

VM Archdesign, Inc. v 58 E. 1st LLC

2021 NY Slip Op 30090(U)

January 11, 2021

Supreme Court, Kings County

Docket Number: 512124/2019

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS: PART 17

Index No.: 512124/2019

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 VM ARCHDESIGN, INC. & JHON A. VELESACA,

Motion date: 11/18/20

Mot. Seq. No.: 01 & 02

Plaintiffs,

- against -

DECISION AND ORDER

58 EAST 1ST LLC d/b/a BOTICARIOS BAR &
 RESTAURANT NYC, WILLIAM APORIH, LUIS
 ENRIQUE JARDINES GOMEZ, MIGUEL A.
 ARANDA and OMAR FLORES CARRILLO,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motions 01 and 02) 20-27, 29, 30, 33, and 34 were read on this motion for summary judgment.

The defendants move to dismiss the Amended Complaint in lieu of an Answer, based on CPLR §§ 3211(a)(1) and (a)(7); treating this motion as one for summary judgment pursuant to § 3211(c); transferring this action to a court of lower jurisdiction pursuant to CPLR § 325(d); and an enlargement of time to file an Answer, pursuant to CPLR § 3012(d), in the event that the Court should deny the defendants' dismissal motion. This action arises from a dispute concerning fees allegedly owed to the plaintiffs by the defendants for construction work/services performed on Boticarios Bar & Restaurant (hereinafter Boticarios). The plaintiffs cross move for summary judgment. For the reasons set forth below, the defendants' motion is granted, only as to that prong of the motion which seeks an enlargement of time to file an Answer, and the remainder of the defendants' motion is denied. The plaintiffs' cross motion is denied as premature.

In or about August of 2017 an amended operating agreement between the plaintiff, John Velesaca (hereinafter Velesaca) the sole equity holder in VM Archdesign, Inc., and the defendants was executed. The agreement also involved a non-party, Magali Jaramillo, who worked under the supervision of Velesaca in performing the agreed upon work and services. Velesaca and Jaramillo were made members of 58 East 1st LLC by entering into the operating agreement with the defendants, whereby each received a 6% equity interest in exchange for the performance of construction services on behalf of Boticarios. According to the plaintiffs, an additional term of the agreement was that two individual "cash investments" of \$15,000 (for a total of \$30,000) was to be made – one payment by Velesaca and the other by non-party Jaramillo. A document dated September 29, 2017 itemizes the work to be performed by the plaintiffs and the valuation of those services, which was agreed to be \$80,000.

According to the plaintiffs, in December of 2017 the defendants "unilaterally" doubled the cash capital contribution from \$30,000 to \$60,000. No payment was made by either Velesaca or Jaramillo. Thereafter, there was a breakdown in communication and this action was

commenced in May of 2019. In June 2019 the restaurant was allegedly evicted for nonpayment of rent.

In support of their motion the defendants submit the Amended Complaint, the amended operating agreement of August 2017, the September 29, 2017 itemization of services to be rendered by the plaintiffs, and the affidavits of defendants Miguel Aranda and William Aporih, managing members of defendant 58 East 1st Street LLC.

The Complaint alleges breach of contract; breach of good faith/fair dealing; rescission of the operating agreement; account stated, unjust enrichment and quantum meruit. The Complaint also seeks an accounting and a declaratory judgment requiring the defendants to take necessary steps to terminate/ revoke a liquor license Velesaca filed on behalf of the defendants which, upon information and belief, expired in December of 2019. In their moving papers, the plaintiffs acknowledge that the declaratory judgment relief sought in the Amended Complaint is now moot as an online search has revealed that the liquor license has expired.

The defendants argue for dismissal of the first cause of action for breach of contract claiming that there cannot be a valid breach of contract claim since the contract remains in effect, and that Velesaca and Jaramillo still owe \$15,000 each. According to the defendants, since the LLC is defunct, has judgments against it and there are no assets to liquidate, it is not a valid claim for breach of contract.

The defendants assert that the second cause of action alleging lack of good faith and fair dealing should be dismissed because it is “misguided,” and would require a showing that the defendants prevented the performance of the contract. According to the defendants, since Velesaca agrees that he performed the work for the equity grant, and no benefits have been withheld from him by the LLC, this cause of action must fail. As to the third cause of action, the defendants do not dispute that Velesaca is entitled to an accounting, however the defendants claim that they are not in possession of the documents and that they have made repeated requests of their accountant to produce them. The defendants believe the documents may have been “lost” when Boticarios was evicted by the landlord. The fourth cause of action seeks to rescind the operating agreement. The defendants contend that it should be dismissed because Velesaca signed an operating agreement in which he would receive a 6% equity interest, which was given to him, and he cannot now ask to be paid upfront because “this is simply not how contract law works.”

The defendants assert that the equity causes of action, i.e. account stated, quantum meruit and unjust enrichment, should be dismissed because there is no dispute as to the membership and percentage contained in the operating agreement, which the parties agree is valid, and therefore the causes of action are duplicative of the breach of contract cause of action. The defendants maintain that the eighth cause of action seeking a declaratory judgment should be dismissed because the liquor license will have expired months before any decision on this motion will be rendered, and therefore will be moot. As the plaintiffs concede, this cause of action is now moot. Lastly, the defendants contend that based on the affidavits of Miguel A. Aranda and William Aporih alone, the Complaint should be dismissed.

The plaintiffs oppose the motion, arguing that the Complaint should not be dismissed because the plaintiffs' allegations, when given the benefit of every possible inference, establish that the causes of action alleged in the Amended Complaint exist. The plaintiffs further assert that the motion should not be treated as one for summary judgment as it would be premature, and the defendants have not yet filed an Answer.

A party seeking dismissal pursuant to CPLR § 3211(a)(1) on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401 (2d Dept 2009); *Epifani v Johnson*, 65 AD3d 224 (Dept 2009); *see also Leon v Martinez*, 84 NY2d 83 (1994). A motion to dismiss based on CPLR § 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Porat v Rybina*, 177 AD3d 632 (2d Dept 2019); *see also Phillips v Taco Bell Corp.*, 152 AD3d 806 (2d Dept 2017); *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002). However, not all printed materials constitute documentary evidence under CPLR § 3211(a)(1). *See Fontanetta v John Doe 1*, 73 AD3d 78 (2d Dept 2010). In order to be considered documentary, the evidence must be "unambiguous and of undisputed authenticity" and "essentially unassailable." *Torah v Dell Equity, LLC*, 90 AD3d 746, 746-747 (2d Dept 2011) (internal quotation marks omitted); *see also Yue Fung USA Enterprises, Inc. v Novelty Crystal Corp.*, 105 AD3d 840, 841-842 (2d Dept 2013).

Materials that clearly qualify as "documentary evidence" include "documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable." *J.P. Morgan Chase Bank, N.A. v Klein*, 178 AD3d 788, 790 (2d Dept 2019) (internal quotation marks omitted); *see also Sands Point Partners Private Client Group v Fidelity Natl. Tit. Ins. Co.*, 99 AD3d 982, 983-984 (2d Dept 2012); *Fontanetta* at 84-85, quoting Siegel; Practice Commentaries; McKinney's Cons Laws of NY; Book 7B; CPLR C3211:10; at 22. Affidavits do not constitute "documentary evidence" upon which a motion to dismiss may be made on the ground of a defense founded upon documentary evidence. *Flushing Sav. Bank, FSB v Siunyalimi*, 94 AD3d 807, 809 (2d Dept 2012). "An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit." *Phillips* at 807.

In considering a motion to dismiss a Complaint pursuant to CPLR § 3211(a)(7), a court "must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018) (internal quotation marks omitted); *Nonnon v City of New York*, 9 NY3d 825, 827 (2007) (internal quotation marks omitted). "[A]ffidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiffs have] no cause of action." *Phillips* at 808 (internal quotation marks omitted). Moreover, affidavits received on a motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support of the pleading. *Anglero v Hanif*, 140 AD3d 905 (2d Dept 2016); *see also Hinrichs v Youssef*, 214 AD2d 604 (2d Dept 1995). The motion must be denied "unless it has been shown

that a material fact claimed by the [plaintiffs] is not a fact at all and unless it can be said that no significant dispute exists regarding it.” *Porat* at 634 (internal quotation marks omitted).

The defendants’ submissions are insufficient to meet the standards required under CPLR §§ 3211(a)(1) and (a)(7) as well as prevailing case law for dismissal of a Complaint. Contrary to the defendants’ assertions, the affidavits of Miguel Aranda and William Aporih are not considered “documentary evidence” under CPLR § 3211 (a)(1) as their contents can be controverted by other evidence. *See Phillips* at 807. Likewise, the affidavits are insufficient to warrant dismissal under CPLR § 3211(a)(7) because they cannot be considered to determine whether there is evidentiary support for the pleading. The affidavits are conclusory and self-serving, and do not provide a basis in fact or law to grant dismissal. *See Anglero*, 140 AD3d 905. Moreover, the amended operating agreement and the September 29, 2017 document itemizing the terms of the work/services to be performed by the plaintiffs, do not support dismissal of the Complaint. Affording the Complaint a liberal construction and accepting all facts as alleged in the Complaint as true, and according the plaintiffs the benefit of every possible inference, the defendants’ motion for dismissal must be denied. *See Lubonty* at 963. Likewise, the defendants’ request for their motion to be treated as one for summary judgment must also be denied as it is premature, and in any event there are clearly issues of material fact which exist that cannot be resolved by such a motion. *See CPLR § 3212(a); Zuckerman v City of New York*, 49 NY2d 557 (1980).

Plaintiffs have cross moved for summary judgment on the causes of action for account stated, quantum meruit and/or unjust enrichment and/or alternatively, to the extent that a contract was formed, restoring plaintiffs to the same position prior to the underlying events and awarding damages on breach of contract, breach of good faith and fair dealing and/or rescission of the amended operating agreement; finding that, *inter alia*, the defendants breached the contract and are liable in damages; and/or awarding plaintiffs an accounting or be subject to sanctions to the extent that the accounting records have “disappeared” or were destroyed subsequent to the preservation notice; and attorneys’ fees. In support of the motion the plaintiffs rely on the facts as recited by plaintiff Velesaca in the Amended Complaint, based on his “firsthand knowledge.”

The defendants oppose the motion, asserting that the plaintiffs’ summary judgment motion is premature as issue has not yet been joined as required by CPLR § 3212(a). The plaintiffs’ summary judgment motion must be denied. “A motion for summary judgment may not be made before issue is joined (CPLR 3212[a]) and the requirement is strictly adhered to.” *Gaskin v Harris*, 98 AD3d 941, 941 (2d Dept 2012), quoting *City of Rochester v Chiarella*, 65 NY2d 92, 101 (1985) (internal quotation marks omitted). *See also Union Turnpike Assoc., LLC v Getty Realty Corp.*, 27 AD3d 725 (2d Dept 2006).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the defendants' motion is granted, only to the extent that the defendants are permitted to serve an Answer within thirty (30) days of the date of this order. The motion is otherwise denied; and it is further

ORDERED, that the plaintiffs' cross motion is denied.

This constitutes the decision and order of the Court.

Dated: January 11, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.