also waived "presentment, demand, protest and notice of any kind" (*id.*). AOI and Artisans also entered into a 10-year sublease, dated October 3, 2007 ("Sublease"), allowing Artisans to continue to operate the Bakery at the existing location.

This action arises from the alleged failure of defendants to satisfy their obligations under the Agreement and related contracts. In the first cause action, plaintiffs allege that Artisans breached its contractual obligations to AOI by (1) failing to pay the $40,000 Promissory Note; (2) failing to pay the $27,317 in adjustments to the purchase price outlined in the Closing Memorandum; (3) failing to pay approximately $2,800 in accounts that were reportedly owed to AOI as of the closing date; (4) failing to pay $6,091.15 for packaging that had reportedly been ordered and paid for by AOI, but had not been delivered as

of the closing date; and (5) failure to satisfy §3.02(c) of the Agreement, pursuant to which Artisans and AOI agreed "to take such actions as will ensure compliance with Section 4204 of ERISA to prevent AOI from incurring at Closing a complete or partial withdrawal with respect to a multiemployer plan for to Employees who are members of Local 3" (Agreement, *supra*, §3.02[c]). The second cause of action alleges that Artisans breached its obligations under §7.08 of the Agreement by failing to compensate Orwasher for his assistance during the two-month transition period immediately following the closing. The third cause of action alleges that Cohen breached his obligations to AOI under the Personal Guaranty.

Defendants answered, generally denying the allegations in the Complaint, asserting numerous affirmative defenses, and alleging counterclaims for breach of the representations and warranties in the Agreement, fraudulent inducement, and unjust enrichment. Defendants essentially claim that almost immediately after the closing, and upon taking possession of the Bakery, they noticed a massive rodent infestation which they claim plaintiffs managed to cover up during inspections by the Health Department. They also claim that they have already spent $261,000 to eradicate the infestation and anticipate incurring an additional $75,000 in future remedial efforts. Defendants further claim that plaintiffs failed to disclose certain time and lease issues for essential personnel and special payroll arrangements for

others, which cost defendants approximately $20,000. Defendants assert that plaintiffs' failure to disclose the extent of the mice infestation constitutes a breach of the representations and warranties contained in the Agreement and an act of fraudulent concealment. They also assert that they may have either declined to purchase the Bakery or negotiated a lower contract price if they had been given a true picture of the rodent infestation and the Bakery's financial condition.

Plaintiffs now seek summary judgment on the Complaint, as well as summary judgment dismissing defendants' counterclaims for breach of contract, fraud, and unjust enrichment to the extent that they relate to rodent infestation at the Bakery.

DISCUSSION

It is well settled that the 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 demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, 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 (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or

unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated above, the Complaint alleges causes of action for breach of the Agreement and related contracts. Plaintiffs have set forth a prima facie case for summary judgment on their contract claim, tendering sufficient evidence to establish the terms of the parties' agreements, the consideration, their performance, and the basis of the alleged breach by defendants. It is undisputed that the parties entered into the Agreement and related contracts for the Sale of the Bakery, and that defendants failed to satisfy all of their obligations thereunder.

The rights and responsibilities of the parties are clearly set forth in the express terms of the Agreement and related contracts. Section 3.01(a) of the Agreement expressly states that the purchase price for the Bakery is $1,500,000, payable at closing by bank check or wire transfer in the amount of $1,460,000 and Promissory Note in the amount of $40,000 (Exhibit "1" to the Motion, at §3.01[a]). Additionally, in the October 3, 2007 Closing Memorandum, the parties agreed that closing adjustments would be made the next day (Exhibit "7" to the Motion), and the submissions include a series of well-documented adjustments (Exhibits "8" through "14").

In §3.02(c) of the Agreement, entitled "Multiemployer Plan Withdrawal Liability," the parties "agreed to take such actions as will ensure compliance with Section 4204 of ERISA to prevent

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Seller from incurring at Closing a complete or partial withdrawal in respect of the multiemployer plan relating to Employees who are members of Local 3 ..." (Exhibit "1" to the Motion, at §3.02[c]).

In §7.06 of the Agreement, the parties agreed that:

> In the event that, on or after the Closing Date, Seller shall receive any payments or other funds due Buyer, or Buyer shall receive any payments or other funds due Seller including, without limitation, the pre-Closing accounts receivable, then the party receiving such funds shall hold such funds in trust and shall promptly forward such funds to the proper party in such manner as the proper party shall reasonably request from time to time.

(*id.*, at §7.06).

In §7.08 of the Agreement, entitled Transition Period, states that:

> Commencing on the Closing Date and for a period of up to two months thereafter ("Transition Period"), Abram Orwasher shall assist Buyer in the operation of the Business by appearing at the Premises between the hours of 9 am and 5 PM Monday to Friday and thereafter for a period of two months he shall be available by telephone for consultation with the Buyer. In return for such service the Buyer shall pay to Abram Orwasher $2,500 for each week during the first two months. As an accommodation to the Buyer, Abram Orwasher agrees to defer the agreed aggregate compensation of $20,000 for a period of six months to April, 2008

(*id.*, at §7.08).

In general, defendants' failure to comply with the terms of the Agreement and related contracts render them liable for damages. Defendants do not deny that they failed to fulfill their obligations under the agreements, but assert numerous arguments in opposition to the summary judgment motion. Specifically, defendants assert that the summary judgment motion is premature as it was made before the parties have had an opportunity to conduct relevant discovery. Defendants contend that discovery is necessary as to whether plaintiffs induced them to enter into the Agreement, and whether defendants actually breached the Agreement and related contracts.

CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of that party exist, but cannot be stated (*Terranova v Emil*, 20 NY2d 493, 497 [1967]). Under CPLR 3212(f), where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion (*Baron v Incorporated Vil. of Freeport*, 143 AD2d 792 [2d Dept 1988]). The party invoking CPLR 3212(f) must provide a proper evidentiary basis supporting its request for further discovery (*see Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [2d Dept 1999]).

Here, defendants fail to identify any fact that would justify postponing decision on the summary judgment motion. Defendants merely assert that further discovery is necessary on the issue of whether they were fraudulently induced to enter the Agreement, and whether they in fact breached the Agreement, without identifying any particulars as to which they desire discovery (*see Auerbach v Bennett*, 47 NY2d 619, 636 [1979]). This is mere speculation and surmise which is an insufficient basis to postpone decision on the summary judgment motion under the authority of CPLR 3212(f) (*id.*). As such, the request for summary judgment based on the need for additional discovery is denied.

Next, defendants argue that triable issues exist as to whether they can be held liable for breach of the Agreement and related contracts. They assert that they made every effort to comply with their obligations under the Agreement and related contracts, but that plaintiffs' actions frustrated their efforts to comply therewith. Specifically, they claim that plaintiffs actively concealed or misrepresented certain material facts pertaining to the condition of the Bakery that raise issues as to the fitness of the premises for food preparation and the fairness of the purchase price.

Defendants point to a purported massive rodent infestation at the Bakery. However, they do not dispute that they were aware of the presence of mice at the premises before entering into the

Agreement and related contracts, or that they were afforded access to the Bakery's premises, books, and records. In fact, defendants admit that they were given access to the Bakery and acknowledge observing rodent droppings. They also acknowledge inspecting the Bakery's books and records, including notices of inspection from the New York State Department of Agriculture and Markets Division of Food Safety and Inspection. They claim, however, that did not know the extent of the rodent infestation, and that plaintiffs concealed prior inspection records that may have presented a clearer picture.

Article IV of the Agreement, entitled Representations and Warranties of Seller, provides, in part:

> 4.08 Litigation and Compliance with Law. Except as may be disclosed on Schedule 4.08, and excluding vehicle negligence actions covered by insurance there is no action (at law or in equity), arbitration, suit, proceeding, claim, governmental proceeding or investigation, or litigation of any kind now pending, existing or, to the knowledge of Seller, threatened against Seller, the Assets, the Premises or the Business or other assets of Seller (whether with respect to the validity and enforceability of this Agreement, any action or transaction contemplated hereby, or otherwise). Neither Seller, nor the Business, Premises, Assets, and business practices of Seller with respect to the Assets, are in violation of any applicable Laws (including any interpretations of any of the Laws binding upon the Seller with respect to the Business), including without limitation those relating to the manufacture, preparation, processing or sale of food products, employee matters, and occupational health and safety. During the past 18 months Seller has received

> no notice alleging any such default or violation other than those set forth in Schedule 4.08. All material permits, concessions, grants, franchises, licenses and other governmental authorizations and approvals necessary for the conduct of the Business have been duly obtained by Seller and are in full force and effect, and there are no proceedings pending or, to the knowledge of Seller, threatened which may result in the revocation, cancellation or suspension, or any adverse modification, of any such permits, concessions, grants, franchises, licenses or other governmental authorizations or approvals.

(*id.*). In addition, Schedule 4.08 states, in part:

> On or about September 26, 2007 the New York State Department of Agriculture and Markets inspected the Premises. Deficiencies were found in the condition of the Premises which were determined to be in need of correction. The Seller has commenced to cure the conditions found to be deficient. A copy of the report of the Department has been provided to the Buyer.

(Exhibit "17" to the Motion).

Furthermore, the detailed report of the Department of Agriculture, which defendants acknowledge receiving, states, in part:

> 04F Approximately 100-150 fresh appearing of mouse droppings were noted in various sections of the basement production area (on floor corners, on top of and inside unused equipment, on wall ledges and on top of empty bulk flour bags left overnight on the base shelf of a metal rack in the production area).
> 15-20 dried an old appearing mouse droppings were noted on floor corners in the supplies room behind the retail area ... .

> 10A Exterior door leading to the basement production floor was noted left open and allowed for the entry of flies and rodents into the establishment.
> Exterior doors behind the chill walk-in box, leading to the street outside, showed gaps at the sides and/or bottom and provided easy access for rodents into the establishment ... .
> 10D A covered, rodent proof refuse container was not provided for inedible/damaged bread products which were stored in open paper bags on a dolly in the front of the basement ... .
> 15E The basement area showed an accumulation of unused equipment stored against the walls and in dirty condition, hampering proper cleaning and inspection and providing a potential harborage for rodents and flies within the establishment ... .
> 16A Exposed rodenticide was noticed on floor corners in the production and unused equipment storage rooms in the basement.

(Exhibit "18" to the Motion, Sanitary Inspection Report). This report also states that the items listed may result in the assessment of civil penalties and other action if the deficiencies are not immediately corrected (*id.*).

Section 4.19 of the Agreement, entitled Representations Exclusive, states, in part, that "[a]ny information disclosed on any Schedule shall be cross referenced and deemed to be disclosed and incorporated into any other Schedule where such disclosure applies, provided that the applicability of such disclosure to such other Schedule is readily apparent on the face of such disclosure (Exhibit "1" to the Motion, at §4.19).

Moreover, defendants expressly acknowledged that they performed a due diligence inspection of the Bakery. Article V of

the Agreement, pertains to Representations and Warranties of the Buyer. Section 5.05 entitled Due Diligence, states, in part:

> The Buyer acknowledges that it and its representatives have conducted and investigation of the Business and have examined all of the books records, contracts and assets of the Business as they determined to be necessary, provided that such investigation shall not diminish, eliminate or modify any representations or warranties of Seller unless the Seller can reasonably demonstrate that the Buyer knew of a contrary state of facts, provided that Buyer's knowledge shall refer only to Keith Cohen's knowledge. The Buyer is not relying on any representation as to the Business, the profitability of the Business or the prospects of the Business which is not set forth in this Agreement. The Buyer has examined the Premises and all records pertaining to the Premises and except for the specific representations and warranties of the Seller as set forth herein accepts the same "as is". Except specifically set forth herein, no representation is made as to the Premises concerning environmental, structural, zoning or other legal matters applicable to the Premises.

(*id.*).

In addition, Section 2.03 of the Sublease states, in part, that "Subtenant acknowledges that Sublandlord has afforded Subtenant the opportunity for full and complete investigations, examinations and inspections of the Sublet Premises" (Exhibit "3" to the Motion, at §2.03).

Defendants' assertions of active concealment and fraudulent misrepresentation are belied by the submissions or otherwise insufficient to defeat summary judgment. Their reliance on prior

inspection reports to bolster their assertions of a massive rodent infestation is unavailing. In addition, the assertions that plaintiffs limited defendants' access to the premises and gave them erroneous books and records in an effort to misrepresent the condition of the Bakery is simply conclusory and unsubstantiated. Nor do the submissions establish that plaintiffs concealed anything that could not readily be discovered through reasonable inspection (*see Vandervort v Higgensbotham*, 222 AD2d 831, 832 [3d Dept 1995]).

Likewise, there is no evidentiary support for defendants' assertion that plaintiffs misrepresented material facts relating to the value of the Bakery. A review of the submissions reveals nothing to substantiate the assertion that plaintiffs altered the Bakery's financial records. The conclusory assertions that the head baker and other essential employees terminated their employment within months after defendants took over; that employees were promised vacation time and raises without defendants' knowledge; that plaintiffs sold software and toasters that they did not own; and that plaintiffs misrepresented the condition of the ovens and boiler prior to the sale, are insufficient to defeat summary judgment.

Defendants also assert that plaintiffs' own actions served to frustrate its efforts to fully comply with the adjustments to purchase price relating to the Agreement. In order for a party to a contract to invoke frustration of purpose as a defense for

nonperformance, "the frustrated purpose must be so basic to the contract that, as both parties understood, without it, the transaction would have made little sense" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [1st Dept 2011][internal citation omitted]). The doctrine applies when a change in circumstances makes one party's performance virtually worthless to the other, frustrating the purpose in making the contract (*id.*).

Here, defendants claim that they paid for advertising, but not for transferred inventory, heating oil, printed bags, telephone service, utility service, website service, and vans because plaintiffs' figures were handwritten and unverified, and the inventory figures were never signed off by defendants at the closing. As to the "Assumption of Liability" under the Agreement, defendants maintain that they always paid for all packaging ordered on delivery, and that they never received any packaging ordered by plaintiffs.

Defendants also argue that they were not obligated to compensate Orwasher for his assistance in the operation of the Bakery during the two-month transition period immediately after the closing since he failed to perform any such services or timely remove his belongings from the Bakery. Instead, defendants claim that Orwasher repeatedly directed defendants' employees to perform personal favors for him. As to the $40,000 promissory note and accounts receivable, defendants argue that they relied

on the accuracy of plaintiffs' books and records to provide a certain amount of profit for Cohen to repay the note, but that inaccuracies in plaintiffs' books and records caused them to consistently experience shortfalls.

Section 9.10, entitled Entire Agreement, states that the "Agreement and the Ancillary Agreements (including the Schedules and exhibits hereto and thereto) constitute the entire agreement and understanding of the parties." The purpose of the Agreement is evident from the plain language of the contract, namely, to transfer the Bakery to Artisans. Given the purpose of the Agreement, and the extensive, lengthy negotiations between the parties, it cannot be said that the alleged actions of plaintiffs had a preclusive effect on defendants' performance under the Agreement.

On review of the submissions, it is clear that defendants' obligations under the Agreement and related contracts are well-documented, and that plaintiffs have established entitlement to summary judgment tendering competent evidentiary proof to establish entitlement to judgment as a matter of law on its first cause of action against Artisans for its failure to pay the $40,000 under the Promissory Note, and $27,317 for adjustments (except that Artisans may seek renewal if it presents proof in admissible form evidencing payment of $352.87 for advertising). Defendants failed to raise any triable issues of fact as to its failure to pay these two claims. However, AOI is not entitled to

summary judgement on the claim for payment of $6,091 for packaging ordered but not yet delivered as Artisans avers that it ordered its own packaging supplies and paid it directly to its vendor. In addition, an accounting of Artisans' books and records is necessary to determine the amount, if any, of AOI accounts receivables which may have been converted by Artisans. Orwasher is also not entitled to summary judgment on his second cause of action seeking $20,000 in damages for services rendered to Artisans, as Artisans contests that Orwasher fully performed the services specified in §7.08 of the Agreement.

The Court also grants plaintiffs summary judgment dismissing defendants' counterclaims for breach of contract, fraudulent inducement, and unjust enrichment. These counterclaims are undeniably based on what defendants perceive to be a massive rodent infestation problem at the Bakery. However, as stated, the submissions refute defendants' claim that plaintiffs breached the Agreement and related contracts, or that they were induced to enter into the Agreement and related contracts because plaintiffs misrepresented material facts (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1st Dept 1999]). The claim for unjust enrichment must be dismissed in light of the valid, enforceable agreement between the parties (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

CONCLUSION

Accordingly, it is

ORDERED, that the plaintiffs' motion for summary judgment is granted, in part, and denied, in part, to the extent set forth above; and it is further

ORDERED, that the Clerk is directed to enter judgment in favor of plaintiff A. Orwasher Inc. and against defendant Oven Artisans, Inc. in the amount of $40,000, with interest thereon at the rate of 15% per annum from the date of April 4, 2008, and $27,317 with interest thereon at the statutory rate of 9% per annum from the date of October 4, 2007, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs[1]; and it further

ORDERED, that an accounting of Artisans' books and records which is necessary to determine the amount, if any, of AOI accounts receivables that may have been converted by Artisans, as well as all remaining causes of action shall be deferred for trial or hearing at a later date.

Dated: October 21, 2014

ENTER:

J. S. C.

SHLOMO HAGLER J.S.C.

[1] While plaintiffs requested an award of reasonable legal fees in its notice of motion, it was not pled in the complaint. Therefore, it may not be awarded herein.