Marconi Intl. (USA) Co., Ltd. v Millennium Realty Group, LLC
2018 NY Slip Op 32157(U)
September 4, 2018
Supreme Court, New York County
Docket Number: 158135/15
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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MARCONI INTERNATIONAL (USA) CO., LTD.

Plaintiff

Index No. 158135/15

v

DECISION AND ORDER

MILLENNIUM REALTY GROUP, LLC, and MARC KRITZER

Defendants.

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

This is an action to recover money paid to and held by a real estate broker in escrow as a security deposit in connection with a proposed license for the use of commercial real property. The plaintiff, Marconi International (USA) Co., Ltd. (Marconi), moves pursuant to CPLR 3212 for summary judgment on the first, second, and third causes of action, which seek to recover for conversion, unjust enrichment, and breach of fiduciary duty, respectively and for an award of punitive damages. The defendants oppose the motion. The motion is granted to the extent that Marconi is awarded summary judgment on the first, second, and third causes of action, and the motion is otherwise denied.

II. BACKGROUND

In support of its motion, Marconi submits an attorney's

affirmation and the affidavit of its officer, Lilian Ching, who annexes a real property license agreement between Marconi, as licensee, and The Hashem Realty Group, Inc., d/b/a Seduka (Hashem), as licensor, with respect to Unit 9A of 462 Seventh Avenue in Manhattan (the premises). Ching also submits copies of the pleadings, checks paid by Marconi to the defendant broker Millennium Realty Group, LLC (Millennium), text and email messages between Marconi, Millennium, and Hashem and the deposition transcript of the defendant Marc Kritzer, a licensed real estate broker and Millennium's sole member.

In her affidavit, Ching asserts that Hashem retained Millennium as a broker with respect to the premises, at which Hashem was the prime tenant. She states that Millennium, in that capacity, showed Marconi the premises because Hashen was interested in subletting or licensing the premises as a commercial showroom. Ching avers that Marconi never entered into a brokerage agreement with Millennium.

Ching further asserts that Hashem, as tenant and licensor, negotiated a proposed license with Marconi, as licensee, with respect to the premises, pursuant to which Marconi would pay Hashem a monthly license fee in the sum of $11,200.00. The proposed license provided, at paragraph 15, that "[u]pon execution of this Agreement, Licensee shall deposit with Licensor the sum of Three month's rent as security deposit for the

faithful performance and observance by Licensee of the terms, covenants and conditions of this Agreement." Schedule A to the License provided, in relevant part: "Security: $33,600.00-$5,000 escrow=$28,600 paid be [sic] Millennium escrow to be delivered to tenant [Hashem] on possession of space."

According to Ching, Marconi delivered to Millennium checks totaling $33,600.00. The copies of those checks, which are attached to her affidavit, contain the memoranda "escrow" and "security deposit" thereon. Ching further avers that, even though the license had not been executed, Marconi delivered a check in the sum of $11,200.00 to Hashem on April 29, 2015, representing the rent for the first month of the license. As Ching describes it, in May 2015, Hashem advised both Marconi and the defendants that it did not wish to execute the license, and "promptly returned to Plaintiff the check for 'first month's rent.'"

Ching explains that it was her understanding that Millennium would hold the entire amount in escrow and that, after the license agreement was executed and Marconi took possession of the premises, Millennium would forward the escrow to Hashem. Ching asserts that the license was never executed and did not go into effect, and that Marconi never took possession of the premises. In one of the email messages she sent to the defendants, she informed them that Hashem's principal "canceled the deal," to

which Kritzer replied that Hashem's principal "was upset that we are holding the security until delivery of the space. That is the sticking point on the deal." Ching also submits an email message in which Hashem's principal wrote, "[t]he deal is canceled come get your money." Hashem's principal complained that Kritzer "said that [he's] holding all deposit in his account while you can start using space and I don't agree with that."

As Ching explains it, beginning on May 14, 2015, after the Hashem-Marconi transaction had been canceled, Marconi asked Millennium to return the security deposit escrow on several occasions. She attaches a series of email and text message correspondence between Marconi and the defendants, in which the defendants first informed Ching that their "accountant" would release the refund check and that she would have it in hand by the "next check run on the 30th." In that same email message, Kritzer assured Marconi that "[n]o one is taking your money and it has to be released from the escrow account." In the same message, Kritzer referred to the funds held by Millennium as "the security."

Ching asserts that, despite further demands on June 1, 2015, and August 6, 2015, and the fact that Marconi never agreed that Millennium or Kritzer could retain those funds for themselves, they never returned the money. Both Ching and Marconi's attorney refer to Krizter's deposition testimony, in which he stated that,

despite the provision of the license agreement that Millennium would hold the disputed funds in escrow, Millennium "does not have an escrow account." Kritzer also testified at his deposition that Marconi's $33,600 security deposit "is probably in the bank account," that "it could be more, it could be less," that he "write[s] personal checks" for his own personal expenses out of "[Millennium's] bank accounts," and that the defendants "transfer money in between" Millennium's corporate and Kritzer's personal bank accounts. Marconi thus seeks to pierce the corporate veil to hold Kritzer personally liable in light of his conceded failure to respect corporate formalities and the fact that he admittedly used Millennium to commit a wrong against Marconi.

In opposition, the defendants submit an attorney's affirmation and Kritzer's affidavit. Kritzer asserts that he is not personally liable for any obligation, since the "Plaintiff's interactions with Defendants in this matter were with Marc Kritzer as an agent of Millennium Realty Group, LLC." Kritzer asserts that, contrary to the written license agreement, the checks paid by Marconi to Millennium were not truly escrow funds, and that Millennium was actually entitled to retain from those funds a commission for introducing Hashem to Marconi. Kritzer further states that it was Marconi that backed out of the license agreement, and that he was willing to refund the payment, but

that Marconi was "unresponsive and/or uncooperative and ultimately refused to acknowledge that the Defendant was entitled to the commission payment."

In reply, Ching points out that all of Kritzer's assertions are contradicted by documentary evidence and his prior deposition testimony and email messages, and she notes that Kritzer never stated that Marconi entered into a brokerage agreement with Millennium, but only claims the right to a brokerage commission because he introduced Hashem to Marconi.

III. DISCUSSION

A. Summary Judgment

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. See Zuckerman v City of New York, supra. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to

defeat summary judgment. See id. Marconi has established its prima facie entitlement to judgment as a matter of law on its causes of action to recover for conversion, unjust enrichment and breach of fiduciary duty, and to pierce the corporate veil with respect to those claims. The defendants fail to raise a triable issue of fact in opposition.

B. Conversion

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49-50 (2006). Where, as here, it is shown that an escrow deposit was commingled with personal or general operating funds or that provisions of General Obligations Law § 7-103 regulating the holding and use of such deposits were violated, a cause of action to recover for conversion may be established. See Harlem Capital Ctr., LLC v Rosen & Gordon, LLC, 145 AD3d 579 (1st Dept. 2016); Leroy v Sayers, 217 AD2d 63 (1st Dept. 1995); Kelligrew v Lynch, 2 Misc.3d 135(A) (App. Term, 9th & 10th Jud. Dists. 2004).

Kritzer concedes that he commingled funds expressly required to be held in escrow with other funds, and admits that Millennium did not even maintain an escrow account despite documentary

evidence and his own acknowledgments that the monies were to be held in escrow by Millennium as a security deposit.

Kritzer's assertion that he was entitled to retain the disputed funds as a commission fail to raise a triable issue of fact. In the first instance, documentary evidence and Kritzer's own admissions establish that the funds were meant to be held in escrow as a security deposit, and were not meant to compensate the defendants their brokerage activities. Kritzer does not deny that Millennium retained and still has possession of the funds, except to the extent that they may have been used for personal purposes. Moreover, Kritzer does not assert that Marconi had a contractual obligation to pay the defendants a brokerage commission, nor does he submit a copy of a brokerage agreement between Millennium or anyone else with respect to the subject transaction. Hence, the defendants "failed to provide any evidence of an express agreement . . . obligating" Marconi "to pay [Millennium's] brokerage commission." Joseph P. Day Realty Corp. v Chera, 308 AD2d 148, 152 (1st Dept. 2003).

Where it is established that a broker was the procuring cause of a transaction by producing a purchaser who was ready, willing, and able to buy on terms acceptable to the seller, he or she is generally entitled to a commission. Lane-Real Estate Dept. Store, Inc. v. Lawlet Corp., 28 NY2d 36 (1971). Nonetheless, where a brokerage agreement provides that a

commission will be due and payable upon the closing of a transaction, the broker's entitlement to a commission "is contingent upon the actual closing." Corcoran Group, Inc. v Morris, 107 AD2d 622, 623 (1st Dept. 1985). Stated another way, a broker is entitled to a commission where, "it 'generated a chain of circumstances which proximately led to' a lease transaction." SPRE Realty, Ltd. v Dienst, 119 AD3d 93, 99 (1st Dept. 2014), quoting Eugene J. Busher Co. v Galbreath-Ruffin Realty Co., 22 AD2d 879, 879 (1st Dept. 1964), affd 15 NY2d 992 (1965). Although the documentary evidence establishes that the disputed funds were to paid over to Hashem upon execution of the license and Marconi's possession of the premises, those events did not occur. Rather, no license was executed, and no license transaction was consummated. Since the defendants did not adduce any evidence to show the existence of a brokerage agreement, or what the terms of such an agreement entailed, Kritzer's assertion that Marconi was required to pay Millennium a brokerage commission, without more, is insufficient to defeat Marconi's right to the return of the funds.

In any event, where, as here, there is no express provision in a brokerage agreement apportioning responsibility for commissions, the party seeking to sell, lease, or license the property is generally held responsible for that obligation. See Joseph P. Day Realty Corp. v Chera, supra; Gronich & Co. v. 649

Broadway Equities Co., 169 AD2d 600 (1st Dept. 1991). Thus, if any commission were to be owed, it would be Hashem, not Marconi, that would bear that obligation.

C. Unjust Enrichment

To establish unjust enrichment, "the plaintiff must show that the defendant was enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Castelotti v Free, 138 AD3d 198, 207 (1st Dept. 2016); see Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511 (2012); Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173 (2011); see generally Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415 (1972).

An escrow agent who improperly retains or uses escrowed funds for his or her own benefit may be subject to a cause of action to recover for unjust enrichment. See First Manhattan Energy Corp. v Meyer, 150 AD3d 521 (1st Dept. 2017). Marconi, with its submissions, has made a prima facie showing that the defendants were enriched at its expense, that the subject funds were entrusted to them as a security deposit for a transaction that did not come to fruition, and that it is against equity and good conscience for the defendants to retain and use those funds for their own purposes.

"[A]n escrow agent has a duty not to deliver the monies in

escrow except upon strict compliance with the conditions imposed by the controlling agreement" (Greenapple v Capital One, N.A., 92 AD3d 548, 549 [1st Dept. 2012]), and thus holds the escrowed funds for the benefit of all parties to the escrow agreement. See id. Krizter's affidavit fails to raise a triable issue of fact in opposition to Marconi's prima facie showing, since his assertion that Millennium was not holding the disputed funds in escrow for the benefit of Marconi belies all of the documentary evidence and his prior statements. Inasmuch as his affidavit "appears to have been submitted to avoid the consequences of his prior admission[s]," the affidavit "create[s] only a feigned issue of fact," and is "therefore insufficient to defeat" Marconi's motion. Estate of Mirjani v DeVito, 135 AD3d 616, 617 (1st Dept. 2016).

D. Breach of Fiduciary Duty

"To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct." Pokoik v Pokoik, 115 AD3d 428, 429 (1st Dept. 2014); see Stortini v Pollis, 138 AD3d 977 (2nd Dept. 2016); Deblinger v Sani-Pine Prods. Co., Inc., 107 AD3d 659, 660 (2nd Dept. 2013); Matter of JPMorgan Chase Bank N.A., 122 AD3d 1274 (4th Dept. 2012). A cause of action sounding in breach of

fiduciary duty must be pleaded with particularity. See CPLR 3016(b).

An escrow agent owes his or her beneficiary a fiduciary duty. See First Manhattan Energy Corp. v Meyer, supra; Greenapple v. Capital One, N.A., 92 AD3d 548 (1st Dept. 2012); Director Door Corp. v. Marchese & Sallah, P.C., 127 AD2d 735 (2nd Dept. 1987); Bardach v Chain Bakers, Inc., 265 App Div 24, 27 (1st Dept. 1942), affd 290 NY 813 (1943). Marconi's submissions demonstrate, prima facie, that Millennium, as escrow agent, misappropriated escrowed funds for its own benefit. It has thus established its entitlement to judgment as a matter of law on the cause of action to recover for breach of fiduciary duty. See First Manhattan Energy Corp. v Meyer, supra. Kritzer's affidavit, which appears to present only feigned issues of fact with respect to whether Millennium has any claim of right to the escrowed funds, is insufficient to defeat Marconi's right to summary judgment.

E. Piercing The Corporate Veil

Marconi seeks to pierce Millennium's corporate veil in order to hold Kitzer individually responsible for Millennium's wrongful conduct. Marconi has established that Kitzer should be held liable under the theory of piercing the corporate veil, and the defendants have failed to raise a triable issue of fact in

opposition.

"Conduct constituting an abuse of the privilege of doing business in the corporate form is a material element of any cause of action seeking to hold an owner personally liable for the actions of his or her corporation under the doctrine of piercing the corporate veil." East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 66 AD3d 122, 127 (2nd Dept. 2009), affd 16 NY3d 775 (2011). Marconi has established, through Kritzer's own deposition testimony, that Millennium failed to observe corporate formalities, and that Kritzer abused the privilege of doing business in the form of a limited liability company in order to perpetrate a wrongful act. See Metropolitan Commercial Bank v Levy, 152 AD3d 409 (1st Dept. 2017); East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., supra; AHA Sales, Inc. v Creative Bath Prods., Inc., 58 AD3d 6 (2nd Dept. 2008). Teachers Ins. Annuity Assn. of Am. v Cohen's Fashion Opt. of 485 Lexington Ave., Inc., 45 AD3d 317 (1st Dept. 2007).

Even in his opposition papers, Kritzer does not deny that he used Millennium's bank account to pay both corporate and personal obligations, that he moved money around between the corporate account and other accounts, or that he had no system in place for ascertaining what money in which account is used for which particular purpose. He further admits in his opposition papers that he used this bank account to assure that the deposit was not

refunded to Marconi, presumably because it was "uncooperative" in his attempts to secure a brokerage commission for a failed transaction. Hence, Marconi is entitled to summary judgment against Kritzer individually on the causes of action to recover for conversion, breach of fiduciary duty, and unjust enrichment.

F. Punitive Damages

Marconi has not established that it is entitled to an award of punitive damages. In order to be entitled to punitive damages, a private litigant "must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." Rocanova v Equitable Life Assur. Socy. of U.S., 83 NY2d 603, 613 (1994); see Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48 (1st Dept. 2015). Punitive damages are "a social exemplary remedy, not a private compensatory remedy." Garrity v Lyle Stuart, Inc., 40 NY2d 354, 358 (1976) (internal quotation marks omitted).

The complaint does not allege, and Marconi has not demonstrated, the requisite egregious tortious conduct that is required to sustain a demand for punitive damages. See Gedula 26, LLC v Lightstone Acquisitions III LLC, 150 AD3d 583 (1st Dept. 2017). Nor has it shown that it seeks more than a private compensatory remedy or that the defendants' conduct was aimed at

the public generally. See Britt v Nestor, 145 AD3d 544 (1st Dept. 2016).

G. Prejudgment Interest

Since the action here seeks to recover for the wrongful withholding of Marconi's money, interest is recoverable under CPLR 5001 from May 14, 2015, when it first made demand for the return thereof. See Eighteen Holding Corp. v Drizin, 268 AD2d 371 (1st Dept. 2000).

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that it is awarded summary judgment on the first, second, and third causes of action against both defendants, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff, Marconi International (USA) Co., Ltd., and against the defendants Millennium Realty Group, LLC (Millennium), and Marc Kritzer, jointly and severally, on the first cause of action, which is to recover for conversion, on the second cause of action, which is to recover for unjust enrichment, and on the third cause of action, which is to recover for breach of fiduciary duty, in the sum of $33,600.00, plus

statutory interest from May 14, 2015.

This constitutes the Decision and Order of the court.

Dated: September 4, 2018

ENTER:

J.S.C.

HON. NANCY M. BANNON