SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

----------x

FXE INDUSTRIES, INC.,

Plaintiff,

- against -

EMPIRE STATE EB-5 REGIONAL CENTER, LLC, ROCK HILL REGIONAL CENTER, LLC, and DAVID ECKERT,

Defendants.

----------x

Index No. 651911/2016

Motion Seq. No. 002

DECISION AND ORDER

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on defendants' motion for summary judgment:

	Papers Numbered:
Notice of Motion - Affirmation - Exhibits (memorandum of law)	1
Opposing Affidavit - Opposing Affirmation- Exhibits (memorandum of law)	2
Reply (memorandum of law only)	

Upon the foregoing papers, defendants' motion is granted in part and denied in part, and, upon searching the record, the Court grants plaintiff partial summary judgment.

Background

This action arises out of a contract dispute between a start-up motorcycle company and the company it hired to procure foreign investment capital through a program sponsored by the U.S. Citizenship and Immigration Services ("USCIS"). The pertinent facts are undisputed, and are as follows. Plaintiff FXE Industries, Inc. ("FXE") is a motorcycle design and production company based in the Brooklyn Navy Yard. Defendants Empire State EB-5 Regional Center, LLC ("Empire"), and its wholly-owned subsidiary Rock Hill Regional Center, LLC ("Rock Hill") are companies designated by the USCIS as "regional centers," which are authorized to procure foreign investors for domestic companies located in specified "redevelopment zones" through the federal government's fifth employment-based preference immigrant visa category program ("EB-5 program"). Defendant David Eckert ("Eckert") is a 50% owner of Empire and Rock Hill, and he manages them.

On July 22, 2015, FXE, on the one hand, and Empire and Rock Hill (collectively, "Empire/RH"), on the other, entered into a "Regional Center Services Agreement" ("the Agreement"), pursuant to which Empire/RH agreed, in the main, to assist FXE in identifying and securing foreign investors in accordance with the EB-5 program and to manage the invested funds, from which a loan of "up to $5,000,000" would be made to FXE. In exchange for Empire/RH's services, FXE agreed to pay Empire/RH a $20,000 consulting fee, payable "$5,000 upfront [upon] execution of this contract and the remainder ($15,000) only upon closing of the loan to FXE." The Agreement contained a "No Guaranty" provision, under which FXE and Empire/RH acknowledged that the Agreement "does not guarantee or predict a specific outcome ... including, but not limited to, any assurance that EB-5 Investors will subscribe to the

Proposed Offering..." Under the Agreement, Empire/RH represented that, to its knowledge, there were "no action[s], suit[s], proceeding[s] or investigation[s] pending ... or currently threatened against [it] or any of its members or managers," and that Empire/RH and its members and managers were not subject to any orders terminating Empire/RH's designation as a "regional center."

It is undisputed that FXE paid Empire/RH $5,000 upon the signing of the Agreement, as required. It is further undisputed that Empire/RH did not secure any foreign investors for FXE under the EB-5 program, or otherwise.

However, on September 10, 2016, Empire/RH demanded that FXE pay it the $15,000 balance of the consulting fee, ostensibly for preparation of "offering documents." On that date, Empire/RH e-mailed FXE as follows:

{Empire/RH e-mail at 15:54 [3:54 p.m.]}:

> Francois - the offering docs are crucial right now in order to take advantage of the 9/30 EB5 expiration date.
>
> I will have the offering docs done and the ancillary entities and forms completed with in a week.
>
> I will need the remainder of the fees we already agreed to.

FXE responded that it had prepared certain of the documents already; asked about the cost of a lawyer to prepare the offering documents; and stated that it already paid Empire/RH the $5,000 downpayment. In reply, Empire/RH continued its demand for the $15,000:

{Empire/RH e-mail at 16:18 [4:18 p.m.]}:

> If you pay the balance of my fees I will incorporate all the offering documents and other documents that need to be completed in my total $20,000 fee and also have the possibility of obtaining $500,000 investor's before the end of the month.

{Empire/RH e-mail at 20:38 [8:38 p.m.]}:

> Per our conversation earlier today, I will handle all documentation and entity formation as it relates to the EB5 capital raise. Please wire the balance of $15,000 consulting fee; instructions are attached.

On September 11, 2016, FXE wired Empire/RH the remaining $15,000 consulting fee. However, as noted above, despite the payment, Empire/RH did not procure any investors for FXE. By letter dated January 14, 2016, FXE demanded return of the $15,000 payment and terminated the Agreement. In pertinent part, the letter states:

> Arguing there was an opportunity to secure investors for our project, you asked us to wire an additional $15,00 in advance, and in contradiction to the Service Agreement which states: *"FXE will pay Regional Center a $20,000 consulting fee, payable for $5,000 upfront execution of this contract and the remainder ($15,000) upon closing of the first investor(s)."*

> We wired to you the remaining $15,000 on 9/11/2015, as you said investment was imminent, and that sum was absolutely necessary to cover costs and commissions to secure these investors.
>
> To this date, despite our frequent communication to which we received no response, and our visit to Rochester where you met with us in a restaurant and proposed no explanation nor perspective on 11/10/2015, there has been no investor.

The Instant Action and Motion

On April 11, 2016, FXE commenced this action against Empire, Rock Hill, and Eckert to recover the $20,000 paid to Empire/RH, plus "monetary losses of at least $50,000." The complaint asserts causes of action for fraud against all defendants (first cause of action); breach of contract against Empire and RH only (second cause of action); unjust enrichment against Empire and RH only (third cause of action); and conversion against all defendants (fourth cause of action). The complaint also alleges "additional facts" in support of a corporate veil-piercing claim. Defendants (all represented by the same attorney) served an answer in which they denied the material allegations of the complaint and asserted several affirmative defenses. The parties engaged in discovery proceedings. On October 19, 2017, FXE filed a Note of Issue.

Defendants now move for summary judgment dismissing the complaint and for an award of attorney's fees as the alleged "prevailing party." In the main, defendants argue that the record unequivocally establishes that they did not breach the Agreement because: the Agreement did not require Empire/RH to procure investors, and FXE voluntarily paid the second installment of $15,000. Defendants also argue that the record lacks any proof: (1) of fraud on the part of any of the defendants; (2) of damages sustained by FXE; and (3) of facts supporting FXE's corporate veil-piercing claim. FXE opposes the motion, arguing, inter alia, that Empire/RH breached the Agreement by failing to disclose a prior lawsuit against it and for failing to procure investors.

Discussion

Summary judgment will be granted where the moving party has met its initial burden of establishing its entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)), and the opponent has failed to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action." Zuckerman v City of New York, 49 NY2d 557, 560 (1980). Upon searching the record, the court may grant summary judgment to a non-moving party "with respect to a cause of action or issue that is the subject of the motions before the court." Dunham v Hilco Const. Co., 89 NY2d 425, 429–30 (1996); See generally CPLR 3212(b). As the saying goes, "summary judgment searches the record."

Breach of Contract

Here, defendants have met their burden of establishing, as a matter of law, that they did not breach the Agreement: (1) by failing to disclose a prior lawsuit, as the Agreement required only disclosure of pending or threatened actions, and the prior lawsuit had been settled in May 2015, two months before the parties entered into the subject Agreement; and (2) by failing to secure EB-5 program investors and effectuate a loan to FXE, as FXE expressly acknowledged in the "No Guaranty" provision, that "a specific outcome," including the procurement of EB-5 investors, was not guaranteed. FXE failed to raise a question of fact on these issues.

However, upon searching the instant record, this Court finds that, on September 10, 2016, Empire/RH anticipatorily breached the Agreement by demanding that FXE immediately pay the $15,000 balance of

the consulting fee, which had not yet become due. Indeed, Empire/RH had not even secured a single EB-5 investor as of September 10, 2016 when it demanded "the remainder of the fees," much less been prepared to close on a loan of $5,000,000 or any other amount. It is undisputed that the Agreement required FXE to pay the remaining $15,000 *only upon closing of a loan from the "first investor(s)*," not upon preparation of closing documents, or in advance of Empire/RH's work in securing investors. Empire/RH was only entitled to the $15,000 at the completion of its work – i.e., at the closing on an investment under the EB-5 program. It had not completed its work on September 10, 2016.

In this Court's considered view, on September 10, 2016, Empire/RH effectively told FXE that if it did not pay the remaining $15,000 due on the consulting fee immediately, Empire/RH would not complete its work under the Agreement. This constitutes an anticipatory breach as a matter of law. See generally Long Island R. Co. v Northville Indus. Corp., 41 NY2d 455, 468 (1977) (under anticipatory breach doctrine "if one party to a contract repudiates his duties thereunder prior to the time designated for performance and before he has received all of the consideration due him thereunder, such repudiation entitles the nonrepudiating party to claim damages for total breach."); Am. List Corp. v U.S. News & World Report, Inc., 75 NY2d 38, 44 (1989) ("the nonrepudiating party need not, however, tender performance nor prove its ability to perform the contract in the future ... Rather, the doctrine relieves the nonrepudiating party of its obligation of future performance and entitles that party to recover the present value of its damages from the repudiating party's breach of the total contract.").

This Court finds that, on September 10, 2016, Empire/RH repudiated the Agreement, entitling FXE to hold Empire/RH in breach thereof and obviating FXE's responsibility to pay the $15,000 balance of the consulting fee. Contrary to Empire/RH's claim, that FXE "voluntarily" paid $15,000 does not relieve Empire/RH of the consequence of its breach – to wit: the obligation to return the money forthwith. Indeed, Empire/RH admits that it did not procure any investors for FXE at any time. Therefore, Empire/RH never earned, or became entitled to payment of, the remaining $15,000 on the consulting fee. The Agreement does not require FXE to pay Empire/RH $15,000, or any other amount, for preparation of closing documents or in advance of securing investors.

Accordingly, FXE is entitled to summary judgment on its second cause of action against Empire and Rock Hill, for breach of contract. As for damages for such breach, this Court finds that FXE is entitled to recover from Empire and Rock Hill, jointly and severally, the sum of $15,000, representing FXE's "future performance" under the Agreement (see Am. List Corp. v U.S. News & World Report, Inc., supra), plus interest from September 11, 2015.

The record fails to establish that FXE sustained damages other than the $15,000. As defendants note, FXE appears to have abandoned its claim to recover $223,000 in purported "operating expenses" that it otherwise had to, and would have had to, pay to run its business; under any view of the facts, such expenses simply were not incurred by reason of Empire/RH's breach. Similarly, FXE is not entitled to recover the $26,000 it allegedly had to pay to the new "regional center" company it engaged at the termination of the parties' Agreement because this was not Empire/RH's doing.

Unjust Enrichment

The Court notes that FXE is also entitled to recover the $15,000 from Empire and Rock Hill, pursuant to its unjust enrichment cause of action. The record establishes, as a matter of law, that Empire and Rock Hill were enriched at FXE's expense – insofar as FXE paid Empire/RH $15,000 that it did not earn and to which it had not become entitled under the Agreement – and it is against equity and good conscience to permit Empire/RH to keep the $15,000. See generally Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972).

Fraud

FXE's fraud claim is subject to dismissal as duplicative of its breach of contract claim, on which it has been awarded full relief as against Empire and RH. See First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287, 291-292 (1st Dept 1999) ("A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract"). The record is devoid of facts that raise material issues as to whether defendants made false representations with the intent to deceive FXE, upon which FXE justifiably relied to its detriment. The record establishes only that Empire/RH anticipatorily breached the Agreement on September 10, 2016 when it told FXE that that it would not complete its work in the absence of the $15,000 payment.

Conversion

Similarly, FXE's conversion claim is subject to dismissal as duplicative of breach of contract claim. See Kopel v Bandwidth Tech. Corp., 56 AD3d 320 (2008) ("The conversion claim also fails because such a cause of action cannot be predicated on a mere breach of contract, and no independent facts are alleged giving rise to tort liability.").

Corporate Veil-Piercing Claim

Defendants have established the lack of merit to FXE's corporate veil-piercing claim against Eckert. Indeed, FXE admits that the record lacks proof that: (1) Eckert "exercised complete domination of" Empire/RH "in respect to the transaction attacked"; and (2) "such domination was used to commit a fraud or wrong against [FXE] which resulted in [FXE's] injury." Morris v New York State Dep't of Taxation & Fin., 82 NY2d 135, 141 (1993). Contrary to FXE's claim, this Court did not refuse to allow discovery on the alter-ego claim. Rather, the Court directed defendants to produce certain documents on the issue, and held additional discovery thereon "in abeyance, but not waived." Thus, FXE could have sought more documents and information on its alter-ego claim. It did not, and offers no reason for its failure to do so. Instead, FXE filed a Note of Issue on October 19, 2017, certifying that all discovery was complete.

Attorney's Fees

The Court finds, as a matter of law, that neither side has prevailed in this unfortunate, unnecessary litigation. Therefore, neither side is entitled to its "actual attorneys' fees and costs" under the Agreement.

Conclusion

Defendants' motion for summary judgment is granted to the extent of dismissing the first cause of action for fraud, the fourth cause of action for conversion, and plaintiffs' corporate veil-piercing claim, and is otherwise denied. Upon searching the record, plaintiff is granted summary judgment on the second cause of action, for breach of contract, and the third cause of action, for unjust enrichment, against defendants Empire State EB-5 Regional Center, LLC and Rock Hill Regional Center, LLC, *only*.

The Clerk is hereby directed to enter judgment as follows: (1) granting plaintiff summary judgment on the second and third causes of action against defendants Empire State EB-5 Regional Center, LLC and Rock Hill Regional Center, LLC, *only*; (2) awarding plaintiff a money judgment in the sum of $15,000, plus statutory interest from September 11, 2015, against defendants Empire State EB-5 Regional Center, LLC and Rock Hill Regional Center, LLC, jointly and severally; (3) dismissing the complaint as against defendant David Eckert in its entirety; and (4) dismissing the first and fourth causes of action as against defendants Empire State EB-5 Regional Center, LLC and Rock Hill Regional Center, LLC.

Dated: August 10, 2018

Arthur F. Engoron, J.S.C.