61 W. 37th St. LLC v Senevi
2016 NY Slip Op 30791(U)
April 28, 2016
Supreme Court, New York County
Docket Number: 652908/2015
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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61 West 37th Street LLC,

Plaintiff,

-against-

Kes Senevi, Daniel J. Zazzali, George P. Zazzali, Kinematics Merchandising & Distributors, Inc., RCI Dining Services (New York), Inc.

Defendants.

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Index No.: 652908/2015

DECISION AND ORDER

Mot. Seq. 001, 002, 003

HON. ANIL SINGH:

Defendants Kes Senevi, Daniel J. Zazzali, George P. Zazzali (together, "Shareholders"), Kinematics Merchandising & Distributors, Inc. ("Kinematics"), and RCI Dining Services (New York), Inc. ("RCI") (collectively, "Defendants") move to dismiss plaintiff 61 West 37th Street LLC's ("Plaintiff" or "Landlord") complaint pursuant to CPLR 3211(a)(1) and (7). Plaintiff opposes the motion.

Prior to RCI's acquisition of the stock, Daniel J. Zazzali and George P. Zazzali were each twenty percent owners of Kinematics. The remaining sixty percent was owned by defendant Kes Senevi.

The complaint alleges that Kinematics entered into a lease with plaintiff landlord approximately thirty years ago. Kinematics used the premises, 61 West 37th Street ("Premises") as an adult and novelty store in accordance with the existing premises permitted use clause (as detailed below).

In 2012, RCI began negotiations with Kinematics regarding acquiring the shares of Kinematics. Kinematics entered into an amended lease with the plaintiff on March 4, 2013. On the same day, March 4, 2013, pursuant to a Stock Purchase Agreement, the shareholders sold all their stock in Kinematics to RCI for $3 million.

Section 55 of the lease provides that if the Kinematics shares are acquired or assigned, landlord is to be paid "fifty percent (50%) of any assignment fees, subrentals and/or other consideration actually paid by the assignee." Plaintiff alleges that RCI paid $3 million for the business. It converted the adult bookstore into a "gentlemen's club" featuring exotic dancers, music, food and beverage service. Although payment has been demanded, defendants have refused to tender the $1.5 million assignment fee owed under section 55 of the lease, spawning this litigation. The complaint alleges three causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; and (3) unjust enrichment.

Standard for Motion to Dismiss

On a motion to dismiss based on the ground that the defenses are founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence must be unambiguous, authentic, and undeniable. See, Fountanetta v. Doe, 73 A.D.3d 78 [2d Dept., 2010]. "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 [2d Dept., 2001], leave to appeal

denied 97 N.Y.2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." See, Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 [2002].

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as true, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 [1st Dept., 2004]. The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994]. The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 [2002].

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 [1st Dept., 1994] (internal citation omitted).

Timing of the Amended Lease and Acquisition, the Key Money Agreement and Limited Guaranty

In its complaint, plaintiff alleges that it entered into the amended lease dated March 4, 2013. Plaintiff asserts that based on the terms of section 55 of the lease,

Kinematic is to pay 50% of the proceeds resulting from either the assignment of the lease or the transfer of a majority of the stock of Kinematics. Plaintiff claims that after it executed the amended lease with Kinematics, RCI acquired a majority of Kinematics shares for $3 million. Defendants counter that this allegation is not true as the acquisition took place before the parties entered into the amended lease. In support of this argument, defendants cite section 56 of the lease, the Key Money Agreement and the Limited Guaranty as documentary evidence that (1) the lease is an acknowledgement by plaintiff that RCI was to be treated as if they had already acquired Kinematics, and (2) states the consideration of $200,000 paid to plaintiff.

The documentary evidence at this juncture establishes only that both the amended lease transaction and the acquisition by RCI occurred on March 4, 2013. There is no other documentary evidence as to the precise sequencing of the two transactions. The documentary evidence does not conclusively establish that the acquisition occurred prior to the execution of the amended lease.

Continuation of the Permitted Use

The second argument raised by defendants is that under section 55A no assignment fee is due where the assignee continues to use the premises as an adult establishment just as Kinematics had used the premises. The provision provides in, relevant part, as follows: "Notwithstanding the foregoing or anything to the contrary contained herein, no sums shall be payable to Owner for an assignment of this lease in connection with the bona fide sale of Tenant's business to an assignee that plans to

continue to use the Existing Premises for the Existing Premises Permitted Use in substantially and materially the same manner as Tenant has theretofore used the Demised Premises...." (Lease at section 55A).

Plaintiff contends that RCI is not using the premises in "substantially and materially the same manner as Tenant (Kinematics) has theretofore used the Demised Premises." In particular, plaintiff contends that because RCI has publicly described its business as a "new gentleman's club" in a press release, it has impliedly admitted that its use is not substantially and materially the same as the earlier use of the premises as an adult book and novelty store. Plaintiff also argues that because RCI engaged in extensive renovation, the gentleman's club cannot be considered substantially and materially the same as the adult book store which preceded it.

Section 43B defines how the demised premises may be used. It expressly provides that the "Existing Premises may only be used and occupied by Tenant as an adult establishment, which use may, upon the issuance of a liquor license and all other permits, licenses, and governmental approvals as required by law...including the operation of a gentlemen's club and/or topless bar and the service of alcoholic beverages...." (Lease at section 43B). RCI's current use of the premises is a permitted use under the terms of the lease.

Plaintiff's argument that the press release and the extensive renovations prove that the premises is substantially and materially dissimilar in the manner it was formerly used by Kinematics is without merit. The press release and the extensive

renovations do not change the terms of the use clause, which clearly provides for use of the premises as an "adult establishment" and, more specifically, as a "gentleman's club and/or topless bar and the service of alcoholic beverages." Here, Kinematics used the premises as an adult establishment. While the business model changed once RCI acquired the lease, the premises undisputedly remained an adult establishment. In short, the demised premises continued to be used substantially and materially in the same manner.

Plaintiff argues that according to For the People Theatres of N.Y., Inc. v. City of New York, 6 N.Y.3d 63, 68 (2005), adult bookstores and gentleman's clubs are distinct types of adult entertainment venues and, therefore, cannot be substantially and materially similar uses for purposes of Section 55A. This case does not provide any meaningful distinction between adult bookstores and topless bars; instead, the case deals with the constitutionality of city zoning resolutions. While there are different definitions for what constitutes an adult book/video store and an adult eating and drinking store, the 1995 zoning resolution defined an "adult establishment" as a commercial establishment in which a "substantial portion" of the establishment includes "an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof" (Amended Zoning Resolution § 12–10[1]). In fact, the zoning rule is consistent with section 43B of the lease that different forms of adult entertainment fall within the definition of adult

establishment. The use of the premises continues to be substantially and materially the same.

The motion to dismiss is granted as an assignment fee is not due to plaintiff.

Kes Senevi, Daniel J. Zazzali and George P. Zazzali

It is axiomatic that the shareholders are not parties to the lease and cannot be held to be contractually liable. Here, the contracting entities were both corporate entities, which is a clear manifestation of the parties' intent that the shareholders and officers will not face personal liability. See, Newman v. Berkowitz, 50 A.D.3d 479 (1st Dep't, 2008); 150 Broadway N.Y. Assc, L.P. v. Bodner, 14 A.D. 3d 1 (1st Dep't, 2004).

Therefore, the shareholder defendants' motion to dismiss for failure to state a cause of action is granted.

Breach of the covenant of good faith and fair dealing and unjust enrichment

Plaintiff has also asserted claims for breach of the covenant of good faith and fair dealing and unjust enrichment.

The covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. Jaffe v. Paramount Communications, 222 A.D.2d 17 (1st Dep't, 1996). Such a claim is proper only when the covenant is "in aid and furtherance of other terms of the agreement of the parties." Murphy v. American Home Prods. Corp., 58

N.Y. 2d 293, 304 (1983). Here, plaintiff fails to allege any facts to demonstrate that defendants deprived it of any rights it had under the agreement. Accordingly, defendants' motion to dismiss based on failure to state a cause of action for breach of the covenant of good faith and fair dealing is granted.

As to plaintiff's claim for unjust enrichment, there is a contract governing the dispute at hand -- namely, the lease -- and therefore there can be no quasi-contract claim as a matter of law. Goldman v. Metropolitan Life Ins. Co., 5 N.Y. 3d 561, 572 (2005) (dismissing unjust enrichment claim because the matter is controlled by contract). Accordingly, defendants' motion to dismiss based on failure to state a cause of action for unjust enrichment is granted.

It is hereby

ORDERED that defendants' motion to dismiss for failure to state a cause of action is granted.

Date: April 28, 2016
New York, New York

Anil C. Singh