SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

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ARISTOTLE DEFTEREOS and SPIRO DEFTEREOS,

Plaintiffs,

- v -

MICHAEL PITSINOS, INDIVIDUALLY, AND AS A MEMBER OF EUTYCHIA GROUP LLC, and EUTYCHIA GROUP LLC,

Defendants.

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INDEX NO. 656618/2020

MOTION DATE 01/02/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for JUDGMENT - SUMMARY.

In this action seeking damages for, *inter alia*, the defendants' alleged breach of Membership Interest Purchase Agreements (MIPAs) respecting interests in restaurant entities controlled by the defendant Eutychia Group, LLC (Eutychia), the plaintiffs move pursuant to CPLR 3212 for summary judgment on the complaint and pursuant to CPLR 3211(b) to strike the defendants' affirmative defenses. The defendants oppose the motion. The motion is denied.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

In support of their motion, the plaintiffs submit, *inter alia*, the pleadings, the affidavits of Aristotle Deftereos (Aristotle) and Spiro Deftereos (Spiro), the deposition transcript of Michael Pitsinos (Pitsinos), the subject MIPAs, and email correspondence relating to the subject transactions. In opposition, the defendants submit, *inter alia*, the affidavit of Pitsinos, excerpts

from the deposition transcripts of each of the plaintiffs, emails and text messages between Pitsinos and the plaintiffs regarding the subject transactions, documents from a related bankruptcy proceeding, and documents from a derivative action commenced by the plaintiffs and other members of the subject restaurant entities in 2018 against the defendants, among other parties (the derivative action).

The submissions establish that in October 2015, Aristotle entered into MIPAs with the defendants wherein Eutychia agreed to buy out Aristotle's Class B membership interests in three restaurant entities, of which Eutychia was the Class A managing member, for $154,000.00, $77,000.00, and $143,750.00, respectively. Pursuant to the written MIPAs, which were signed by Aristotle and Pitsinos, on behalf of Eutychia, payment and transfer of the interests was to occur on the closing date, designated as on or about November 20, 2015, at Eutychia's offices. Spiro avers that he, too, entered into written MIPAs with Eutychia, wherein he agreed to sell his own Class B membership interests in the restaurant entities for the total sum of $180,000.00. According to Spiro, the terms of his own MIPAs were otherwise substantively identical to those executed by Aristotle. No written MIPA attributable to Spiro has been produced.

No payment or transfer of the plaintiffs' Class B interests took place on November 20, 2015, as contemplated in the alleged MIPAs, nor was the closing date ever rescheduled. In the years that followed, the plaintiffs have continued to exercise their rights as Class B interest holders in the restaurant entities, including by their participation in the derivative action. In January of 2019, the restaurant entities each filed for bankruptcy. It is undisputed that the entities are defunct and that any interests therein are now worthless. On November 30, 2020, the plaintiffs commenced this action seeking, *inter alia*, to enforce the MIPAs for the first time.

In their first cause of action, the plaintiffs seek the purchase price of their membership interests under a theory of breach of contract. To successfully prosecute a cause of action to recover damages for breach of contract, the plaintiffs are required to establish (1) the existence of a contract, (2) the plaintiffs' performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). Even assuming that Eutychia entered into valid MIPAs with definite terms with both Aristotle and Spiro, the plaintiffs have not demonstrated that they engaged in or attempted to engage in any performance under the MIPAs in the years since those agreements were allegedly executed. Contrary to the plaintiffs' assertion that *no* performance was required of them beyond signing the MIPAs, it is plainly stated in the MIPAs proffered to the court that Eutychia's agreement to pay the purchase price was "in consideration of and in exchange for the sale, conveyance, assignment, transfer and delivery of the Purchased Interest." More significantly, the sale and purchase of the plaintiffs' membership interests was to "be consummated at a closing," set "on or about November 20, 2015," at the offices of Eutychia.

Failure to appear at closing to tender performance on a purchase agreement may constitute a default where time is deemed an essential term of the contract. See, e.g., Champion v Blue Water Advisors, Inc., 82 AD 3d 568, 568 (1st Dept. 2011) (failure to appear on

scheduled "time of the essence" closing date constituted default); Kaiser-Haidri v Battery Place Green, LLC, 85 AD3d 730, 733-34 (2nd Dept. 2011) (same). Generally, in an executory contract, time is assumed to be of the essence unless the factual circumstances demonstrate otherwise. See Lusker v Tannen, 90 AD2d 118, 124 (1st Dept. 1982); see also Whitecap (U.S.) Fund I, LP v Siemens First Capital Commercial Finance LLC, 121 AD3 584, 591 (1st Dept. 2014). Where time is not of the essence, "the law permits the respective parties a reasonable time in which to tender performance, regardless of whether the contract specifies a particular date on which such performance is to be tendered." Mader v Mader, 101 AD2d 881, 882 (2nd Dept. 1984); see, e.g., Clements v 201 Water Street LLC, 157 AD3d 615, 615 (1st Dept. 2018) (the law provides for a reasonable time to close where no closing date is specified in real estate purchase contracts).

Regardless of whether the November 20, 2015, date specified in the MIPAs is deemed of the essence or not, the plaintiffs fail to establish, *prima facie*, that they performed under the MIPAs. First, the record is devoid of any indication that the plaintiffs appeared at Eutychia's offices on November 20, 2015, or any other date, for closing and tendered performance. Moreover, no party has even attempted to seek an adjournment of the closing date in the six and a half years since such date lapsed. No argument has been presented as to why six and a half years would not have constituted a reasonable time frame in which to consummate the transaction. See Cipriano v Glen Cove Lodge #1458, B.P.O.E., 297 AD2d 649, 652 (2nd Dept. 2002) (failure to appear at closing date scheduled over a year after closing date set in contract constituted default). Nor has any party to the MIPAs proffered any basis for its apparent lack of regard for its contractual rights and obligations during that time period. Under such circumstances, the plaintiffs are not entitled to summary judgment with respect to the first cause of action.

Additionally, the court notes that even though discovery has concluded, the plaintiffs have not produced the written MIPA that Spiro states he signed. Insofar as the defendants dispute the existence and terms of Spiro's MIPA, there is a triable issue as to Spiro's breach of contract claim.

As to the second cause of action, sounding in unjust enrichment and asserted on behalf of Spiro only, Spiro is required to demonstrate that (i) the defendants were enriched, (ii) at Spiro's expense, and (iii) "it is against equity and good conscience to permit the [defendants] to retain what is sought to be recovered." Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972) (citations omitted). Moreover, as a general rule, where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012); Steven Pevner, Inc. v Ensler, 309 AD2d 722 (1st Dept. 2003). To the extent there remain triable issues as to whether Spiro had an express agreement with Eutychia, and inasmuch as Spiro fails to explain when and in what manner the defendants were enriched, the plaintiffs' motion for summary judgment on the second cause of action is denied.

Finally, the branch of the plaintiffs' motion seeking to strike the defendants' affirmative defenses is denied. Pursuant to CPLR 3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011). The plaintiffs seek to dismiss all 26 of the defendants' affirmative defenses based on the single conclusory assertion that "[t]he defenses are without merit in law." Since the plaintiffs elected not to state a specific basis for dismissal of any defense, their application is denied.

While the defendants have not made any motion or cross-motion for summary judgment, they ask the court in their moving papers to exercise its discretion to search the record and award them the same pursuant to CPLR 3212(b). The record does not demonstrate the defendants' entitlement to such relief on the first and second causes of action. Moreover, the plaintiffs have not addressed any of their other claims, or the defendants' counterclaim, in the instant motion. The court is not authorized by CPLR 3212(b) to dispose of issues that are not the subject of a summary judgment motion. See Cerbone v Lauriano, 170 AD3d 942 (2nd Dept. 2019). Thus, the court declines to exercise its discretion as sought by the defendants.

Accordingly, it is

ORDERED that the plaintiffs' motion is denied in its entirety.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

4/7/2022
DATE

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