

FM Cost Containment, LLC v +42 W 35th Prop. LLC

2021 NY Slip Op 30150(U)

January 8, 2021

Supreme Court, New York County

Docket Number: 653515/2020

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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FM COST CONTAINMENT, LLC,
Plaintiff,

DECISION AND ORDER

- v -

Index No. 653515/2020

+42 W 35TH PROPERTY LLC, MEADOW CAPITAL
MANAGEMENT LP, and HOTEL ASSET VALUE
ENHANCEMENT, INC.,

MOT SEQ 001

Defendants.
-----x

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking damages arising from causes of actions sounding in breach of contract, breach of a verbal or implied agreement, promissory estoppel, and unjust enrichment, the defendants move pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the complaint as against the defendants Meadow Capital Management, LP ("Meadow"), and Hotel Asset Value Enhancement, Inc. ("Hotel AVE"), and to dismiss the second, third, and fourth causes of action as against the defendant +42 W 35th Property, LLC ("+42"). The plaintiff opposes the motion. For the following reasons, the motion is granted.

II. BACKGROUND

The following allegations are drawn from the plaintiff's complaint, unless otherwise noted, and are assumed to be true

solely for purposes of this motion. See Grassi & Co. v Honka, 180 AD3d 564 (1st Dept. 2020).

The plaintiff, a limited liability company that assists clients in seeking recovery of overpaid sales and use taxes, was initially contacted by David Israel, Senior Vice President of Hotel AVE, to discuss the provision of its services for properties controlled by Meadow, including +42. Israel indicated to the plaintiff that Hotel AVE had an ownership interest in at least one of the Meadow properties. Thereafter, Meadow contacted the plaintiff to discuss services to be provided with regard to an audit by New York State of +42. The plaintiff's CEO met with various representatives from Meadow and Hotel AVE, including Israel and Adam McMaster, Meadow's CFO and +45's authorized signatory, to discuss the services the plaintiff would provide and the manner in which the services would be paid for.

On July 12, 2016, the plaintiff entered into a written professional services agreement (the "Services Agreement") with +42. Pursuant to the Services Agreement, which has been submitted by the defendants, the plaintiff agreed to provide +42 services to reduce and/or recover sales and use taxes, interest, and penalties. The Services Agreement provided that it constituted "the entire Agreement between [+42] and [the plaintiff]," and that "no promises or representations, except as

contained in the [Services] Agreement, [had] been made to [+42].”

The plaintiff performed services for +42 that entitled the plaintiff to a 30% contingency fee under the Services Agreement. The total amount due to the plaintiff under the Services Agreement was \$710,800.52. However, the plaintiff has not been paid. Israel and McMaster have engaged in negotiations to reduce the fee with the plaintiff.

The plaintiff avers that, although the Services Agreement was only signed on behalf of +42, the plaintiff performed work for all of the defendants because they are operated as a single entity and are under common control. Specifically, the plaintiff states that “Meadow is the owner and/or controls the operations of +42” and Hotel AVE also has an ownership interest in +42. The plaintiff points to the circumstances surrounding the negotiation of the Services Agreement as evidence of its claim. Accordingly, the plaintiff commenced this action stating claims sounding in breach of contract, breach of a verbal or implied agreement, promissory estoppel, and unjust enrichment as against all defendants.

III. LEGAL STANDARDS

A. CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the

documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) quoting Fontanetta v John Doe 1, supra.

B. CPLR 3211(a)(7)

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-

Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

IV. DISCUSSION

The defendants move to dismiss all of the plaintiff's claims as against Meadow and Hotel AVE, and all of the plaintiff's quasi-contractual claims as against +42. The defendants argue that dismissal is warranted due to the existence of a written contract governing the subject matter from which the plaintiff's claims arise, and the fact that the only signatories to that contract were the plaintiff and +42. The plaintiff counters that it has pleaded viable contractual and quasi-contractual claims against Meadow and Hotel AVE based on, *inter alia*, their role in negotiating the Services Agreement and the plaintiff's assertion that the defendants are all "interchangeable corporate entities." Further, the plaintiff avers that it should be permitted to plead quasi-contractual claims in the alternative to its breach of contract claim at this early stage in the proceeding.

Upon review of the parties' submissions, the court agrees with the defendants that the plaintiff's first cause of action sounding in breach of contract, as against +42 alone, is the only viable claim in the complaint.

To sufficiently plead a cause of action sounding in breach of contract, a plaintiff must allege the existence of a contract, the plaintiff's performance thereunder, the defendant's breach, and resulting damages. See Harris v Seward Park Hous. Corp., 79 AD3d 425 (1st Dept. 2010). "Generally, a breach of contract claim cannot be asserted against a non-signatory to the contract ... unless a plaintiff pleads liability on veil piercing or alter ego theories." Array BioPharma, Inc. v AstraZeneca AB, 184 AD3d 463, 464 (1st Dept. 2020); see CWCapital Investments LLC v CWCapital Cobalt VR Ltd., 182 AD3d 448 (1st Dept. 2020); Randall's Island Aquatic Leisure, LLC v City of New York, 92 AD3d 463 (1st Dept. 2012); CDR Creances S.A. v Euro-American Lodging Corp., 40 AD3d 421 (1st Dept. 2007).

A party seeking to pierce a corporate veil or invoke an alter ego exception "bear[s] a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d 335, 339 (1998); see Cheng v Danjonro, Inc., 81 AD3d 510 (1st Dept. 2011);

Sheridan Broadcasting Corp. v Small, 19 AD3d 331 (1st Dept. 2005). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance." TNS Holdings, Inc. v MKI Securities Corp., supra at 339.

Here, the Services Agreement was plainly signed on behalf of the plaintiff and +45 only. Meadow and Hotel AVE were not signatories. Furthermore, the plaintiff fails to meet its heavy burden of showing that, even if +45 was dominated by Meadow and Hotel AVE, such control resulted in some fraud or wrong warranting liability for Meadow and Hotel AVE.

As to the plaintiff's quasi-contractual claims against Meadow and Hotel AVE, it is well-settled that "[t]here can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim." Randall's Island Aquatic Leisure, LLC v City of New York, supra at 464; see J.T. Magen & Company, Inc. v Nissan North America, Inc., 178 AD3d 466 (1st Dept. 2019); 22 Gramercy Park, LLC v Michael Haverland Architect, P.C., 170 AD3d 535 (1st Dept. 2019); Bellino Schwartz Padob Advertising, Inc. v Solaris Marketing Group, Inc., 222 AD2d 313 (1st Dept. 1995). The plaintiff cites to no binding authority to the contrary.

Though it appears there may be disagreement as to whether the plaintiff performed services entitling it to payment under

the Services Agreement's terms, there is no dispute that the Services Agreement is a valid and enforceable contract governing the subject matter of the plaintiff's claim. Accordingly, the Services Agreement bars the plaintiff's quasi-contractual claims against Meadow and Hotel AVE.

Likewise, with respect to the plaintiff's quasi-contractual claims against +45, the existence of an express contract governing the subject matter precludes recovery in quasi-contract for claims against a signatory arising out of the same subject matter. See EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11 (2005); Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); Adelaide Productions, Inc. v BKN Intern. AG, 38 AD3d 221 (1st Dept. 2007). Although an exception exists where the subject conduct is not covered by the contract, or there is a *bona fide* dispute as to the existence of the contract, neither scenario is present here. The plaintiff's quasi-contractual claims against +45 are therefore barred by the Services Agreement.

V. CONCLUSION

Accordingly, it is hereby,

ORDERED that the defendants' motion to dismiss pursuant to CPLR 3211(a)(1) and 3211(a)(7) is granted, the complaint is dismissed in its entirety as against Meadow Capital Management,

LP, and Hotel Asset Value Enhancement, Inc., and the second, third, and fourth causes of action of the complaint are dismissed as against +45 W 35th Property, LLC; and it is further,

ORDERED that the Clerk shall enter judgment accordingly; and it is further,

ORDERED that +45 W 35th Property, LLC, shall serve an answer to the first cause of action of the complaint within 21 days; and it is further,

ORDERED that the remaining parties shall appear for a telephonic preliminary conference on March 11, 2021, at 11:30 a.m.

This constitutes the Decision and Order of the court.

Dated: January 8, 2021



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