

Ebrahimzadeh v Connaught Tower Corp.
2017 NY Slip Op 31751(U)
August 17, 2017
Supreme Court, New York County
Docket Number: 651643/2016
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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BABAK EBRAHIMZADEH; 1012 SECOND AVENUE INC.;
and 1014 SECOND AVENUE INC.,

Plaintiffs,

Index Number: 651643/2016

- against -

Sequence Number: 001

CONNAUGHT TOWER CORPORATION; MATTHEW ADAM
PROPERTIES INC.; HARVEY GREENBERG; TRENDS
BROW AND SPA, INC.; VIOLETA CHULPAYEV; and
DROR HARSINAY,

Decision & Order

Defendants.
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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on plaintiffs' motion, pursuant to CPLR 3205(b), to amend the complaint, and defendants' cross-motion, pursuant to CPLR 3211(a)(1), (3), (5) & (7), to dismiss the complaint:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits	1
Notice of Cross-Motion + Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, plaintiffs' motion to amend the complaint is partially granted, and defendants' cross-motion to dismiss is partially granted.

Background

Plaintiff Babak Ebrahmzadeh, by and through his corporate entities, plaintiffs 1012 Second Ave Inc. ("1012") and 1014 Second Avenue Inc. ("1014"; with "1012," collectively, the "Corporate Plaintiffs"), owned and operated a spa and adjoining café called Spa Martier and Caffe Martier; located at 1012 and 1014 Second Avenue in Manhattan ("Premises"). Pursuant to a multi-year lease ("Lease"), plaintiffs leased the Premises from defendants Connaught Tower Corporation, Matthew Adam Properties Inc., and Harvey Greenberg (collectively, the "Landlord").

In or around late 2014, the Lease terms proved financially untenable for plaintiffs, and plaintiffs fell behind in rent payments. In or around January 2015, plaintiffs and the Landlord allegedly agreed to a written modification of the lease ("Lease Modification"), whereby the Landlord agreed to allow plaintiffs to locate a third party to assume the Lease and thereafter pay the Landlord back rent due from the proceeds of the Lease assumption. Plaintiffs then began their search for a new lessor. Babak alleges that he maintained regular communication with the Landlord regarding his efforts to locate a new lessor.

In or around June 2015, plaintiffs were introduced to defendants Trends Brow and Spa, Inc. ("Trends") and its principals, Violeta Chulpayev and Dror Harsinay (with "Trends," collectively, the "Buyer"), who indicated they were interested in the Premises. Plaintiffs allege that when Babak informed the Landlord that he had found a prospective buyer to assume the Lease, the Landlord insisted on arranging a private meeting with the Buyer on July 8, 2015 ("Meeting") before any further steps could be taken. Plaintiffs allege that the Landlord informed Babak that he was not allowed to attend the Meeting.

At some point before the Meeting, the Corporate Plaintiffs entered into a nondisclosure, non-solicitation, non-circumvention agreement (“NDA Agreement”) with the Buyer. The NDA Agreement states, inter alia, that the Buyer agrees not to: directly or indirectly solicit, induce, influence, or otherwise contact any landlord, owner, tenant, or subtenant of the Premises; enter into any lease or sales contract for the Premises without plaintiffs’ prior written consent for a period of two years; or disclose any “confidential information,” including pricing information and plaintiffs’ sales figures. Paragraph 12 of the NDA Agreement states, “If any action in law or in equity is brought by a party to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys’ fees, costs, and disbursements.” The NDA Agreement was allegedly signed by Chulpayev and Harsinay on the Buyer’s behalf, and by Babak on plaintiffs’ behalf.

Defendants allege that plaintiffs were in significant arrears in payment of their rent to the Landlord. As a result, the Landlord commenced two separate non-payment proceedings against each of the Corporate Plaintiffs in the Housing Part of New York County’s Civil Court, under Index Nos. 67967/2015 and 67968/2015. By settlement agreement dated August 2015 (“Settlement Agreement”), plaintiffs agreed to, inter alia: surrender possession of, and all right, title, and interest in the Premises to the Landlord; terminate the Lease; and provide the Landlord with general releases. Thereafter, plaintiffs vacated the Premises.

Shortly after plaintiffs vacated the Premises, a new spa appeared. Plaintiffs allege that on or about October 22, 2015, in contravention of the NDA Agreement, the Buyer, through the corporate entities of Second Avenue Café, Inc. and Flirt NY, Inc. (collectively, the “Additional Defendants”), entered into a lease (“Subsequent Lease”), whereby Chulpayev and Harsinay agreed to lease the Premises for a 10-year term from November 1, 2015 to October 31, 2025. Plaintiffs allege that the Buyer breached the NDA Agreement, as they disclosed certain “confidential information” and purposely circumvented plaintiffs by directly contacting the Landlord and negotiating the Subsequent Lease without plaintiffs’ involvement.

The Instant Action

On March 29, 2016, plaintiffs commenced the instant action, alleging, inter alia, breach of contract, tortious interference with contractual relations, and unjust enrichment, against defendants. The complaint demands \$750,000 in damages, plus attorney’s fees, and costs and disbursements. By stipulation dated April 25, 2016, plaintiffs discontinued the action as against the Landlord. On May 23, 2016, the Buyer e-filed a verified answer denying the allegations set forth in the complaint and asserting various affirmative defenses. The Buyer argues, inter alia: that the Corporate Plaintiffs lack standing to commence this action; that the NDA Agreement lacked consideration; and that plaintiffs’ failure to mitigate their damages is the cause of the injury they claim to have suffered.

Plaintiffs now move, pursuant to CPLR 3025(b), to amend the complaint to add the Additional Defendants as named defendants. The Buyer now cross-moves, pursuant to CPLR 3211(a)(1), (3), (5) & (7), to dismiss the complaint, with prejudice, and seeks attorney’s fees, plus costs and disbursements. The Buyer argues, inter alia, that plaintiffs lack capacity to sue, as the Corporate Plaintiffs had been dissolved when this action was commenced; that plaintiffs fail to state a cause of action because they are not a party to the Trends Lease, which they claim supports their causes of action; and that plaintiffs’ claims are barred by the doctrine of judicial estoppel, as, pursuant to the Settlement Agreement, plaintiffs provided the Landlord and the Buyer with general releases.

The Buyer alleges that, according to the record of the New York Department of State, the Corporate Plaintiffs were dissolved by proclamation for failure to pay corporate taxes as of April 27, 2011. By letter correspondence dated April 20, 2017, plaintiffs state that since their motion to amend the complaint was filed, the Corporate Plaintiffs have paid their taxes and have been reinstated by New York State as “active corporations.”

Discussion

I. Plaintiffs’ Motion to Amend the Complaint is Granted in Part and Denied in Part

Pursuant to CPLR 3025(b), a party may amend its pleading “at any time by leave of court or by stipulation of all parties.” See id. (“Leave shall be freely given upon such terms as may be just”); see generally Eighth Ave. Garage Corp. v H.K.L. Realty Corp., 60 AD3d 404, 405 (1st Dept 2009) (“Where a court concludes that an application to amend a pleading clearly lacks merit, leave is properly denied”).

Plaintiffs' request to amend the complaint to add the Additional Defendants as named defendants is hereby partially granted. Plaintiffs have alleged facts sufficient to uphold a cause of action for tortious interference against the Additional Defendants. Plaintiffs have alleged, *inter alia*: (1) the existence of a valid Lease Modification contract between themselves and the Landlord; (2) that the Additional Defendants had knowledge of the contract; (3) that the Additional Defendants procured the Landlord's breach; and (4) that plaintiffs were damaged by the Landlord's alleged breach of the contract. See Lama Holding Co. v Smith Barney, 88 NY2d 413, 424 (1996) ("Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom").

On the other hand, plaintiffs have not alleged facts that sufficiently raise an unjust enrichment cause of action. It is unclear to the Court what benefit was conferred upon the Additional Defendants, separate from the tortious interference claim. See Nakamura v Fujii, 253 AD2d 387, 390 (1st Dept 1998) ("To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit").

Plaintiffs' request to assert a breach of contract cause of action against the Additional Defendants lacks merit and, thus, leave is denied. The genesis of plaintiffs' complaint is their allegation that defendants breached the NDA Agreement entered into between Trends, Harsinay, Chulpayev, and the Corporate Plaintiffs. From the face of the Agreement, it is apparent that the Additional Defendants are not a party to any agreement at issue, and, as such, the cause of action for breach of contract cannot stand. See Coast to Coast Energy, Inc. v Gasarch, 126 AD3d 621, 621 (1st Dept 2015) ("Defendants' motion to dismiss the second amended complaint was properly granted since plaintiffs failed to allege that [the additional defendants] were parties to the contracts at issue").

Accordingly, plaintiffs' motion to amend the complaint is granted in part and denied in part.

II. Defendants' Cross-Motion to Dismiss the Complaint is Granted in Part and Denied in Part

Under CPLR 3211(a)(1), a dismissal on the ground that the action is barred by documentary evidence is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. See Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 (2002) ("such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"). Pursuant to CPLR 3211(a)(3), an action may be dismissed if the party asserting the cause of action has no legal capacity to sue. See U.S. Bank Nat. Ass'n v Guy, 125 AD3d 845, 847 (2d Dept 2015) ("On a defendant's motion pursuant to CPLR 3211(a)(3) to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law"). Pursuant to CPLR 3211(a)(5), dismissal is warranted if a cause of action may not be maintained because of collateral estoppel. See Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP, 116 AD3d 134, 138 (1st Dept 2014) ("The doctrine of collateral estoppel applies where first, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination"). Dismissal pursuant to CPLR 3211(a)(7) is only warranted if, accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. See Leon v Martinez, 84 NY2d 83, 87-88 (1994); Morone v Morone, 50 NY2d 481, 484 (1989). The court's inquiry is limited to whether plaintiff has stated a cause of action and not whether it may ultimately be successful on the merits. See Stukuls v State of New York, 42 NY2d 272, 275 (1977); EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action).

Defendants' CPLR 3211(a)(3) request to dismiss the complaint based on the Corporate Plaintiffs' lack of standing is unavailing. Although plaintiffs concede that 1012 and 1014 were dissolved corporations at the time this action was commenced, the corporations have since paid their outstanding taxes and been reinstated. As a matter of law, reinstatement is applied retroactively, meaning that the Corporate Plaintiffs had, *nunc pro tunc*, standing and/or capacity to commence this action. See Tax Law § 203-a(7) ("Any corporation so dissolved may file ... a certificate of consent[, which] shall be given only if the commissioner of taxation and finance ascertains that all fees and taxes imposed under this chapter ... have been paid. The filing of such certificate of consent shall have the effect of annulling all of the

proceedings theretofore taken for the dissolution of such corporation ... and it shall thereupon have such corporate powers, rights, duties and obligations as it had on the date of the publication of the proclamation, with the same force and effect as if such proclamation had not been made or published”); see also Landau v LaRossa, Mitchell & Ross, 11 NY3d 8, 13 (2008) (“Although [plaintiff] initially lacked capacity to initiate the subject litigation in that it had been dissolved by proclamation of the Secretary of State pursuant to Tax Law § 203-a for failure to pay franchise taxes, this deficiency was cured when [plaintiff] paid the required fees. Thus, [plaintiff] was restored to the status it had when it was dissolved by proclamation”).

Defendants’ CPLR 3211(a)(1) request to dismiss the complaint is unavailing, as they did not submit or identify the documentary evidence upon which they rely to dismiss the complaint. Likewise, defendants’ CPLR 3211(a)(5) request to dismiss the complaint fails, as defendants do not allege that plaintiffs have maintained an inconsistent position from one that they maintained in a prior action. See D & L Holdings, LLC v RCG Goldman Co., LLC, 287 AD2d 65, 71 (1st Dept 2001) (“the doctrine of judicial estoppel is intended to prevent abuses of the judicial system by which a party obtains relief by maintaining one position, and later, in a different action, maintains a contrary position”).

Defendants’ CPLR 3211(a)(7) request to dismiss the complaint is partially unavailing, as plaintiffs have alleged facts sufficient to uphold its cause of action for tortious interference, but not that for unjust enrichment, against the Buyer. The rationale previously discussed, granting plaintiffs’ request to assert their tortious interference claim *only* against the Additional Defendants, similarly applies to the Buyer. See Lama Holding Co. v Smith Barney, 88 NY2d at 424; see also Nakamura v Fujii, 253 AD2d at 390. There are issues of fact that cannot be determined without further elaboration, thus warranting denial of the motion as premature. See Podraza v Carriero, 212 AD2d 331, 340 (4th Dept 1995) (“Such dismissal would be premature until the facts are developed with respect to the participation of those defendants in that conduct”); see also Philips S. Beach, LLC v ZC Speciality Ins. Co., 55 AD3d 493, 497 (1st Dept 2008) (“In determining a motion which seeks to dismiss the action for failure to state a cause of action, the court must accept as true the allegations of the complaint, and give the non-moving party the benefit of any reasonable inference in the light most favorable to it”) (internal citations omitted); see generally Marcus v Hemphill Harris Travel Corp., 193 AD2d 543, 543 (1st Dept 1993) (where “the various claims are sufficiently pleaded on their face, dismissal for failure to state a cause of action is unwarranted”).

However, defendants’ motion to dismiss the breach of contract cause of action asserted against them is hereby granted. As a matter of law, the NDA Agreement is unenforceable. There is a lack of consideration for the alleged agreement, and plaintiffs have not only failed to prove any benefit the Buyer received by signing the NDA Agreement, but have failed to prove their damages. See Curtis Prop. Corp. v Greif Companies, 212 AD2d 259, 265-66 (1st Dept 1995) (“Because the promise of both parties to a bilateral contract must be supported by consideration, the contract is unenforceable if the promise of either party is illusory”); see generally Martin Roofing, Inc. v Goldstein, 60 NY2d 262, 269 (1983) (“The elements of the rule are consideration for the promise and a benefit which accrues to the promisor ... [Here], the evidence does not establish consideration beneficial to defendant and plaintiff’s complaint was properly dismissed”).

The Court has considered the parties’ other arguments and finds them unavailing or nondispositive. Accordingly, defendants’ motion to dismiss the complaint is granted in part and denied in part.

Conclusion

Motion granted in part, denied in part; cross-motion granted in part, denied in part. The clerk is hereby directed to enter judgment dismissing plaintiffs’ breach of contract and unjust enrichment causes of action against defendants.

Plaintiffs may file and serve an amended complaint, naming, as defendants, Second Avenue Café, Inc. And Flirt NY, Inc., and plaintiffs may assert a cause of action for tortious interference against them, within 30 days of the date of this Order.

Dated: August 17, 2017



Arthur F. Engoron, J.S.C.