

Rubin v Impagliazzo
2021 NY Slip Op 30802(U)
March 11, 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,

- v -

ANDREW IMPAGLIAZZO, 622W47, LLC, RAM LOUNGE,
 LLC, GLEN BERNARDI

Defendant.
 -----X

INDEX NO. 651038/2014

MOTION DATE 03/03/2021

MOTION SEQ. NO. 004

**DECISION + ORDER ON
 MOTION**

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 255, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 312

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

Defendant Andrew Impagliazzo (“Impagliazzo”), is the landlord and present owner of the premises at 622 West 47th Street, New York, NY 10036, a commercial space that Plaintiffs Victoria Rubin (“Rubin”) and Lion’s Den Cabaret, Inc. (“Lion’s Den”) (collectively “Plaintiffs”) rented and intended to purchase. Impagliazzo also served as managing member of Co-defendants Ram Lounge, LLC (“Ram Lounge”) with Lion’s Den serving as the other member.

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.¹

¹ Plaintiffs have discontinued the case as against Glen Bemardi.
 651038/2014 RUBIN, VICTORIA vs. IMPAGLIAZZO, ANDREW
 Motion No. 004

Defendants Impagliazzo, 622W47, LLC (“622W47”) and Ram Lounge (collectively, “Defendants”) move for summary judgment, pursuant to CPLR § 3212, for an order: (i) dismissing Plaintiffs’ Complaint in its entirety; (ii) granting judgment in favor of Defendants on their counterclaim against plaintiff Lion’s Den in the amount of \$240,000 for unpaid rent, together with interest from February 1, 2009; and (iii) granting judgment in favor of Defendants and against Rubin, individually, for violation of the New York Debtor and Creditor Law (“DCL”). In support of their motion, Defendants submit the affidavit of Impagliazzo, counsel’s affirmation and a multitude of documentary exhibits.

In opposition, Plaintiffs contend that Defendants have not met their burden on summary judgment.

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]).

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 argue that Plaintiffs breached the contract by not obtaining a liquor license and not paying rent. Defendants have not sufficiently demonstrated that they are entitled to summary judgment in the breach of contract claim. There remain significant questions of material fact as to the parties' actual performance under the contracts as well as the damages sustained. Accordingly, Defendants' motion for summary judgment as to the breach of contract claim is denied.

Third Cause of Action, Unjust Enrichment

Defendants contend that Plaintiffs cannot maintain a cause of action for unjust enrichment where there is a written contract that governs the subject matter at issue.

“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. Accordingly, summary judgment is granted as to the unjust enrichment claim and it is dismissed.

Fourth Cause of Action, Conversion

Defendants contend that Plaintiffs cause of action for conversion must be dismissed as a matter of law because it is duplicative of their breach of contract claim; and that Plaintiffs do not have any possessory right or interest in the premises. In opposition, Plaintiffs allege that Defendants benefitted from all of Plaintiffs’ trade fixtures, equipment and furniture when they changed the locks and barred Plaintiffs from 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 assert 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, Defendants’ motion for summary judgment as to conversion is granted.

Defendant’s Counterclaim for Unpaid Rent

Defendants contend that Plaintiffs used and occupied the premises for 14 months, from October 2008 through January 2010 and failed to pay rent as required by the lease. Specifically, Defendants allege that the lease required Plaintiffs pay \$40,000 per month for each of February 2009, April 2009, June 2009, August 2009, October 2009, and January 2010. In opposition, Plaintiffs argue that due to Defendants failure to close within 180 days, or June 11, 2009, Plaintiffs obligation to pay rent was terminated. Plaintiffs further claim that even if they did owe rent, the amount would have to be reduced by the first and last months rent that was paid. There are several factual disputes between the parties that preclude a finding of summary judgment. Accordingly, Defendants’ motion for summary judgment on their first counterclaim is denied.

Defendants’ Second, Third, Fourth and Fifth Counterclaims

Defendants 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 §280². Defendants’ DCL claims are premised upon their allegations and Rubin’s

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.

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.

In opposition, 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 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]).

The law does state that “[f]air consideration is given for property, or obligation, when in exchange ... as a fair equivalent thereof, and in good faith, property is conveyed or an antecedent debt is satisfied.” DCL § 272(a). In other words, under New York law, any transfer that would have been constructively fraudulent if it had not been made for fair value can alternatively be avoided if it was not made in “good faith”, which “is required of both the transferor and the transferee, and ... is lacking when there is a failure to deal honestly, fairly, and openly” (*see The CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. L.P.*, 25 AD3d 301, 303 [1st Dept 2006] [*quoting Berner Trucking, Inc. v Brown*, 281 AD2d 924, 925 [4th Dept 2001]]). Defendants have not met their *prima facie* burden under the DCL and accordingly, summary judgment as to the second and third counterclaims is denied.

Defendants’ fourth and fifth counterclaims were previously dismissed under motion sequences 003, and accordingly will not be discussed here.

Conclusion

Defendants' motion for summary judgment is denied as to the first cause of action and granted as to the third and fourth causes of action. Further, Defendants' motion for summary judgment as to the second and third counterclaims is denied. Defendants' fourth and fifth counterclaims were previously dismissed pursuant to Plaintiffs' motion for summary judgment, motion sequence number 003.


It is hereby,

ORDERED that Defendants' motion for summary judgment on the first cause of action is denied; and it is further

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

ORDERED that Defendants' motion for summary judgment on Plaintiffs' third and fourth causes of action is granted, and those claims are dismissed, and the balance of the action shall continue.

3/11/2021
DATE


SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE