Ziya Rest. Inc. v Mulberry Dev. LLC
2020 NY Slip Op 31565(U)
April 23, 2020
Supreme Court, New York County
Docket Number: 656500/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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ZIYA RESTAURANT INC.,PRANA RESTAURANT LLC,

Plaintiff,

- v -

MULBERRY DEVELOPMENT LLC,ROBERT LAVECCIA, MICHAEL BUONO

Defendant.

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INDEX NO. 656500/2016

MOTION DATE 01/28/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In this action sounding in breach of contract, defendant Mulberry Development LLC ("Mulberry") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiffs Ziya Restaurant Inc. ("Ziya") and Prana Restaurant LLC ("Prana") (collectively "plaintiffs") (Doc. 45-61). Plaintiffs oppose the motion (Docs. 64-72). After oral argument, as well as a review of the parties' papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order of this Court entered February 5, 2018 ("the 2/5/18 order"), which dismissed all causes of action against defendants except for Ziya's first cause of action for breach of contract, as well as Ziya and Prana's sixth cause of action based on unjust enrichment (Doc. 55). The breach of contract claim seeks

damages in the amount of at least $226,444 for alleged overpayments to Mulberry, plus $350,000 which plaintiffs claimed were improperly diverted from their security funds (Doc. 1 at 5-6). The unjust enrichment claim seeks the identical relief (Doc. 1 ¶ 34-37). The relevant facts are summarized as follows.

In May 2015, Ziya executed a contract with Mulberry ("the Ziya-Mulberry contract") to build Ziya Restaurant in a commercial space located at 79 Madison Avenue, New York, New York ("the premises") (Docs. 48; 68, Exhibit D, pg. 8). The premises were partially occupied by Prana, a restaurant that had operated there since 2008 with its own commercial space and lease with non-party 79 Madison LLC ("79 Madison"), plaintiffs' landlord (Doc. 68, Exhibit D, pg. 11-12). On October 20, 2015, after work had commenced at the premises for the construction of the Ziya Restaurant, Mulberry served Ziya with a notice of non-payment and a suspension of the project for outstanding payments amounting to $273,343.08, which it claimed was approved by both the owner's representative, Glen Wolland of Q-Rep, LLC ("Wolland") and Ziya's architect, Wid Chapman Architects ("Chapman"), pursuant to their agreement (Doc. 49). Since the debt remained unsatisfied, Mulberry filed a mechanic's lien against the premises in June 2016 for $461,925.20 relating to work performed and materials used at the premises (Doc. 53, Exhibit F). In August 2016, 79 Madison and Mulberry executed a settlement agreement for the discharge of the mechanic's lien whereby 79 Madison paid $349,995 in satisfaction of the debt owed (Doc. 53, Exhibit F).

Mulberry argues, *inter alia*, that plaintiffs do not have standing to sue for $350,000, corresponding to the amount paid to release the mechanic's lien against the premises, because that payment was made pursuant to a valid settlement agreement between Mulberry and 79 Madison (Doc. 60 at 4-8). Despite plaintiffs' claim that 79 Madison funded the settlement payment with

Prana's security deposit and without its permission, Mulberry maintains that this is insufficient to maintain a breach of contract claim for $350,000 since Ziya was neither a party, nor an intended third-party beneficiary to, the settlement agreement (Doc. 60 at 5). Mulberry further represents that dismissal of that portion of the breach of contract claim seeking at least $226,444 in overpayment is warranted because said payments were made only after all the work performed at the premises was inspected and approved by Wolland and Chapman (Doc. 60 at 8-11). The unjust enrichment claim, argues Mulberry, is also precluded by the existence of both the Ziya-Mulberry contract and the settlement agreement (Doc. 60 at 11-12).

In support of its motion, Mulberry submits, *inter alia*, the affidavit of Robert Laveccia ("Laveccia"), Mulberry's vice president, who avers, among other things, that Mulberry billed Ziya $1,097,269.75 for work it performed at the premises but that it was only paid $634,344.55 (Doc. 46); the Ziya-Mulberry contract (Doc. 48, Exhibit A); the settlement agreement between Mulberry and 79 Madison (Doc. 53, Exhibit F); all discovery responses produced by plaintiffs in this action (Doc. 56, Exhibit I); and the deposition testimony of Ziya's majority partner, Rajiv Sharma ("Sharma") (Doc 58, Exhibit K).

In opposition to the motion, plaintiffs argue, *inter alia*, that Mulberry has failed to establish its entitlement to judgment because there is an issue of fact as to whether Mulberry was entitled to the payments it received from Ziya pursuant to Requisition 3, the document allegedly approved for the work completed at the premises through August 2, 2015, which reflects that 52% of work was completed (Doc. 64 at 2). Instead, they maintain that Mulberry received over $1 million for the equivalent of $408,900 worth of work performed (Doc. 69 at 5). The $408,900 figure is based on the expert affidavit of Mike Ghaida ("Ghaida") who opined that, based on his inspection of the site in April 2016 and the Ziya-Mulbery contract, this was the total value of the materials used and

the work performed by Mulberry at the premises (Doc. 70-72).[1] They also claim that Mulberry has failed to proffer any documentation, i.e., invoices, payments or subcontracts, to demonstrate that each of the itemized construction tasks were completed (Doc. 64 at 8-17). Plaintiffs further contend that the settlement agreement does not preclude Prana's unjust enrichment claim because no services were rendered to Prana that would justify Mulberry keeping its security deposit and, moreover, that issues of fact remain about the validity of the mechanic's lien filed against the premises, which was the subject of this payment (Doc. 69 at 7, 12-13).

Plaintiffs submit, *inter alia*, the deposition testimony of Michael Buono ("Buono") and Laveccia, the owners of Mulberry, as well as Sharma's deposition transcript (Docs. 65-66, 68). Plaintiffs also submit Ghaida's affidavit, which includes an itemized valuation and photos of the premises showing the incomplete work at the premises (Doc. 70-72). Additionally, plaintiffs submit Requisition 3, reflecting that $689,732.80 was due for work allegedly completed up until August 2, 2015 (Doc. 67).

LEGAL CONCLUSIONS:

It is well-established that "[t]he 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 eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64

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[1] This Court rejects Mulberry's argument that this affidavit should be disregarded based on bias. Although Ghaida is a friend of Sharma and did not charge a fee for the services rendered, this argument goes to credibility, which is not assessed on a motion for summary judgment (*see Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1286 n 6 [3d Dept 2014]). Moreover, the fact that this expert affidavit was not provided to plaintiffs during discovery does not warrant preclusion (*see Saul v Sutton House Associated*, 2015 NY Slip Op 31788[U], 2015 NY Misc LEXIS 3426, *10 [Sup Ct, NY County 2015]).

NY2d 851, 853 [1985] [citations omitted]; *see* CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact (*see Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Breach of Contract

Summary judgment is granted with respect to that branch of Ziya's breach of contract claim seeking damages in the amount of $350,000 since it is well-established that no privity of contract existed between Mulberry and Ziya with respect to said payment (*see Republic Reality Services, Inc. v Kaufu Properties LLC*, 167 AD3d 436, 436 [1st Dept 2018], *lv denied* 33 NY3d 912 [2019]; *Aetna Health Plans v Hanover Ins. Co.*, 116 AD3d 538, 539 [1st Dept 2016]). Moreover, it has neither been demonstrated nor argued by plaintiffs that Ziya was an intended third-party beneficiary of the settlement agreement.

However, Mulberry has not established its entitlement to summary judgment with respect to that branch of Ziya's breach of contract claim seeking $226,444. Mulberry submits the deposition testimony of Sharma, who affirmed, in pertinent part that, pursuant to the Ziya-Mulberry contract, Mulberry was paid on a "percent complete basis," which required prior approval of all requisitions by both Wolland and Chapman (Doc. 58, Exhibit K, p. 26-27). He also represented that the $635,344.55 was paid to Mulberry only after the payment was approved (Doc.

58, Exhibit K, p. 148). Although Mulberry relies on case law holding that "where . . . an owner or its agents [have] certified that a defendant-contractor's work 'ha[s] been completed in accordance with all of the contract documents,' the defendant-contractor is entitled to summary judgment" (*MG Hotel, LLC v Bovis Lend Lease LMB, Inc.*, 2014 NY Slip Op 33675[U], 2014 WL 10713755 *8 [NY Sup Ct, 2014], *quoting Stevens v Bast Hatfield, Inc.*, 226 AD2d 981, 981-982 [3d Dept 1996]), this Court nevertheless finds that issues of fact preclude summary judgment. Specifically, plaintiffs argue that Mulberry has failed to submit any documents that Ziya had approved those payments (Doc. 69 at 11), which is corroborated by the fact that Requisition 3, the document upon which the $635,344.55 was allegedly paid to Mulberry, was not signed by Mulberry or certified by Wollman and Chapman (Doc. 67, Exhibit C). Moreover, Ghaida's assertion that Mulberry was overpaid for the work it performed at the site, based on his inspection of the premises, is enough to preclude the drastic remedy of summary judgment with respect to that branch of Ziya's breach of contract claim.

Unjust Enrichment

"The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks, ellipsis and citations omitted]). To establish this claim, a plaintiff must establish "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" (*Board of Managers of 28 Cliff Street Condominium v Maguire*, 65 Misc 3d 737, 745 [Sup Ct, NY County 2019] [internal quotation marks and citations omitted]; *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 182).

Although a "[p]laintiff may plead both breach of contract and quasi-contract as alternative theories of recovery where 'there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute at issue'" (*Centennial El. Indus., Inc. v New York City Dept of Citywide Admin. Servs.*, 2018 NY Slip Op 31055[U], 2018 NY Misc LEXIS 2075, * 28 [Sup Ct, NY County 2018], *quoting Hochman v LaRea*, 14 AD3d 653, 654-655 [2d Dept 2005]), an unjust enrichment claim will not survive a motion for summary judgment if there is a valid and enforceable written contract governing the subject matter (*see Clark v Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]).

Summary judgment is granted as against Ziya with respect to the sixth cause of action. The Ziya-Mulberry contract governs the dispute concerning the $226,444, and plaintiffs maintain that it was Prana's security deposit, and not any of Ziya's funds, that form the basis for the unjust enrichment claim seeking to recover $350,000 relating to the settlement fund 79 Madison paid Mulberry (Doc. 69 at 6).

Mulberry has also established its prima facie entitlement to judgment as against Prana for its unjust enrichment claim seeking $226,444 because is undisputed that Prana did not make any payments under the Ziya-Mulberry contract. However, because issues of fact remain as to whether Prana's security deposit was used by Mulberry without its permission (Doc. 65 at 214), especially considering the fact that Prana was not a party to the Ziya-Mulberry contract that gave rise to the mechanic's lien, this Court rejects Mulberry's argument that the settlement agreement precludes Prana's unjust claim for the $350,000 (*see Winthrop v Rosenthal & Rosenthal, Inc.*, 139 AD3d 476, 476 [1st Dept 2016]).

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that that branch of defendant Mulberry Development LLC's motion for summary judgment seeking dismissal of Ziya Restaurant Inc.'s first cause of action for breach of contract is granted to the extent that Ziya Restaurant Inc. seeks $350,000 based on the settlement agreement between defendant Mulberry Development LLC and non-party 79 Madison LLC dated August 29, 2016, and it is otherwise denied; and it is further

ORDERED that that branch of defendant Mulberry Development LLC's motion for summary judgment seeking dismissal of plaintiffs' sixth cause of action for unjust enrichment is granted as against Ziya Restaurant Inc., and as against Prana Restaurant LLC to the extent Prana Restaurant LLC seeks $226,444 under the contract between Mulberry Development LLC and Ziya Restaurant Inc. dated May 1, 2015, and it is otherwise denied; and it is further

ORDERED that, within twenty days of the entry of this order, counsel for plaintiffs shall serve a copy of this order, with notice of entry, upon defendant Mulberry Development LLC and upon the Clerk of the Court (60 Centre Street, Room 141 B), who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible* at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further

ORDERED that this constitutes the decision and order of this Court.

4/23/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE