SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ALEX MURRAY and DANIELLE RICHARDS

Plaintiff,

- v -

SOLE EAST, LLC,

Defendant.

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INDEX NO. 650196/2021

MOTION DATE 1/10/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for SUMMARY JUDGMENT.

I. INTRODUCTION

In this breach of contract action, the plaintiffs seek, *inter alia,* the return of a $43,577.00 deposit paid to the defendant, a Montauk hotel and event space, for their wedding ceremony and reception to be held at the property in September 2020, which they cancelled. The plaintiffs now move for summary judgment on the amended complaint pursuant to CPLR 3212. The defendant opposes the motion. The motion is denied.

II. BACKGROUND

The parties entered a written contract on November 24, 2019, which included pre-ceremony reception, ceremony, dinner and after party for 200 guests to take place on September 19, 2020, for a total of $65,548.25. The contract provided, *inter alia*, that deposits would not be refunded if the client canceled "for any reason" and the client would also be responsible for payment on guest rooms that could not be rebooked if the cancellation was within 30 days of the event. However, "if the event is canceled due to an act of God, all deposits will be refunded." After the onset of the COVID-19 pandemic in March 2020, the parties began renegotiating the terms of the contract and the details of the event, which was to be scaled down and modified in order to comply with governmental regulations and health and safety guidelines. After several months of negotiations, on August 13, 2020, the plaintiffs canceled the

event in its entirety and demanded the return of their deposit. The defendant refused to refund the money. This action ensued.

In their amended complaint, the plaintiffs allege causes of action sounding in breach of contract and unjust enrichment and seek the return of the $43,577.00 deposit. In its amended answer, the defendant admits that a contract existed between the parties but denies any breach on its part and maintains that the plaintiffs are not entitled to any refund. The defendant also asserted twelve affirmative defenses. This motion ensued.

III. DISCUSSION

A. Legal Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851 (1985); O'Halloran v City of New York, supra). 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).

A plaintiff alleging a breach of contract must establish (i) the existence of a contract, (ii) the plaintiff's performance under the contract, (iii) the defendant's breach of that contract, and (iv) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). A cognizable claim for unjust

enrichment requires a plaintiff to demonstrate that (i) the other party was enriched, (ii) at that party's expense, and (iii) "it is against equity and good conscience to permit the [other party] to retain what is sought to be recovered." Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972) (citations omitted). Further, 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).

B. Plaintiffs' Proof

The plaintiffs' submissions include the pleadings, an affidavit of plaintiff Alex Murray, the subject contract, proposed amendments to the contract and email communications between the parties. This proof, however, fails to demonstrate the absence of material, triable issues of fact as to either cause of action. Indeed, the terms of the contract support the defendant's argument that the plaintiffs were not entitled to the return of their deposit. The original contract, signed by the defendants, contains the refund policy which barred the return of any deposit absent an "act of God." The plaintiffs do not establish as a matter of law on this motion, or even allege, that the COVID-19 pandemic constituted an "act of God" within the meaning of their agreement, entitling them to a full refund. Indeed, to the extent they are arguing that the doctrine of frustration of purpose or impossibility of performance may be invoked to excuse their own performance of the contract, neither the facts of this case nor the decisional authority on that issue is in their favor. See e.g. Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575 (1st Dept. 2021); 558 Seventh Ave. Corp. v Times Square Photo Inc., 194 AD3d 561 (1st Dept. 2021). The fact that the plaintiffs rejected the proposed amended contract which contained additional cancellation terms is of no moment since they signed the original contract, which remained the operative agreement between the parties.

Furthermore, the defendant's submissions, which include an affidavit from its Director of Events, Cindi Ceva, and additional communications between the parties, raise triable issues. Ceva asserts that the plaintiff venue was ready and willing to host the wedding on the original date requested by the plaintiffs and fulfill its contractual obligations, but on modified terms. Ceva explained that after March 2020, the plaintiffs and all other clients who had booked events in 2020 were offered alternative dates in 2021. The plaintiffs desired to go forward with their wedding in September 2020 but scaled it down from 200 to 50 guests. Discussions were

thereafter had to accommodate the changes and keep guests safe, which culminated in a revised contract sent to the plaintiff on or about August 8, 2020. The declined to sign it.

The parties' submissions further show that sometime in July 2020, the plaintiffs retained an attorney who contacted Ceva on their behalf. The attorney and Ceva discussed add-ons and changes which were memorialized in an e-mail dated August 1, 2020. It describes a rehearsal dinner to take place the evening of September 18, 2021, including a tent, appetizers, dinner and an open bar for post-dinner drinks. For September 19, 2020, the plan was to have the ceremony performed at 11:00 a.m., followed by a champagne toast and picnic lunches for the beach. Ceva added a service of s'mores over the outdoor firepit. The total cost was $29,777.00, leaving a credit of $13,946.87, which Ceva planned to put toward the bar tab.

In an e-mail sent to Ceva on August 1, 2020, the plaintiffs' attorney stated that he "would like to move this along per our conversation yesterday" and "we hope we can reach an agreement as the present contract is presently enforceable and we have advanced considerable funds." A subsequent email sent the same day by the attorney states "meant to say unenforceable." It appears that the plaintiffs then took over the negotiations themselves.

In an email dated August 6, 2020, sent to the plaintiffs, Ceva stated that she was waiting on a modified tent invoice from a vendor and asked them to decide on dessert and snack options. In a response the same day, plaintiff Richards agreed to the s'mores addition and asked that Ceva "send over the revised contract" once "the tent invoice comes back." On August 7, 2020, Ceva suddenly needed to travel out of town to aid a sick relative. She sent the plaintiffs a proposed revised contract dated August 8, 2020, with a "COVID Rider" which provided that "it is hereby understood and agreed by all parties that any and all public health emergencies, such as the ongoing COVID-19 situation, do not fall within the "Act of God" or "Force Majeure" language, as the same is set forth in the original contract." The rider also altered the refund policy to allow the client to request a refund of 50% of the deposit if the cancellation "due to COVID-19 uncertainty or other such public health emergency" is made more than three months prior to the event date. In an email dated August 11, 2020, plaintiff Murray stated "Danielle and I are willing to sign the contract you sent dated August 8 however we are not comfortable signing the COVID Event Rider. If we are able to proceed without the rider we will send the signed contract back to you asap." In an email dated August 13, 2020, plaintiff Murray e-mailed Ceva to "officially cancel all planned/proposed events." On August 12,

2020, reservations for the 17 rooms booked at the hotel for the plaintiffs' wedding were cancelled. The papers do not indicate whether the rooms were rebooked.

In reply, the plaintiffs submitted documents reflecting that the defendant received loans under the federal Payroll Protection Program, which were forgiven, and screenshots from two commercial wedding websites showing that another wedding was held at the defendant's property on September 18, 2020. However, these documents are improperly submitted in reply and, in any event, do not support the drastic relief sought in the plaintiffs' motion.

The plaintiffs' remaining contentions are without merit.

For these reasons, the plaintiffs have not established their entitlement to summary judgment on the amended complaint. See Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra.

IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiffs' motion for summary judgment is denied, and it is further

ORDERED that the parties shall proceed with discovery and appear for a remote status conference on June 30, 2022, at 11:30 a.m., as previously scheduled.

This constitutes the Decision and Order of the court.

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

5/25/2022
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