Shugrue v Stahl
2017 NY Slip Op 30992(U)
May 8, 2017
Supreme Court, New York County
Docket Number: 650912/2013
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
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EDWARD L. SHUGRUE III and GRETA SHUGRUE

Plaintiffs,

- against -

Index No.
650912/2013

LEE STAHL, LETO ENTERPRISES, LTD., THE RENOVATED HOME I, LTD. collectively doing business as THE RENOVATED HOME,

Defendants.
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Hon. C.E. Ramos, J.S.C.

In motion sequence 002, plaintiffs Edward L. Shugrue III ("Mr. Shugrue") and Greta Shugrue ("Mrs. Shugrue")(collectively, "Plaintiffs") move pursuant to CPLR 3212 for partial summary judgment on their fourth claim for conversion, and for dismissal of Lee Stahl ("Mr. Stahl"), Leto Enterprises, Ltd. ("Leto"), the Renovated Home I, Ltd.'s ("Renovated Home") (collectively, "Defendants") first counterclaim for breach of contract, second counterclaim for anticipatory breach of contract, and third counterclaim for loss of business earnings due to Plaintiff's breach of contract.

In motion sequence 003, Defendants move pursuant to CPLR 3212 for summary judgment, seeking dismissal of Plaintiffs' complaint ("Complaint") in its entirety, and a grant of summary judgment in their favor on their first counterclaim for breach of contract.

At oral argument on January 9, 2017, this Court granted Plaintiffs' motion for summary judgment dismissing Defendants' third counterclaim for $1,000,000 due to lost business and denied

Plaintiffs' motion to dismiss Defendants' first and second counterclaims (Tr. Dated January 9, 2017, p. 13).

This Court also dismissed Plaintiffs' claims against Mr. Stahl, but reserved decision on Plaintiffs' motion for summary judgment and Defendants' motion to dismiss the conversion claim, both of which are addressed below (Tr. Dated January 9, 2017, pp. 22, 32).

For the reasons set forth below, this Court denies Plaintiffs' motion for summary judgment on the conversion claim and grants Defendants' motion to dismiss Plaintiffs' conversion claim. This Court also grants Defendants' motion for summary judgment dismissing Plaintiffs' unjust enrichment claim.

Background

The following factual allegations are taken from the Complaint and its accompanying exhibits, and are presumed to be true.

Plaintiffs are residents of New York and own a cooperative apartment located at 580 Park Avenue, Apartment 9D, New York, New York 10021 ("Residence") (Complaint, ¶ 7).

Leto and Renovated Home are unincorporated associates or sole proprietorships through which Mr. Stahl does business (Complaint, ¶ 8). All three Defendants operate from Mr. Stahl's office in New York, New York (Complaint, ¶ 8).

In March 2012, Plaintiffs closed on the purchase of the Residence, which is subject to "Landmark" restrictions and therefore requires permits and approvals from not only the New York City Department of Buildings ("DOB") but also New York's Landmarks Preservation Commission ("LPC") (Complaint, ¶ 11).

On February 6, 2012, the parties entered into a design/build retainer agreement ("Retainer Agreement"), wherein Defendants were to design, plan, and seek approvals for a renovation of the Residence (Shugrue Aff., Ex. 3).

On October 4, 2012, Plaintiffs entered into a construction contract ("Construction Contract") with Defendants, wherein Defendants were to perform demolition and construction work (Shugrue Aff., ¶ 9). The total price of the Construction Contract was $2,182,338.84, payable through specified progress payments (Shugrue Aff., ¶ 10).

For construction purposes, Defendants allegedly purchased marble slabs at a cost of approximately $108,000 from ABC Worldwide ("ABC") and Superior Selected Stone ("Superior") (Complaint, ¶ 43). Although Plaintiffs, ABC, and Mr. Stahl were unable to provide records of the purchase, Plaintiffs presented evidence of account activity at JP Morgan Chase from July to October 2012 amounting to $62,512.46 involving the parties to ths dispute (Shugrue Aff., Ex. 12) (Complaint, ¶ 44). No detailed information is provided regarding these transactions.

On November 1, 2012, Mr. Shugrue and Mr. Stahl had a conversation regarding the status of the Construction Contract, wherein Mr. Stahl purportedly admitted that he would not be able to complete the renovation until at least thirty days after the contractual deadline of February 28, 2013 (Shugrue Aff., ¶ 15).

Plaintiffs allege that during this conversation, Mr. Stahl notified Plaintiffs that he was overpaid by approximately $730,000, and that although the Construction Contract called for the next payment to Defendants of $470,000, it was allegedly not

needed at that time (Shugrue Aff., ¶ 15). Defendants dispute making this statement, asserting that Plaintiffs failed to pay the required amount by the November 1, 2012 deadline (Stahl Aff., ¶ 4).

On November 19, 2012, Plaintiffs allegedly asked Mr. Stahl for invoice and proof of payment for the $108,000 that Defendants purportedly spent on marble (Shugrue Aff., Ex. 11). In response, Defendants' lawyer, Edward M. Rosenthal ("Mr. Rosenthal"), stated that Plaintiffs were in breach of the Construction Contract due to their previous missed payments, demanded immediate payment, and notified Plaintiffs that until then, "no further work will be performed on [their] behalf at the above premises" (Shugrue Aff., Ex. 12).

On November 20, 2012, Plaintiffs terminated the Construction Contract (Shugrue Aff., Ex. 13). Subsequently, Plaintiffs hired a replacement contractor to complete the renovation of the Residence.

Plaintiffs allege that Defendants refused to return the approximately $220,000 that they continue to hold despite Plaintiffs' repeated requests to turn over the purported funds and for a full accounting (Complaint, ¶ 42).

Plaintiffs also allege that, on several occasions, they asked Defendants to deliver the marble that they purportedly purchased with Plaintiff's money, but Defendants refused to do so.

On March 14, 2013, Plaintiffs commenced this action alleging breach of contract, fraudulent inducement, unjust enrichment, conversion, alter ego liability, and piercing the corporate veil.

Discussion

Summary judgment shall be granted "if upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212 [b]).

Since summary judgment is a drastic measure, it should only be granted if it is apparent that no material and triable issue of facts are presented (*Mason v Dupont Direct Financial Holdings, Inc.*, 302 AD2d 260, 262 [1st Dept 2003]).

Conversion occurs when someone, intentionally and without authority, exercises control over the personal property of another individual, thereby interfering with that individual's right of possession (*Colavito v New York Organ Donor Network*, Inc., 8 NY3d 43, 50 [2006]). In order to prevail on a conversion claim, a plaintiff must establish: (1) a 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 (*Id.*).

Conversion of money occurs if there "is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (*Thys v Fortis Securities LLC*, 74 AD3d 546, 547 [1st Dept 2010]).

A cause of action for conversion will fail if it is predicated on a mere breach of contract claim, absent independent facts giving rise to tort liability (*Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008]).

Plaintiffs allege that they are entitled to prevail on a

conversion theory because Defendants are holding, at a minimum, at least $64,253.77 more than they would be entitled to should they prevail on any of their counterclaims. Plaintiffs maintain that under New York Lien Law, funds paid to a contractor for the improvement of real property must be held in trust by the contractor, and that the contractor's account must show the allocation to each trust of the deposited funds (N.Y. Lien Law §§ 70, 75). In addition, Plaintiffs argue that the monies at issue are separate and identifiable, as the Chase Bank Account records demonstrate the amount paid to Defendants and the money spent by Defendants for the marble.

In opposition and in support of their motion to dismiss, Defendants maintain that a cause of action for conversion cannot stand when damages are also being sought for breach of contract (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883 [1st Dept 1982]). Defendants allege that there is a triable issue of fact as to whether the monies used were transferred into a segregated account or that Defendants were under any obligation to deposit these monies in a separate fund. Defendants further allege that, since the marble was purchased by the Renovated Home and later charged to Plaintiffs as an invoice, the Plaintiffs have not demonstrated entitlement to recovery under a conversion theory, as a matter of law.

Absent a separate identifiable fund or a possessory right to the monies expended, Plaintiffs have failed to establish a prima facie conversion claim and, therefore, are not entitled to summary judgment. The allegations that the Chase Bank Records demonstrate that Defendants maintained separate accounting for

the monies received from Plaintiffs are unsupported and insufficient to warrant summary judgment in Plaintiffs' favor.

However, the Court finds that no issue of fact exists as to whether the funds Defendants used to purchase the marble were sufficiently identifiable, or were subject to an obligation to be returned to Plaintiffs in a specified manner *(Republic of Haiti v Duvalier*, 211 AD2d 379 [1st Dept 1995]). There is no dispute that Mr. Stahl purchased the marble with his own funds, thereby negating Plaintiffs' ownership rights in the monies. The fact that Defendants purportedly used the same Chase Bank Account for all the construction purchases is insufficient to sustain this claim as a matter of law.

Further, the fact that New York Lien Law requires that contractors maintain separate funds for monies received from an owner in connection with real property renovations does not confirm that a separate account actually was created specifically for the purchase of the marble.

Generally, a conversion action cannot be predicated on a breach of contract claim absent an independent duty (*Phipps Houses Services, Inc. v New York Presbyterian Hospital*, 139 AD3d 480, 481 [1st Dept 2016]).

The Plaintiffs' contention that Defendants will receive a windfall of $64,253.77 if their conversion claim is dismissed is unwarranted.

Finally, the Court dismisses Plaintiffs' unjust enrichment claim, as the Construction Contract addresses the issue of payment between the parties in the event of contract termination (*Schultz v Gershman*, 68 AD3d 426 [1st Dept 2009]).

Accordingly, it is hereby

ORDERED that Plaintiffs' motion for summary judgment as to their conversion claim is denied; and it is further

ORDERED that Defendants' motion for summary judgment is granted to the extent of dismissing Plaintiffs' conversion and unjust enrichment claims; and it is further

ORDERED that the parties shall appear for a status conference on June 7, 2017 at 11AM; and it is further

ORDERED that the remainder of the action shall continue.

Dated: May 8, 2017

ENTER:

J.S.C.

CHARLES E. RAMOS