

Hamilton v Croman
2015 NY Slip Op 32525(U)
February 3, 2015
Supreme Court, New York County
Docket Number: 150749/13
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

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GABRIELLE HAMILTON AND HAMILTON
& SONS, LLC,

Plaintiffs,

Index No. 150749/13

-against-

Motion Sequence No.: 001

STEVEN B. CROMAN, HARVEY BOJARSKY,
CROMAN REAL ESTATE, INC. AND 44 EAST
1ST LLC,

DECISION & ORDER

Defendants.

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

Plaintiffs Gabrielle Hamilton (“Hamilton”) and Hamilton & Sons, LLC (“Hamilton & Sons”) (collectively, “plaintiffs”) move, pursuant to CPLR § 3212, for [partial] summary judgment on their first through third causes of action. Defendants Steven B. Croman (“Croman”), Harvey Bojarsky (“Bojarsky”), Croman Real Estate, Inc. (“CRE”) and 44 East 1st LLC (“44 East”) (collectively “defendants”) oppose plaintiffs’ motion. Plaintiffs have withdrawn their claim for punitive damages, and their claims against Bojarsky individually (Memorandum of Law in Support of Plaintiffs’ Motion for Partial Summary Judgment at 1).

FACTUAL BACKGROUND

Plaintiff Hamilton contends that in or about the summer of 2012, she contacted Bojarsky to inquire about renting a store in a building known as 44 E. 1st Street, New York, NY (the “Premises”), which was located on the same block as a restaurant she owned and operated. (Verified Complaint at ¶ 10 [Affirmation of Beth E. Nagalski, Exhibit “E”]). Bojarsky is a real estate broker, and director of real estate leasing for CRE whose name appeared on a sign in the window of the Premises (Verified Complaint at ¶ 4, 10 [Affirmation of Beth E. Nagalski, Exhibit

“E”)). Hamilton was interested in opening a gourmet prepared food and take-out restaurant at the Premises (*Id.*). Bojarsky showed her the Premises and shortly thereafter, Hamilton met with Bojarsky and his employer Croman, the sole owner of CRE (Verified Complaint, ¶ 11 [Affirmation of Beth E. Nagalski, Exhibit “E”]); Tr. of Croman deposition at 12:21-24 [Affirmation in Opposition to Plaintiffs’ Motion for Summary Judgment, Exhibit “D”]).¹

At this meeting, the parties began to negotiate a lease for the Premises and a lease was prepared with 44 East, as landlord and plaintiff Hamilton & Sons, an entity owned and controlled by Hamilton, as tenant (the “Lease”) (Verified Complaint ¶ 15 [Affirmation of Beth E. Nagalski, Exhibit “E”]); Lease [Affirmation of Beth E. Nagalski, Exhibit “C”]). The Lease attached as Exhibit “C” to plaintiffs’ motion for summary judgment, included a clause which provided *inter alia* that the Lease would not be binding until, among other things, countersigned by the landlord and delivered by the landlord to the tenant (Lease at ¶ 56 [Affirmation of Beth E. Nagalski, Exhibit “C”]).

It is undisputed that on or about August 11, 2012, Hamilton’s counsel, David M. Rubin, Esq. (“Rubin”), met with Bojarsky at a diner in Manhattan to provide him with copies of the Lease executed by plaintiffs together with the deposit checks (Tr. of Bojarsky deposition at 45-48 [Affirmation of Beth E. Nagalski, Exhibit “A”]). Bojarsky testified at his deposition that Rubin “raised concerns about the space being able to be used for commercial use” (*Id.* at 48). Rubin delivered four copies of the signed Lease, and checks in the amounts of \$47,500 and \$9,500, representing the lease security and first month’s rent, respectively, and a third check for \$75,

1. Defendant 44 East, of which Croman is the managing member, is the owner of the Premises (Verified Complaint, ¶¶ 13, 14 [Affirmation of Beth E. Nagalski, Exhibit “E”]; Tr. of Croman deposition [Affirmation of Beth E. Nagalski, Exhibit “B” at 15:6-13])

payable to CRE to cover a credit check fee (Verified Complaint at ¶ 18 [Affirmation of Beth E. Nagalski, Exhibit "E"]; Verified Answer at ¶¶ 17, 19 [Affirmation of Beth E. Nagalski, Exhibit "F"]). With the alleged consent of Croman, Bojarsky accepted a letter from Rubin, dated August 10, 2012 (the "Escrow Letter"), which provides in part that

As the landlord has made no representation on the suitability for the premises for the intended use, we submit this lease and the accompanying checks subject to our determination that the premises may be used for such purposes as of right. We submit these documents to you in escrow for a period of one week from the date hereof during which time we will determine that the premises may be used for the services contemplated herein.

Upon our determination, we will so advise you. If we advise you that we conclude Tenant may not use the premises for the contemplated use, you agree to return the lease[s] and checks (Affirmation of Beth E. Nagalski, Exhibit "D").

By letter, dated August 16, 2012, Rubin informed defendants that, as plaintiffs' experts advised plaintiffs that the Premises location was not zoned for plaintiffs' intended use, plaintiffs would be unable to proceed. By letter, dated October 5, 2012, Rubin requested that defendants return plaintiffs' checks (Affirmation of Beth E. Nagalski, Exhibits "H" & "I").² Plaintiffs never took possession of the Premises (Tr. of Bojarsky deposition at 22:7-9 [Affirmation of Beth E. Nagalski, Exhibit "A"]).

Plaintiffs thereafter served and filed a Summons and Verified Complaint in this action seeking damages from defendants for conversion (first cause of action), breach of contract

2. It is also undisputed that defendants requested an extension of the one week period provided in the Escrow Agreement in order for defendants to provide information to plaintiffs which, according to defendants, would support plaintiffs' proposed use of the Premises as a retail space (Tr. of Bojarsky deposition at 94:2-21 [Affirmation of Beth E. Nagalski, Exhibit "A"]).

(second cause of action), and ‘moneys had and received’ and unjust enrichment (third cause of action).³ Defendants answered the complaint and raised nine affirmative defenses, including claims that plaintiffs failed to mitigate damages, that the complaint fails to state a cause of action, that defendants are entitled to keep and retain the security deposit, and that plaintiffs failed to comply with a condition precedent to any agreement (Verified Answer, ¶¶ 28-36 [Affirmation of Beth E. Nagalski, Exhibit “F”]).

DISCUSSION

Summary Judgment

The movant has the initial burden of proving entitlement to summary judgment. (*Winegrad v New York Univ. Medical Ctr.*, 64 NY2d 851 [1985].) Once the movant has provided such proof, in order to defend the summary judgment motion the opposing party must “show facts sufficient to require a trial of any issue of fact.” (CPLR § 3212[b]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]; *Freedman v Chemical Construction Corp.*, 43 NY2d 260, 264 [1977]; *Spearmon v. Times Square Stores Corp.*, 96 AD2d 552, 552 [2d Dept. 1983].) “It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the complaint] are real and are capable of being established upon a trial.” (*Spearmon*, 96 AD2d at 553 [quoting *Di Sabato v. Soffes*, 9 AD2d 297, 301 (1st Dept.

3. At oral argument, on August 6, 2014, plaintiffs’ counsel clarified that plaintiffs are moving herein for summary judgment on their third cause of action only, *to wit*, for unjust enrichment (Tr. of oral argument, at 4-5, 7).

1959)].) If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists. (*Kuehne & Nagel v. Baiden*, 36 NY2d 539, 543-544 [1975].)

Plaintiffs here move for summary judgment pursuant to CPLR § 3212 contending that defendants neither countersigned nor delivered the lease and it is thus unenforceable, and that pursuant to the Escrow Agreement, defendants would be obligated to return plaintiffs' money even if the lease had been executed and delivered. Subsequent to the filing of the within motion and at oral argument, plaintiffs effectively limited the grounds of this motion to that portion seeking summary judgment on their third cause of action for unjust enrichment. Plaintiffs' counsel stated that the existence of an Escrow Agreement, upon which plaintiffs' first two causes of action for conversion and breach of contract lie, is not relevant, as plaintiffs are entitled to recovery on their unjust enrichment cause of action based upon defendants' failure to execute and deliver the lease (Tr. of oral argument at 4-7, 10-12, 18-19). This Court will thus limit its determination of plaintiffs' motion for summary judgment on their third cause of action for moneys had and received, and unjust enrichment.⁴

Third Cause of Action for Moneys Had and Received and Unjust Enrichment

Plaintiffs' third cause of action for 'moneys had and received', and unjust enrichment, alleges that (i) they paid defendants \$57,075 as a deposit arising from the lease, (ii) pursuant to an agreement between the parties, plaintiffs elected not to pursue the Lease and demanded return of the monies paid to defendants; and (iii) that defendants have refused to return such funds and

4. There was no discussion at oral argument of that prong of plaintiffs' third cause of action for 'moneys had and received.'

have benefitted from same (Verified Complaint at ¶¶ 35-39 [Affirmation of Beth E. Nagalski, Exhibit “E”]).

Given that causes of action for ‘moneys had and received’, and unjust enrichment are causes of action in quasi-contract, the Court must first determine whether there was a valid and enforceable lease in the first place. “The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter A ‘quasi contract’ only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party’s unjust enrichment” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] [internal citations omitted]). See *Georgia Malone & Co., Inc. v. Rieder*, 19 NY3d 511, 516 (2012).

Here, plaintiffs contend that there is neither admissible evidence demonstrating that defendants signed the lease nor evidence that the Lease was ever delivered to plaintiffs. General Obligations Law (“GOL”) § 5-703(2), provides that “a contract for the leasing for a longer period than one year...of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.” It is undisputed that defendants never executed the lease. In support, plaintiffs have produced ‘Defendants’ Responses to Request for Admission’ signed by Bojarsky, sworn to on December 17, 2013, wherein Bojarsky states “on information and belief, there is no executed copy of the leases in defendants’ custody or control” (Affirmation of Beth E. Nagalski, Exhibit “G”]). Moreover, at his deposition, Croman testified only that he “believed” he signed the lease, that he does not

recall signing the lease in front of anybody as he “he signs things quickly”, that “it’s two years ago... [he] signs literally so many things per day,” and that he will look for the signed lease (Tr. of Croman deposition [Affirmation of Beth E. Nagalski, Exhibit “B” at 84:8-22]). There is also testimony by Bojarsky that there were two versions of the lease, which were marked as Exhibit 5 and 5A for identification at Bojarsky’s deposition, allegedly both produced by defendants.

Bojarsky identified Hamilton’s signature on Exhibit 5A, which Bojarsky claimed was the final draft. Bojarsky testified as follows:

Q (by plaintiffs’ counsel). This copy, which is the only lease you produced [purportedly at the deposition], has somebody’s signature for Hamilton & Sons, Inc. or Hamilton & Sons LLC. Do you see that?

A. Yes

Q. Do you know whose signature that is?

A. I was told that is Mr. Rubin’s and Ms. Hamilton’s signature.

Q. It is witnessed by Steven Rubin?

A. Right.

Q. *Right above the signature of Steven Croman, manager of 44 First LC [sic]?*

A. *That’s correct.*

Q. Do you have a copy of this lease that is signed by Mr. Croman?

A. No.

Q. He never signed it?

A. Not to my knowledge.

Q. Did anybody sign it for 44 First LLC [sic]?

A. Not to my knowledge

[emphasis supplied].

(Tr. of Bojarsky deposition [Affirmation in Opposition, Exhibit “C” at 37-38]). Bojarsky was also asked by plaintiffs’ counsel, “so it is accurate to say that as far as you know, nobody from 44 East 1st LLC ever signed a lease with Ms. Hamilton or her company?” Bojarsky replied “As far as I know” (Tr. of Bojarsky deposition [Affirmation in Opposition, Exhibit “C” at 39-40]).

Defendants argue that an issue of fact is raised as a result of Bojarsky’s affirmative response to

the question posed by plaintiffs' counsel as to whether Rubin's signature appears "right above the signature of Steven Croman." In the context of the remainder of the record, including Bojarsky's deposition testimony that to the best of his knowledge the Lease was never signed on behalf of defendants, it is not credible to assert that the question posed by plaintiffs' counsel referred to an actual signature by Croman, rather than merely a blank signature line.

In any event, a signed lease was neither produced in the motion papers nor ever produced at any subsequent time. At oral argument, the court requested that plaintiffs' counsel submit the transcript thereof together with Exhibits 5 and 5A marked as Exhibit s for identification at Bojarsky's deposition. The leases which were submitted contain only signatures (illegible) on behalf of plaintiff Hamilton & Sons and not any signature on behalf of defendants.⁵

Even more significantly, there is no evidence demonstrating that the Lease was delivered to plaintiffs. It is well established that "delivery is required for a lease to take effect" 219 *Broadway Corp. v. Alexander's, Inc.*, 46 NY2d 506, 512 (1979). See *Alsaedi v. Ninth Ave. Realty*, 2 AD3d 233 [1st Dept. 2003]; *Jaffe v. Gordon*, 240 AD2d 233 [1st Dept. 1997]. Even if

5. In their affirmation in opposition, defendants' counsel suggests that defendants' prior attorney may have possession of additional records in this matter, including a fully executed copy of the Lease, which defendants' counsel cannot have access to as a result of an ongoing dispute with prior counsel, including an assertion of a retaining lien (Affirmation in Opposition to Plaintiffs' Motion for Summary Judgment at 7, footnote 1; Tr. oral argument at 5-7, 11-12). This claim is speculative in light of an affidavit of Bojarsky, sworn to on September 27, 2013, sent to plaintiffs' counsel, Beth Nagalski, by defendants' prior counsel. Bojarsky attests that, as defendants' [CRE] custodian of records with respect to CRE's Leasing Department (which would purportedly maintain all records related to plaintiff), he made a search of all records pertaining to plaintiff, and determined that "the documents previously provided to plaintiff constitute all of the responsive records in defendants' possession, custody or control. Defendants have no further documents responsive to plaintiff's demands" (Reply Affirmation of David M. Rubin in Further Support of Plaintiffs' Motion for Partial Summary Judgment, Exhibit "A").

the Lease had been signed by both parties, delivery is required. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 NY2d at 512; *Jaffe v. Gordon*, 240 AD2d 233. In opposition, defendants have failed to produce a scintilla of evidence that a fully executed lease was delivered to plaintiffs, and as such, the Lease never took effect.

Since plaintiffs have satisfied their *prima facie* burden that there was no valid and enforceable Lease, and defendants having failed to present admissible evidence to raise an issue of fact, the Court must next turn to the merits of plaintiffs' 'money had and received', and unjust enrichment claim. "The essential elements of a cause of action for 'money had and received' are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money" (*Goel v Ramachandran*, 111 AD3d 783, 790 [2d Dept. 2013]). *See also Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128, 138 [1991] [the law recognizes a cause of action for money had and received "in the absence of an agreement when one party possesses money that in equity and good conscience [it] ought not to retain and that belongs to another"] [internal citation and quotation omitted].

The elements of an unjust enrichment claim are similar (*See generally Knobel v. Shaw*, 90 AD3d 493, 495 [1st Dept. 2011]). "An unjust enrichment claim is rooted in 'the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another'" *Georgia Malone & Co., Inc. v. Rieder*, 19 NY3d 511, 516 (2012) [citation and internal quotation omitted]. "A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182

[2011] [internal citations and quotations omitted]).

Here, it is undisputed that plaintiffs never took possession of the Premises, and that defendants retained the monies paid to them in contemplation of the execution and delivery of the Lease. The record establishes, therefore, that defendants received monies belonging to plaintiffs and were unjustly enriched at plaintiffs' expense. See *Goel v Ramachandran*, 111 AD3d 783, 789-792 [2d Dept. 2013]. Moreover, it would be against principles of equity and good conscience to allow defendants to retain the funds paid to them representing the Lease security and first month's rent, and expense for a credit check, in the circumstances herein where there was no enforceable Lease.

CONCLUSION

Based upon the above discussion, it is hereby

ORDERED that plaintiffs' motion for summary judgment on their third cause of action for 'money had and received', and unjust enrichment is granted; and it is further

ORDERED that plaintiffs' motion for summary judgment on their first cause of action for conversion, and their second cause of action for breach of contract are denied as moot; and it is further

ORDERED that plaintiffs are entitled to a judgment against defendants Steven B. Croman, Croman Real Estate, Inc. and 44 East 1st LLC in the amount of \$57,075 with interest thereon from October 5, 2012, plus costs and disbursements of this action. The Clerk shall enter

judgment accordingly.

The foregoing constitutes the decision and order of this Court.

Dated: February 3, 2015

ENTER:

A handwritten signature in black ink, appearing to be 'SHLOMO HAGLER', written over a horizontal line.

J.S.C.

SHLOMO HAGLER
J.S.C.