

My Maya, Inc. v Malta
2017 NY Slip Op 30466(U)
March 7, 2017
Supreme Court, New York County
Docket Number: 152528/14
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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MY MAYA, INC.,

Plaintiff,

-against-

Index No. 152528/14

Mot. Seq. 004

ROBERT MALTA, individually, and ROBERT MALTA d/b/a
NEW YORK CITY RESTAURANT GROUP,

Defendants,

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ROBERT MALTA, individually, and ROBERT MALTA d/b/a
NEW YORK CITY RESTAURANT GROUP,

Third-Party Plaintiffs,

-against-

THERESE VIRSERIUS and INNER SPACE DESIGN, INC.,

Third-Party Defendants.

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OSTRAGER, J.:

Before the Court are competing motions for partial summary judgment filed post-Note of Issue. Defendants' motion to dismiss plaintiff's Second and Third Causes of Action is granted on consent. As discussed hereinafter, the motion by plaintiff/third-party defendants to dismiss the Second and Third Counterclaims/Third-Party Claims is granted in part and denied in part.

Plaintiff My Maya, Inc. is engaged in the business of providing design services. Third-party defendant Therese Virserius is the President of My Maya and the principal executive owner of third-party defendant Inner Space Design, Inc., a company engaged in a related business. Defendant Robert Malta, individually and d/b/a New York City Restaurant Group (NYCRG), is in the business of owning and operating various restaurants.

By written Consulting Agreement dated February 14, 2013, NYCRG retained My Maya, Inc. as a "Consultant" to provide "concept design, schematic design, design development specifications, [and] architectural finish specifications for the 'Bocca Di Bacco' restaurant located at 169 9th Avenue, New York, New York." The Agreement included a detailed fee schedule, which included a share of revenue for the twelve month period beginning December 8, 2012 (a date which precedes the date of the Agreement) and ending December 5, 2013. The Agreement was signed by Robert Malta as President of NYCRG and by Therese Virserius on behalf of My Maya on March 8, 2013. (See NYSCEF Doc. No. 74).

My Maya commenced this action in March of 2014 to recover \$77,000 allegedly due under the Consulting Agreement, asserting three causes of action sounding, respectively, in Breach of Contract, Unjust Enrichment, and Promissory Estoppel (NYSCEF Doc. No. 71). Defendants served an Answer and Third-Party Complaint naming Virserius and her company Inner Space, asserting three counterclaims/third-party causes of action: Breach of Contract, Fraud, and Unjust Enrichment (NYSCEF Doc. No. 72). NYCRG alleges that, before the Consulting Agreement was signed regarding the Bacco restaurant, Malta had retained Virserius individually to complete design work for his restaurant Vucceria. Though no party seeks damages in this case related to work on Vucceria, those earlier business dealings are raised in the motions.

NYCRG disputes that My Maya is entitled to any additional monies, alleging deficiencies in the work performed. Additionally, NYCRG affirmatively claims that Virserius and her companies are liable for damages exceeding \$250,000, including monies collected based on invoices sent by Inner Space throughout 2012 — before the

Consulting Agreement was signed — that wrongfully included a 20% purchasing fee, shipping charges and sales tax for items Virserius purchased for use in her design work at Bacco. Virserius insists that the parties had an agreement for such charges in connection with her earlier work on the Vucceria restaurant and that the practice continued with respect to the Bacco restaurant without objection. As she correctly notes, the invoices clearly set forth the 20% fee, as well as shipping charges and sales tax. However, it appears undisputed that the addressee on the invoices was misnamed (Fernando Hernandez, as opposed to Fernando Gonzalez).

In the motions being decided here, NYCRG moved to dismiss My Maya's Second Cause of Action for Unjust Enrichment and the Third Cause of Action for Promissory Estoppel. As indicated earlier, plaintiff's Complaint is based solely on an alleged breach of the written Consulting Agreement. Thus, the Second and Third Causes of Action are dismissed, with the consent of plaintiff's counsel at the February 28, 2017 oral argument, and plaintiff's sole remaining claim for trial is the First Cause of Action sounding in Breach of Contract.

The cross-motion filed by My Maya as plaintiff and the related parties Therese Virserius and Inner Space as third-party defendants seeks dismissal of the claims by NYCRG sounding in Fraud and Unjust Enrichment (the Second and Third Counterclaims/Third-Party Claims), as well as claims against Virserius individually. NYCRG opposes, claiming that it was wholly unaware that Inner Space was owned by Virserius, that Virserius ordered more materials than needed, and that she charged an excessive markup for goods purchased, as if acting as a broker for third-party vendors, all as part of a fraudulent scheme to increase her profits. In addition to being fraudulent and unjustly enriching Virserius and her companies My Maya and Inner Space, the

arrangement allegedly violated the provision in the Consulting Agreement that:

"Consultant [My Maya] further agrees that NYCRG has not entered into any other agreement(s) with My Maya Inc., Therese Virserius or any of Ms. Virserius' related entities."

In light of the clarity of the invoices and the fact that the arrangement and the invoices themselves pre-dated the Consulting Agreement, the Court finds that NYCRG does not have a viable claim for fraud. The affidavits and deposition testimony produced with the motions demonstrate that NYCRG will be unable to prove at trial the elements of fraud; namely, a false representation of fact regarding any relationship between Virserius and Inner Space, knowledge by Virserius of the falsity, that the misrepresentation was made to induce reliance by NYCRG, and that NYCRG justifiably relied on the misrepresentation, resulting in injury. See *Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245 AD2d 96, 98 (1st Dep't 1997). In light of the sophistication of the parties and their extensive business dealings, the element of justifiable reliance in particular is lacking. Therefore, the Fraud claim is dismissed.

However, the Unjust Enrichment claim survives summary judgment. The parties dispute whether the invoices at issue were for work included as part of the Consulting Agreement, or whether they constitute a separate agreement that pre-dates the Consulting Agreement. In the event the Court finds the invoices are not within the Consulting Agreement and therefore not part of the third-party plaintiffs' alleged damages for Breach of Contract, NYCRG is entitled to maintain the Unjust Enrichment claim as an alternative theory. The evidence submitted with the motions suggests that NYCRG could potentially prove at trial the elements of Unjust Enrichment; namely,

(1) that the Virserius companies were enriched, (2) at the expense of NYCRG, and (3) that it would be against equity and good conscience to permit those companies to retain the monies paid pursuant to the invoices. See *Georgia Malone & Company, Inc. v Rieder*, 19 NY3d 511, 516 (2012), quoting *Mandarin Trading Ltd. V Wildenstein*, 16 NY3d 173,182 (2011). However, issues of fact relating to the parties' course of dealings preclude summary judgment and mandate a trial.

In light of the dismissal of the Fraud claim and the fact that Ms. Virserius was at all times acting as a representative of one of her two corporations, no basis for individual liability exists. Therefore, the motion to dismiss the individual claims is granted.

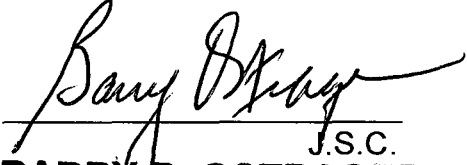
Accordingly, it is hereby

ORDERED that the motion by defendants/third-party plaintiffs is granted, and the Clerk is directed to enter judgment dismissing the Second Cause of Action for Unjust Enrichment and the Third Cause of Action for Promissory Estoppel; and it is further

ORDERED that the cross-motion by plaintiff/third-party defendants is granted to the extent that the Clerk is directed to enter judgment dismissing the Second Cause of Action for Fraud, as well as the individual claims against Therese Virserius, and is otherwise denied.

Counsel shall report to Room 341 on March 16, 2017 at 9:30 a.m. as previously scheduled prepared to commence jury selection for the trial of this action.

Dated: March 7, 2017


J.S.C.
BARRY R. OSTRAGER
JSC