

Mercuris v Rome

2015 NY Slip Op 30387(U)

March 18, 2015

Supreme Court, New York County

Docket Number: 651011/2013

Judge: Shirley Werner Kornreich

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHIRLEY WERNER KORNREICH

I.R.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54-----X
CHERYL MERCURIS,

Index No.: 651011/2013

Plaintiff,

DECISION & ORDER

-against-

TODD ROME and PRIVATE JET MD, LLC,

Defendants.
-----X

SHIRLEY WERNER KORNREICH, J.:

Defendants Todd Rome and Private Jet MD (the Company) move, pursuant to CPLR 3212, for partial summary judgment against plaintiff Cheryl Mercuris. Defendants' motion is denied for the reasons that follow.

The procedural history of this action is set forth in an order dated July 17, 2014, which granted plaintiff leave to amend its complaint for the third time. *See* Dkt. 81. Plaintiff filed its third amended complaint on August 6, 2014 (the TAC). *See* Dkt. 84. The TAC contains three causes of action, asserted against both Rome and the Company: (1) breach of contract; (2) money had and received; and (3) unjust enrichment. Discovery is complete, and plaintiff filed a Note of Issue on August 15, 2014. Defendants now move for partial summary judgment, seeking dismissal of the claims against Rome and dismissal of the second and third quasi-contract causes of action.

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing

requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all of the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The parties agree that questions of fact exist about the parties' agreement, or lack thereof, with respect to the \$500,000 plaintiff gave Rome in October 2011. It is undisputed that this money was specifically for the purpose of either a potential investment in or a loan of money to the Company, but the parties dispute the terms of that agreement. Defendants, therefore, do not move for summary judgment on plaintiff's breach of contract claim against the Company.

Rather, defendants contend that any agreement was between plaintiff and the Company, and not with Rome individually. This, however, is a disputed fact. Plaintiff alleges that she also had an oral agreement with Rome individually, which provided that if the parties did not agree upon and document terms governing plaintiff's investment in the Company, Rome would return plaintiff's money. It is undisputed that the parties attempted to document a written agreement, but no written agreement was ever finalized or executed. Moreover, as noted in the court's prior

decision, Rome returned \$114,000 to plaintiff, and plaintiff brought this action seeking the remaining \$386,000. Rome contends the \$114,000 refund was a settlement, but no documentation to that effect exists.

Insofar as defendants' legal arguments are concerned, those proffered in their briefs (e.g., imputing corporate liability onto directors and the business judgment rule) are mostly irrelevant and do not merit discussion. Summary judgment must be denied on the breach of contract claim asserted against Rome individually because plaintiff alleges an oral agreement with Rome which obligated Rome to personally refund her money if, as occurred, no written agreement was executed. The finder of fact¹ must decide if these were the terms of the parties' agreement. The court may not, on summary judgment, make credibility determinations with respect to the parties' competing narratives.

The quasi-contract claims survive as well. Defendants deny the terms and, indeed, the very existence of the oral contract alleged by plaintiff, a denial warranting the maintenance of the alternative quasi-contract claims. *See Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 439 (1st Dept 2014), quoting *Zuccarini v Ziff-Davis Media, Inc.*, 306 AD2d 404, 405 (2d Dept 2003) ("Where, as here, there is a bona fide dispute as to the existence of a contract ... a plaintiff may proceed upon a theory of quasi contract as well as contract, and will not be required to elect his or her remedies"); *see also Livathinos v Vaughan*, 121 AD3d 485, 486 (1st Dept 2014) (plaintiff may maintain unjust enrichment claim when defendant denies existence of oral agreement). To be sure, while it is ordinarily the case that an election to assert either contract or quasi-contract claims must be made before trial [*see Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367 (1st Dept 1996), citing *Baratta v Kozlowski*, 94 AD2d, 454, 464 (2d Dept

¹ Plaintiff's Note of Issue did not request a jury trial. *See* Dkt. 85 at 1.

1983)], plaintiff need not do so here since the trial will determine which defendant plaintiff contracted with. It may well be the case that plaintiff contracted with both defendants. If, however, plaintiff only contracted with one defendant, the other defendant, as explained below, may be liable for unjust enrichment. Therefore, both contract and quasi contract claims may be tried.

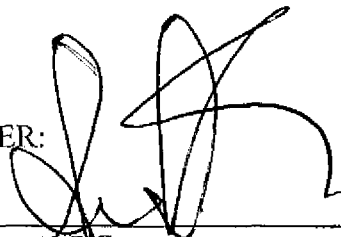
The need for quasi contract claims is best exemplified by a possible verdict that Rome is plaintiff's sole contractual counterparty, but that the money was wrongfully transferred to and is being held by the Company (or, perhaps, vice versa). In such a circumstance, even where the non-contracting defendant did not commit a legal wrong against plaintiff, plaintiff is still entitled to claw back the money via a quasi contract claim. *See Carriafelio-Diehl & Assocs., Inc. v D & M Elec. Contr., Inc.*, 12 AD3d 478, 479 (2d Dept 2004), accord *3105 Grand Corp. v City of New York*, 288 NY 178 (1942). Summary judgment, therefore, is denied, and all of the claims asserted in the TAC shall proceed to trial. Accordingly, it is

ORDERED that the motion by defendants Todd Rome and Private Jet MD for partial summary judgment against plaintiff Cheryl Mercuris is denied; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a pre-trial conference on April 16, 2015 at 11:00 in the forenoon.

Dated: March 18, 2015

ENTER:



J.S.C.