

BRL Hampton Rd. LLC v Heather
2022 NY Slip Op 30039(U)
January 5, 2022
Supreme Court, New York County
Docket Number: Index No. 651511/2019
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X

BRL HAMPTON ROAD LLC,

Plaintiff,

INDEX NO. 651511/2019

MOTION DATE _____

- v -

MOTION SEQ. NO. 005

ASHLEY HEATHER, SPUR INNOVATION, INC., and 630
HAMPTON ROAD LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

ASHLEY HEATHER, SPUR INNOVATION, INC., and 630
HAMPTON ROAD LLC,

Third-Party
Index No. 595831/2019

Third-Party Plaintiffs,

-against-

BRUCE LEWIN,

Third-Party Defendant.

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, it is

Plaintiff BRL Hampton Road LLC moves pursuant to CPLR 3212 for summary judgment on its remaining causes of action for against defendant Ashley Heather:¹ sixth for fraudulent inducement, seventh for constructive fraud, and eighth for unjust

¹ Heather is unrepresented. “[C]ourts try to afford unrepresented litigants some leeway in prosecuting their actions . . . [but] their entitlement to relief is not thereby enlarged.” (See *Kent v Kent*, 29 AD3d 123, 130-131 [1st Dep’t 2006] [citations omitted].)

enrichment. (NYSCEF Doc. No. [NYSCEF] 103, Amended Complaint; NYSCEF 36, Decision and Order [motion seq. no. 001]; NYSCEF 37, Transcript [motion seq. no. 001].)

On May 18, 2018, plaintiff entered into a lease agreement (Lease) and escrow agreement (Escrow) with defendant 630 Hampton Road LLC (Hampton) for property located in Southampton, New York (Premises) and a Construction Allowance Promissory Note to defaulted defendants Spur Innovation Inc. (Spur) and Hampton for a \$1,000,000 construction loan (Construction Loan and, collectively with the Lease and the Escrow, Transaction.) (NYSCEF 104, Lease; NYSCEF 105, Escrow; NYSCEF 106, Construction Loan.) The Construction Loan was exclusively for the “renovation and development” of the former car dealership at the Premises into a new shared office co-working space (the Project). (NYSCEF 106, Construction Loan at 6/9.²)

Heather is the only remaining defendant in this action. The entities he controlled, Hampton and Spur (collectively, Corporate Defendants), have defaulted. (NYSCEF 114, Corporate Defendants Judgment; see *also* NYSCEF 95, Corporate Defendants Judgment [entered by County Clerk].) On July 31, 2020, the Court granted plaintiff's motion to strike and entered a default judgment. (NYSCEF 88, Amended Decision and Order [motion seq. no. 004].) Judgment was entered on November 6, 2020 in the amount of \$1,000,000, with interest at the rate of 9% from May 18, 2018, plus costs and disbursements, for the total sum of \$1,223,267.53 which remains unpaid. (NYSCEF 95, Corporate Defendants Judgment; NYSCEF 121, Lewin *aff* ¶ 6.)

² Page numbers refer to NYSCEF pages.
651511/2019 BRL HAMPTON ROAD LLC vs. HEATHER, ASHLEY
Motion No. 005

Under CPLR 3212, “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 demonstrate the absence of any material issues of fact.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

For fraudulent inducement, “there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury.” (*Gosmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010] [citations omitted].)

Bruce Lewin, the sole member of plaintiff, states that he relied on Heather’s representations, and that plaintiff would have never entered into the Transaction if Heather had not previously represented to Lewin that he had secured a \$500,000 cash investment from Frank Devito, the contractor, as was necessary to fund the initial rent escrow deposit of \$427,885.16. (NYSCEF 121, Lewin aff ¶ 3.) Lewin denies that Heather disclosed to him, prior to the Transaction closing, that the Corporate Defendants had not, in fact, received Devito’s \$500,000 cash investment as Heather had expected. (*Id.* ¶ 4.) Months after entering into the Transaction, Lewin learned that the money that funded the \$427,885.16 initial rent escrow deposit actually came from the Construction Loan that plaintiff provided to the Corporate Defendants. (*Id.* ¶ 5.) In other words, Heather used plaintiff’s Construction Loan proceeds to pay the initial rent escrow deposit due under the Lease.

Heather admits that he consciously chose not to tell Lewin about the loss of anticipated finding prior to the parties' transaction because he thought Lewin might cancel or delay the transaction, which Heather wanted to proceed. (NYSCEF 100, Joint Statement of Material Facts ¶ 24.)

Plaintiff has established Heather's knowing misrepresentation of material present fact concerning Devito's failure to provide the funds, Heather's admitted intention to deceive and induce plaintiff into purchasing the Premise and making the Construction Loan, and the resulting injury when the funds were misused, and the Loan not paid. The burden thus shifts to Heather.

Heather counters that there are disputed facts that preclude summary judgment. He insists that, as an experienced and successful investor, Lewin understood the importance of due diligence and the risks of start-ups. (NYSCEF 124, Heather aff ¶¶ 1-4.) Indeed, Heather observes that it was Lewin's idea to provide the \$1 million Construction Loan, in addition to purchasing the Premises, to get the project moving. (*Id.* ¶ 9.) Heather opines that in pursuing this case, plaintiff is motivated by personal animosity. (*Id.* ¶ 12.) Finally, Heather complains that he has not been compensated as founder and executive of the project and instead re-mortgaged his home to keep the project alive. (*Id.* ¶ 16.)

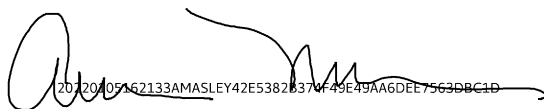
Heather's objections are not relevant to the claim before the court. Implicit in Heather's objection to Lewin's failure to conduct due diligence is the idea that plaintiff would have discovered Heather's scheme. Alternatively, Heather asserts that plaintiff knew in September 2018 that Devito had not provided the funds he promised to invest which completely contradicts his first argument, but the critical date is May 18, 2018, the

date of the closing. (*Id.* ¶¶10-11.) Moreover, neither the operation of a startup, nor the false hope that money might one day arrive to cover the money Heather took from plaintiff's Construction Loan, legally excuse Heather from having made knowing misrepresentations to plaintiff.

Accordingly, it is unnecessary to address plaintiff's alternate claims, and it is

ORDERED that the plaintiff's motion for summary judgment on the complaint is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff BRL Hampton Road LLC and against defendant Ashley Heather in the amount of \$572,114.90 (\$1 million- \$427,885.16 initial rent escrow deposit held by plaintiff),³ together with interest at the rate of 9 % per annum from the date of May 18, 2018 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, for a sum of \$_____, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, for a total sum of \$_____; and it is further

ORDERED that plaintiffs are directed to submit a proposed judgment to the Clerk of the Court with the above order language.


20220105162133AMASLEY42E53828374F49E49AA6DEE7563DBBC1D

1/5/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

³ In the Amended Complaint, plaintiff seeks damages of \$1million. With this motion, plaintiff asks for damages of \$1,670,000 without explanation.