SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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PETER LENTZ,

Plaintiff,

- v -

JAHANSHAH JOSH NAZIMAYAL, RUGS AND KILIM CORP.

Defendant.

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INDEX NO. 161300/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for summary judgment is denied and the cross-motion by defendant to amend to add a counterclaim is granted.

Background

Defendants are rug dealers and plaintiff has a Persian Mahal rug. This case is about a consignment agreement dated June 21, 2011 in which defendants acknowledged receiving plaintiff's rug and agreed to try to sell it for a 20% commission. The agreement, on defendants' letterhead, estimates that the rug "as is" is probably worth $18,000 but if defendants were to wash the rug and do some minor repairs, the rug would likely be sold for between $25,000 and $35,000. Finally, the agreement provides that the cost of washing (approximately $2,000) plus the cost of minor repairs caused by washing, would be recouped by defendant from the sales price.

Plaintiff states that in 2019, defendants told him that they were unable to sell the rug and plaintiff asked for the rug back. Defendants refused unless plaintiff paid $9,100 for expenses incurred to wash and repair the rug. Plaintiff insists that defendants never told him they had this amount of work done on the rug nor did he ever give authorization for such expensive repairs. Plaintiff says he offered to pay defendants $2,000 for the wash but this was rejected. He also observes that the rug was recently put on sale for $80,000.

Plaintiff's claim is that he was never supposed to pay anything for the washing of the rug unless it was sold. He brings causes of action for breach of contract, breach of fiduciary duty and conversion. He claims that defendants have no right to retain the rug and that plaintiff is entitled to damages for the rug.

In opposition and in support of the cross-motion to amend, defendants point out that they expended financial resources to wash the rug and prepare it for sale. According to defendant Nazimayal, he spent $3,100 for an antique wash on the rug in addition to $6,000 in repairs by an expert from Pakistan and others in New York. Defendants' contention is that plaintiff has failed to account for the money they expended to clean and restore the rug and it would be wholly inequitable to just give the rug back to plaintiff. Defendants move for leave to amend the answer to assert a counterclaim for unjust enrichment based on the expenses they incurred to wash and fix the rug.

In reply and opposition to the cross-motion, plaintiff contends that none of the issues raised by defendants are legitimate defenses to the claim in the cause of action. Plaintiff points out that defendants could raise the issue of unjust enrichment in a separate action or as an offset to damages awarded plaintiff in a subsequent trial.

In reply to the cross-motion, defendants stress that if plaintiff made the repairs to the rug, it would have cost him well over $26,000 and that defendants' relationship with experts allowed them to fix the rug at a greatly reduced cost.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court's analysis starts with the consignment agreement. It states that "This is to acknowledge that we have received a Persian Mahal piece approximately 18x22 to be sold in our showroom. We are pricing it as is for $18,000 from which a commission of 20% will be paid out to rug & Kilim and the remainder will be paid out to you. In the event that antique washing is done, we estimate that the piece could be sold between $25,000 to $35,000, from which a commission of 20% would be paid out to rug & Kilim and the balance be issued to you. rug & Kilim will pay for the wash which is approximately $2,000 and any minor restorations caused by washing, to be reinstated once the piece is sold. Should you have any questions or concerns please feel free to contact me" (NYSCEF Doc. No. 25).

Unfortunately, the rug did not sell and the agreement does not say what happens if the rug does not sell after defendant advanced funds for cleaning and repairs. And that is exactly the issue here. Quite fortunately, however, the rug is still available to return; it has not been destroyed or damaged.

Certainly, if plaintiff demanded his rug back the week after defendants spent the money to clean and repair it, no one would expect defendants to hand it over without being paid back for their expenditures. The dispute would be about how much defendants were entitled – what did they spend, was it authorized (impliedly or expressly), was it reasonable, etc. The fact is that even though years have passed, the inquiry is the same, although the passage of time may work in plaintiff's favor because obviously the cleaning and repairs did not work to sell the rug within a reasonable time.

And so this is a case about how much, if anything, plaintiff must pay defendants in order to get his rug back. At one extreme, it may be nothing because defendants, who drafted the agreement, only provided for recouping expenses out of sale proceeds; in that event, it doesn't

matter how much defendants spent – it could be chalked up to defendants' lost investment, made in trying to earn a bigger commission. On the other extreme, it could be every penny defendants spent plus interest, especially if there was any communication with the plaintiff before he demanded the rug back, on the basis that the repairs were reasonable and necessary to preserve the integrity of the rug, without which the rug would have little value.

To put this in perspective, the amount in dispute here is less than ten thousand dollars. Plaintiff is entitled to his rug back and will have to pay defendant between zero and $9,100 plus interest.

However, in this action, plaintiff has not asked for the rug back – in essence, he wants to force the defendants to buy the rug. Defendants never offered to buy the rug – they agreed to sell it for a commission. They are willing to give back the rug but don't want to chase the plaintiff for the expenses they claim. Defendants have sought to amend the complaint to sue for unjust enrichment- that amount probably should be capped at the $9100 (plus interest, etc.) because defendants have been unable to sell the rug for any price.

Plaintiff has taken the position that defendants would be entitled to raise the expenses they incurred in an effort to sell the rug as an offset to any damages that plaintiff might be entitled to collect. But the Court finds that it would be inappropriate to force the defendants to buy a rug that they took on consignment and are willing and able to return. Thus, it makes sense that plaintiff pay whatever the finder of fact determines that defendants are entitled to recoup.

Summary

The positions of the parties are clear. Plaintiff's theory, made clear in the email thread he attached in support of the motion (NYSCEF Doc. No. 14), is that while he recognizes the rug might require an investment of $2,000 for washing, he would not have agreed to expend an additional $7,100. In other words, plaintiff believes that defendants incurred extraordinary expenses without first receiving his authorization. The goal of the consignment agreement was for defendants to sell the rug, not to rack up expenses that plaintiff would have to repay especially in the event that the rug did not sell. Moreover, plaintiff insists that the expenses were to be recouped from the sale of the rug, not by him.

And defendants' view is that they used all of their expertise and decades in the industry to prepare the rug for sale and to try to sell the rug. They contend they used their connections to have the rug cleaned and repaired at below market value and they should be compensated for these expenses. That is why they want to add a counterclaim, which states a valid cause of action.

The trier of fact will determine how much, if anything, plaintiff must pay defendant. In the meantime, defendant must keep the rug stored in a safe place; if the rug deteriorates and is not in good condition, then it would not be available to return and the plaintiff's damages would be quite different. In that case, the plaintiff may make another motion.

The parties may conduct extensive discovery and/or request a settlement conference. This Court is available for a settlement conference before, during or after discovery. The Court will schedule a discovery conference in this decision; if the parties desire a settlement conference, kindly contact the part clerk (tmmaser@nycourts.gov).

Accordingly, it is hereby

ORERED that the motion by plaintiff is denied and the cross-motion by defendants to add a counterclaim is granted and plaintiff shall respond pursuant to the CPLR.

Remote Discovery conference: April 28, 2021.

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01/08/2021
DATE

ARLENE P. BLUTH, J.S.C.

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