Core Dev. Group LLC v Spaho
2020 NY Slip Op 33598(U)
October 28, 2020
Supreme Court, New York County
Docket Number: 651478/2019
Judge: W. Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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CORE DEVELOPMENT GROUP LLC,

Plaintiff,

- v -

NICK SPAHO, FATION SPAHO, CORE MANAGEMENT NY, LLC

Defendant.

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INDEX NO. 651478/2019

MOTION DATE 01/09/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISS.

Plaintiff Core Development Group, LLC ("Plaintiff") brings this action for breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, and unjust enrichment against Defendants Besnick and Fation Spaho.[1] Defendants move to dismiss for failure to state a claim and because the claim for conversion is barred by the statute of limitations. The motion has been fully submitted.

BACKGROUND

This case stems from an alleged breach of contract by the Spahos to repay to Plaintiff certain rent payments, plus penalties and interest. Plaintiff is unable to definitively allege whether these rent payments were either "uncollected [by the Spahos in their capacity as building managers] or collected and not remitted[.]" (NYSCEF Doc No. 11 at ¶ 23.)

[1] The parties have agreed to the dismissal of Core Management, LLC as a Defendant in this case. (NYSCEF Doc No. 24 at 3.)

Plaintiff is a builder and developer of residential properties that also served as the managing company for several of its condominium buildings. In 2008, it hired the Spahos to oversee the management side of its business. Plaintiff alleges that the Spahos served without incident until 2014, when an IRS audit revealed that the Spahos had failed to collect over $545,000 in rental income owed to Plaintiff, despite submitting financial records in 2011 and 2012 reflecting occupancy and rent collection rates of 100%. In addition, Plaintiff alleges that the Spahos owe it another $600,000, representing penalties and interest.

Plaintiff alleges that the Spahos "promised and agreed to 'cover' and 'make good' on the missing funds 'no matter how long it took,'" and that Plaintiff relinquished its right to commence an action seeking recovery of the missing funds as consideration. (NYSCEF Doc No. 11 at ¶ 24.)

DISCUSSION

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

"To set forth a breach of contract claim, plaintiff must allege the existence of a contract, performance by plaintiff, failure to perform by defendant, and damages." (*Rubin v Sabharwal*, 2018 WL 984844, at *4 [Sup Ct, NY County 2018], citing *Noise in the Attic Productions, Inc. v London Records*, 10 AD3d 303, 304 [1st Dept 2004].)

Here, Defendants argue that Plaintiff fails to adequately allege the existence of a contract between the parties because it fails to demonstrate that the material terms of the purported contract were definitively agreed upon. (NYSCEF Doc No. 18 at 12.) Specifically, Defendants argue that Plaintiff's articulation of the very nature of the contract is impermissibly vague due to the way that the underlying funds are characterized. (*See* NYSCEF Doc No. 11 at ¶ 26 ["Despite these apparent efforts by the Spahos to recover some of the missing funds from tenants Plaintiff has no way of knowing if the missing funds were never collected, or if all or a portion of these rents were collected by the Spahos and never remitted to Plaintiff."] Further, Defendants argue that there is no signed writing memorializing the alleged oral contract, and that the Amended Complaint alleges "no date; no parties; no amount due; no deadline(s); no interest; no payment schedule; no termination clause; and no consideration." (NYSCEF Doc No. 18 at 12.)

Plaintiff responds by submitting a September 2016 email chain between Joshua Guberman, the principal of Core Development, and the Spahos, relying on one sentence in particular: "Nevertheless, as we keep working on clearing this, we and you for that matter can not be bogged down with this and continue prospering and us on the other hand building our new business further so that we can be financially successful and if anything is not recovered make up for it in the future as we have discussed and promised." (NYSCEF Doc No. 24, Jan. 9, 2020 Trans., at 12, quoting NYSCEF Doc No. 20 at 7.)

However, in the context of the entire email chain, this quote does not demonstrate that the parties entered into an enforceable contract. Rather, the emails merely show the parties discussing the amount of rental arrears still owed by certain tenants that the Spahos were working "to get covered, collected etc." in court proceedings against the tenants who actually owed those arrears. (NYSCEF Doc No. 20 at 6.) Additionally, Guberman inquires as to the status of "clear and specific

new instructions and guidelines for our tenants" in response to the issue of the nonpayment of rent by certain tenants. (*Id*. at 7.) These emails do not demonstrate that the Spahos agreed to be personally liable for the rental arrears, they simply demonstrate that the Spahos were attempting to collect outstanding rent, which was their job at the time. Thus, there is no "manifestation of mutual assent to essential terms," as there are no essential terms set forth in the emails and there is no manifestation of mutual assent. (*Express Industries and Terminal Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589-90 [1999].)

Further, there was no valid consideration given by Plaintiff because it's alleged agreement to forbear commencing a legal action against the Spahos for failing to collect rent is "nothing more than a promise not to sue for the failure to fulfill the same promise that [it] relies upon as forming the basis of the oral contract—" namely, the Spahos' promise to collect rent. (*Robert v Bango*, 146 AD3d 1101, 1102 [3d Dept 2017].)

Next, the claim for breach of the implied covenant of good faith and fair dealing is dismissed as duplicative of the breach of contract claim because it is based on the same operative facts. (NYSCEF Doc No. 11 at ¶ 40 ["Defendants made an implicit covenant of good faith and fair dealing in the course of performance that Defendants would not deprive Plaintiff of the right to … receive the rents and other fees due it from the tenants of the Rental Buildings"]; (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 104-105 [1st Dept 2014] ["[w]here a good faith claim arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed].) Further, the implied covenant is only breached "when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." (*Jaffe v Paramount Comms. Inc.*, 222 AD2d 17, 22-23 [1st Dept 1996].) Here, there is no contract between the parties.

Lastly,[2] the claim for unjust enrichment is likewise dismissed. "The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff." (*One Madison FM, LLC v 18 East 23rd Street Realty Company LLC*, 2013 WL 582256, at *1 [Sup Ct, NY County 2013], quoting *Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 [2012].) This throwaway claim is comprised of two sentences of bare conclusory allegations and the court notes that Plaintiff is still unable to articulate whether the Spahos actually held onto the missing rents, or merely failed to collect them. (*Id*.) Thus, there is not even a specific allegation that the Spahos were enriched to the Plaintiff's detriment. Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss the complaint is granted and the complaint is dismissed in its entirety as against all Defendants, with costs and disbursements to Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the Defendants.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

10/28/20							
DATE						**W. FRANC PERRY, J.S.C.**	
CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**

[2] Plaintiff is not opposing the part of the motion to dismiss the conversion claim based on the statute of limitations. (NYSCEF Doc No. 24 at 16, lns. 2-8.) Thus the conversion claim is dismissed.