Brooklyn Park Slope Fitness, LLC v Manischevitz Family LLC
2022 NY Slip Op 30832(U)
February 28, 2022
Supreme Court, Kings County
Docket Number: Index No. 525288/2019
Judge: Larry D. Martin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

BROOKLYN PARK SLOPE FITNESS, LLC and BACK ON TRACK CONSULTING, INC., Plaintiffs, -against- MANISCHEVITZ FAMILY LLC, 12TH STREET ASSOCIATES LLC, et al., Defendants.	Index No. 525288/2019 IAS Part 12 <u>DECISION & ORDER</u> Hon. Larry D. Martin Mot. Seq. No. 3

This case involves a commercial landlord-tenant dispute between plaintiffs Brooklyn Park Slope Fitness, LLC ("BPSF") and Back on Track Consulting, Inc. ("BOTC") and defendants Manischevitz Family LLC ("Manischevitz"), Two Trees Management Co. LLC, 12th Street Associates LLC, 12th Street Associates A LLC, 12th Street Associates B LLC, 12th Street Associates C LLC ("12th Street Defendants"), Team Slope LLC ("Team Slope"), MF Member LLC, and Big Initiatives Incorporated ("Two Trees Defendants").[1] Two Trees Defendants moved to dismiss dismissing certain claims as to certain parties on the grounds that they "fail[] to state a cause of action" and that Two Trees's "defense is founded upon documentary evidence" (CPLR 3211[a][1], [a][7]; Mot. Seq. No. 3, NYSCEF Doc. No. 145).

BACKGROUND

BPSF has leased space in a former Pathmark building located near the Gowanus Canal in Brooklyn since April of 2014. Since then, the building and its parking lot (the "Property") have

[1] Defendants maintain that not all Two Trees Defendants are affiliated with Two Trees Management Co. and are jointly referenced solely for purposes of the motion.

changed hands repeatedly and BPSF's lease has been modified and extended several times. Today, the Property is owned by the 12th Street Defendants and is managed by Two Trees Management.

In 2017, BPSF entered into a Put/Call Agreement and a Consulting Agreement ("Agreements") with Manischevitz, an affiliate of its then-landlord, Team Slope. Pursuant to the Put/Call Agreement, BPSF would have the right to demand that Manischevitz buy BPSF out of its lease, provided that specified conditions were satisfied (Put/Call Agreement, NYSCEF Doc. No. 174). In 2018, Team Slope sold the Property to the 12th Street Defendants and its interest in Manischevitz to the 12th Street Defendants' affiliate, MF Member LLC (Sale Contract, NYSCEF Doc. No. 156). Manischevitz then terminated its interest in the Property, purportedly leaving it a shell entity with no income or assets, as "designee" of 12th Street Associates ABC's Agreements. BPSF claims to have exercised its right to demand that Manischevitz buy BPSF out of its lease ("Lease"). Defendants argue BPSF has not properly done so and, even it had, BPSF could not satisfy the conditions specified.

The crux of the parties' dispute centers around the issue of the scope of Manischevitz' obligations under the Put/Call Agreement, and whether the 12th Street Defendants assumed those obligations. Plaintiffs argue that all of Team Slope's affiliated entities are its "successors" or "assigns" because they are controlled by the same or overlapping members, and that the Put/Call Agreement obligated Team Slope to require Manischevitz and its "successors and assigns" to accept assignment of BPSF's interest in the Lease. Defendants argue that mere overlap in membership does not automatically make them Team Slope's successors and assigns, and that Team Slope only outwitted BPSF, an antagonistic adversary, in negotiations.[2]

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2 BPSF notes that none of the defendants except Manischevitz responded to it demand notices. Defendants argue that (1) since none of them, except Manischevitz, were signatories of the Agreements,

In moving to dismiss, defendants argued that plaintiffs are not third-party beneficiaries of the sale contract; the complaint failed to allege fraud, the requisite elements of a constructive trust, and alleged various claims that are actually remedies, and that, as a matter of law, quasi-contractual claims are barred by the existence of an express contract and must therefore be dismissed. Plaintiffs challenge that the sale contract's boilerplate language is insufficient to defeat their third-party-beneficiary status and that proceeding alternatively on contractual and quasi-contractual claims is permissible.

Following the motion, the parties stipulated to withdraw the complaint's first (specific performance), tenth (alter ego liability), eleventh (rescission), and twelfth (constructive trust) causes of action "without prejudice to assert the factual allegations therein" (Stipulation, NYSCEF Doc. No. 153). Plaintiffs also agreed to release Manischevitz as to the fifteenth (promissory estoppel) and seventeenth (fraudulent inducement) claims (*id.*). The eighth, fourteenth, and eighteenth causes of action as to the defendants and the fifteenth and seventeenth causes of action as the defendants, except Manischevitz, remain (Amend. Compl. 3, NYSCEF Doc. No. 142).

DISCUSSION

A. Standard of Review

The standard in determining motions under CPLR 3211(a)(1) is straight-forward: the proffered documents must "utterly refute" the allegations in plaintiff's complaint, "conclusively establishing a defense as a matter of law" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 34 NY3d 908, 115 NYS3d 782 [2021]; *Hart 230, Inc. v PennyMac Corp.*, 194 AD3d 789, 149 NYS3d 134 [2d Dept 2021]). As to CPLR 3211

only Manischevitz had an obligation to respond; but (2) even if they *had* been signatories, plaintiffs have not met the predicate conditions for a buyout under the Put/Call Agreement; and that (3) plaintiffs cannot sue as a third party to the sales contract to which they were not parties.

(a)(7), a plaintiff is aided by three rules of decision: (1) accept the allegations as true, (2) accord the complaint a liberal construction providing plaintiff with the benefit of every possible favorable inference, and (3) determine only whether the facts alleged fit within any cognizable legal theory (*Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.*, 131 AD3d 601, 603, 15 NYS3d 406, 408 [2d Dept 2015]).

B. Eighth, Fourteenth, and Fifteenth Cause of Action

Plaintiffs allege the defendants were unjustly enriched (eighth claim) and seek recovery sounding in promissory estoppel as to all defendants (fourteenth claim) and promissory estoppel as to all defendants except Manischevitz (fifteenth claim). Specifically, defendants argue quasi-contractual claims are barred by the existence of express contracts on the same subject matter and that quasi-contract claims may not be pled in the alternative where there is no dispute as to the validity and enforceability of the contract governing the dispute.

Causes of action may be pled alternatively or even "hypothetically" (CPLR 3014). Generally, quasi-contract claims "only appl[y] in the absence of an express agreement," and are "equitable obligation[s] imposed in order to prevent a party's unjust enrichment" (*UETA Latinamerica, Inc. v Zafir*, 129 AD3d 704, 705-06, 10 NYS3d 566, 568 [2d Dept 2015]). In the case of unjust enrichment, a plaintiff must allege that (1) the other party was enriched, (2) at that party's expense and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 19, 867 NYS2d 169, 180 [2d Dept 2008]). Promissory estoppel requires a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise (*id.* at 20–21, at 181).

Here, plaintiffs summarily allege that defendants reneged on "clear and unambiguous

promises" that they "would honor the Put/Call Agreement," "BPSF's exercise of its option," and "ensure that BPSF's rights under the Put/Call Agreement and [] Consulting Agreement[] would survive the sale" of the Property. Nonetheless, for now, plaintiffs' eighth, fourteenth, and fifteenth sounding in quasi-contract should stand, without prejudice to the parties' right to move for summary judgment following discovery.

C. Seventeenth Cause of Action

Defendants correctly argue that claims "rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b) (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147, 150 [2009]), including, at minimum, who made the misrepresentations, when the misrepresentations were made, and the substance of the misrepresentations. Here, plaintiffs never identify the individuals who allegedly made their alleged fraudulent representations or when and where they were made.

Defendants further correctly note that plaintiffs failed to allege facts suggesting reasonable reliance upon any alleged misrepresentations, and that in cases "involving sophisticated parties and high-stakes transactions—a party lacking information cannot reasonably rely on oral representations from a negotiator on the other side of a proposed transaction, and must be expected to demand documented confirmation or otherwise perform basic due diligence" (*Hindsight Sols., LLC v Citigroup Inc.*, 53 F Supp 3d 747, 773 [SDNY 2014]). Equally, a "party cannot claim reliance on a misrepresentation when he or she could have discovered the truth with due diligence" (*KNK Enterprises, Inc. v Harriman Enterprises, Inc.*, 33 AD3d 872, 824 NYS2d 307, 307 [2d Dept 2006]. That is particularly true where, as here, the negotiating parties have an "adversarial" relationship.

Here, plaintiffs do not allege that they did *any* due diligence as to Manischevitz's financial condition, its relationship with the landlord, or any of the particulars that a party

settling an adverse claim is charged with scrutinizing in the ordinary course. By failing to do so, plaintiffs' seventeenth cause of action cannot stand.

D. Eighteenth Cause of Action

Plaintiffs' seek to recover as "third party beneficiaries" of the contract by which the Property was sold to its current owners. But the Contract of Sale explicitly disclaims any third party beneficiaries (*see* Defs. Ex. B, NYSCEF Doc. No. 173 ["The parties do not intend to confer any benefit hereunder on any person, firm or corporation other than the parties hereto."]). Such disclaimers are valid and permissible in New York. Indeed, where a provision "in an agreement expressly negat[es] an intent to permit enforcement by third parties," it is "decisive" (*Nepco Forged Products, Inc. v Consol. Edison Co. of New York, Inc.*, 99 AD2d 508, 470 NYS2d 680, 681 [2d Dept 1984]).

Plaintiffs cannot meritoriously claim they are third-party beneficiaries to the sales contract explicitly precluding the same. Likewise, plaintiffs cannot claim against the non-signatories unless they prevail in arguing a quasi-contract theory after discovery.

CONCLUSION

For the reasons stated above, defendants' motion to dismiss (Mot. Seq. No. 3) is **granted** plaintiffs' **seventeenth** and **eighteenth** causes of action and **denied** as to plaintiffs' **eighth**, **fourteenth**, and **fifteenth** causes of action.

Dated: February 28, 2022

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

Hon. Larry D. Martin
Supreme Court of the State of New York