

Brick&Mortar LLC v Momo Sushi Inc.

2021 NY Slip Op 32630(U)

December 8, 2021

Supreme Court, Kings County

Docket Number: Index No. 504574/2020

Judge: Lillian Wan

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

Index No.: 504574/2020
Motion Date: 12/08/2021
Motion Seq.: 01, 02

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BRICK&MORTAR LLC d/b/a
BRICK&MORTAR GROUP LLC,

Plaintiff,

DECISION AND ORDER

- against -

MOMO SUSHI INC. and JAMES CHANCE
JOHNSTON,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 01) 10-21, and (Motion 02) 23-39 and 41-49, were read on this motion to dismiss.

In this action to recover damages for breach of contract, defendants Momo Sushi Inc. and James Chance Johnston move for an Order (Motion 01) pursuant to CPLR § 3211(a)(1) dismissing the plaintiff's complaint in its entirety. The plaintiff also cross moves for an Order (Motion 02): 1) pursuant to CPLR § 3212 granting partial summary judgment on the issue of liability for plaintiff's first cause of action for breach of contract and scheduling a trial on the issue of damages; and 2) pursuant to CPLR § 3124 compelling defendants to comply with discovery demands. The motions are denied for the reasons set forth below.

This action arises out of an alleged breach of a brokerage agreement entered into by the parties on or about June 14, 2019. *See* NYSCEF Doc. No. 15. The plaintiff alleges that its agreement with Momo Sushi, a Japanese restaurant located at 43 Bogart Street in Williamsburg, Brooklyn, allowed plaintiff the sole and exclusive right as broker to negotiate any sale, sub-lease, or assignment of Momo Sushi, along with any shares or membership interests of Momo Sushi. The plaintiff alleges that Momo Sushi made a sale to an individual named Makoto Suzuki in the amount of \$200,000.00, which entitles the plaintiff to a 10% commission in the amount of \$20,000.00, and that the defendants have not paid this commission.

In support of their motion, the defendants submit, inter alia, the pleadings, the brokerage agreement, the affidavit of Mr. Johnston, and copies of American Express statements. The defendants argue that the documentary evidence establishes that there has been no transfer of ownership interests in Momo Sushi since 2016, and that Mr. Johnston still retains the one-third interest he has had since the company's inception. Defendants further argue that ownership in Momo Sushi has changed only once, in 2016, and that any related transaction is therefore not subject to the agreement signed in 2019. In addition, Mr. Johnston states in his affidavit that the alleged transaction, which is the entire basis for the instant lawsuit, never occurred. *See* NYSCEF Doc. No. 11. Mr. Johnston further states that because Momo Sushi is an entity licensed by the New York State Liquor Authority (SLA), all changes of ownership interest must

be approved by the SLA, and that SLA records show that no ownership change has occurred since 2016. Mr. Johnston states that the only change that occurred in 2020 is that Mr. Suzuki returned to handling day-to-day operations at Momo Sushi.

In opposition and in support of its cross motion, the plaintiff submits, inter alia, the pleadings, copies of emails and texts, and copies of discovery orders and demands. The plaintiff argues that a defense based on CPLR § 3211(a)(1) is waived if not brought first in a pre-answer motion or responsive pleading. Plaintiff further contends that defendants' Answer does not include an affirmative defense based on documentary evidence, which also waives said defense. In support of its motion for summary judgment, the plaintiff contends that texts allegedly sent by Mr. Suzuki indicate that he purchased Momo Sushi "as of November 1st" for \$200,000.00. See NYSCEF Doc. No. 32. The plaintiff further asserts that it has eliminated all triable issues of fact with regard to whether the brokerage agreement was breached.

In opposition to the cross motion and in further support of their motion to dismiss, the defendants submit copies of bank records of both Mr. Johnston and Momo Sushi. Defendants contend that a defense based on documentary evidence is not waived because one of the defendants' affirmative defenses is "substantial compliance with the Contract," which is precisely what defendants seek to establish on their motion to dismiss. See NYSCEF Doc. No. 2. Defendants further assert that the only evidence plaintiff has that a transaction occurred is a series of text messages from someone purporting to be Mr. Suzuki, even though the sender spells Mr. Suzuki's first name incorrectly.

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 (2d 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 the 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 Siunykalimi*, 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. Furthermore, a printout from a website has been determined not to be documentary evidence for the purposes of motions to dismiss. *See Guido v Orange Regional Medical Center*, 102 AD3d 828 (2d Dept 2013).

Here, the defendants have failed to establish an entitlement to dismissal of the complaint pursuant to CPLR § 3211(a)(1). As an initial matter, since the defendants first raised a documentary evidence defense in a motion to dismiss that was filed after service of their Answer, this defense was waived. *See Masada Universal Corp. v Goodman System Co., Inc.*, 121 AD2d 518 (2d Dept 1986); *see also* CPLR § 3211(e). However, even assuming arguendo that the documentary evidence defense was not waived, the evidentiary submissions that the Court could consider on this motion, such as the brokerage agreement and the lease, do not utterly refute the plaintiff’s allegation that a transaction occurred in 2019. *See Porat* at 632. The affidavit of Mr. Johnston and the SLA website printout do not constitute documentary evidence for the purposes of this motion. *See Phillips* at 807; *see also Guido* at 830. Accordingly, the defendants’ motion is denied in its entirety.

Turning to the plaintiff’s cross motion, summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie’s Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” *Zuckerman* at 562. Furthermore, the essential elements of a cause of action for breach of contract are: “the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and resulting damages.” *Ayers v City of Mount Vernon*, 176 AD3d 766, 769 (2d Dept 2019); *see also Webb v Greater New York Auto. Dealers Ass’n, Inc.*, 123 AD3d 1111 (2d Dept 2014); *Dee v Rakower*, 112 AD3d 204 (2d Dept 2013).

Here, the plaintiff has failed to establish an entitlement to judgment as a matter of law. The plaintiff’s evidentiary submissions do not eliminate all triable issues of fact, specifically with regard to whether the alleged \$200,000.00 transaction ever occurred. As such, the plaintiff has not established prima facie that a breach of the contract has taken place, which is a required element of contract cases. *See Dee* at 209-210. Even if plaintiff had met its prima facie burden in this regard, the bank statements submitted by defendants in opposition were sufficient to

demonstrate the existence of material issues of fact. Accordingly, the plaintiff's motion is denied in its entirety.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the defendants' motion to dismiss the complaint pursuant to CPLR § 3211(a)(1) (Motion 01) is **DENIED** in its entirety; and it is further

ORDERED, that the prong of the plaintiff's motion seeking summary judgment as to its first cause of action is **DENIED**; and it is further

ORDERED, that the prong of the plaintiff's motion seeking to compel discovery is **DENIED** with leave to renew before the Central Compliance Part.

This constitutes the decision and order of the Court.

DATED: December 8, 2021



HON. LILLIAN WAN, J.S.C.

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