

Veneziano v Miller

2017 NY Slip Op 33369(U)

October 17, 2017

Supreme Court, Nassau County

Docket Number: Index No. 607141/15

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 10

JOHN VENEZIANO and PASQUALE VENEZIANO, X

Plaintiffs,

Index No. 607141/15
Motion Sequence...01
Motion Date...08/31/17
XXX

-against-

MICHAEL B. MILLER and GLADYCE, INC.,

Defendants.

Papers Submitted: X
Notice of Motion.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Upon the foregoing papers, the motion by the Plaintiffs, JOHN VENEZIANO and PASQUALE VENEZIANO (hereinafter the "Plaintiffs" or "Veneziano") seeking an Order pursuant to CPLR §3212 granting them summary judgment, dismissing the Defendants Affirmative Defenses, is determined as hereinafter provided. By Stipulation dated August 2, 2017, the Plaintiffs withdrew the portion of their motion which sought costs and sanctions pursuant to NYCRR §130-1.1.

In this breach of contract dispute, the Plaintiffs seek to recover from the Defendants the total amount of \$76,383.67 based upon a Consulting Agreement dated June 19, 2007 ("Consulting Agreement") and Amendment to Consulting Agreement ("Amended

Agreement” or “Amendment”) dated April 2, 2009, executed by the parties in this action. The Plaintiffs allege two causes of action in their Complaint, the first is for breach of contract on which summary judgment is sought, and the second is for judgment on an unfiled Confession of Judgment signed by the Defendants. The Plaintiffs do not move for summary judgment on their second cause of action.

The parties executed an Agreement of Sale dated May 18, 2007, pursuant to which a restaurant known as LaCoquille Restaurant located at 1669 Northern Boulevard, Manhasset, New York was sold to the Defendants (“Agreement of Sale”). The “seller” of the restaurant was collectively LaCoquille Restaurant, Inc. (of which the Plaintiff, Pasquale Veneziano was the sole stockholder and president) and Pinstrat Enterprises, Inc.; and the “buyer” was Gladyce, Inc., the principal of which is the Defendant, Michael B. Miller. The closing occurred on June 19, 2007 without incident, and the instant dispute does not involve the sale.

On the date of the closing, the parties also entered into a Consulting Agreement pursuant to a provision in the Agreement of Sale. The Defendant-Buyer of the restaurant is referred to as the “Company” while the Plaintiffs, Pasquale and John Veneziano, were collectively referred to as the “Consultant”. The Consulting Agreement sets forth the scope of work to be provided by the Plaintiffs to the Defendants whereby “the Consultant agrees to provide consulting services to the Company from time to time, on a part time basis, by rendering advice with respect to the operation of the Company’s restaurant business.” [See Exhibit B to Complaint, annexed to Plaintiffs’ motion]. The

Consulting Agreement further sets forth the rate of compensation applicable at that time whereby the Company agreed to pay the Consultant an annual amount of \$54,800, payable in equal monthly installments of \$4,566.67, for a term of five years following the expiration of ninety days after the closing date. Notably, the Defendant, Miller, personally guaranteed the Company's payment obligations set forth therein.

On April 2, 2009, the parties executed the Amended Consulting Agreement which reflected "[t]he Parties desire to amend that certain Consulting Agreement entered into by them on June 19, 2007 (the 'Agreement')" [See Exhibit "F" annexed to Plaintiffs' Motion]. The Amendment provided for a simultaneous payment, modified the compensation rate, and extended the term of the original Consulting Agreement. More specifically, Paragraphs "1", "2" and "3" of the Amendment provide as follows:

1. Simultaneously herewith, the Company is delivering a bank check to the Consultant in the amount of \$30,000.00. The Parties agree that said sum is in satisfaction of (i) all past sums due and owing under the Agreement, and (ii) all consulting services to be rendered through December 31, 2009.
2. Paragraph 2 of the Agreement is hereby amended to provide that, from and after December 31, 2009, and until the expiration of the term of this Agreement (as provided in Paragraph 3), the consulting fee shall be in the annual amount of \$13,200.00, payable in equal monthly installments of \$1,100.00 each.
3. The Term of this Agreement is hereby amended to provide for an expiration date of June 30, 2017.

[*Id.*]

The Amended Consulting Agreement further included a provision whereby the parties “ratified” and “reaffirmed” the original Agreement, as amended therein; and that the “Confession of Judgment remains in effect as per original contract as preamble #2”. [See Exhibit “F” to Plaintiffs’ Motion].

The Amended Consulting Agreement reflects two signatures by Miller – one in his capacity as President of Gladyce, Inc., and the other in his individual capacity.

By letter dated October 28, 2014, counsel for the Plaintiffs advised the Defendant, Miller, that Gladyce, Inc. has failed to make any of the monthly payments of \$4,566.67 pursuant to the Consulting Agreement. He further demanded immediate payment of \$274,000 pursuant to the Confession of Judgment [See Exhibit “H” annexed to Plaintiffs’ Motion]. No mention was made of the terms as revised by the Amendment.

The Defendant, Miller, responded by letter dated October 28, 2014 which he advised was “made after a full review of the facts and the law with [his] attorney, Carl M. Lawrence, Esq., 23 Green Street, Suite 301, Huntington, New York...” Miller apprised the Plaintiffs’ counsel of the Amendment to the Consulting Agreement, conceding that a total balance of \$99,000.00 remained due and owing pursuant to the revised terms [See Exhibit “A” annexed to Plaintiffs’ Motion]. Miller further advised as follows:

From and after the date of the Amendment, certain payments were made in cash or in kind to further reduce the total balance owing. The credits to Gladyce, Inc. are in the amount of \$1,100.00 in 2010, \$3,979.81 in 2012, \$12,863.42 in 2013 and \$3,573.10 in 2014. *The total credits equal \$21,516.33, leaving a balance due in the amount of \$77,483.67.*

Notwithstanding the above, and in the interest of resolving this issue amicably, I am enclosing a good faith payment towards the total balance due. As such, enclosed is a check from Gladyce, Inc. payable to Pasquale Veneziano and John Veneziano in the amount of \$1,100.00.

cc: Carl M. Lawrence, Esq.

Enclosure: Check #5012

[See Exhibit "A" annexed to Plaintiffs' Motion, with copy of enclosed check in the amount of \$1,100.00 (emphasis supplied)].

By letter dated March 10, 2015, counsel for the Plaintiffs acknowledged the credits applied to the outstanding balance, the payment of \$1,100.00 tendered with Miller's letter, and the remaining balance in the amount of \$76,383.67 [See Exhibit "I" annexed to Plaintiffs' Motion]. Counsel also warned that a lawsuit would be commenced unless Miller provided an interim check in the amount of \$40,000 toward the outstanding agreed upon balance.

By letter dated April 16, 2015, counsel for the Plaintiffs advised Miller that an action would be commenced unless a payment was made by April 30, 2015. The instant action was commenced shortly after the Defendants' failure to make any payments as demanded.

In seeking summary judgment on the breach of contract claim and dismissal of the Defendants' Affirmative Defenses, counsel for the Plaintiffs avers that Miller's October 2014 letter serves as an admission that the Defendants are indebted to the Plaintiffs in the amount of \$76,383.67, and that no material issues of fact remain.

The Plaintiffs seek dismissal of the First Affirmative Defense wherein the Defendants contend that the default provision in the Agreement of Sale limits defendants' damages to \$25,000 on the grounds that it contradicts the parties' performance through January 2015 and the admitted facts. As to the Second Affirmative Defense wherein the Defendants allege that the Plaintiffs violated the Restrictive covenant provisions of both the Agreement of Sale and Consulting Agreement, the Plaintiffs submit sworn affidavits demonstrating that no such violation occurred. Lastly, in their Third Affirmative Defense, the Defendants assert that the "Plaintiffs failed to perform any consulting services pursuant to the Consulting Agreement despite the fact that defendants paid plaintiffs for consulting services from the closing on June 19, 2007 until January 1, 2015." [See Defendants' Verified Answer annexed to Plaintiffs' Motion].

In the restrictive covenant provisions of the parties' various agreements, the Plaintiffs agreed not to engage in any business that is "similar to" or "competitive with" the business of the Defendants within a twenty-five (25) mile radius of the restaurant for a period of five (5) years. Such provisions further provide that "[n]otwithstanding the foregoing, it is agreed that [the Plaintiffs] shall at all times have the right to work as an employee in the food and club industry" [See Agreement of Sale annexed as Exhibit "D" to Plaintiffs' Motion; and Consulting Agreement annexed as Exhibit "F" to Defendants' Opposition].

The Plaintiffs each submitted a sworn affidavit attesting that neither of them have "gone into any restaurant or similar business since the date of the Agreement dated

May 18, 2007” [See Affidavit of John Veneziano, sworn to on July 7, 2017; see also Affidavit of Pasquale Veneziano, sworn to on July 3, 2017, annexed to Plaintiffs’ Motion]. Pasquale further attested that he has been employed by the Port Washington Yacht Club during the relevant time period which, in any event, is not “similar to” or “competitive with” the business of the Defendants. Nor does he have any ownership interest therein. [See Pasquale Veneziano Affidavit at ¶10].

John Veneziano similarly testified that he was an employee of a car wash business and has been employed by the Douglaston Club for several years, neither of which are “similar to” or “competitive with” the Defendants’ business. Nor does he have any ownership interest in the Douglaston Club [See John Veneziano Affidavit at ¶12].

In opposition, the Defendant, Miller, submits a sworn affidavit wherein he concedes that he personally guaranteed the payments due under the Consulting Agreement; that payments were in fact made in accordance therewith; and that the terms were revised in the Amended Consulting Agreement. However, Miller believes that no payments are due and owing to the Plaintiffs based on their purported violations of the restrictive covenant provisions and based upon the Plaintiffs failure to provide consulting services at any time from the date of the closing until the present time. Miller contends in his affidavit that he “did not know of any purpose for [the Consulting Agreement] except, possibly, the avoidance of taxes on the sale of the restaurant business by the seller” and that “[he] believed that the Consulting Agreement would be unenforceable against Gladyce, Inc. if the document was a sham and the plaintiffs never actually provided any consulting services

as required by it.” Miller continues that, “[n]onetheless, for a time, Gladyce, Inc. did make payments to plaintiffs after June 19, 2007. Gladyce, Inc. also permitted the plaintiffs in kind use of the restaurant for dinners and parties, without charge, at numerous times after June 19, 2007.”

Concerning whether Miller personally guaranteed the payments under the Amended Consulting Agreement, he claims that he “was not asked to and [he] did not sign any personal guarantee of this amended agreement” as only Gladyce, Inc. and the Plaintiffs were signatories to the Amendment. He also believes that the extension of the term of the agreement “was a substantial modification of the provisions of the original agreement” and thus, he is not personally responsible for said payments.

Miller further concedes that he consented to the hand-added language that the June 19, 2007 Affidavit of Confession of Judgment would remain in effect and references its unenforceability due to the fact that it was never filed with the County Clerk and has since expired. As to the January 2015 letter acknowledging the balance due and owing under the Amended Consulting Agreement, Miller contends that it “was simply intended to inform this attorney of the intervening facts of the Amendment to Consulting Agreement on April 2, 2009” – admitting to the contents of the letter. Yet, he claims that the letter was not intended to release plaintiffs from any claim that they had not performed consulting services in the past or that they were not still required to perform consulting services through the end of the new term.

With regard to the alleged violations of the restrictive covenant provisions, Miller merely claims that both Plaintiffs have “been engaging in conduct which would violate the terms of the restrictive covenants”, without providing any factual detail or predicate for his belief.

Lastly, Miller urges that further discovery is necessary to develop the proofs required to support their defenses and Affirmative Defenses.

Legal Analysis

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact [*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957); *Bhatti v. Roche*, 140 A.D.2d 660 (2d Dept. 1988)]. It is nevertheless an appropriate tool to weed out meritless claims [*Lewis v. Desmond*, 187 A.D.2d 797 (3d Dept. 1992)]. Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party’s favor, the moving party would still be entitled to relief [*Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 A.D.2d 894 (3d Dept. 1993)].

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat a motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial [See CPLR § 3212(b); see also *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)].

The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion [*Mgrditchian v. Donato*, 141 A.D.2d 513 (2d Dept. 1988)]. Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 A.D.2d 631 (2d Dept. 1993)].

If a party defends a motion by resort to CPLR § 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient [*Companion Life Ins. Co. v All State Abstract Co.*, 35 A.D.3d 519 (2d Dept. 2006)]. Nor can mere speculation serve to defeat the motion [*Pluhar v. Town of Southampton*, 29 A.D.3d 975 (2d Dept. 2006)].

The court must draw all reasonable inferences in favor of the nonmoving party [*Nichklas v. Tedlen Realty Corp.*, 305 A.D.2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 A.D.2d 546 (2d Dept. 1995)]. The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist [*Dyckman v. Barrett*, 187 A.D.2d 553 (2d Dept. 1992); *Barr v. County of Albany*, 50 N.Y.2d 247, 254 (1980); *James v. Albank*, 307 A.D.2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 A.D.2d 330 (2d Dept. 1993)].

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned [*See Village Bank v. Wild Oaks Holding, Inc.*, 196 A.D.2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v. Sokol*, 128 A.D.2d 492 (2d Dept. 1987)].

With respect to the Plaintiffs' breach of contract claim, it is settled that when assessing "whether the parties entered into a contractual agreement * * * it is necessary to look * * * to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" – albeit without placing "disproportionate emphasis * * * on any single act, phrase or other expression (*Brown Bros. Elec. Contrs. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 399 [1977] *see, Zheng v. City of New York, supra*, 19 N.Y.3d 556, 574 [2012]; *Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp.*, 93 N.Y.2d 584, 589-590 [1999]; *Martin Delicatessen v. Schumacher*, 52 N.Y.2d 105, 109-110 [1981]). Significantly, "[m]utual assent evincing the intention of the parties to form a contract is essential" [*Miranco Contr., Inc. v Perel*, 29 A.D.3d 873, 874 (2d Dept. 2006)].

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach (*See Canzona v. Atanasio*, 118 A.D.3d 837, 838 (2d Dept. 2014); *Dee v. Rakower*, 112 A.D.3d 204, 208–209 (2d Dept. 2013); *Elisa Dreier Reporting Corp. v. Global NAPs Networks, Inc.*, 84 A.D.3d 122, 127 (2d Dept. 2011). "[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of

the document itself. Consequently, ‘a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms’ ” (*MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009), quoting *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). “A contract is unambiguous if the language it uses has ‘a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion’ ” [*Greenfield v. Philles Records*, 98 N.Y.2d at 569]. “Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties’ intent, or when specific language is susceptible of two reasonable interpretations” (*Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244 [citation and internal quotation marks omitted]).

Extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide (*Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569-570, quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). A contract is unambiguous if the language it uses has “a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion” (*Id.* quoting *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d at 355, rearg. denied 46 N.Y.2d 940 (1979)). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity [*Id.*].

Here, the essential terms of the Consulting Agreement and Amended Consulting Agreement entered into between the parties are clear and unambiguous [*cf Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.*, 74 N.Y.2d 475 (1989) (where price term not necessarily indefinite because agreement failed to specify a dollar figure)]. Defendants promised to pay a specified rate of compensation within a clearly specified timeframe. The Plaintiffs proffered sufficient proof, in admissible form, of the express contract between the parties, its essential terms and the parties' mutual assent thereof. More specifically, the Amended Consulting Agreement revised the total compensation due and owing pursuant to the revised contract term that was extended to June 30, 2017. The Plaintiffs demonstrated that the parties agreed to such terms, the Defendants' failure to pay, and the damages resulting therefrom. Indeed, the amount sought by the Plaintiffs on their breach of contract claim, \$76,383.67, is the precise amount the Defendant, Miller, conceded remained due and owing under the Amended Consulting Agreement [*See Miller Letter dated 1/19/15, annexed as Exhibit "A" to Plaintiffs' Motion*]. As such, the Plaintiffs' met their *prima facie* burden establishing their entitlement to judgment as a matter of law on their breach of contract claim.

In turn, the Defendants failed to sufficiently rebut the Plaintiffs' *prima facie* showing. Preliminarily, the Court takes particular note of Miller's inaccurate contention that he was not asked nor did he sign the Amended Consulting Agreement in his individual capacity. Miller's claim is flatly contradicted by the document itself, which reflects that Miller is a signatory to the contract separate and apart from Gladyce, Inc., on behalf of

which Miller also signed the Amendment as President in his official capacity. Accordingly, to the extent that this Court finds Gladyce, Inc. liable for breach of contract, Miller is similarly liable in his individual capacity.

Also unavailing are Miller's nebulous averments that the Defendants' obligation to pay is excused due to the Plaintiffs' alleged failure to perform and receipt of payments "in kind". These statements are belied by Miller's own admissions and course of conduct from the time of the agreement until the commencement of this litigation. To this end, Miller agreed to execute the Amendment and simultaneously tendered a payment in the amount of \$30,000.00, which, according to the express terms of the contract, represented payment for services already performed, and future services to be performed. Moreover, the Plaintiffs' use of the restaurant "free of charge" in 2012, 2013 and 2014 are fully accounted for in the total amount of "credits" Miller applied to the balance due and owing. Despite the unequivocal evidence before the Court, Miller "categorically [denies] that the amount of \$76,383.67 is owed to the plaintiffs' as alleged in the first cause of action." We find Miller's alleged defense to be conclusory and unsupported by the parties' "words and deeds".

The Court likewise finds the Defendants' claim of the Plaintiffs' alleged violation of the restrictive covenant provisions in the contract unavailing. Miller contends, upon information and belief, that the Plaintiffs breached the agreement by possibly engaging in business that competes with or is similar to the Defendants' business. He also requests further discovery in the hopes that depositions would reveal the claimed

violations. These obliquely framed assertions do not support a non-speculative inference that the Plaintiffs have engaged in any conduct that violated the restrictive covenant provisions of the agreement between the parties. In sum, the Defendants failed to demonstrate how discovery may reveal or lead to relevant evidence, or that “facts essential to opposing the motion were exclusively within” another party’s “knowledge and control” sufficient to warrant denial of the Plaintiffs’ motion [*Espada v. City of New York*, 74 A.D.3d 1276 (2d Dept. 2010)].

Even in drawing all reasonable inferences in favor of the Defendants, the Court finds that no triable issues of fact exist as to the Plaintiffs’ breach of contract claim.

Accordingly, it is hereby

ORDERED, that the Plaintiffs’ motion seeking an Order granting them summary judgment on their breach of contract claim in the amount of \$76,383.67, and dismissal of the Defendants’ Affirmative Defenses, is **GRANTED**.

Submit judgment on notice.

Dated: Mineola, New York
October 17, 2017



Hon. Randy Sue Marber, J.S.C.
XXX

ENTERED

OCT 18 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE