

**Mammoth Entertainment, Inc. v Global Poverty
Project, Inc.**

2018 NY Slip Op 30705(U)

April 18, 2018

Supreme Court, New York County

Docket Number: 655970/2017

Judge: Gerald Lebovits

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 7

-----X
Mammoth Entertainment, Inc.,

Plaintiff,

Index
Number:

-against-

655970/2017

Global Poverty Project, Inc.
d/b/a Global Citizen,

Defendant.

-----X
Gerald Lebovits, J.:

Plaintiff moves, pursuant to CPLR 3212, for summary judgment and defendant cross-moves, pursuant to CPLR 3211 (a) (7), to dismiss plaintiff's complaint for failure to state a claim.

Underlying Allegations

Plaintiff is a production company that works with artists and entities in the entertainment industry to produce films and other entertainment projects (Courtney affidavit, ¶ 3). Defendant is a not for profit corporation that has hosted the Global Citizen music festival since 2012 (*id.*, ¶¶ 7-8).

Plaintiff contends that, in June 2016, it reached an agreement with Verizon (the Verizon Agreement) for production of certain content on an exclusive basis (*id.*, ¶¶ 11-17). It asserts that, in September 2016, it introduced a Verizon representative to defendant and on October 26, 2016, plaintiff and defendant executed an agreement (the Agreement) in connection with the upcoming 2017 Global Citizen music festival (*id.*, ¶¶ 18, 20). Plaintiff states that the Agreement provides that it was to submit to Verizon content in exchange for securing financing for the content for the upcoming music festival (*id.*, ¶¶ 20-27). Plaintiff further states that it fulfilled its contractual obligation by securing Verizon's agreement to finance and distribute the content in the form of the Verizon Agreement (*id.*, ¶¶ 35-37, 43-44).

Plaintiff contends that defendant improperly delayed executing an agreement with Verizon and, on February 28, 2017, defendant unilaterally terminated the Agreement (*id.*, ¶¶ 44-49, 54). It states that, after this breach of the Agreement, defendant entered into a direct relationship with Verizon and that, defendant further breached its obligation to pay 10% of Verizon's \$534,100 fee to plaintiff and its damages for this breach constituted \$54,100 (*id.*, ¶¶ 60-65). It also states that defendant breached its obligation to give plaintiff credit for producing the content (*id.*, ¶ 75). On December 15, 2017, plaintiff brought the instant motion for summary judgment.

On January 3, 2018, defendant cross-moved to dismiss plaintiff's complaint. It contends that the Agreement includes a "shopping deal" clause, which provided that the content for the upcoming music festival was on a non-exclusive basis and that financing and distribution for the content had to be guaranteed (Mencher affidavit, ¶¶ 19-29). Defendant asserts that securing financing required more than a draft agreement with Verizon and affiliated entities, but a binding agreement (*id.*, ¶¶ 30-34).

Defendant contends that no binding agreement for financing was reached with Verizon, that financing for the content was not provided and that, therefore, in November 2016, it reached a separate agreement with Hyde Park Entertainment, Inc. (Hyde Park) for financing (*id.*, ¶¶ 36-46). It states that, since Hyde Park had supplied funds, the Agreement between plaintiff and defendant had to be "updated" to reflect this (*id.*, ¶¶ 54-57). Defendant states that ultimately, despite months of negotiations as to the terms of their relationship, plaintiff and defendant failed to reach an agreement that reflected the real relationship between them and, consequently, in February, 2017, defendant terminated the Agreement (*id.*, ¶¶ 60-69, 72-76). It further states that, after the termination, it began working with Verizon for a new agreement for distribution of the content (*id.*, ¶¶ 81-84). It seeks dismissal of plaintiff's breach of contract cause of action contending that plaintiff never fulfilled its contractual obligation to secure financing and distribution of the content for the music festival. Defendant also seeks dismissal of the breach of duty and fair dealing claim as duplicative, dismissal of the unjust enrichment, quantum meruit and promissory estoppel claims as barred by the existence of the Agreement, dismissal of the tortious interference for failure to show a contractual breach and wrongful motive and dismissal of the unfair competition claim for failure to show wrongful motive.

In reply, plaintiff states that "[t]his is a simple breach of contract action" (plaintiff reply memorandum at 20) and contends that it fulfilled its contractual obligations and, accordingly, is entitled to summary judgment. It did not address any of defendant's arguments on any of its causes of action in its reply, except for its breach of contract cause of action.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; see also *Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] the benefit of every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotation marks and citation omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by

the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Contract Interpretation

Generally, "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Put another way, "[c]ourts will give effect to the contract's language and the parties must live with the consequences of their agreement [and] [i]f they are dissatisfied . . . , the time to say so [is] at the bargaining table" (*Enjoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [2013] [internal quotation marks and citation omitted]; see also *McFarland v Opera Owners, Inc.*, 92 AD3d 428, 428-429 [1st Dept 2012]; *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

"To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation . . . by examining the entire contract . . . as a whole [and] in deciding the motion, [t]he evidence will be construed in the light most favorable to the one moved against" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] [internal quotation marks and citations omitted]).

Unjust Enrichment

"[U]njust enrichment is not a catchall cause of action to be used when others fail [but] [i]t 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 N.Y., Inc.*, 18 NY3d 777, 790 [2012]). "The essence of unjust enrichment is that one party has received money or a benefit at the expense of another which, in good conscience, ought to be returned" (*Carriafiello-Diehl & Assoc., Inc. v D & M Elec. Contr., Inc.*, 12 AD3d 478, 479 [2d

Dept 2004]) However, “[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*Corsello*, 18 NY3d at 790; see also *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]). Also “[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out the same subject matter” (*id.* at 388; see also *L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d 527, 528 [1st Dept 2017]).

Tortious Interference with Contract

“The elements of tortious interference with a contract are [1] the existence of a contract between plaintiff and a third party; [2] defendant’s knowledge of the contract; [3] defendant’s intentional inducement of the third party to breach or otherwise render performance impossible; and [4] damages to plaintiff” (*Hersh v Cohen*, 131 AD3d 1117, 1119 [2d Dept 2015], quoting *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). However, “mere contentions . . . offered with no factual basis to support the allegations are insufficient to state a cause of action for tortious interference with contractual relations” (*M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488, 490 [2d Dept 1995]). A claim for tortious interference with business relations or prospective contracts requires a showing that the defendant’s “actions were motivated solely by malice” (*J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2009]; see also *Arts4All, Ltd. v Hancock*, 5 AD3d 104, 109 [1st Dept 2004]).

Discussion

Initially, the court notes that the dispute between the parties involves the Agreement, its terms and the extent to which either party complied with or breached the Agreement. In considering plaintiff’s motion for summary judgment, the court must accept defendant’s version of the contested facts as true and construe the evidence in the light most favorable to defendant, as the non moving party (see *Branham*, 8 NY3d at 932; *Perella*, 153 AD3d at 446). Viewed in this light, defendant has raised material issues of fact as to whether plaintiff fulfilled its obligation to secure financing for the content for the upcoming music festival. The emails submitted by each party do not conclusively demonstrate an entitlement to judgment as a matter of law in favor of plaintiff, but rather are indicative of conflicting interpretations of the parties’ obligations under the Agreement. Where there are conflicting reasonable interpretations of a contractual provision, the provision is

ambiguous and summary judgment is inappropriate (see *Perella*, 153 AD3d at 446). Accordingly, plaintiff's motion for summary judgment must be denied.

Turning to defendant's cross motion to dismiss plaintiff's complaint, the court must accept plaintiff's allegations as true for the purpose of deciding whether plaintiff has a viable claim (see *Goldman*, 5 NY3d at 570-571). However, since plaintiff has stated that this case "is a simple breach of contract action," the other causes of action that plaintiff failed to defend in its reply memorandum may be considered to be abandoned. Dismissal of these claims is also appropriate since a breach of duty of fair dealing claim is duplicative of a contract claim, unjust enrichment and quantum meruit claims are barred by the existence of a valid contract (in this case, the Agreement), and unfair competition and tortious interference with business relations require a showing of wrongfulness absent in this case. However, accepting plaintiff's allegations as true, it has alleged a viable claim that it fulfilled its obligations under the Agreement and that defendant breached the Agreement. Consequently, the portion of defendant's motion that seeks dismissal of plaintiff's breach of contract cause of action must be denied. Plaintiff's claim for punitive damages must be dismissed "as they are not available in a breach of contract action based upon a mere private wrong" (*Fischer v Machon Bais Yaakov*, 176 AD2d 655, 656 [1st Dept 1991]; see also *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 1994]; *Quik Park W. 57 LLC v Bridgewater Operating Corp.*, 148 AD3d 444, 446 [1st Dept 2017]).

Order

It is, therefore,

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

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ORDERED that defendant's cross motion to dismiss plaintiff's complaint is granted to the extent of dismissing plaintiff's claims except for its cause of action for breach of contract and dismissing plaintiff's claim for punitive damages and is otherwise denied.

Dated: 4/18, 2018

ENTER:



J.S.C.

HON. GERALD LBOVITS
J.S.C.