Rubin v Impagliazzo
2021 NY Slip Op 30801(U)
March 8, 2021
Supreme Court, New York County
Docket Number: 651038/2014
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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VICTORIA RUBIN, LION'S DEN, INC., Plaintiff,	INDEX NO.	651038/2014
- v -	MOTION DATE	03/03/2021
ANDREW IMPAGLIAZZO, 622W47, LLC, RAM LOUNGE, LLC, GLEN BERNARDI Defendant.	MOTION SEQ. NO.	003

DECISION + ORDER ON MOTION

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 254, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 313
were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiffs Victoria Rubin ("Rubin") and Lion's Den Cabaret, Inc. ("Lion's Den") (collectively "Plaintiffs") are former tenants of 622 West 47th Street, New York, NY 10036 ("622W47"), a commercial space that Plaintiffs intended to purchase from Defendant Andrew Impagliazzo ("Impagliazzo"), landlord and present owner of the premises, who served as managing member of Co-defendants Ram Lounge, LLC ("Ram Lounge") and 622W47 (collectively "Defendants").[1]

Plaintiffs assert five causes of action: breach of contract, reasonable value, unjust enrichment, conversion, and tortious interference with contractual relations based on Defendants' alleged failures to timely close on the premises, to obtain a permanent liquor license for all five floors of the premises, to obtain a certificate of occupancy for the premises, and to re-execute and ratify the lease.

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[1] Plaintiffs have discontinued the case as against Glen Bemardi.

The complaint seeks $1,300,000, plus interest, lost business profits, lost business assets, attorney's fees, costs and other relief. Plaintiffs move pursuant to CPLR § 3212 for summary judgment on the first, third and fourth causes of action in the Verified Complaint under the theories of breach of contract, unjust enrichment; and conversion, and for an Order pursuant to CPLR. § 3212, for Summary Judgment on Defendants' first, second, third, fourth and fifth Amended Counterclaims, under the theories of breach of contract and New York Debtor Creditor Law § 273, § 274, § 276 and § 280 (NYSCEF Doc. No. 1). In support of their motion, Plaintiffs submit the affidavit of Victoria Rubin, counsel's affirmation and a multitude of documentary exhibits.

In opposition, Defendants contend that Plaintiffs have not met their burden on summary judgment as the entire lawsuit is frivolous and that Plaintiffs have not submitted any evidence to support their claims.

Factual Allegations and Procedural History

On March 31, 2008, Defendant Ram Lounge by Contract of Sale, purchased the lease of the premises from TS47 Corp., a non-party, becoming the triple-net lessee of the Property (NYSCEF Doc. No. 201). Pursuant to another Contract of Sale, also dated March 31, 2008, Ram Lounge sought to purchase the Property from non-party Golden Horn Development, LP (which had leased the Property to TS47) (NYSCEF Doc. No. 200).

On June 30, 2008, Impagliazzo and Lion's Den entered into an Operating Agreement which formed Ram Lounge LLC and defined the members' interests as 90% for managing member Impagliazzo and 10% for member Lion's Den (NYSCEF Doc. No. 193). The Operating Agreement further stated, "The Managing Member shall have the responsibility for acquiring all

licenses and/or approvals desirable or necessary for the ownership and operation of an adult eating or drinking establishment, including but not limited to, full liquor license, cabaret license, NYC Dept. of Buildings designation as an adult establishment, PA permit, and NYS Board of Health permit." (*Id.*)

Also on June 30, 2008, Impagliazzo, Lion's Den and Ram Lounge entered into an Ownership Interest Purchase Agreement (herein "Purchase Agreement") by which, "Purchaser [Lion's Den] shall, upon execution of this agreement and completion of the various purchases contemplated herein after fulfillment of all the conditions set forth herein, own all of the ownership interest in the Company [Ram Lounge]." (NYSCEF Doc. No. 194). Further, the agreement defines the closing as, "as the date on which Seller [Impagliazzo] shall transfer all or any portion of Ownership Interest to Purchaser and on which Purchaser [Lion's Den] shall pay to Seller [Impagliazzo] the consideration set forth herein due at Closing." (*Id.*)

The Purchase Agreements states, "Conditions shall be fulfilled when the Company [Ram Lounge] has obtained all licenses desirable and/or necessary for the ownership and operation of an adult eating or drinking establishment, including but not limited to, full unrestricted liquor license with community board approval if necessary, recognizing that Purchaser [Lion's Den] is the one hundred (100%) percent owner of the Company..." (*Id.*) Additionally, the Purchase Agreement outlined four conditions that must be satisfied by the Company [Ram Lounge] before the $240,000 consideration could be released from escrow to Impagliazzo (*Id.*). The conditions specifically included that, "The Company [Ram Lounge] shall have obtained all permits and approvals for the ownership and operation of an adult eating or drinking establishment, including but not limited to, a temporary liquor license" and "The Landlord [622W47 LLC] shall have

obtained title to the real property located at 622 West 47 Street, New York, NY, having successfully consummated its contract of sale." (*Id.*)

The Purchase Agreement also states that,

> in the event that any of the foregoing conditions to Closing are not fulfilled, including, but not limited to, the rejection by the New York State Liquor Authority of the application for the transfer of the Ownership Interest from Seller to Purchaser recognizing, among other things, that Purchaser is the one hundred (100%) percent owner of the Company and that the license is applicable to the entire five (5) floors, Purchaser shall have the right to declare that it has no further obligations to Seller pursuant to this Agreement or otherwise, any Ownership Interest shall be deemed returned to Seller, and this Agreement shall be deemed null and void and the Consideration set forth in Paragraph 3 hereof shall be returned forthwith to Purchaser by the escrow agent or the Seller, depending on who then has it. In addition, and not in lieu of the foregoing remedies, the Seller shall also pay to Purchaser any costs, expenses, including, but not limited to, fees, construction labor and materials, architect's fees, and utilities, expended by Purchaser on behalf of the Company from the date of execution of this Agreement to its termination without defense or set-off. (*Id*).

On June 30, 2008, 622W47 as Landlord and Ram Lounge as Tenant entered into a Lease Agreement (herein "Lease") which stated that Ram Lounge would occupy the premises for rent of $40,000 per month with a rent credit of six (6) months free rent which equals the $240,000 provided in the Purchase Agreement (NYSCEF Doc. No. 195). The Lease states that the agreement is made effective as of the date Landlord takes title to the demised premises. (*Id.*)

Subsequently, on December 2, 2008, Lion's Den and Impagliazzo entered into an Extension and Modification Agreement (herein "Modification Agreement") which stated that due to the inability of Ram Lounge to obtain a temporary liquor license, the parties are amending the June 30, 2008, Purchase Agreement to alter the conditions (NYSCEF Doc. No. 203).

Specifically, the Purchase Agreement was extended for 180 days after Ram Lounge secures a liquor license and shifted the responsibility of obtaining that liquor license to Lion's Den (*Id.*).

Further, the parties agreed that the $240,000 Consideration stated in the Purchase Agreement would be reduced to $80,000, of which $40,000 would be used by Seller as payment of the first month's rent of December 2008 and $40,000 would be retained by Seller as the lease security deposit (NYSCEF Doc. No. 203). Additionally, payment of the monthly rent of $40,000.00 for the 12-month period starting with December 2008 shall be as follows: December. February, April. June, August, October. Rents for January, March, May, July, September and November would be waived (*Id.*).

Analysis

Summary Judgment Standard

"'The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the "light most favorable to the party opposing the motion" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or

conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

It is well established that on a motion for summary judgment, the submission of an attorney affirmation only (a person with no personal knowledge of the facts) may be considered by the court provided that the relief is based on documentary evidence relevant to the issue (*see*, *Spink v Cohen*, 156 AD2d 201 [1st Dept 1989]). Here, the relief sought is based upon the Operating Agreement, Purchase Agreement, Lease and the Extension and Modification Agreement. In addition, Plaintiffs submit Victoria Rubin's affidavit and various documentary evidence including deposition transcripts. Accordingly, the court may consider the within application submitted with an attorney affirmation.

As a threshold matter, the affidavit submitted by Victoria Rubin has been notarized out of state, in Florida, and does not include a certificate of conformity (NYSCEF Doc. No. 218). A certificate of conformity certifies that the manner in which the acknowledgment or proof was taken conforms with the laws of the appropriate jurisdiction. For an affidavit that is signed and notarized outside of New York State to be admissible, it must be accompanied by a certificate of conformity. As a result, plaintiff's failure to submit a certificate of conformity renders the affidavit insufficient. However, as discussed above, the court will consider Plaintiffs' attorney affirmation and the documentary evidence submitted.

First Cause of Action and Defendants' First Counterclaim, Breach of Contract

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiffs specifically allege that Defendants never performed by failing to timely obtain a liquor license and failing to timely take

title of the premises. Further, Plaintiffs contend that on December 11, 2008, Impagliazzo obtained a liquor license for the premises and therefore, the 180-day time limit to close was triggered.

Defendants agree that there exists a written agreement between the parties, comprised of the Purchase Agreement as modified by the Modification Agreement. However, Defendants allege that Plaintiffs' summary judgment motion is deficient in that: (i) there is no evidence that Plaintiffs paid the consideration of $240,000 to Impagliazzo for his interest in Ram Lounge because $160,000 of that sum was returned to Plaintiffs when they exhausted their capital reserves; (ii) Plaintiffs failed to perform their obligations under the Modification Agreement because they neither obtained the Liquor License nor paid rent for the premises; (iii) there is no evidence that Defendants breached the Modification Agreement; and (iv) there is neither a showing of causation nor evidence of damages.

Plaintiffs have not met their *prima facie* burden for breach of contract. Strikingly, Plaintiffs fail to adequately address the modification of the original purchase agreement and do not provide any documentary evidence of actual damages that were sustained, but instead submit a word document titled "Asset List" which purportedly reflects the expenses Plaintiffs incurred in improving the premises (Plaintiffs' Ex. N; NYSCEF Doc. No. 206). However, there are no vendor invoices, receipts or other documents submitted that would support these dollar amounts. There remains a significant question of fact as to what Plaintiffs' damages were. Accordingly, Plaintiffs' summary judgment motion as to breach of contract is denied.

Third Cause of Action, Unjust Enrichment

Plaintiffs concede that though a claim for unjust enrichment is often not sustainable in the presence of a contract, where a bona fide dispute exists as to the existence, or applicability, of a contract, the plaintiff may proceed on both breach of contract and quasicontractual theories.

"Unjust enrichment is a quasi-contract theory of recovery, and is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned' " (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], *quoting IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered' " (*Georgia Malone & Co.*, 86 AD3d at 408, *quoting Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). However, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (*Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388–389, 521 NYS2d 653 [1987]; *Samiento v World Yacht Inc.*, 10 NY3d 70, 81 [2008]).

While a claim for unjust enrichment may stand alongside a breach of contract cause of action at the pleading stage (*see Wilmoth v Sandor*, 259 AD2d 252, 254 [1st Dept 1999]), when, as here, plaintiffs allegations merely duplicate contract claims stated, a claim for unjust enrichment is not stated (*see Khurdayan v Kassir*, No. 159480/17, 2020 WL 3511498, at *4 [2020]; *Shilkoff Inc. v 885 Third Avenue Corp.*, 299 AD2d 253 [1st Dept 2002]; *Brintec Corp. v*

Akzo, N.V., 171 AD2d 440 [1st Dept 1991][recovery for unjust enrichment applies only in the absence of an express agreement]. Plaintiffs have stated that they entered into a written agreement with Defendants and Defendants similarly concede the existence of a contract. Plaintiffs have not demonstrated any facts that would entitle them to summary judgment on their claim of unjust enrichment. Accordingly, summary judgment is denied as to the unjust enrichment claim.

Fourth Cause of Action, Conversion

Plaintiffs allege that they took possession of the premises on October 2008 and proceeded to pay costs and expenses including a purchase price of $240,000, rent of $40,000 per month, deposits, equipment costs, furniture costs, construction labor and materials costs and fees, architect's fees, attorney's fees, licensing fees and costs, and utilities from October of 2008 through January of 2010. Plaintiffs argue that Defendants benefitted from at least $360,000 and as much as $1,300,000 from all of Plaintiffs' trade fixtures, equipment and furniture when Plaintiffs vacated the premises.

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]). "[A] claim to recover damages for conversion cannot be predicated on a mere breach of contract" (*Wolf v National Council of Young Israel*, 264 AD2d 416, 417, 694 NYS2d 424 [2d Dept 1999]; *see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316, 639 NYS2d 283 [1995]). Plaintiffs have failed to demonstrate a *prima facie* entitlement to judgment as a matter of law because they failed to demonstrate that Defendants "engaged in tortious conduct separate and apart from [any alleged] failure to fulfill its contractual obligations" (*New York Univ. v*

Continental Ins. Co., 87 NY2d at 316). Accordingly, Plaintiffs' motion for summary judgment as to conversion is denied.

Defendants' Second, Third, Fourth and Fifth Counterclaims

Plaintiffs move for summary judgment on Defendants' Second, Third, Fourth and Fifth counterclaims, alleging violations of New York's Debtor Creditor Law (herein "DCL") §273, §274, §276, and §280[2]. Defendants' DCL claims are premised upon their allegations and Rubin's testimony that she is the sole shareholder and owner of Lion's Den and that Lion's Den maintained its bank account with Chase Bank and that she was a signatory to that account. (*see* NYSCEF Doc. 270; Rubin Tr. at 36:21-23, 41:15-22, 176:9-11). Defendants contend that the bank statements from Chase that Plaintiffs produced in this lawsuit indicate that in February 2010, less than one month after Plaintiffs vacated the Property without allegedly paying any rent to Impagliazzo for approximately one year, Rubin withdrew more than $25,000 in cash from the Lion's Den bank account, leaving it fully depleted.

Plaintiffs argue that the DCL counterclaims are improperly pled and therefore, legally insufficient because they are made under information and belief, and that neither of the Plaintiffs is a judgement debtor of the Defendants. Moreover, Plaintiffs contend that each amended counterclaim and each allegation therein fails to name an alleged transferee and fails to assert fraud, in any factual detail whatsoever, or that the alleged transfers were made without fair consideration.

Defendants' Amended Answer and Counterclaims states,

> In or around February 2010, at a time when Lion's Den owed hundreds of thousands of dollars to Impagliazzo for rent, Rubin

[2] The court notes preliminarily that the Debtor Creditor Law was recently repealed and replaced by the Uniform Voidable Transactions Act ("UVTA") effective April 4, 2020. However, the UVTA does not apply to transfers, such as those at issue here, which occurred prior to its enactment (see Laws 2019, ch 580, § 7). Thus, the Court analyzes the Defendants' counterclaims under the version of Debtor Creditor Law which was in effect prior to April 4, 2020.

> withdrew tens of thousands of dollars from the Lion's Den account, thereby depleting Lion's Den of all cash assets and leaving the company insolvent to the detriment of creditors, including Impagliazzo. Lion's Den did not receive good and valuable consideration in return for the tens of thousands of dollars in cash that Rubin withdrew from the Lion's Den bank account. Rubin used Lion's Den to commit a wrong against Impagliazzo, including the fraudulent conveyance of tens of thousands of dollars in cash to herself to the detriment of Lion's den's creditors, including Impagliazzo. (NYSCEF Doc. No. 112, Amended Answer and Counterclaims ¶23-25)

Debtor and Creditor Law § 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent ... without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Debtor and Creditor Law § 274 states, "[e]very conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent." Neither statute requires a showing of actual motive or intent to defraud (*see Zanani v Meisels*, 78 AD3d 823, 824 [2d Dept 2010]), and therefore dispenses with the particularity of pleading under CPLR § 3016(b) (*see Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149 [2d Dept 2009]). Accordingly, Plaintiffs' motion for summary judgment as to DCL § 273 and § 274 is denied.

On the other hand, DCL § 276 states that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." It requires proof that the transferor actually intended to "hinder, delay, or defraud" any present or

future creditors (Debtor & Creditor Law § 276; *see Kreisler Borg Florman Gen. Constr. Co., Inc. v Tower 56, LLC*, 58 AD3d 694, 696, 872 NYS.2d 469; *Matter of CIT Group/Commercial Servs., Inc. v 160–09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303, 808 NYS2d 187, *quoting Berner Trucking v Brown*, 281 AD2d at 925; *Zanani v Meisels*, 78 AD3d 823, 825, 910 NYS2d 533, 535 [2010]).

Debtor & Creditor Law § 280 provides that in "any case not provided for in this article under the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause shall govern."

Defendants allege that in February 2010, when Impagliazzo was a creditor of Lion's Den, Rubin withdrew tens of thousands of dollars in cash from the Lion's Den bank account without providing any consideration in return, leaving the company insolvent and unable to pay its creditors. Defendants have not shown that Rubin had the requisite intent to defraud Impagliazzo and accordingly, Plaintiffs' motion for summary judgment as to DCL § 276 and § 280 is granted.

Conclusion

Plaintiffs' motion for summary judgment is denied as to the first, third and fourth causes of action and denied as to Defendants' second and third counterclaims. Plaintiffs' motion for summary judgment is granted as to Defendants' fourth and fifth counterclaims and those counterclaims are dismissed.

It is hereby,

ORDERED that Plaintiffs' motion for summary judgment on the first, third and fourth causes of action is denied; and it is further

ORDERED that Plaintiffs' motion for summary judgment on Defendants' second and third counterclaims is denied; and it is further

ORDERED that Plaintiffs' motion for summary judgment on Defendants' fourth and fifth counterclaims is granted, and the balance of the action shall continue.

3/8/2021
DATE

SHAWN TIMOTHY KELLY, J.S.C.

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