Pak v Jet Lag Prods., Inc.
2016 NY Slip Op 30386(U)
March 4, 2016
Supreme Court, New York County
Docket Number: 154717/2014
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29
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June Helen Pak

Plaintiff,

Index No. 154717/2014

-against-

Jet Lag Productions, Inc., Vanessa Duquesnes,
and Marc Bikindou

Defendants

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KALISH, J.:

Upon review of the Parties' submitted papers, the Plaintiff's motion for summary judgment is granted solely as to her first cause of action against the individual Defendant Vanessa Duquesnes. Further, Defendants' cross-motion for summary judgment is granted only as to dismissing the Plaintiff's second, third, fourth and fifth causes of action as against the Defendant Vanessa Duquesnes and dismissing the Plaintiff's second cause of action as against the Defendant Marc Bikindou.

Background and Procedural History

In the underlying action, the Plaintiff alleges in sum and substance that during the course of planning a "destination wedding" she decided to rent a villa in Turks and Caicos. The Plaintiff further alleges that she located a venue called Villa Blanche (the "House") using a website called Caribique Villa Rentals, which connects vacationers to housing being rented by owners in the Carribean. Plaintiff alleges that she was introduced to the defendant Vanessa Duquesnes through this website. Plaintiff further alleges that on or about January 7, 2014, she had a phone conversation with Ms. Duquesnes, wherein Ms. Duquesnes represented that she was the owner of the House and was willing to rent the House to the Plaintiff for the period of March 24 - 31, 2014. The Plaintiff further alleged that between January 8 through 18, 2014, she negotiated a rental agreement as to the House. Plaintiff alleges that on January 18, 2014, she and Ms. Duquesnes (on behalf of the Defendant Jet Lag Productions, Inc.) entered

into an agreement for the rental of the House for the period of March 24 - 31, 2014 at the agreed price of $21,000.00. Plaintiff alleges that said agreement covered the rental and certain amenities including a private chief and ground transportation. Plaintiff further alleges that she made full payment for the rental on or about January 28, 2014.

Plaintiff further alleges that on or about March 10, 2014, Ms. Duquesnes called the Plaintiff and informed her that she could no longer rent the House to the Plaintiff. Plaintiff alleges that during said phone call, Ms. Duquesnes informed the Plaintiff for the first time that she was not the owner of the House and that she was only a tenant of the House. Plaintiff further alleges that Ms. Duquesnes informed her that the actual owner of the House was requiring that Ms. Duquesnes vacate the House within one week from March 10, 2014. Plaintiff alleges that during said phone call, Ms. Duquesnes indicated to the Plaintiff that the Plaintiff's full $21,000.00 payment would be returned to her by the defendant Jet Lag Productions, Inc. ("Jet Lag").[1]

The Plaintiff further alleges that on March 10, 2014, there were multiple phone calls between the Plaintiff's spouse and both the Defendants Ms. Duquesnes and Marc Bikindou (Mr. Bikindou is Ms. Duquesnes' spouse). Plaintiff alleges that during the course of said phone calls, Mr. Bikindou confirmed to Plaintiff's spouse that he was a co-owner of Jet Lag. Plaintiff alleges that Mr. Bikindou indicated to her spouse that Mr. Bikindou knew of the rental agreement for the House, and that Mr. Bikindou assured the Plaintiff and her spouse that the $21,000.00 payment would be reimbursed. Plaintiff alleges that she has made demands to the Defendants for the return of her $21,000.00 on March 19, 2014, March 21, 2014 and March 26, 2014. However, to date the Defendants have failed to refund said sum to her.

The Plaintiff further alleges that due to the Defendants' breach of the rental agreement, on or about March 13, 2014 the Plaintiff entered into a new booking agreement with Luxury Retreats Management for an alternative location. Plaintiff alleges that the cost for the new rental was $31,360.00, and in addition, required her to hire a catering company at a cost of $18,504.36, for a total of $49,864.38.

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[1] The Court notes that the case file for the underlying action includes an affidavit by the Defendant Vanessa Duquesnes, wherein she states that Jet Lag has assured the Plaintiff that her $21,000.00 payment would be returned.

Plaintiff alleges the following five causes of action against the Defendants:

- first cause of action for breach of contract for damages in the amount of $60,000.00 plus interest from March 11, 2014, costs and attorney's fees,
- second cause of action for conversion of the Plaintiff's $21,000.00 payment in the amount of $21,000,00 plus interest from March 11, 2014, costs and attorney's fees,
- third cause of action for fraudulent inducement, conspiracy to commit fraud and misrepresentation for damages in the amount of $60,000.00 plus interest from March 11, 2014, costs and attorney's fees,
- fourth cause of action for unjust enrichment in the amount of $21,000,00 plus interest from March 11, 2014, costs and attorney's fees, and
- fifth cause of action for promissory estoppel for damages in the amount of $60,000.00 plus interest from March 11, 2014, costs and attorneys's fees,

The Plaintiff now moves for summary judgment on all five of her causes of action against the Defendant, and the Defendant cross-moves to dismiss all five of the Plaintiff's causes of action.

Parties' contentions

In support of the instant motion, the Plaintiff attaches with the moving papers a copy of the rental agreement, a copy of the checks Plaintiff issued to the Defendants pursuant to said agreement, copies of the emails allegedly exchanged between the Plaintiff and Ms. Duquesnes and factual affidavits from both the Plaintiff and her spouse, Mr. Jeffery Zimmerman. The Plaintiff and Mr. Zimmerman both attest to the facts as alleged in the pleadings.

Plaintiff's attorney also attaches an affirmation wherein he argues that the individual Defendants Ms. Duquesnes and Mr. Bikindou should be held personally liable for the unlawful actions undertaken under the veil of Jet Lag, since Jet Lag does not exist as a separate valid corporation. Specifically, Plaintiff attaches with the submitted papers a copy of the New York Department of State, Division of Corporations search results, which show that there is only one entity currently registered in New York

State under the name Jet Lag Productions, Inc. Plaintiff argues that there is no relationship between the entity authorized to do business in the State of New York as Jet Lag Productions, Inc. and the Defendants in the underlying action. Plaintiff attaches with her moving papers a copy of a letter purportedly from the counsel for the entity registered with New York Department of State as Jet Lag Productions, Inc. Said letter is addressed to the Defendants' attorney and indicates that Jet Lag Productions, Inc. has no relationship whatsoever with the Defendants Vanessa Duquesnes and/or Marc Bikindou. The Plaintiff also attaches with her papers a printout from the Delaware Department of State database which lists Jet Lag Productions, Inc. as a void corporation. As such, the Plaintiff argues that the individual Defendants Ms. Duquesnes and Mr. Bikindou must be held liable for their unlawful conduct on behalf of Jet Lag, which is a nonexistent corporation.

Based upon the affidavits and submitted exhibits, the Plaintiff argues that she has established prima facie entitlement to summary judgment on all five of her causes of action against the individual Defendants and Jet Lag (to the extent that it actually exists).

The Plaintiff further argues that the Defendants have waived any affirmative defense as to improper service. Specifically, the Plaintiff argues that although the Defendants raised the affirmative defense of improper service in their amended verified answer, which was filed with the Court on September 22, 2014, the Defendants failed to move for a judgment on said grounds within sixty days after serving the amended verified answer. As such, Plaintiff argues that the Defendants have waived said defense pursuant to CPLR §3211(e). Plaintiff further argues that there did not exist any undue hardship preventing the Defendants from timely moving for a judgment based upon allegations of improper service.

In opposition to the Plaintiff's motion and in support of their own cross-motion to dismiss the underlying action, the Defendants do not dispute that the Plaintiff and Jet Lag entered into an agreement to rent the House or that the Plaintiff paid Jet Lag $21,000.00 pursuant to said agreement. Further, the Defendants do not dispute that they informed the Plaintiff that she would be unable to rent the House pursuant to the rental agreement, nor do the Defendants dispute that to date they have not refunded the $21,000.00 to the Plaintiff. Instead, the Defendants claim that there was no breach of contract on the part of the individual Defendants Vanessa Duquesnes and Marc Bikindou. The Defendants argue that only Ms. Duquesnes signed the rental agreement and that she only signed it on behalf of Jet Lag. Defendants argue in sum and substance that since Jet Lag is a corporate entity, personal liability cannot be imposed upon Vanessa Duquesnes and/or Marc Bikindou as corporate officers. The Defendants further argue that the Plaintiff is not entitled to money damages, since the rental agreement only entitled the Plaintiff to a $21,000.00 credit towards future rentals during the period from April 2014 to November 2014.

The Defendants further argue that the Plaintiff's second, fourth and fifth causes of action for conversion, unjust enrichment and promissory estoppel respectively are all precluded by the Plaintiff's first cause of action for breach of contract pursuant to the written rental agreement. The Defendants further argue that the Plaintiff has failed to make out a prima facie case for her third cause of action for fraud against the Defendants.

The Defendants attach with their opposition papers an affidavit by Ms. Duquesnes, wherein she states that she resides in Turks and Caicos and was not properly served with the "Order to Show Cause and the Summons and Complaint". Ms. Duquesnes further states in her affidavit that Jet Lag advised the Plaintiff that it "intends to make her 'whole'". She further states that Jet Lag was a victim of fraud whereby the fee owner of the House did not advise Jet Lag that the House was a subject of a foreclosure. She states that she made no false statements to the Plaintiff nor did she engage in any conduct to deceive the Plaintiff.

Ms. Duquesnes indicates in her affidavit that Jet Lag is a New York State entity. However, Defendants have submitted no proof to dispute the Plaintiff's argument that Jet Lag is not a properly registered corporation. Specifically, the Defendants have not included with their submitted papers any articles of incorporation or other proof that Jet Lag is a properly registered corporation in the State of New York or any other state. Further, the Defendants fail to address in any way, the Plaintiff's argument that the Defendants waived their affirmative defense of improper service.

The Defendants also attach with their submitted papers an affidavit by Mr. Bikindou, who adopts all of the factual allegations in Ms. Duquesnes' affidavit. Mr. Bikindou further attests that he was not a signatory to the rental agreement, made no false representations to the Plaintiff and that he does not recall communicating with the Plaintiff.

In reply, the Plaintiff reiterates her arguments for summary judgment and argues in effect that the Defendants do not dispute any of the substantive factual allegations that he Plaintiff made in her motion papers. Specifically, the Plaintiff argues that the Defendants do not dispute that they entered into a rental agreement with the Plaintiff and/or that the Defendants later informed the Plaintiff that she would be unable to rent the House. The Plaintiff further argues that both Ms. Duquesnes and Mr. Bikindou acknowledge that they must turn over the $21,000.00 payment back to the Plaintiff, and that the Defendants do not dispute that the Plaintiff made multiple demands for said money.

Oral Argument

On February 9, 2016, the Parties appeared before the Court for oral argument on the motion and cross-motion. Plaintiff's counsel reiterated the arguments presented in the moving papers, emphasizing that Jet Lag is a nonexistent corporate entity and that the Defendants failed to submit any proof in opposition to the Plaintiff's proof on this point.

The Defendants' counsel also reiterated the arguments presented in their submitted papers, emphasizing that according to the terms of the rental agreement, the Plaintiff is only entitled to a $21,000.00 credit towards a future rental, and not the return of the $21,000.00 payment that the Plaintiff made to the Defendants. The Defendants' counsel do not dispute that Jet Lag was not a registered corporate entity in New York at the time that the Parties entered into the rental agreement. The Defendants counsel also failed to submit any evidence to show that Jet Lag was a corporate entity registered in any state at the time that the Parties entered into the rental agreement. The Defendants' counsel further conceded that Jet Lag Productions, Inc., a corporation registered in the State of New York, has no affiliation with either the individual Defendants or the Defendant Jet Lag (to the extent it exists).

The Defendants' counsel did argue that Ms. Duquesnes' indication in her affidavit that Jet Lag was a New York State entity was a mistake on her part and that Jet Lag was a Delaware corporation. The Defendants' counsel further indicated to the Court that the Defendants attempted to have Jet Lag's corporate status reinstated in the state of Delaware in December of 2014. Defendants' counsel further indicated to the Court that counsel had an invoice paid by the Defendants to a company that the Defendants' counsel indicated was hired by the Defendants to get Jet Lag reinstated as a Delaware corporation. However, the Parties entered into the rental agreement on or about January 18, 2014, significantly prior to December of 2014, and Defendants' counsel did not submit any basis for the Court to conclude that Jet Lag was a properly incorporated entity on the date of the January 18, 2014 rental agreement.

Analysis

The Defendants have waived their affirmative defense of improper service and cannot not now move for dismissal of the action for improper service and/or oppose the Plaintiff's motion for summary judgment on the grounds of improper service.

CPLR §3211(e) specifically indicates that "an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the Court extends the time upon the ground of undue hardship". As such, a party waives the defense of lack of personal jurisdiction based on improper service by failing to move on it within 60 days after having previously raised it in its answer (See Tannenbaum Helpern Syracuse & Hirschtritt LLP v. DeHeng Law Offs., 127 AD3d 564 (NY App. Div. 1st Dept 2015) citing CPLR §3211(e); Aretakis v. Tarantino, 300 AD2d 160 (NY App Div 1st Dept 2002)).

In the instant action, the Defendants' verified answer dated July 23, 2014 includes the affirmative defense that the summons and complaint were not properly served upon the individual Defendants. Further, the affidavit of service as to the Defendants' verified answer indicates that it was served upon the Plaintiff on August 13, 2014. As such, the Defendants had until October 13, 2014 (60 days measured from August 13, 2014) to move to dismiss the Plaintiff's action for improper service. The Defendants failed to do so, and the Court notes that their submitted papers are completely devoid of any argument on this point. As such, there is no basis for this Court to conclude that the Defendants failure to make a timely motion to dismiss the underlying action for lack of service was due to any "undue hardship".

Accordingly, the Defendants' affirmative defense of improper service is hereby waived and cannot now be raised in opposition to the Plaintiff's motion for summary judgment or in support of the Defendants' cross-motion to dismiss the underlying action (See Credigy Receivables, Inc. v Agiwal, 66 AD3d 949 (NY App Div 2d Dept 2009)).

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (NY App Div 1st Dept 2012) [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (id.). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, 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 quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002)).

Plaintiff has established that Jet Lag is a nonexistent corporate entity.

Upon review of the Plaintiff's submitted papers and having conducted oral argument, this Court finds that the Plaintiff has established prima facie that Jet Lag is a nonexistent corporate entity. Specifically, the Plaintiff attaches with her moving papers a copy of the New York Department of State, Division of Corporations search results showing that there is only one entity currently registered in New York State under the name Jet Lag Productions, Inc. Further Plaintiff attaches with her moving papers a copy of a letter purportedly from the counsel for the entity registered with New York Department of State as Jet Lag Productions, Inc. Said letter is addressed to the Defendants' attorney and indicates that

Jet Lag Productions, Inc. has no relationship whatsoever with the Defendants Vanessa Duquesnes and Marc Bikindou. Based upon said proof, the Court finds that the Plaintiff has established prima facie that Jet Lag is not a corporate entity within the State of New York.

Further, although Ms. Duquesnes states in her affidavit that Jet Lag is a New York State entity, the Defendants do not attach with their opposition papers any proof to this effect. Neither do the Defendants attach any proof that Jet Lag is a corporate entity registered in any state or anywhere at all. In point of fact, the Defendants' memorandum of law in support of their cross-motion to dismiss and in opposition to the Plaintiff's motion for summary judgment does not in any way address the Plaintiff's argument on this point. The Defendants do argue that Ms. Duquesnes signed the rental agreement on behalf of Jet Lag and that she cannot be held personally liable as a corporate officer. However, the Defendants at no point dispute the Plaintiff's argument (and/or the proof submitted in support of said argument) that Jet Lag is not a corporate entity registered within the State of New York.

Further, at oral argument, the Defendants' counsel conceded that Jet Lag was not a New York Corporation, but a Delaware Corporation. Defendants' counsel further indicated at oral argument that the individual Defendants attempted to have Jet Lag's corporate status reinstated in Delaware in December of 2014, which implies that the individual Defendants Vanessa Duquesnes, and Marc Bikindou were aware that Jet Lag did not have corporate status (or at very least had reason to question Jet Lag's corporate status in Delaware) at the time Ms. Duquesnes signed the rental agreement with the Plaintiff in January of 2014.

"Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539 (NY 1975); Madeline D'Anthony Enters., Inc. v. Sokolowsky, 101 AD3d 606 (NY App Div 1st Dept 2012)). Based upon the Plaintiff's submitted proof and the Defendants' failure to submit any proof in opposition, the Court finds that Jet Lag is a nonexistent corporate entity.[2]

Plaintiff is entitled to summary judgment on its breach of contract claim against the individual Defendant Vanessa Duquesnes.

"A 'written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'. In searching for the intent of the parties, our goal must be to accord the words of the contract their 'fair and reasonable meaning'. In other words, 'the aim is a practical interpretation of the expressions of the parties to the end that there be a 'realization of [their] reasonable expectations'. '[N]ot merely literal language, but whatever may be reasonably implied therefrom must be taken into account'" (Duane Reade, Inc. v. Cardtronics, LP, 54 AD3d 137, 140 (NY App Div 1st Dept 2008) citing Greenfield v. Philles Records, 98 NY2d 562 (NY 2002); Heller v. Pope, 250 NY 132 (NY 1928); Brown Bros. Electrical Contractors, Inc. v. Beam Constr. Corp., 41 NY2d 397 (NY 1977); Sutton v. East River Sav. Bank, 55 NY2d 550 (NY 1982)). Further, "a 'contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (Greenwich Capital Fin. Prods., Inc. v Negrin, 74 AD3d 413, 415 (NY App Div 1st Dept 2010) citing Lipper Holdings, LLC v. Trident Holdings, LLC, 1 A.D.3d 170 (N.Y. App. Div. 1st Dept 2003)).

[2] The Court notes that unless otherwise specifically indicated any references to "Jet Lag" in the instant decision refers only to the nonexistent corporate entity "Jet Lag", which is one of the named Defendant in the instant action, allegedly associated with the individual Defendants Vanessa Duquesnes and Marc Bikindou. None of the findings in the instant decision have any bearing on New York Corporate Entity Jet Lag Productions Inc. other than the Court's finding that the New York Corporation Jet Lag Productions Inc. has no relationship to the individual Defendants Vanessa Duquesnes and Marc Bikindou and/or the nonexistent corporate entity "Jet Lag".

Further, where a party enters into a contract on behalf of a nonexistent entity, said party would be personally liable under the contract on the theory of a breach of an implied warranty of authority" (See Metro Kitchenworks Sales, LLC v Continental Cabinets, LLC, 31 AD3d 722, 723 (NY App Div 2d Dept 2006) quoting 14 NY Jur 2d, Business Relationships § 96; see also Sunquest Enters., Inc. v Zar, 115 AD3d 486 (NY App Div 1st Dept 2014) citing Imero Fiorentino Associates, Inc. v. Green, 85 AD2d 419 (NY App Div 1st Dept 1982); Benfield Elec. Supply Corp. v. C & L El. Controls, Inc., 58 AD3d 423 (NY App Div 1st Dept 2009); Bay Ridge Lumber Co. v. Groenendaal, 175 AD2d 94 (NY App Div 2d Dept 1991)). "As a corollary to this rule, the purported principal, which had neither de facto nor de jure existence at the time the contract was entered into, cannot be bound by the terms thereof "unless the obligation is assumed in some manner by the corporation after it comes into existence by adopting, ratifying, or accepting it" (Metro Kitchenworks Sales, LLC v. Continental Cabinets, LLC, 31 AD3d 722, 723 (NY App Div 2nd Dept 2006) citing 4 NY Jur 2d, Business Relationships § 97).

In the instant action, the Parties do not dispute that the Plaintiff entered into a contract with Jet Lag to rent the House, that Ms. Duquesnes signed said contract on behalf of Jet Lag and/or that the Jet Lag failed to provide the House to the Plaintiff for rental in accordance with the contract. For the reasons, previously stated, the Plaintiff has established that Jet Lag is a nonexistent entity, and the Defendants have failed to submit any proof to establish an issue of fact on this point. Accordingly, Ms. Duquesnes is personally liable under the rental contract.

Further, the Court finds the Defendants' argument that the Plaintiff is only entitled to a "credit" of $21,000.00 under the contract to be entirely without merit. The rental agreement between the Plaintiff and Ms. Duquesnes specifically states that "[i]n such event that the tenant is unable to use the villa during the aforementioned period of March 24th to March 31st, Vanessa Duquesnes will allow the fee $21,000.00 to be credited toward a future rental". Upon a plain reading, said terms address the Plaintiff's potential inability to rent the House for the period from March 24th to March 31st. Said terms do not address the Defendants' inability to make the House available to the Plaintiff for said period of

time. In point of fact, the rental agreement does not in any away address the potentiality of the Defendants being unable to make the house available to the Plaintiff during the period from March 24th to March 31st. The Defendants no not dispute the Plaintiff's claim that she paid them the $21,000.00 and/or that they did not make the House available for rental during the contracted period, nor that they have yet to return the Plaintiff's $21,000.00.

Accordingly, Ms. Duquesnes is in clear breach of the rental agreement, and the Plaintiff is entitled to summary judgment on her first cause of action for breach of contract against the Defendant Vanessa Duquesnes.

Further, upon the reasons so stated, the Defendants' cross-motion for summary judgment to dismiss the Plaintiff's first cause of action for breach of contract is denied as to the Defendant Vanessa Duquesnes.

The Plaintiff has established that she is entitled to at least $21,000.00 in damages from the Defendant Ms. Duquesnes on Plaintiff's first cause of action for breach of contract.

"It is well settled that in breach of contract actions 'the nonbreaching party may recover general damages which are the natural and probable consequence of the breach'. Special, or consequential damages, which 'do not so directly flow from the breach,' are also recoverable in limited circumstances (Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 10 NY3d 187, 192 (NY 2008) citing Kenford Co. v. County of Erie, 73 NY2d 312, 319 (NY 1989); American List Corp. v. U.S. News & World Report, Inc., 75 NY2d 38 (NY 1989)). "In order to impose on the defaulting party a further liability than for damages [which] naturally and directly [flow from the breach], i.e., in the ordinary course of things, arising from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." (Kenford Co. v. County of Erie, 73 NY2d 312, 319 (NY 1989)).

Upon review of the submitted papers, the Court finds that the Plaintiff is entitled to summary judgment on her breach of contract claim on the issue of damages to the extent that Plaintiff shall recover at least $21,000.00 from the Defendant Ms. Duquesnes. Said sum represents the undisputed amount that Plaintiff paid to the Defendants Ms. Duquesnes to rent the House pursuant to the rental agreement. There remain issues of fact as to any additional damages beyond the $21,000.00 sought by the Plaintiff from the Defendants due to the Defendants' breach of the rental agreement. Said issues shall be determined at trial. Further, it shall be for the jury or the trier of fact to determine the appropriate total measure of damages based upon the facts and testimony presented.

Further, as the Court is granting the Plaintiff summary judgment on her first cause of action for breach of contract against the Defendant Vanessa Duquesnes, the Plaintiff's motion for summary judgment on the second cause of action for conversion, fourth cause of action for unjust enrichment and fifth cause of action for promissory estoppel as against Vanessa Duquesnes are denied as moot.

There is an issue of fact as to whether or not the Defendant Marc Bikindou was bound by the rental agreement signed by Vaness Duquesnes.

Upon review of the submitted papers, the Court finds that the Plaintiff has failed to establish prima facie that she is entitled to summary judgment on her first cause of action for breach of contract as against Marc Bikindou. Specifically, there is no dispute that Mr. Bikindou did not sign the rental contract for the House.

The Court does recognize, however, that Mr. Zimmerman (Plaintiff's spouse) states in his affidavit that Mr. Bikindou informed him over the course of three phone calls that Mr. Bikindou was the co-owner of Jet Lag and that Mr. Bikindou knew of the rental agreement. Mr. Zimmerman further indicated in his affidavit that Mr. Bikindou informed him that the full $21,000.00 would be reimbursed to the Plaintiff. Neither the Defendants' attorney nor Mr. Bikindou deny that Mr. Bikindou is affiliated with Jet Lag (to the extent that it exists). The Court further notes that although the Defendants' verified Answer specifically denies the Plaintiff's allegations in the amended complaint "upon information and belief" that the Defendant Vanessa Duquesnes was a "shareholder and officer" of Jet Lag, the

Defendants in no way deny the Plaintiff's allegation in the amended complaint "upon information and belief" that Mr. Bikindou was a "shareholder and officer " of Jet Lag. Finally, the Defendants' submitted papers in no way dispute Mr. Zimmerman's description of his telephone conversations with Mr. Bikindou, nor did Defendants counsel argue at oral argument that said conversations did not occurr (See Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539 (NY 1975) ["Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted"]; Madeline D'Anthony Enters., Inc. v. Sokolowsky, 101 AD3d 606 (NY App Div 1st Dept 2012)).

As such, the Court finds that there are issues of fact as to the Defendant Marc Bikindu's potential liability under the rental agreement. Specifically, there is an issue of fact as to whether, in addition to entering the rental agreement in her own capacity, the Defendant Vanessa Duquesnes also entered into the rental agreement on behalf of the Defendant Marc Bikindou.

Accordingly, the Plaintiff's motion for summary judgment on her first cause of action is denied as to the Defendant Marc Bikindou.

Based upon these same reasons and issues of fact, the Defendants' cross-motion to dismiss the Plaintiff's first cause of action for breach of contract as against the Defendant Marc Bikindou is also denied.

The Defendants are entitled to summary judgment dismissing the Plaintiff's second cause of action for conversion as the $21,000.00 is not specifically identifiable so as to form the basis for a cause of action for conversion.

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49-50 (NY 2006) citing State v Seventh Regiment Fund, 98 NY2d 249, 259 (NY 2002); Pierpoint v. Hoyt, 260 NY 26 (NY 1933); Employers' Fire Ins. Co. v. Cotten, 245 NY 102 (NY 1927)).

"Money, if specifically identifiable, may be the subject of a conversion action" (Simpson & Simpson, PLLC v Lippes Mathias Wexler Friedman LLP, 130 AD3d 1543, 1544-1545 (NY App Div 4th Dept 2015) citing Peters Griffin Woodward, Inc. v. WCSC, Inc., 88 AD2d 883 (NY App Div 1st Dept 1982)). Further dismissal of causes of action for conversion is warranted if the monies alleged to have been converted by the defendant are not sufficiently identifiable. If the allegedly converted money is incapable of being described or identified in the same manner as a specific chattel, it is not the proper subject of a conversion action (See 9310 Third Ave. Assocs. v. Schaffer Food Serv. Co., 210 AD2d 207 (NY App Div 2d Dept 1994); Heckl v Walsh, 122 AD3d 1252 (NY App Div. 4th Dept 2014). "[A]n action for conversion cannot be validly maintained where damages are merely being sought for breach of contract" (Peters Griffin Woodward, Inc. v. WCSC, Inc., 88 AD2d 883, 884 (NY App Div 1st Dept 1982); Kopel v. Bandwidth Tech. Corp., 56 AD3d 320 (NY App Div 1st Dept 2008)).

Upon review of the submitted papers, the Court finds that the $21,000.00 payment that the Plaintiff made to the Defendants pursuant to the rental agreement is not "sufficiently identifiable" so as to form the basis for a cause of action for conversion. Further, the Plaintiff's second cause of action for conversion is based upon the same underlying factual allegations as her breach of contract claim. The only additional factual allegation that the Plaintiff makes in support of her second cause of action for conversion, is that Plaintiff made repeated demands for the return of the $21,000.00. The Court does not find that merely demanding the return of funds under a breach contract is sufficient to constitute a claim for conversion of funds. Therefore, Plaintiff's cause of action for conversion is subject to dismissal as duplicative of her breach of contract claim (See Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC, 125 AD3d 548 (NY App Div 1st Dept 2015); Kopel v. Bandwidth Tech. Corp., 56 AD3d 320 (NY App Div 1st Dept 2008)).

Accordingly, the Defendants' cross-motion for dismissal of the Plaintiff's second cause of action for conversion is hereby granted as to all of the Defendants.

Based upon these same reasons, the Plaintiff's motion for summary judgment as to the Plaintiff's second cause of action for conversion against both Defendants is also denied.

Plaintiff's third cause of action for fraudulent inducement, conspiracy to commit fraud and misrepresentation is duplicative of the Plaintiff's first cause of action for breach of contract as against the Defendant Vanessa Duquesnes. Further, there are no allegations that Mr. Bikindou's alleged misrepresentations "induced" any action on the part of the Plaintiff or caused the Plaintiff to incur any damages apart from those stemming from the breach of contract.

"The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (Blagio Rest., Inc. v C.E. Props., Inc., 127 AD3d 1006, 1008 (NY App. Div. 2d Dept 2015) citing Lama Holding Co. v. Smith Barney Inc., 88 NY2d 413 (NY 1996); see also Mandarin Trading Ltd. v. Wildenstein, 16 NY3d 173, 178 (NY 2011); Laduzinski v Alvarez & Marsal Tax and LLC, 132 AD3d 164 (NY App Div. 1st Dept 2015); GoSmile, Inc. v. Levine, 81 AD3d 77 (NY App Div 1st Dept 2010); Nicosia v Board of Mgrs. of the Weber House Condominium, 77 AD3d 455 (NY App Div 1st Dept 2010)).

Further, a fraud-based cause of action is duplicative of a breach of contract claim and subject to dismissal "when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract" (See Manas v VMS Assoc., LLC, 53 A.D.3d 451, 453 (NY App Div 1st Dept 2008) citing First Bank of the Americas v Motor Car Funding, Inc., 257 AD2d 287 (NY App Div 1st Dept 1999); Mosaic Caribe, Ltd. v AllSettled Group, Inc., 117 AD3d 421 (NY App Div 1st Dept 2014)).

Upon the submitted papers, the Court finds that the Plaintiff's third cause of action for fraudulent inducement, conspiracy to commit fraud and misrepresentation is duplicative of the Plaintiff's first cause of action for breach of contract as against the Defendant Vanessa Duquesnes. Specifically, the Plaintiff does not allege that Ms. Duquesnes breached any duty separate from the breach of contract (See Manas v

VMS Assoc., LLC, 53 A.D.3d 451, 453 (NY App Div 1st Dept 2008) citing First Bank of the Americas v Motor Car Funding, Inc., 257 AD2d 287 (NY App Div 1st Dept 1999)).

Further, the Plaintiff's submitted papers are insufficient to make out a a cause of action for fraud against the Defendant Marc Bikindou. Specifically, Mr. Zimmerman indicates in his affidavit that he had three phone conversations with Mr. Bikindou after Ms. Duquesnes had already indicated to the Plaintiff that she would be unable to rent the House in accordance with the rental agreement. As such, any misrepresentations that Mr. Bikindou made to Mr. Zimmerman occurred after the contract had already been breached. Further, there are no allegations that the Plaintiff entered into any additional agreement with the Defendants following Mr. Zimmerman's conversations with Mr. Bikindou or that the Plaintiff incurred any additional "injuries" due to Mr. Bikindou's alleged misrepresentations, apart from those directly stemming from the breach of contract. As such, even assuming arguendo that Mr. Bikindou made misrepresentations to the Plaintiff's spouse, there is no basis from the submitted papers or from the arguments presented at oral argument to show that said misrepresentations "induced" the Plaintiff to enter into any additional agreements with the Defendants and/or to incur any damages apart from those directly stemming from the breach of contract.

Accordingly, the Defendants' cross-motion for dismissal of the Plaintiff's third cause of action for fraudulent inducement, conspiracy to commit fraud and misrepresentation is hereby granted.

Based upon these same reasons, the Plaintiff's motion for summary judgment as to her third cause of action is denied.

Plaintiff's fourth and fifth causes of action for unjust enrichment and promissory estoppel are both dismissed as to the Defendant Vanessa Duquesne based upon a written rental agreement, however there is an issue of fact as to whether or not Mr. Bikindou was bound by said rental agreement and issues of fact as to Mr. Bikindou's liability in equity.

"'The theory of unjust enrichment lies as a quasi-contract claim'' and contemplates 'an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties.' 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 (NY 2012) [internal citations omitted]). "The elements of a cause of action to recover for unjust enrichment are '(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.' 'The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (GFRE, Inc. v U.S. Bank, N.A., 130 AD3d 569, 570 (NY App Div 2d Dept 2015) citing Mobarak v Mowad, 117 AD3d 998 (NY App Div 2nd Dept 2014); Paramount Film Distrib. Corp. v State, 30 NY2d 415 (NY 1972); Sperry v. Crompton Corp., 8 NY3d 204 (NY2007)).

"The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance" (Schroeder v Pinterest Inc., 133 AD3d 12, 32 (NY App Div 1st Dept 2015) quoting MatlinPatterson ATA Holdings LLC v Federal Express Corp., 87 AD3d 836 (NY App Div 1st Dept 2011)). "[T]he doctrine of promissory estoppel is limited to cases where the promisee suffered an "unconscionable injury." (AHA Sales, Inc. v Creative Bath Prods., Inc., 58 AD3d 6, 21 (NY App. Div. 2d Dept 2008)).

Claims for unjust enrichment are equitable in nature, and are appropriate only if there is no valid and enforceable contract between the parties covering the dispute at issue." (Stephan B. Gleich & Assoc. v Gritsipis, 87 AD3d 216, 223 (NY App Div 2nd Dept 2011) citing AHA Sales, Inc. v Creative Bath Prods., Inc., 58 AD3d 6 (NY App Div 2nd Dept 2008); Hochman v LaRea, 14 AD3d 653 (NY App Div 2d Dept 2005); Zuccarini v Ziff-Davis Media, Inc., 306 AD2d 404 (NY App Div 2d Dept 2003); Old Salem Dev. Group, Ltd v Town of Fishkill, 301 AD2d 639 (NY App Div 2d Dept 2003)). Similarly, a claim for promissory estoppel cannot stand when there is a contract between the parties (See Susman v Commerzbank Capital Mkts. Corp., 95 AD3d 589 (NY App Div 1st Dept 2012) citing SAA-A, Inc. v. Morgan Stanley Dean Witter & Co., 281 AD2d 201 (NY App Div 1st Dept 2001)).

There is no dispute that the Plaintiff entered into a written rental agreement signed by Vanessa Duquesnes. As such, the Plaintiff's fourth and fifth causes of action for unjust enrichment and promissory estoppel are subject to dismissal as to the Defendant Vanessa Duquesnes.

However, as previously stated in the instant decision, there remains an issue of fact as to whether or not the Defendant Marc Bikindou was also bound by said written rental agreement. If Mr Bikindou was bound by said written rental agreement, then the Plaintiff would not be entitled to recover under the equitable theories of unjust enrichment or promissory estoppel. However, if the jury or trier of fact determine at trial that Mr. Bikindou was not bound by the written rental agreement, the Plaintiff may still potentially recover from Mr. Bikindou under the Court's broad equitable powers.

Further based upon the submitted papers and after hearing oral arguments the Court finds that there are significant issues of fact as to whether or not Mr. Bikindou may be liable to the Plaintiff under the equitable theories of unjust enrichment and/or promissory estoppel. Specifically, there are significant issues of fact as to the level Mr. Bikindou's involvement with Jet Lag. Mr. Zimmerman indicated in his affidavit that Mr. Bikindou told him that Mr. Bikindou was a co-owner of Jet Lag and that Mr. Bikindou knew of the rental agreement. The Defendants did not dispute Mr. Zimmerman's affidavit in their opposition papers nor at oral argument. Further, the Defendants did not dispute the

Plaintiff's allegation in the amended complaint that Mr. Bikindou was a "shareholder and officer' of Jet Lag. As such there are significant issues of fact as to Mr. Bikindou's level of involvement in the rental agreement and level of "enrichment" for said agreement.

The Court further notes that the Defendants' only arguments in opposition to the Plaintiff's motion for summary judgment on its fourth and fifth causes of action for unjust enrichment and promissory estoppel (and in support of Defendant's cross-motion for summary judgment dismissing said charges), were that said claims were duplicative of the Plaintiff's breach of contract claim and that the rental agreement was between the Plaintiff and Jet Lag. However, for the reasons so stated in the instant decision, the the Plaintiff has established that Jet Lag was a nonexistent entity at the time of the rental agreement, and as such the Defendant Vanessa Duquesnes is personally liable for breaching the rental agreement. Further, as previously stated, there are issues of fact as to whether or not Ms. Duquesnes entered into the rental agreement on behalf of both herself and Mr. Bikindou.

Accordingly, the Defendants' cross-motion for dismissal of the Plaintiff's fourth and fifth causes of action for unjust enrichment and promissory estoppel respectively is hereby granted only as to the Defendant Vanessa Duquesnes.

Based upon these same reasons, the Plaintiff's motion for summary judgment as to her fourth and fifth cause of action is denied.

Conclusion

Accordingly and for the reasons so stated it is hereby

ORDERED that the Plaintiff's motion for summary judgment is hereby granted solely as to her first cause of action for breach of contract against the Defendant Vanessa Duquesnes on the issue of liability. It is further

ORDERED that the Plaintiff's motion for summary judgment is denied in its entirety as against the Defendant Marc Bikindou. It is further

ORDERED that on the issue of damages on Plaintiff's first cause of action for breach of contract against the Defendant Vanessa Duquesnes, the Plaintiff has established that she is at least entitled to $21,000.00 in damages stemming from the Defendant Vanessa Duquesnes' breach of the rental agreement. It shall be the Plaintiff's burden at trial to establish any additional damages stemming from said breach beyond the $21,000.00. It is further

ORDERED that the Defendants' cross-motion for summary judgment is granted solely to the extent that the Plaintiff's second, third, fourth and fifth causes of action are hereby dismissed as to the Defendant Vanessa Duquesnes and that the Plaintiff's second and third causes of action are dismissed as to the Defendant Marc Bikindou.

As such, the remaining issues in the underlying action are as follows:

- the determination of the total monetary damages incurred by the Plaintiff as against the Defendants Vanessa Duquesnes for her breach of the rental agreement, and
- the Plaintiff's first, fourth and fifth causes of action against the Defendant Marc Bikindou on the issues of liability and damages.

Said issues shall be determined at trial. Further, should the Defendant Marc Bikindou be found to be liable for breach of contract in the underlying action, he shall be held jointly and severally liable for the total measure of damages that the trial Court determines were incurred by the Plaintiff as against the Defendants Vanessa Duquesnes for breach of contract.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: March 9, 2016

ENTER:

HON. ROBERT D. KALISH
J.S.C.