

Cityside Archives LLC v Greenspoon Marder LLP

2020 NY Slip Op 30154(U)

January 7, 2020

Supreme Court, New York County

Docket Number: 652532/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

CITYSIDE ARCHIVES LLC

Plaintiff,

- v -

GREENSPOON MARDER LLP,

Defendant.

-----X

INDEX NO. 652532/2019

MOTION DATE 06/07/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for DISMISSAL.

Cityside Archives LLC (**Cityside**) brings this action against Greenspoon Marder LLP (**Greenspoon Marder**), alleging that Greenspoon Marder failed to pay certain invoices allegedly due for record storage and management services. Greenspoon Marder moves to dismiss the complaint in its entirety pursuant to CPLR § 3211 (a) (1), (5), and (7). For the reasons set forth below, the motion is granted solely to the extent that the declaratory judgment, promissory estoppel, and implied covenant of good faith and fair dealing claims are dismissed, but is otherwise denied.

BACKGROUND

Reference is made to a certain Storage and Service Agreement (NYSCEF Doc. No. 3), dated March 11, 1994, between Cityside and the law firm of Jacob, Medinger & Finnegan, LLP (**Jacob Medinger**), as amended by an Amendment (NYSCEF Doc. No. 4), dated on or about October 4, 2011 (the Storage and Service Agreement, together with the Amendment, collectively, the

Agreement), by and between Cityside and Jacob Medinger. Pursuant to the Agreement, Cityside, a company engaged in the business of record storage and management, agreed to provide its services to Jacob Medinger, and Jacob Medinger agreed to pay Cityside for its services according to an incorporated schedule of rates (NYSCEF Doc. No. 3, Schedule A).

Section 7 of Schedule B to the Agreement provides that failure to pay any sums due within 45 days, breach of any provisions of the Agreement, or the insolvency of Jacob Medinger constitute Events of Default (*id.*, Schedule B §§ 7.1 [a] – [c]). Section 7 further provides that, upon the occurrence of an Event of Default, Cityside may demand that Jacob Medinger pick up the stored materials, deliver the stored materials to Jacob Medinger, destroy the stored materials upon 90 days' advance written notice, or terminate the Agreement (*id.*, Schedule B § 7.2 [a] – [c], [e]). Section 7.2 (d) states that, following an Event of Default, so long as the Agreement has not been terminated, Jacob Medinger remains obligated to pay all sums due under the Agreement.

Jacob Medinger continued to use Cityside's services pursuant to the Agreement through early 2016, resulting in the storage of approximately 10,804 boxes in Cityside's inventory. Then, by letter dated March 16, 2016 (the **March 2016 Letter**), from Jacob Medinger to Cityside, Jacob Medinger informed Cityside that it was to be acquired by Greenspoon Marder on April 1, 2016 (NYSCEF Doc. No. 5):

“Dear Valued Vendor,

[Jacob Medinger] is happy to announce that on April 1, 2016, the firm will officially be acquired by Greenspoon Marder Law which is based in Florida. We will continue to have the same address but for any services or products rendered on or after 4/1/2016, please address all invoices to:

Greenspoon Marder Law

Attn: Accounts Payable
1270 Avenue of the Americas, 16th Floor
New York, NY 10020

Any invoices for services or products rendered on or before 3/31/16, please continue to send the bill to [Jacob Medinger]. **Please make sure you send out all of [Jacob Medinger's] finalized invoices before 4/30/16, because the firm will no longer exist.**"

Greenspoon Marder continued using Cityside's services after its acquisition of Jacob Medinger. Beginning in April 2016, Cityside invoiced Greenspoon Marder on a monthly basis for its storage and service fees. To wit, during the calendar year 2016, Greenspoon Marder requested 15 stored boxes in April, 24 boxes in May, 30 boxes in June, 42 boxes in August, and 60 boxes in September, and Greenspoon Marder tendered 47 boxes to Cityside to be re-filled. It is undisputed that in connection the foregoing, Greenspoon Marder paid Cityside's invoices.

In December 2017, Greenspoon Marder requested the delivery and permanent removal of approximately 1,600 stored boxes. However, inasmuch as Greenspoon Marder did not make the required estimated payment, Cityside did not permanently remove the requested stored boxes. In July 2018, Greenspoon Marder inquired as to the cost of permanent removal of approximately 9,000 stored boxes. Cityside again provided an estimate to Greenspoon Marder for this service, but Greenspoon Marder did not send the payment to Cityside and Cityside therefore did not provide the requested services. Greenspoon Marder failed to pay its regular monthly invoice for March 2018. After paying the April 2018 and September 2018 invoices, Greenspoon Marder made no other payments. Accordingly, Cityside placed the account on hold while it reached out to Greenspoon Marder regarding its nonpayment.

By letter dated November 14, 2018 (the **November 14, 2018 Letter**), by Dariel Abrahamy of Greenspoon Marder to Marla Pailet of Cityside, Greenspoon Marder indicated that it had not assumed the Agreement and was not liable for any of the obligations arising thereunder (NYSCEF Doc. No. 7):

“Be advised that [Greenspoon Marder] did not assume the Agreement, is not liable for the prior balance of [Jacob Medinger], and will not enter into a new agreement with Cityside. We are aware that you have received requests from third-parties to remove some of the inventory. While [Greenspoon Marder] disputes that it is bound in any way by the Agreement, to the extent you need authorization to release files to third-parties, [Greenspoon Marder] authorizes Cityside to release files to Womble Bond Dickinson (Womble) and Skadden, Arps, Slate, Meagher & Flom LLP (Skadden). You may coordinate payment with Womble and Skadden directly for the release of those files.

If you pursue legal action against [Greenspoon Marder, Greenspoon Marder] will vigorously defend any lawsuit. Simply put, your agreement is with [Jacob Medinger], not [Greenspoon Marder].”

By letter dated January 15, 2019 (the **Demand Letter**), sent by counsel for Cityside to counsel for Greenspoon Marder, Cityside notified Greenspoon Marder that it was in default and that Cityside was exercising its rights under Section 7.2 (a) of the Agreement (NYSCEF Doc. No. 8). In the Demand Letter, Cityside demanded that Greenspoon Marder begin pickup of all stored materials with 45 days, *i.e.*, by February 28, 2019, and pay all charges associated with the termination of the account including the costs of permanent removal of stored materials and all outstanding storage charges (*id.*). It is undisputed that no payments have been made in connection with the foregoing.

DISCUSSION

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). In addition, CPLR § 3211 (a) (5) provides that an action that is barred by the statute of frauds may be dismissed.

Declaratory Judgment

Cityside seeks a declaration that Greenspoon Marder is bound by the Agreement and is liable for any failures on its part to comply with the obligations arising thereunder. Pursuant to CPLR § 3001, "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." On a pre-answer motion to dismiss a cause

of action for declaratory judgment, the relevant inquiry is whether the pleadings set forth a cause of action, not whether the plaintiff is entitled to a favorable declaration (*North Oyster Baymen's Ass'n v Town of Oyster Bay*, 130 AD3d 885, 890 [2d Dept 2015]).

Declaratory relief is generally reserved for those cases in which the plaintiff is “unable to find among the traditional kinds of action one that will enable her to bring it to court” (Siegel, N.Y. Prac. § 437, at 742, citing *Kalman v Shubert*, 270 NY 375 [1936]). In other words, “[d]eclaratory judgment ‘is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action . . . [and] [w]here there is no necessity for resorting to the declaratory judgment it should not be employed’” (*Automated Ticket Systems, Ltd. v Quinn*, 90 AD2d 738, 739 [1st Dept 1982], quoting *James v Alderton Dock Yards, Ltd.*, 256 NY 298, 305 [1931]). Here, Cityside has adequate remedies under its contract and quasi-contract causes of action. Accordingly, the first cause of action for declaratory judgment is dismissed (*see Watson v Sony Music Entertainment, Inc.*, 282 AD2d 222, 223 [1st Dept 2001]).

Breach of Contract

To prevail on a breach of contract claim, a plaintiff must establish “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Here, the complaint alleges that (i) Greenspoon Marder is bound by the Agreement, (ii) Greenspoon Marder agreed to pay for Cityside’s services as well as additional sums in the event of default, (iii) Cityside has performed its obligations by performing all requested record storage

and management services, (iv) Greenspoon Marder breached its obligations by failing to pay nearly all of Cityside's monthly invoices for its services beginning in March 2018 in addition to all fees and penalties arising from its default, and (v) Cityside has been damaged as a result of Greenspoon Marder's breach in the amount of \$471,038.11 (compl ¶¶ 46-52). These allegations taken as true as this court must at this stage of the proceedings, ground a claim for breach of contract.

Greenspoon Marder argues that the breach of contract claim should be dismissed because it was not a party to the Agreement and did not agree to assume the obligations arising thereunder. The argument is unavailing.

A plaintiff asserting the existence of an implied contract for personal services generally "must prove that the services were performed and accepted with the understanding on *both* sides that there was a fee obligation" (*Sivin-Tobin Assocs., LLC v Akin Gump Strauss Hauer & Feld LLP*, 68 AD3d 616, 617 [1st Dept 2009], quoting *Shapira v United Med. Serv.*, 15 NY2d 200, 210 [1965]). And, the assent of the party to be charged will only be found where assent may be inferred from the party's conduct (*Sivin-Tobin Assocs., LLC*, 68 AD3d at 617-18; *Miller v Schloss*, 218 NY 400, 406 [1916]). In this case, even in the absence of a written agreement between Cityside and Greenspoon Marder, the allegations in the complaint, taken as true for the purposes of the instant motion, indicate a course of dealing between the parties from which an implied contract may be inferred (*Goldfarb v Romano*, 160 AD3d 448, 449-50 [1st Dept 2018]). To wit, the complaint alleges that Cityside provided services and that those services were accepted by Greenspoon Marder with the understanding that they were to be paid for, *i.e.*, that

Cityside was not providing its services free of charge. In fact, as alleged in the complaint, Greenspoon Marder specifically requested Cityside's services on a number of occasions as though the Agreement with Jacob Medinger remained in full force and effect. And, significantly, the complaint alleges that Greenspoon Marder paid Cityside's invoices every month for approximately two years. It is beyond cavil that these allegations support the inference that there was a meeting of the minds and assent to the contract. The motion to dismiss the breach of contract claim therefore fails.

Unjust Enrichment

The theory of unjust enrichment “contemplates ‘an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties’” (*Georgia Malone & Co., Inc. v Reider*, 19 NY3d 511, 516 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). To state a cause of action for unjust enrichment, a 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 conscious to permit the other party to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [brackets and internal quotation marks omitted]). Here, the complaint alleges that Greenspoon Marder has been enriched at Cityside’s expense by receiving the benefit of Cityside’s records storage and management services without paying for them, and that it would be unjust for Greenspan Marder to retain the benefits without paying Cityside all sums owed (comp ¶¶ 53-58). Based on these allegations, the complaint sufficiently pleads a cause of action for unjust enrichment. Accordingly, dismissal is not warranted at this stage of the proceedings. For the avoidance of doubt, Cityside is not precluded from maintaining its unjust enrichment claim in the alternative

because the issue of whether there is a valid and binding contract is in dispute (*The Limited, Inc. v McCrory Corp.*, 169 AD2d 605, 607 [1st Dept 1991]).

Promissory Estoppel

The elements of a claim of promissory estoppel are: “(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance” (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-42 [1st Dept 2011]).

Here, the complaint fails to allege a sufficiently clear and unambiguous promise made by Greenspoon Marder that it was assuming the Agreement or entering into a new contract. In addition, inasmuch as Cityside seeks relief based on the same nucleus of operative facts, this cause of action is duplicative of the breach of contract claim (*Wald v Graev*, 137 AD3d 573, 574 [1st Dept 2016]). Accordingly, the cause of action for promissory estoppel is dismissed.

Implied Covenant of Good Faith and Fair Dealing

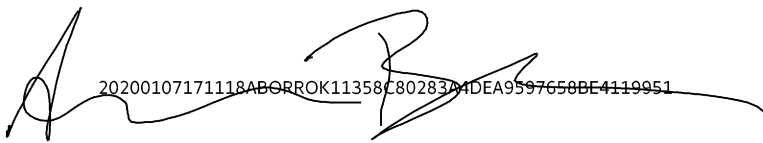
All contracts contain an implied covenant of good faith and fair dealing (*Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 [1st Dept 2010]). The covenant provides that no party to a contract shall take any actions to spoil the rights of another party to receive the fruits of the contract (*id.*). Where a good faith cause of action is based on the same operative facts and seeks the same damages as a cause of action for breach of contract, the good faith claim is duplicative and should be dismissed (*Mill Financial, LLC v Gillett*, 122 AD3d 98, 104-05 [1st Dept 2014]).

Here, the allegations forming the basis of the good faith claim are based on the same operative facts and seek the same damages as the breach of contract claim. Therefore, the good faith claim is dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part solely to the extent that the declaratory judgment, promissory estoppel, and implied covenant of good faith and fair dealing claims are dismissed and is otherwise denied; and it is further

ORDERED that the defendant shall file an answer to the complaint within 30 days of the date of the decision and order herein.


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1/7/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE