

<b>292 St. Johns LLC v 212 Crown Realty LLC</b>
2016 NY Slip Op 30156(U)
January 27, 2016
Supreme Court, New York County
Docket Number: 153390/2012
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
292 ST. JOHNS LLC and PINNACLE PARKWAY LLC

Plaintiffs,

-against-

INDEX NO. 153390/2012

212 CROWN REALTY LLC and THE BROOKLYN  
UNION GAS COMPANY d/b/a NATIONAL GRID,

Defendants.

-----X  
JOAN A. MADDEN, J.:

Plaintiffs 292 St. Johns LLC and Pinnacle Parkway LLC (together, plaintiffs) commenced this action to recover monies that they mistakenly paid to defendant The Brooklyn Union Gas Company d/b/a National Grid NY, sued hereunder as The Brooklyn Union Gas Company d/b/a National Grid (National Grid), in payment of bills for gas service that National Grid had provided to a neighboring property, with which plaintiffs have no connection.

Plaintiffs now move, pursuant to CPLR 3212, for summary judgment against National Grid in the amount of \$204,338.14, plus statutory interest, on their first and second causes of action.

National Grid cross-moves, pursuant to CPLR 3212 and CPLR 3211, for summary judgment dismissing all five of plaintiffs' causes of action.

#### BACKGROUND

The following facts are not in dispute.

Plaintiffs are each New York limited liability companies with their principal place of business at 1 Penn Plaza, Suite 4000, New York, New York. Between May 29, 2003 and June 26, 2008, plaintiff Pinnacle Parkway LLC (Pinnacle Parkway) owned the real property and

building located at 292 St. John's Place in Brooklyn, New York (the 292 Property). In June 2008, Pinnacle Parkway conveyed the 292 Property to 292 St. Johns LLC (292 St. Johns), its current owner.

A neighboring property and building, located at 298 St. Johns Place (the 298 Property), was owned by Plaza Associates between June 2003 and January 2006, and by defendant 212 Crown Realty LLC (212 Crown) from February 2006 through December 2011. Plaintiffs have no relationship with either Plaza Associates or 212 Crown, and have never had any ownership interest in the 298 Property.

Beginning in June 2003, immediately after Pinnacle Parkway's purchase of the 292 Property, plaintiffs began receiving, at their principal place of business at 1 Penn Plaza, Suite 4000, gas bills from National Grid for gas service supplied through gas meter number 009840342. The bills were addressed to "Plaza Associates," and state that they were for gas "[s]ervice to Plaza Associates, 298 Saint Johns Pl, Brooklyn, NY" (*see* Wiener aff, exhibit C). Plaintiffs allege that, under the mistaken belief that these gas bills reflected gas service to the 292 Property, between June 2003 and December 2011, they, through entities associated with them, made payments on all of these bills. Plaintiffs allege that they mistakenly paid these bills because National Grid had "mistakenly sent the bills to [plaintiffs'] principal place of business, and because the names of the properties listed as the billing address and service address on the gas meter bills were very similar to properties actually owned by [plaintiffs]" (*see* memorandum of law in opposition to cross motion at 1; Wiener aff in opposition to cross motion, ¶ 4).

According to the affidavit of Joel Weiner, a member of plaintiffs, it was not until February of 2012 that plaintiffs discovered that the gas service charges reflected by these bills

were actually connected to a gas meter that was located at, and provided service to, the 298 Property, and that National Grid had been sending these bills to the wrong address. Plaintiffs note that, in fact, it was impossible that these gas meter charges could have been for service to the 292 Property, since the 292 Property was heated by oil, not gas, and since all of the tenants at the 292 Property paid for their own cooking gas through their own separate and individual meters.

By letter dated February 21, 2012, Weiner wrote to National Grid explaining the mistake and demanding the immediate return of all of the payments that plaintiffs mistakenly had made during the previous eight and a half years. National Grid has declined to return any of this money.

Plaintiffs commenced this action on June 5, 2012, and thereafter served a first amended complaint seeking recovery of the \$222,266.91 that they allege that they paid on these bills between June 2003 and December 2011 (*see* Kirschner affirmation, exhibit A). In their first amended complaint, plaintiffs asserted causes of action against National Grid, 212 Crown, Plaza Associates, and The Related Companies, Inc. (Related), the alleged general partner of Plaza Associates, for unjust enrichment, mistake, money had and received, breach of contract, and conversion.

Issue was joined by National Grid by answer dated September 14, 2012 (*id.*, exhibit B). In its answer, National Grid asserted three cross claims for contribution and/or indemnification against 212 Crown, Plaza Associates, and Related.

Issue was joined by Plaza Associates and Related by answer dated July 18, 2012 (*see* Buffaloe affirmation, exhibit E). Subsequently, by a so ordered stipulation of settlement dated

[\* 4]

March 26, 2014, plaintiffs' claims against Plaza Associates and Related were settled and the entire action was discontinued as to these two defendants (*id.*, exhibit F). As part of this settlement, plaintiffs agreed to reduce their damages claim against National Grid by \$18,028.77 (*id.*).

Defendant 212 Crown failed to appear or answer in this action and, by order dated November 1, 2013, this court granted plaintiffs a default judgment as to liability against 212 Crown, and directed an inquest and assessment of damages at the time of trial (*id.*, exhibit D).

Plaintiffs filed their note of issue and a certificate of trial readiness on February 27, 2015 (*id.*, exhibit G). Plaintiffs now move for summary judgment against National Grid in the amount \$204,338.14 on their first and second causes of action for unjust enrichment and mistake.

National Grid opposes plaintiffs' motion, and cross-moves, pursuant to CPLR 3212 and 3211, for summary judgment dismissing all five of plaintiffs' causes of action.

#### DISCUSSION

It is well settled that "[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 issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad*, 64 NY2d at 853). Once the movant's burden is met, the burden shifts to the party opposing the motion to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562

[1980]). “[The] facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012])[internal quotations and citations omitted]. If there is any doubt as to the existence of a triable fact, or such an issue is even arguable or debatable, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *International Customs Assoc. v Bristol-Myers Squibb Co.*, 233 AD2d 161, 162 [1<sup>st</sup> Dept 1996]).

National Grid’s cross motion to dismiss plaintiffs’ third, fourth and fifth causes of action for money had and received, breach of contract, and conversion is granted. Plaintiffs do not oppose National Grid’s motion for summary judgment insofar as it seeks dismissal of these three causes of action. Here, National Grid adequately has demonstrated its entitlement to summary judgment dismissing plaintiffs’ breach of contract and conversion claims, as plaintiffs have produced no evidence of the existence of a contract between these parties, or that the monies paid by plaintiffs constituted discrete, specifically identifiable funds subject to an obligation of particular treatment (*see Lemle v Lemle*, 92 AD3d 494, 497 [1<sup>st</sup> Dept 2012]; *Thys v Fortis Sec., LLC*, 74 AD3d 546, 547 [1<sup>st</sup> Dept 2010]). Dismissal of plaintiffs’ third cause of action, for money had and received, also is warranted, as this claim, in the manner alleged, is merely duplicative of plaintiffs’ second cause of action alleging payment by mistake.

As for plaintiffs’ two remaining causes of action, to prevail on a claim of unjust enrichment, “[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 quotation marks omitted]). “[A] plaintiff’s allegation that the [defendant]

received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment” (*Goel v Ramachandran*, 111 AD3d 783, 791 [2<sup>d</sup> Dept 2013, quoting *Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 [2<sup>d</sup> Dept 2005]). Rather, an “action to recover under a theory of unjust enrichment is ‘based on the equitable principles that a person shall not be allowed to enrich himself unjustly at the expense of another’” (*Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 463 [1<sup>st</sup> Dept 2010], quoting *Waldman v Englishman Sportswear*, 92 AD2d 833, 836 [1<sup>st</sup> Dept 1983]). “Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant’s conduct was tortious or fraudulent” (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]).

Our courts have held that, under the mistake of fact doctrine, if a payor pays money based upon the erroneous assumption that it is indebted to the payee, the payee is not entitled to retain the money acquired by the mistake of the payor, even if the mistake is the result of negligence (*see Banque Worms v BankAmerica Intl.*, 77 NY2d 362, 366 [1991]; *Bank of New York v Spiro*, 267 AD2d 339 [2<sup>d</sup> Dept 1999]). However, where the receiving party has changed its position to its detriment in reliance upon the mistake, recovery may be denied (*see Collins v HSBC Bank USA*, 305 AD2d 361, 362 [2<sup>d</sup> Dept 2003]; *see also BanqueWorms*, 77 NY2d at 366).

Plaintiffs argue that they should be granted summary judgment on their claim for unjust enrichment because, under New York law, a party may be unjustly enriched when its debt is wrongly satisfied by another party. Plaintiffs argue that, here, the evidence clearly establishes that National Grid received \$204,238.14 from plaintiffs in payment of its bills for gas service to

the 298 Property, a property with which plaintiffs have no connection and have derived no benefit. Plaintiffs argue that, since it is clear that plaintiffs mistakenly paid the meter charges owed to National Grid by another as a result of National Grid's carelessness and mistake in sending the bills to plaintiffs' principal place of business, it would be inequitable to allow National Grid retain those monies plaintiffs paid by mistake.

Plaintiffs argue that summary judgment on its second cause of action for mistake is warranted because, even if plaintiffs somehow were negligent in making the payments on these bills, it is clear that such payments were made based on plaintiffs' mistaken belief that the bills were for gas service to the 292 Property, rather than the 298 Property. Plaintiffs argue that, although a payee's detrimental reliance on a mistaken payment can be a defense to repayment, National Grid cannot show detrimental reliance where, as here, its bills for gas service to the 298 Property merely were paid by a different party.

National Grid argues that plaintiffs' motion for summary judgment should be denied, and its cross motion for summary judgment dismissing plaintiffs' first two cause of action should be granted, because there is no basis in law or equity for plaintiffs' claims.

National Grid argues that where, as here, the evidence is clear that plaintiffs failed to examine the bills before paying them, the payments must be considered voluntary and not made under any mistake of law (*see Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003] [voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law]; *Gimbel Bros. v Brook Shopping Ctrs.*, 118 AD2d 532, 535 [2<sup>d</sup> Dept 1986]). National Grid notes that, although plaintiffs claim that their payment of these bills was based on a mistake of fact,

plaintiffs have acknowledged that the bills clearly indicated that they were for gas service provided to Plaza Associates at the 298 Property, and not the 292 Property. Additionally, plaintiffs themselves have acknowledged that, during the entire period in which they paid these bills, the 292 Property was heated only by oil, not gas, and thus that it was impossible for the gas meter charges to be for service to the 292 Property.

National Grid additionally argues that, even if the payments on these bills resulted from a mistake of fact on the part of plaintiffs, recovery must be denied because it is evident that National Grid detrimentally changed its position in reliance on these payments, by continuing to supply gas service to the 298 Property as a direct result of receiving the continuing payments for such service. National Grid argues that it is axiomatic that, had it ceased receiving payments on these bills, it would have ceased rendering gas service to the 298 Property. National Grid argues that because plaintiffs' payments were applied to reimburse National Grid for its cost in providing continuing gas service to the 298 Property during the relevant time period, plaintiffs cannot show that National Grid still holds the benefit of such payments, or that National Grid was unjustly enriched or received an unjust benefit from such payments.

National Grid further argues that it would be unjust to allow plaintiffs to recover their payments from National Grid at this point, because there is evidence that 212 Crown has since sold the 298 Property to a third party, and thus that National Grid will not now be able to recover for the services it rendered in good faith and in reliance on plaintiffs' payments. National Grid also argues that, even if it were possible for it to obtain a judgment for these amounts against defendant 212 Crown, any judgment in its favor would be subordinate to the default judgment already obtained by plaintiffs.

In any event, National Grid argues that plaintiffs' motion for summary judgment must be denied because the documents produced by plaintiffs indicate that the payments for these gas bills actually were made from the accounts of two business entities that are not parties to this action: Pinnacle Brooklyn LLC and BAP I Preferred LLC (*see* Buffaloe affirmation, exhibit J). National Grid argues that plaintiffs have yet to produce evidence sufficient to establish the connection between these two corporate entities and the two companies that are parties to this action.

Finally, National Grid argues that, to the extent that plaintiffs are seeking to recover the amounts of any payments that were made more than six years prior to the commencement of this action, such recovery is time-barred by the six-year statute of limitations applicable to causes of action for unjust enrichment and mistake (CPLR 213 [2] and [6]).<sup>1</sup>

Plaintiffs' motion for summary judgment on their two remaining causes of action is denied. While plaintiffs have presented some evidence in support of their claim that they made the payments on the gas bills as a result of their mistaken belief that the bills related to the 292 Property, given that the gas bills themselves clearly identified the 298 Property as the property that was being serviced, it is unclear as to what precise fact was supposedly mistaken. In any event, National Grid has presented evidence that is sufficient to raise an issue of fact as to whether it detrimentally changed its position in reliance on plaintiffs' payments, by continuing to provide gas service to the 298 Property (*see Island Fed. Credit Union v Smith*, 60 AD3d 730, 732 [2<sup>d</sup> Dept 2009] [recovery of payment based on mistake of fact has been denied "where the payee

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<sup>1</sup>In their memorandum of law in opposition to National Grid's cross motion, plaintiffs have since conceded that any payments made more than six years prior to the commencement of this action are time-barred (*see* memorandum of law in opposition to cross motion at 11).

has changed its position to its detriment in reliance upon the mistake so that requiring that it refund the money paid would be unfair” [internal quotations omitted]); *see also Bank Saderat Iran v Amin Beydoun, Inc.*, 555 F Supp 770, 774 [SD NY 1983] [recovery of payment under a theory of unjust enrichment denied where payment, though mistaken, was not obtained through any fraudulent conduct, and where payees then shipped materials after receipt of the payment and thus “changed their positions to their detriment in reliance upon the payment, and are neither in possession of the money, nor able to recover it from the party who ultimately received the benefit of the mistake”]). Plaintiffs have produced no evidence in support of their apparent contention that National Grid was aware, or should have been aware, that plaintiffs were mistakenly paying the gas meter bills for a property with which they had no relationship.

National Grid’s cross motion to dismiss these two causes of action is likewise denied, as issues of fact remain as to whether requiring National Grid to refund such monies would necessarily lead to an undue net loss to National Grid, and thus be unfair. Although National Grid may have continued to provide gas service to the 298 Property in reliance on plaintiffs’ continuing payments, it has yet to establish that it necessarily would not be able to recover the payments for such service from 212 Crown, the then owner of the property. Although there is evidence that 212 Crown has since sold the 298 Property, and has failed to appear in this action, defendants have presented no evidence to establish that 212 Crown would no longer be able to pay the amounts sought to be recovered (*see Bank Saderat Iran*, 555 F Supp at 774 [detrimental change in position established where recovery against payee was no longer available, as payee had since gone out of business]; *see also Matter of Liberty Mut. Ins. Co. v Newman*, 92 AD2d 613, 614 [2<sup>d</sup> Dept 1983] [“Among the broad considerations of equity and justice considered by

the courts in suits of this nature is whether the defendant will suffer a detrimental, material and irrevocable change of position if restitution is ordered”]).

Accordingly, it is

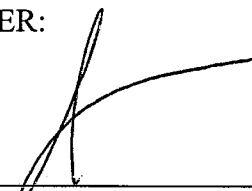
ORDERED that the motion by plaintiffs for summary judgment on their first and second causes of action is denied; and it is further

ORDERED that the cross-motion by defendant The Brooklyn Union Gas Company d/b/a National Grid NY, sued hereunder as The Brooklyn Union Gas Company d/b/a National Grid, for summary judgment is granted solely to the extent of dismissing the third, fourth, and fifth causes of action, and the cross motion otherwise is denied; and it is further

ORDERED that the action shall continue as to plaintiffs’ first and second causes of action.

Dated: January 27 2016

ENTER:

  
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HON. JOAN A. MADDEN  
J.S.C.