Matthew Adam Props., Inc. v United House of Prayer for All People of the Church on the Rock of the Apostolic Faith
2016 NY Slip Op 33118(U)
March 15, 2016
Supreme Court, New York County
Docket Number: 118510-2009
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

MATTHEW ADAM PROPERTIES, INC.

INDEX NO. 116510-2009

- v -

MOTION DATE

THE UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH and BISHOP C.M. BAILEY, as TRUSTEE,

MOTION SEQ. NO. 004

The following papers, numbered 1 to 7, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits	No(s). 1, 2
Notice of Cross-Motion— Affirmation — Affidavit(s) —Exhibits	No(s). 3
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 4, 5
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 6,7

Upon the foregoing papers, it is ordered that the motion is

The Court's decision and order dated February 28, 2014 is amended to read as follows:

In this action for breach of contract, unjust enrichment, and account stated, Defendant The United House of Prayer for all People of the Church on the Rock of the Apostolic Faith and Bishop C.M. Bailey, as Trustee ("Defendant") moves for an Order pursuant to CPLR §3212, dismissing Plaintiff Matthew Adam Property's ("Plaintiff") Complaint and granting summary judgment for its counterclaims. Plaintiff opposes this motion and cross-moves for summary judgment pursuant to CPLR §3212.

Plaintiff, a property manager, entered into a Management Agreement ("the agreement") on April 16, 2004 with Defendant to manage five of Defendant's buildings in New York, New York. Parties continued doing business together through May 2009. Plaintiff paid itself the greater of $5,000/month or 5% of the gross income for its services as property manager. Defendant gave Plaintiff notice in May 2009 that the agreement would be terminated as of June 1, 2009. Plaintiff alleges in its Complaint that upon gathering the paperwork and records to transfer to Defendant's new project manager, it realized it had mistakenly underpaid itself from May 2004 through March 2009 in the amount of $203,782.90 (the difference between the gross income and the $5,000/month Plaintiff had paid itself each month under the Agreement). Further, Plaintiff alleges Defendant failed to pay Plaintiff for its invoices of $7,586.43 and $7,702.894 for the months of April 2009 and May 2009, respectively. Plaintiff seeks damages totaling $228,173.91 from Defendant for its underpaid fees, unpaid fees for April-June 2009, and indemnification.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Defendant's Motion to Dismiss

In support of its motion to dismiss, Defendant argues that each of Plaintiff's three causes of action must be dismissed. Defendant argues Plaintiff is barred from bringing its breach of contract claim by defenses of laches and waiver. Defendant argues that laches applies where Plaintiff waited until after the Agreement was terminated (over 70 months after it commenced) to enforce its right to collect 5% as opposed to the $5,000/month it had been collecting. Defendant further argues it will be prejudiced if it should now have to pay more than $200,000 five years after the agreement commenced. Further, Defendant argues Plaintiff's payment to itself of $5,000/month waived its right to collect the 5% based upon its long-standing course of conduct. Lastly, Defendant argues Plaintiff never provided evidence of Defendant's breach of the agreement, where it only provided a self-created spreadsheet and its management statements, which in it of itself do not support Plaintiff's claim. Further, Defendant argues Plaintiff's second cause of action of unjust enrichment must be dismissed, where a legal contract exists and its claim mirrors its breach of contract claim, which is improper. Lastly, Defendant argues that Plaintiffs third cause of action, account stated, must also be dismissed where the account was never presented, rendered, or assented to and as such, Plaintiff has not stated is claim for account stated.

Defendant's Motion for Summary Judgment on its Counterclaims

Further, Defendant argues it is entitled to summary judgment on all six of its counterclaims. In its first counterclaim, Defendant argues Plaintiff breached Article 3.1 of the agreement, where it failed to use good faith efforts to collect tenant's rent and allowed one particular tenant's rent to be in arrears of $63,328.27 without commencing any proceeding to collect the rent or evict the tenant. Such action belies the "good faith efforts" required by the agreement. Second, Defendant argues Plaintiff failed to keep the property free of violations, breaching Articles 3.1 and 3.10 of the agreement. Defendant argues Plaintiff should be liable for the $34,906.58 Defendant had to pay in fines as a result of the violations on Defendant's properties. Third, Defendant argues Plaintiff entered into service contracts which were not in accordance with the terms of the agreement (Article 3.7), allowing the contract with Nouveau Elevator Industries to terminate within 60 days, as opposed to the required 30 days under the agreement. As such, Defendant had to buy Nouveau out of the contract, costing Defendant $4,949.00. Fourth, Defendant argues Plaintiff breached Article 3.2(a), where it granted a tenant permission to sublet without Defendant's approval. Defendant avers that it collects 10% of the rent payable under any sublease, and where it was not even aware of this particular sublease, it never received its percentage of the rent. Defendant argues, under its fifth counterclaim for conversion, that Plaintiff failed to return interest that accrued on a Capital Bank account. Defendant argues it is entitled to summary judgment on conversion and to a hearing to determine the interest to which it is entitled. Lastly, Defendant's sixth counterclaim is for attorneys fees, which Defendant is entitled to assuming it prevails in this matter, pursuant to the agreement.

In opposition to Defendant's motion for summary judgment on its counterclaims, Plaintiff argues that Defendant has no evidence that Plaintiff did not use good faith in collecting rents from its tenants. Plaintiff avers that the tenant violated its lease by not paying its rent on time, and, as such, should be held liable for any damages Defendant incurred as a result. Further, Plaintiff argues it had no obligation to commence action against the tenant, where the agreement leaves this decision to the Plaintiff's discretion and Defendant was always kept apprised of the arrears and issues with the particular tenant from which this counterclaim arises. As such, Defendant's first counterclaim must be dismissed. Under Defendants second counterclaim, Plaintiff argues that the agreement has no provision that would impose liability on Plaintiff for the mere existence of building violations. Defendant points to no specific malfeasance on the part of Plaintiff and where Plaintiff never agreed to keep the building free of violations or to pay costs associated with the violations, Plaintiff is not responsible. Further, Plaintiff argues there are no damages attributable to its alleged breaches of contract. Plaintiff argues that the only counterclaim where Defendant can actually claim damages, albeit limited, is on its third counterclaim,

where Plaintiff admits it failed to enter into a contract pursuant to the agreement due to impossibility. The service contractor would not agree to anything less than 60 days termination and Plaintiff was required to hire an elevator service provider and thus, it had no choice other than to enter into this lease with this particular termination language. Defendants failed to mitigate the damages and the true amount of damages is only $75.00, the difference in the amount between the old elevator contractor and the new contractor. Plaintiff argues Defendant's fourth counterclaim for illegal subletting is without merit, where Plaintiff cannot be liable for tenants failure to perform under its lease and Plaintiff was unaware of the sublet. Plaintiff further argues Defendant's fifth counterclaim for conversion is fabricated, where Plaintiff avers that the operating account at issue was a non-interest bearing account and Defendant cannot allege otherwise.

Plaintiff's Cross-motion for Summary Judgment

Plaintiff also cross-moves for summary judgment on its three causes of action. Plaintiff argues it is entitled to summary judgment on its breach of contract claim, where Plaintiff contends that Defendants breached Article 4.1 of the agreement. Plaintiff avers it was underpaid throughout its tenure as property manager from May 2004- March 2009 and unpaid for its services from April-June 2009. Plaintiff further argues that Defendant has no defenses to Plaintiff's breach of contract claim, where Defendant failed to assert waiver as an affirmative defense and as such, it is deemed waived. Plaintiff further argues that a waiver must be clear and deliberate, not based upon a mistake or an oversight. Additionally, Plaintiff argues that laches is not a viable defense and should be dismissed as an affirmative defense where Defendant has not demonstrated any prejudice to itself based upon the delayed notice of the underpayment. Additionally, as soon as Plaintiff discovered the underpayment, it made Defendant aware and made demands for its full payment. Plaintiff further argues it is entitled to summary judgment on its claim for account stated, where Plaintiff avers that Defendant never disputed the account stated. Plaintiff has submitted copies of the agreement and detailed statements from May 2004-May 2009, which provides proof of the amount owed. Plaintiff argues it sent the necessary paperwork to Defendant on June 30, 2009 and again on July 23, 2009 and Defendant failed to object. Lastly, Plaintiff argues it is entitled to summary judgment on unjust enrichment. Although normally a Plaintiff may not recover where a valid contract exists, Plaintiff argues it may proceed to trial on both unjust enrichment and breach of contract claims where a dispute exists as to the existence of the contract during time periods where the contract had lapsed and Plaintiff continued working on a month-to-month basis. Plaintiff argues that if Defendant agrees that the contract was continuous from May 2004-June 2009, then its cause of action for unjust enrichment is duplicative.

In opposition to Plaintiff's cross-motion, Defendant argues Plaintiff is not entitled to summary judgment on any of its causes of action. Under Plaintiff's breach of contract claim, Defendant argues that even if Plaintiff was entitled to collect funds over the $5,000/month it had been paying itself, it sat on its rights for over 70 months. Defendant argues Plaintiff waived its right to collect the 5% of gross income by its course of conduct which involved paying itself the lesser $5,000/month every month for 70 months. Further, Defendant argues there is a lack of documentary evidence where the management records standing alone do not support Plaintiff's claims and until its cross-motion, Plaintiff failed to provide any bank account information to support its claim. Defendant argues it sufficiently plead its defenses to Plaintiff's breach of contract claim. Further, Plaintiff essentially admitted that its claim for unjust enrichment was duplicative, where Defendant contends that a contract existed between the parties and as such, this claim must be dismissed. Lastly, Defendant argues Plaintiff is not entitled to summary judgment on its claim for account stated where the account was never presented and no bills were rendered, and as such, Defendant could not possibly have assented or rejected the purported account.

Analysis

"A party moving for summary judgement must make a *prima facie* showing of entitlement to a judgement as a matter of law, providing sufficient evidence to demonstrate the absence of any material

issue of fact." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81, 760 NYS2d 397, 790 NE2d 772 [2003]). "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." (*Id.*)

Defendant's Motion to Dismiss and Plaintiff's Cross-Motion for Summary Judgment

Defendant makes its prima facie case to dismiss Plaintiff's breach of contract claim, where it plead the affirmative defense of waiver. Even though Article 10.1 of the agreement between the parties states, "All notices, waivers, demands, requests, or other communications required or permitted hereunder shall, unless otherwise expressly provided, be in writing and deemed to be properly given...," Plaintiff orally waived its right to claim breach of contract. "A contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement *(Alside Aluminum Supply Co. v Berliner,* 32 AD2d 731). Such waiver may be evinced by words or conduct *(see, Rose v Spa Realty Assocs.*, 42 NY2d 338, 343-344))" (*Bank Leumi Trust Co. of New York v. Block 3102 Corp.*, 180 A.D.2d 588, 590, 580 N.Y.S.2d 299 (1992)). While Plaintiff established that Defendant breached Article 4.1 of the agreement by providing its management reports showing it was in fact entitled to 5% of Defendant's gross income, Plaintiff waived its right to the 5% of Defendant's gross-income through its continued course of conduct. Plaintiff paid itself $5,000/month, rather than the greater 5% of the gross income, every month from May 2004 through the termination of the agreement in May 2009. After its course of performance over five years, Plaintiff waived this particular provision of its agreement with Defendant and as such cannot now recover under its breach of contract claim. As such, Plaintiff's cross-motion for summary judgment on this cause of action is denied as moot.

Defendant also makes its prima facie case to dismiss Plaintiff's claim for unjust enrichment. Unjust enrichment "is a quasi-contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142, 879 N.Y.S.2d 355, 907 N.E.2d 268 [2009])." (*Georgia Malone & Co., Inc. v. Ralph Rieder*, 86 A.D.3d 406, 408, 926 N.Y.S.2d 494, 497 (2011) aff'd sub nom. *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 973 N.E.2d 743 (2012)). However, "unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." (*Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790, 967 N.E.2d 1177, 1185). Here, where a contract existed between the parties, Plaintiff's claim for unjust enrichment is duplicative of its breach of contract claim and as such, the claim for unjust enrichment must be dismissed. Plaintiff's cross-motion for summary judgment on this cause of action is denied as moot.

Further, Defendant made its prima facie case for dismissal of Plaintiff's cause of action for account stated. In order to prove an account stated, Plaintiff must show the existence of "an account, balanced and rendered, with an assent to the balance either express or implied (*Interman Indus. Prods. v. R.S.M. Electron Power,* 37 N.Y.2d 151, 153, 371 N.Y.S.2d 675, 332 N.E.2d 859). There can be no account stated where no account was presented or where any dispute about the account is shown to have existed (*Waldman v. Englishtown Sportswear,* 92 A.D.2d 833, 836, 460 N.Y.S.2d 552))" *(Abbott, Duncan & Wiener v. Ragusa*, 214 A.D.2d 412, 413, 625 N.Y.S.2d 178 (1995)). While Plaintiff did balance and render the account to Defendant in a letter as of June 2009, Defendant never assented to the total balance, either expressly or impliedly. After receiving the balance in a letter from Plaintiff, Defendant responded stating, "you have suggested that Matthew Adam 'underbilled' the United House of Prayer over the past years and that approximately $203,000 is now owed for past services rendered. This claim, as you can imagine, is a surprise to the United House of Prayer so your final accounting and any further information you can provide to support this claim are necessary to fully evaluate this matter." This response does not amount to an assent to the balance. As such, where there is no assent to the total balance, Plaintiffs claim for account stated for the "underbilling" must be dismissed.

However, Plaintiff sent the April and May 2009 invoices to Defendant along with its account balance of the "under billing." Defendant only questioned the $203,000 amount of "under billing," and where it did not object to the April and May 2009 invoices, it impliedly assented to the payment of the balance of those invoices. As such, Plaintiff's motion for summary judgment on account stated is granted only as to the invoices from April and May 2009, in the total amount of $15,289.27.

Defendant's Motion for Summary Judgment on its Counterclaims

On its first counterclaim, Defendant makes its prima facie case by providing evidence of Plaintiff's breach of Article 3.1 of the agreement, and of its damages as a result thereof. However, Plaintiff raised issues of fact where it avers that it kept Defendant apprised of the arrears and where Plaintiff argues its lack of obligation under the agreement to commence action against a particular tenant.

In its second counterclaim, Defendant failed to make its prima facie case when alleging a breach of Articles 3.1 and 3.10 of the agreement. The agreement fails to specifically require a violation-free building. Defendant failed to list with sufficient detail the alleged breaches and failed to provide any information for the Court regarding those breaches (the only detail was provided by Plaintiff in its opposition).

In Defendant's third counterclaim, Defendant makes its prima facie case by providing evidence of Plaintiff's breach of Article 3.7 of the agreement, where Plaintiff admits to entering into a contract outside of the requirements per the agreement. However, Plaintiff raised questions of fact as to Defendant's damages as a result of the breach.

In Defendant's fourth counterclaim, Defendant makes its prima facie case where it provides evidence of Plaintiffs breach of Article 3.2(a) of the agreement, where Plaintiff granted a tenant permission to sublet without Defendant's approval and argues it normally would collect 10% of the rent payable under subleases. However, Plaintiff raises issues of fact as to its knowledge of the sublease and argues whether Defendant is entitled to a 10% fee on subleases.

Further, Defendant makes its prima facie case under its fifth counterclaim for conversion, where "the tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner." (*Republic of Haiti v. Duvalier*, 211 A.D.2d 379, 384, 626 N.Y.S.2d 472, 475 (1995)). Defendant successfully argues that the account was interest bearing and while Plaintiff turned over the principal, Plaintiff failed to forward Defendant the interest earned on the account. However, Plaintiff raises issues of fact as to whether the account is interest earning, where it contends that it is not.

Lastly, Defendant makes its prima facie case as to its sixth counterclaim for attorneys fees, where Article 10.7 of the agreement provides, "should either party employ attorneys to enforce any of the provisions hereof, the party losing in any final judgment agrees to pay the prevailing party all reasonable costs, charges, and expenses, including attorney's fees." Here, there is not a final judgment and as such, an award of attorneys fees is not appropriate at this time where there is no definitive prevailing party. Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss Plaintiff's complaint is granted as to Plaintiff's claim for breach of contract and unjust enrichment; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment is granted as to account stated in the amount of $15, 289.27 (April 2009 and May 2009 invoices); and it is further

ORDERED that Defendant's Second Counterclaim be dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment in accordance with the foregoing; and it is further

ORDERED that Defendant's motion for summary judgment on its First, Second, Third, Fourth, Fifth, and Sixth counterclaims is denied; and it is further

ORDERED that the movant shall serve a copy of this order, with Notice of Entry, upon all parties, as well as upon the Clerk of the Trial Support Office (60 Centre Street, Room 158) within thirty (30) days of entry.

George J. Silver, J.S.C.

Dated: 3/15/16

New York County

GEORGE J. SILVER

FILED

MAR 25 2016

COUNTY CLERK'S OFFICE
NEW YORK