

Jin Hai Liu v Forever Beauty Day Spa Inc.
2018 NY Slip Op 32701(U)
October 11, 2018
Supreme Court, New York County
Docket Number: 652167/2017
Judge: Gerald Lebovits
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NYSCEF DOC. NO. 57

RECEIVED NYSCEF: 10/22/2018

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 652167/2017

JIN HAI LIU and USA KIMBERLEY,

MOTION SEQ. NO. 002

Plaintiffs,

- v -

FOREVER BEAUTY DAY SPA INC., BEAUTY SPA SOHO INC.,
and WU XIA HUANG

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 42, 43, 44, 45, 46

were read on this motion to/for

DISMISSAL

I. Background

Plaintiffs, Jin Hai Liu and his solely owned corporation, USA Kimberley, commenced this case against defendants Wu Xia Huang and her solely owned corporations Forever Beauty Day Spa (Forever Spa) and Beauty Spa Soho (Spa Soho). Plaintiffs assert four causes of action against defendants: (1) fraudulent misrepresentation and failure to disclose; (2) negligent misrepresentation and failure to disclose; (3) breach of contract; and (4) unjust enrichment.

Defendants move to dismiss plaintiffs' first, second, and fourth causes of action under CPLR 3211 (a) (7) or alternatively, for summary judgment under CPLR 3212.

Individual defendant Huang and her solely owned corporate defendant Forever Spa operated a spa business on the second-floor of 83 Mott Street, New York County (the premises). The Premises is leased from a non-party, Fay Da Mott Street, Inc. (the landlord). Defendant Huang, on behalf of corporate defendant Forever Spa entered into a Management Agreement (agreement) with plaintiffs appointing plaintiffs "as independent contractor[s] to operate and manage part of the [spa] business in massage area." (Defendants' Exhibit A, at ¶ 3.) The agreement allowed plaintiffs to "make, or cause to be made, any changes in the operation of Business or any purchase of any fixtures." (Defendants' Exhibit A, at ¶ 8.) Pursuant to this clause, plaintiffs started to renovate the Premises. Unbeknownst to the plaintiffs, pursuant to the lease agreement between defendant Forever Spa and the landlord, defendant must first obtain a written consent from the landlord before making any alteration to the premises. (Complaint at ¶ 24.) Plaintiffs did not seek landlord's consent when making the renovation. (Defendant Exhibit D). Thus, when the landlord found out about the renovations, it evicted both plaintiffs and

defendants. (Complaint at ¶ 16.) Defendant Huang, after being evicted from the premises, started Spa Soho, another spa business.

Plaintiffs then commenced this action.

II. Defendants' Motion to Dismiss Under CPLR 3211 (a) (7)

A. First Cause of Action: Fraudulent Misrepresentation and Failure to Disclose

Defendants' CPLR 3211 (a) (7) motion to dismiss plaintiffs' cause of action for alleged fraudulent misrepresentations is denied. Plaintiffs have stated a cause of action.

In a claim for fraudulent misrepresentation, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*Mandarin v Wildenstein*, 16 NY3d 173, 178 [2011].)

Defendants first argue that heightened pleading requirement under CPLR 3016 (b) required plaintiffs to plead with particularity when alleging fraud and misrepresentation. The Court of Appeals has held that a plaintiff meets the CPLR 3016 (b) requirement "when the facts are sufficient to permit a reasonable inference of the alleged conduct." (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008].)

Here, the alleged fraudulent misrepresentation rests on the fact that defendants knew they must first obtain a written consent from the landlord before any changes were made to the premises. Nonetheless, defendants still granted plaintiffs the authority in the Agreement to "make ... any changes [to the premises]." (Defendants' Exhibit A, at ¶ 8.) Thus, plaintiffs have alleged sufficient facts to make a reasonable inference that defendants were misrepresenting their authority to induce plaintiffs to enter into the Agreement. Plaintiffs allegedly relied on defendants' misrepresentation and began to renovate the premises to "fit [their] business needs." (Plaintiffs' Complaint, at ¶10.) As a result, plaintiffs allege that they had suffered an injury when the landlord evicted them for renovating the premises without its written consent.

Defendants then argue that a fraud claim cannot be stated when the fraud claim is duplicative of a breach of contract claim. But a fraud claim can be sustained when defendants had a "preconceived and undisclosed intention of not performing" the promises that they made to plaintiffs to induce them to enter into the Agreement. (*Manas v VMS Assoc.*, 53 AD3d 451, 453 [1st Dept 2008] [internal quotation marks and citation omitted].) Here, plaintiffs allege that defendants had promised plaintiffs to make changes to the premises to induce plaintiffs to enter into the agreement. At the same time, defendants knew that they do not have such authority. Thus, the alleged facts are sufficient to indicate that defendant had no intention to perform the contract at the time of signing.

The court finds defendants' argument unpersuasive and denies defendants' motion to dismiss.

B. Second Cause of Action: Negligent Misrepresentation and Failure to Disclose

Defendants' CPLR 3211 (a) (7) motion to dismiss plaintiffs' negligent- misrepresentation claim is denied. Plaintiffs have stated a cause of action.

A claim for negligent misrepresentation requires a plaintiff to demonstrate "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." (*J.A.O. v Stavitsky*, 8 NY3d 144, 148 [2007].)

Plaintiffs' pleading satisfies all three requirements. Plaintiffs allege that there was an actual contract between plaintiffs and defendants Huang and Forever Spa that raises a contractual duty for the defendants to disclose correct information to the plaintiffs. The alleged information regarding the authority plaintiffs had with making changes to the premises was incorrect and that plaintiffs had allegedly relied on that information.

C. Fourth Cause of Action: Unjust Enrichment

Defendants' CPLR 3211 (a) (7) motion to dismiss plaintiffs' unjust-enrichment claim is granted as plaintiffs have failed to state a cause of action.

To plead an unjust enrichment claim, the plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." (*Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 [2012].) Also, "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (*Clark-Fitzpatrick. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987].)

Plaintiff is suing for a breach of contract (plaintiffs' third cause of action), therefore admitting that there is an enforceable contract. Plaintiffs' cause of action for unjust enrichment cannot be maintained because an express contract exists covering the same subject matter.

III. Defendants' Motion for Summary Judgment Under CPLR 3212 (b)

Defendants' motion for summary judgment is denied.

A summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law and showing absence of any material issue of fact. (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985].)

The moving defendants failed to make a prima facie showing of entitlement to judgment as a matter of law on plaintiffs' fraudulent misrepresentation claim.

Plaintiffs' alleged fraudulent misrepresentation rested on the allegation that defendants had misrepresented their authority to enter into the agreement with plaintiffs to allow plaintiffs to

make alterations to the premises without obtaining written consent from the landlord. There is a material issue of fact about whether plaintiffs knew that they needed to obtain written consent from the landlord for any alterations to be made on the premises before entering into the agreement with the defendants.

The moving defendants failed to make a prima facie showing of entitlement to judgment as a matter of law on plaintiffs’ negligent misrepresentation claim. The reasoning is stated above.

This court granted defendants’ motion to dismiss plaintiffs’ claim for unjust enrichment. Therefore, the court does not need to evaluate plaintiffs’ unjust-enrichment claim under the summary judgment standard. That aspect of defendants’ motion is denied as academic.

IV. Defendants’ Motion to Dismiss All Causes of Action as Against the Individual Defendant Wu Xia Huang and Unrelated Corporate Spa Soho.

Piercing the corporate veil requires a showing that (1) the owners exercised complete dominion and control over the corporation with respect to the transaction attacked; and (2) that such dominion was used to commit a fraud or wrong against plaintiff which resulted in plaintiffs’ injury. (*Matter of Morris v New York State Dept of Tax. & Fin.*, 82 NY2d 135, 141 [1993].) A party who seeks to “pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.” (*Id.*)

Here, plaintiffs have alleged that defendant Huang exercised complete dominion and control over Forever Spa for the sole purpose of conducting spa businesses with “respect to the transaction attacked.” (*See id.*) Plaintiffs have also alleged that defendant Huang’s dominion over corporation Forever Spa was used to commit a fraudulent misrepresentation which resulted in plaintiffs’ injury. Thus, individual defendant Huang will remain as a party.

Also, plaintiff Liu has alleged in his affidavit in opposition to the motion that defendant Huang transferred all the assets from Forever Spa to Spa Soho, a successor corporation, and rendered former corporation Forever Spa insolvent. (Aff of plaintiff at 7.) Pursuant to NY Debtor & Creditor Law § 273-a, “[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages ... is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant.”

Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

Plaintiff has alleged sufficient facts to maintain a cause of action against defendants Huang and Spa Soho.

Accordingly, it is hereby

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ORDERED that defendants' motion is granted in part and denied in part: plaintiffs' cause of action for unjust enrichment is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the parties appear for a preliminary conference in Part 7, room 345, at 60 Centre Street, on January 30, 2019, at 11:00 a.m.

10/11/2018			
DATE		GERALD LEBOVITS, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☒ DENIED	☐ SUBMIT ORDER	
	☐ SETTLE ORDER	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		