Residential Bd. of Mgrs. of Fifth Ave. Tower Condominium v Sumner
2020 NY Slip Op 31802(U)
June 4, 2020
Supreme Court, New York County
Docket Number: 652380/2017
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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THE RESIDENTIAL BOARD OF MANAGERS OF FIFTH AVENUE TOWER CONDOMINIUM,

DECISION AND ORDER

Plaintiff,

Index No. 652380/2017

- v -

MOT SEQ 004

NEIL SUMNER AND SUMNER CPA

Defendant.

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NANCY M. BANNON, J.:

I. INTRODUCTION

This action concerns a dispute between a residential condominium board and its former accountant arising from a delay in the preparation of 2015 financial statements. The complaint filed by the plaintiff, The Residential Board of Managers of Fifth Avenue Tower Condominium (Residential Board), alleges causes of action for fraud, breach of contract, and specific performance. The defendants, Neil Sumner and Sumner CPA, now move pursuant to CPLR 3212 for summary judgment (i) dismissing the complaint and (ii) on their counterclaim for breach of contract, or in the alternative, unjust enrichment. The plaintiff, The Residential Board of Managers of Fifth Avenue Tower Condominium (Residential Board), opposes the motion. The motion is granted in part.

II. BACKGROUND

Sumner is a licensed Certified Public Accountant and the principal of Sumner CPA, a sole proprietorship accounting firm formed in 1998. Fifth Avenue Tower Condominium is a thirty-four floor mixed-use building located at 445 Fifth Avenue in Manhattan. The building is comprised of retail space, commercial office space, and 174 residential units. The plaintiff is responsible for managing the common elements of the building, and reports to a master board of directors which governs the entire building and is responsible for reviewing the budget and any audits of the Residential Board.

At the beginning of each fiscal year, Brown Harris Stevens ("BHS"), the managing agent for the building, prepares an estimated budget for shared expenses and sends monthly invoices and collected payments from each commercial tenant for shared expenses. At the end of each fiscal year, the plaintiff hires an accountant to prepare an annual financial report called a "true-up" which compares the actual expenses paid by the Residential Board against the estimated budget for shared expenses.

From 1986 to about 2014, the plaintiff engaged Roger Berman (Berman) of Bloom & Streit (B&S) to audit the annual financial statements, and prepare income tax returns and true-up reports

based on books and records maintained and supplied by BHS. However, in 2014, the plaintiff voted in new officers *i.e.*, President (James Curry) and Treasurer (Moris Mostafiz), and began its search for a replacement accountant, as it felt B&S was too expensive and had issues with its accounting and bookkeeping procedures. The plaintiff delegated the task to Mostafiz, as Treasurer, to find the new accountant because he was a licensed CPA, and thus, had some expertise.

Mostafiz, in searching for a new accountant, contacted Sumner, whom Mostafiz met previously while practicing as an accountant. During their initial conversation, Mostafiz told Sumner that the Residential Board was looking for a small firm and asked him whether he could produce financial statements and tax returns for a "rather mixed, complex...condominium." Other than representing that the job would be easy, Mostafiz did not go into details of the engagement, failing to provide Sumner with any information concerning the building's different management boards, issues with the prior accountant, or B&S and its bookkeeping procedures. Mostafiz also failed to inform Sumner that he would have to answer to the Master Board, and did not ask Sumner for any references. At the end of the meeting, Sumner represented that he could handle the engagement.

Mostafiz thereafter presented Sumner at a Residential Board meeting for approval. However, the Residential Board did not approve Sumner at this meeting because some of the board members were concerned that he did not have enough experience with mixed-use condominiums. In response, Sumner told Mostafiz that he was capable of performing the engagement, referred Mostafiz to Sumner CPA's website and provided him with the names of two clients, 44 West 106 Street and 460 West Broadway, as references. Sumner did not make any further specific representations concerning his abilities or capabilities of preparing financial statements. Despite having the opportunity, Mostafiz did not look at Sumner's website or contact Sumner's references before retaining the defendants.

In November 2014, the Residential Board approved the defendants as the accountant. On or about December 15, 2014, the Residential Board executed an engagement letter wherein the defendants agreed to provide services "for the year ended December 31, 2015." The services encompassed in the engagement letter included: (i) an audit of "the financial statements of Fifth Avenue Tower Condominium...and the related notes to the financial statements;" (ii) "[a] schedule of budgeted and actual income and expenses for the year consistent with past practice;" and (iii) the preparation of "the Association's federal and state income tax returns for the year ended December 31, 2015."

The engagement letter incorporated standard language and disclaimers required under the Generally Accepted Accounting Standards ("GAAS"), which included that: (i) the defendants could not "provide assurance that an unmodified opinion will be expressed" and that "[c]ircumstances may arise in which it is necessary for [the defendants] to modify [their] opinion" (ii) "[i]f, for any reason, [the defendants] are unable to complete the audit or unable to form or have not formed an opinion, [they] may decline to express an opinion or withdraw from this engagement;" (iii) that the Residential Board would be "responsible for making all financial records and related information available to [the defendants] and for the accuracy and completeness of that information;" and (iv) would provide the defendants with "access to all information you aware that is relevant to the preparation and fair representation of financial statements."

The engagement letter also contained a fee provision which provided that the defendants estimated that their fees for the services would be "$7,500 for the audit and $1,500 for the tax return" and that the fee estimate was based on anticipated cooperation from the plaintiff's personnel and "assumption that unexpected circumstances will not be encountered during the engagement." It also stated, "[i]f significant additional time is necessary," the defendants would keep the Residential Board

informed of any problems they encountered and "that fees would be adjusted accordingly."

The defendants maintain that they could not produce an initial draft of the audited financials until October 2016 because the plaintiffs did not provide the defendants with information or documents necessary to perform the audit, including a legal confirmation letter from the plaintiff's litigation attorney, Meyer Suozzi English & Klein, P.C. (Meyer Suozzi). In addition, the defendants claim that the plaintiff asked the defendants to prioritize the completion of various ancillary services over the 2015 financial audit including a report summarizing the past four years of B&S' true-up reports, a compilation of additional electrical costs from 2009-2014, and the crafting of the Residential Board's 2016 budget. Moreover, the plaintiff claims that B&S did not turn over their work papers and documents to the defendants until January 22, 2016 because there was an ongoing fee dispute between the Residential Board and B&S, and when the defendants eventually received B&S's work papers, they were incomplete and there were no calculations provided which could substantiate the numbers in the financial statement's balance sheet, budget presented, and expense/income analysis. Due to the missing information, the defendants claim they were required to reconstruct much of B&S's work and had to

rely on BHS to make up the difference in the documents, which delayed the commencement and completion of the financial audit.

When the defendants did submit their audit report to the plaintiffs in October 2016, the plaintiff rendered a qualified opinion based upon the withheld legal confirmation letter from Meyer Suozzi, due to the possibility of ongoing litigation between the Residential Board and commercial and retail unit holders. The plaintiff suggested differing language to that in the qualified opinion, which the defendants declined to incorporate on October 31, 2016, claiming that the wording was required under the applicable accounting standards. However, the defendants stated that they were amenable to changing the wording of the note if their attorney provided more information.

The defendants claim that in response to the request for additional information counsel for the plaintiff threatened them with termination if they did not change the wording and issue an unqualified opinion. On November 10, 2016, the defendants received a legal confirmation letter from Meyer Suozzi stating that there was no ongoing litigation between the Residential Board and commercial and retail unit holders. On or about November 18, 2016, the defendants issued an unqualified 2015 financial audit report, based upon the legal confirmation letter. After additional unrelated changes on or about December

1, 2016, the Residential Board approved the 2015 financial audit report.

On December 19, 2016, the defendants asked the Residential Board for a supplemental payment of approximately $3,000.00 for additional work required to complete the engagement. The plaintiff rejected the defendants' request, claiming that the defendants had accepted the $9,000.00 in the engagement letter. The defendants then halted all work finalizing the audit report until the Residential Board paid their request for $3,000.00. The Residential Board eventually told the defendants that it would pay the additional $3,000.00 if they finalized the 2015 financial audit report and sent it to the Master Board of the building for approval by December 31, 2016.

On December 23, 2016, Curry informed the defendants via email that the Residential Board consulted with a "specialist in Manhattan condominium accounting." The email also attached a copy of the consultant’s revisions to the report, which the Residential Board wanted Sumner to copy in order to get the financial statement approved by the Master Board. However, the Residential Board did not disclose the consultant’s identity nor was Sumner given an opportunity to speak with him, review his work, or otherwise perform procedures to test his opinion. Due to those circumstances, on December 30, 2016, the defendants

sent the Residential Board a withdrawal letter. Thereafter the plaintiff filed a complaint with the AICPA, and three weeks later, on May 3, 2017, filed the instant action, alleging three causes of action for fraud, breach of contract, and specific performance. On May 22, 2017, the defendant answered the complaint and alleged a counterclaim for breach of contract or, alternatively, for unjust enrichment.

III. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of

law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

B. First Cause of Action for Fraud

The defendants establish their entitlement to summary judgment dismissing the plaintiff's first cause of action for fraud. To establish entitlement to summary judgment dismissing a cause of action for fraud, a defendant must demonstrate either that 1) it did not make a material representation that was false; 2) it did not have knowledge of the falsity of the statement or an intent to deceive the plaintiff; 3) the plaintiff did not justifiably rely on the representation; or, 4) plaintiff did not suffer damages as a result of the representation. See New York Univ. v Continental Ins., 87 NY2d 308 (1995); J.A.O. Acquisition Corp. v Stavisky, 18 AD3d 389 (1st

Dept. 2005); Cohen v Houseconnect Realty, 289 AD2d 277 (2nd Dept. 2001).

In regard to the fraud cause of action the defendants submit, *inter alia*, defendant Sumner's deposition transcript, in which he states that based upon his thirty years' experience as an accountant and having performed audits for other clients' mixed-use buildings, he believed he was capable and ready to prepare audited financial statements and tax returns for the plaintiff after his discussions with Mostafiz.

The defendants also submit and rely upon the deposition transcript of Moris Mostafiz, the plaintiff's treasurer stating that he only asked Sumner whether he could produce financial statements and tax returns for a "rather mixed, complex ... condominium," and represented that the job would be easy, without going into details of the engagement, or providing Sumner with any information concerning the building's different management boards, issues with the prior accountant, or B&S and its bookkeeping procedures. Mostafiz' deposition transcript also states that neither he nor any other member of the plaintiff or any of their affiliates checked Sumner's references and previous clients, asked him for any previous work product, or made any attempt at all to determine whether he was suited for the job. Notably, no testimony or other proof was produced to show that

Sumner ever held himself out as an expert or specialist in New York City mixed-use condominium buildings.

These submissions demonstrate that Sumner did not make a misrepresentation to the plaintiff. Sumner's representation that he was capable and ready to prepare audited financial statements and tax returns for plaintiff were not an assertion of fact, but rather a professional opinion as to his capability to perform the work. Assertions relating to one's expertise and their ability to perform work, to the extent that they do not violate any professional or ethical standards, are merely opinions or puffery that are not actionable as a matter of law. See Jacobs v Lewis, 261 AD2d 127 (1st Dept. 1999); Schonfeld v Thompson, 243 AD2d 343 (1st Dept. 1997).

Moreover, even were Sumner's representations considered a representation of fact, which they are not, the record is devoid of any evidence that Sumner knew his statements to be false. Sumner's testimony demonstrates that he has more than thirty years' experience as an accountant and has performed audits for mixed-use buildings. Additionally, in light of Mostafiz' testimony stating that he told the plaintiff that the work was easy, Sumner's representations about his ability to do the work are attributable to the plaintiff's failure to apprise him of

the intricacies of the work that was required, not any knowing attempt to defraud the plaintiff.

Furthermore, it is well settled that a party cannot establish justifiable reliance if, in an arms-length transaction it failed to make use of the means of verification available to it. See UST Private Equity Investors Fund, Inc. v Salomon Smith Barney, 288 AD2d 87, 88 (1st Dept. 2001); Urstadt Biddle Properties, Inc. v Excelsior Realty Corp., 65 AD3d 1135, 1136 (2nd Dept. 2009). Here, the defendants' submissions demonstrate that the Residential Board did not perform any due diligence to verify Sumner's qualifications. The Residential Board was managed by competent board members, including a CPA and was also represented by outside counsel and a well-known managing agent, Brown Harris Stevens ("BHS"), the latter of which was familiar with the prior accountant's work and the Residential Board's books and financial statements. The plaintiff, or any of the other parties affiliated with the plaintiff, could have easily interviewed Sumner, asked for samples of his work, researched Sumner's credentials, or checked his references, yet they did not. As such, the defendant establishes its *prima facie* entitlement to summary judgment.

In opposition, the plaintiff only reiterates its position that Sumner's representation that he could adequately perform

the work, coupled with the fact that the work was not timely completed, constitutes a triable issue of fact with regard to the defendants' alleged fraud. For the reasons discussed herein, this is insufficient to raise a triable issue of fact, and therefore, the defendants' motion to dismiss the first cause of action for fraud is granted.

C. Second Cause of Action for Breach of Contract

The defendants fail to establish their entitlement to summary judgment dismissing the second cause of action of the complaint, alleging breach of the December 8, 2014 engagement letter. This cause of action alleges that the defendants breached the engagement agreement by (i) not producing a financial statement on or before March 15, 2016, and (ii) that withdrawing from the engagement without producing a final copy of the 2015 financial statement. To establish entitlement to summary judgment dismissing a cause of action for breach of contract, a defendant must establish either that 1) no contract existed, 2) the plaintiff did not perform under the contract, 3) the defendant did not breach the contract, or 4) the plaintiff did not sustain damages. See Harris v Seward Park Hous. Corp., 79 AD3d 425 (1st Dept. 2010).

Here, the defendants argue that the plaintiff cannot establish a breach of the engagement letter because (i) the

March 15, 2016 date in the 2015 engagement letter was not a deadline and the plaintiff delayed the 2015 financial audit by failing to provide the defendants with necessary information and prioritizing ancillary services, and (ii) the 2015 engagement letter allowed the defendants to withdraw from the engagement if the defendants could not form an opinion due to the plaintiff's delays and actions. In support of their position, the defendants submit, *inter alia*, the December 8, 2014 engagement letter between the plaintiff and the defendants, stating that March 15, 2016 is when the defendants "expect[ed].....to complete" the 2015 tax returns and 2015 financial audit, if there were no unforeseen circumstances impeding the completion of the contract, and that "[i]f, for any reason, we are unable to complete the audit or unable to form or have not formed an opinion, we may decline to express an opinion or withdraw from this engagement."

The defendants further submit Sumner’s deposition testimony, detailing the delays he faced in preparing the financial reports, and the deposition transcripts of James Curry and Moris Mostafiz corroborating specific instances in which Sumner faced difficulties in obtaining documents necessary to prepare the financial report.

Based upon these submissions, the defendants argue that as there was no definite term as to time of performance date set by the 2015 engagement letter, common-law principles dictate that the defendants were only required to issue the report in "a reasonable time," based upon the "facts and circumstances of the particular case." See Savasta v 470 Newport Assocs., 82 NY2d 763, 765 (1993). The defendants further argue that they issued the report within reasonable time due to circumstances outside of the defendants' control, specifically, B&S' delayed the production of its work papers, the Residential Board prioritizing the completion of various ancillary services, and Residential Board failing to provide the defendants with a legal confirmation from Meyer Suozzi.

However, despite the defendants' contentions, the justifications for non-consented delays in performance of a contract are issues of fact not suited for determination on summary judgment. See Corinno Civeta Construction Corp. v City of New York, 67 N.Y.2d 297 (1986); Kalish-Jarco Inc. v. City of New York, 58 N.Y.2d 377 (1983). Therefore, although the defendants were delayed by circumstances beyond their control, they do not conclusively establish that their performance was timely in light of these delays and summary judgment on the issue of the defendants' breach of contract for failure to timely deliver the 2015 financial statements is denied.

Inasmuch as the defendants also claim that they were also justified in withdrawing from the engagement letter due to the pressures that they felt in issuing an unqualified financial report, it is well settled that a party who prematurely terminates a contract is in breach thereof unless the justifications for the termination are made in good faith. See Elkoulily v New York State Catholic Hospital Plan, 153 AD2d 768 (2nd Dept. 2017); Legend Autorama v Audi of America, 100 AD3d 714 (2nd Dept. 2012).

The defendants argue that they justifiably withdrew from the engagement in good faith because the Residential Board threatened Sumner's ability to perform an independent audit by threatening to terminate Sumner on at least two occasions and, on two other occasions, urging Sumner to adopt language from an unknown accountant consultant without allowing him to review their credentials. Based upon their submissions, the defendants established *prima facie* that it withdrew from the engagement on a good faith basis.

However, in opposition, the defendants raise a triable issue of fact inasmuch as they allege that the defendants did not withdraw because of any circumstances preventing them from performing an independent audit, but rather withdrew over a dispute regarding compensation. In support, the plaintiff's

point to various excerpts from Sumner's deposition testimony where he admitted that the defendants halted all work until the Residential Board paid their request for $3,000.00 in excess of what was agreed to in the engagement letter. As such, the defendants raise a triable issue of fact as to whether the defendants' withdrawal was in bad faith, and the defendants' motion for summary judgment dismissing the second cause of action is denied.

D. Third Cause of Action for Specific Performance

The defendants move for summary judgment dismissing the third cause of action which seeks specific performance directing the defendants to turn over certain documents regarding their work for the plaintiff. The defendant argues that the cause of action should be dismissed on the ground that in its verified supplemental bill of particulars, the plaintiff concedes that that request for relief is now moot. The plaintiff does not oppose this portion of the defendants' motion, and therefore fails to raise a triable issue of fact. As such, the plaintiff's third cause of action is dismissed.

E. Counterclaim for Breach of Contract or, Alternatively, Unjust Enrichment

The defendants move for summary judgment on their counterclaim for breach of contract, or alternatively, for

unjust enrichment is denied. The defendants assert that it is undisputed that the plaintiff denied the defendants' October 21, 2016 request for $3,000.00 in supplemental payment. In support of their motion, the defendants submit, *inter alia*, the engagement letter, the defendants' timesheets reflecting that approximately 300 hours were spent working for the plaintiff, and Sumner's deposition testimony. The engagement letter between the plaintiff and the defendants states that the total scope of the work is estimated to be approximately $9,000.00 based upon Sumner's hourly billing of $200.00 and his staff's hourly billing of $100.00, and that the Residential Board agreed to compensate the defendants "[i]f significant additional time is necessary."

While these submissions appear to demonstrate that the defendants worked significantly more than was anticipated under the engagement letter due, in part, to the delays and additional requests of the defendants by the plaintiff, the plaintiff correctly notes that excerpts in Sumner's deposition testimony show that the defendants were compensated for services over and above the $9,000.00 specified in the engagement letter. Additionally, the defendants fail to specify which of the 300 hours in the timesheets they submitted in support of this motion they believe are unpaid.

Finally, as a general rule, where a party seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). That rule applies here to defeat the defendants' unjust enrichment counterclaim.

IV. CONCLUSION

In light of the court's disposition of the defendants' motion for summary judgment, the only issues left for trial are whether any party breached the contract and, if so, the amount of damages due.

Accordingly, and for the reasons set forth herein, it is

ORDERED that the motion of the defendants Neil Sumner and Sumner CPA for summary judgment pursuant to CPLR 3212 dismissing the complaint and and in granting their counterclaim against the plaintiff is granted to the extent that the first cause of action for fraud and the third cause of action for specific performance are dismissed, and the remainder of the motion is denied; and it is further,

ORDERED that the parties are to contact chambers on or before July 15, 2020 to schedule a settlement conference.

This constitutes the Decision and Order of the court.

Dated: June 4, 2020 ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON