SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

----------X

JEFFREY S. ANTIN, SCOTT W. EPSTEIN, ANTIN, EHRLICH & EPSTEIN, LLP,

Plaintiffs,

- v -

ROBERT I. CANTOR,

Defendant.

----------X

INDEX NO. 654054/2019

MOTION DATE 07/08/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 59, 61, 62, 63, 66, 67, 68, 69, 70, 71, 72, 135, 136

were read on this motion to/for DISMISS.

Plaintiffs, Jeffrey S. Antin (Antin), Scott W. Epstein (Epstein), Antin, Ehrlich & Epstein, LLP (collectively, plaintiffs), commenced this action for, among other claims, breach of contract, stemming from a purported rent sharing agreement between plaintiffs and defendant, Robert Cantor (defendant). Defendant now moves pursuant to CPLR Rule 3211(a) (1), (5) and (7) to dismiss the amended complaint (complaint). The motion is opposed. For the following reasons, defendant's motion is granted in part.

According to the complaint, the parties in this action were all members of a corporation identified as non-party JJMRS LTD (JJMRS), formed in February 2003. Plaintiffs allege that in 2003, JJMRS leased the seventh floor within the premises located at 9 West 37th Street, New York, New York (premises), which was initially set to run through September 2014, and was later extended through September 2023. The parties executed a personal guaranty wherein they guaranteed JJMRS' performance under the lease.

Plaintiffs further allege that by 2010, the shareholder ownership in JJMRS was distributed as follows: defendant owning 50% of the corporation and Epstein and Antin each owning 25%. According to the complaint, the parties agreed to a rent sharing agreement wherein defendant would be responsible for 45% of the rent for the premises, and 50% of carrying costs, due to the landlord. The rent sharing agreement was not reduced to writing. Plaintiffs also allege that defendant personally guaranteed his financial obligations to the landlord. According to the complaint, defendant fulfilled his alleged obligation under the rent sharing agreement by paying his share or rent and carrying costs. According to plaintiffs, defendant moved out of the premises and stopped paying his share of rent and carrying costs from April 1, 2017. Plaintiffs thereafter commenced the instant action, alleging claims for breach of contract, breach of fiduciary duty, fraudulent inducement, breach of good faith and fair dealing, unjust enrichment, detrimental reliance, promissory estoppel, and declaratory judgment.

Defendant previously moved to dismiss the claims. In that motion defendant argued, in relevant portion, that the rental sharing agreement was subject to dismissal on the basis of the statute of frauds, in that the alleged oral argument between the shareholders of JJMRS cannot be performed within one year. The court held that defendant is liable under the guarantee, finding that *Royal Equities Operating, LLC v Rubin* (154 AD3d 516 [1st Dept 2017]), "[t]rumps the statute of frauds" (NYSCEF doc. no. 53, transcript at 38:15-19). The Court notes that plaintiffs previously withdrew their claims for fraud in the inducement, breach of the duty of good faith and fair dealing, and unjust enrichment. At oral argument, and after denying defendant's motion, the court informed defendant that: "You have an automatic right to renew" the motion to dismiss and that defendant was not required to "[m]ake a motion under 2221 to renew to reargue" (NYSCEF doc. no. 51 at 40:6; 40:22). On this basis alone the Court finds that defendants' motion is properly before this court.

DISCUSSION

CPLR § 3211(a)(1) states that: "A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that a defense is founded upon documentary evidence." Dismissal under CPLR 3211(a)(1) is warranted where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]. CPLR § 3211(a)(5) provides that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the cause of action may not be maintained because of...[the] statute of frauds."

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

In support of his motion, defendant first argues that the decision in *Royal Equities* is inapplicable here because that case does not address the relationship between the guarantors themselves. Defendant further argues that General Obligations Law (GOL) § 5-701(a)(1) is the proper statute of frauds provision, and not GOL § 5-703, since the latter provision concerns the leasing of property, and that no property was leased here. The expense sharing agreement did not give the shareholders a lease agreement. Only the company, JJMRS received a leasehold interest in the premises. Accordingly, defendant argues, the expense sharing agreement is subject to GOL § 5-701. As the alleged rental sharing agreement was not reduced to writing, defendant contends that plaintiffs' claims should be dismissed. Next, defendant argues that whether defendant paid under his obligations is immaterial, since there is no partial performance exception under GOL § 5-701(a)(1). Moreover, defendant argues that the agreement could not be performed within one year, since the terms of the alleged agreement exceed through the lease.

In opposition, plaintiffs argue that the holding in *Royal Equites* precludes defendant from asserting the statute of frauds because defendant agreed to be liable under the guarantee. Plaintiffs further argue that the statute of frauds is inapplicable, first, because defendant admitted to the existence of the agreement. And second, because the agreement was capable of being performed within one year pursuant to the guarantee. Plaintiffs further argue that GOL § 5-703 is the proper provision under the statute of frauds.

"[A]n agreement will not be recognized or enforceable if it is not in writing and 'subscribed by the party to be charged therewith' when the agreement "[b]y its terms is not to be performed within one year from the making thereof." (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998], quoting GOL § 5-701[a][1]). "[T]he determination of whether an alleged oral contract can possibly be performed within one year of its making is not conducted by looking back at the actual performance; it requires analysis of what was possible, looking forward from the day the contract was entered into" (*Gural v Drasner*, 114 AD3d 25, 28 [1st Dept 2013]). "The fact that full performance within one year [is] unlikely or improbable does not make the agreement subject to the statute of frauds. . . , for the statute encompasses only those agreements which, by their terms, 'have absolutely no possibility in fact and law of full performance within one year' " (*Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 418 [1st Dept 2010]).

Here, the alleged oral expense sharing agreement could have been performed within one year. The parties, as shareholders of JJMRS, could have agreed to vacate the premises pursuant to the lease and guarantee, which included a corresponding right of mutual termination, within one year of entering the rent sharing agreement, thereby terminating their obligations under the agreement (*N. Shore Bottling Co. v C. Schmidt & Sons, Inc.*, 22 NY2d 171, 176 [1968] [removing agreement from the purview of the statute of frauds where, despite parties expectation that the agreement would last over a long period, the parties contemplated termination of the agreement at any time]; *cf. D & N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449, 456–457 [1984] ["As this court early explained, 'termination is not performance, but rather the destruction of the contract * * * * where there is no provision authorizing either of the parties to terminate as a matter of right' "], *Blake v Voight*, 134 NY 69, 72 [1892]; *McCoy v Edison Price, Inc.*, 186 AD2d 442, 443 [1st Dept 1992] ["Where the alleged oral agreement only may be terminated within one year upon a breach thereof or non-performance, it is not exempt from the Statute of Frauds"]). As the court finds that the mutual vacatur provision permitting the parties to terminate the lease does not equate to a breach of the rent sharing agreement and that performance of the agreement within one year was possible, the statute of frauds is inapplicable.

Defendant also argues that the documentary evidence, including the lease and rent checks, demonstrate that defendant's law firm, non-party Cantor Epstein & Mazzola, LLP (CEM), was responsible under the agreement, not defendant individually. While the rent checks appear to demonstrate that CEM paid the amount due for rent for at least some months, the documents do not utterly refute plaintiffs' claims concerning the existence of the rent sharing agreement.

Defendant also raises, for the first time in his reply, that plaintiffs failed to make a claim for contribution, and that even if they did, plaintiffs' misconduct renders the enforcement of the claim for contribution as inequitable. At this stage, the Court declines to determine whether

plaintiffs have stated a claim for contribution. Assuming the complaint does state a claim for contribution, that branch of defendant's motion would be denied on the basis that the affidavit submitted by defendant does not conclusively demonstrate that plaintiffs do not have a claim for contribution (*see Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010] ["Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it' "], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

Defendant also argues that plaintiffs' claims for detrimental reliance, equitable and promissory estoppel should be dismissed. Initially, there is no independent cause of action for "detrimental reliance" (*Adams v Washington Grp., LLC*, 11 Misc. 3d 1083[A], 819 NYS2d 846 [Sup Ct., New York County 2006], *affd as modified*, 840 NYS2d 109 [2d Dept 2007] ["There is no independent cause of action for detrimental reliance. Detrimental reliance is, however, an element of equitable and promissory estoppel, both of which, plaintiff argues, apply here"]). Accordingly, plaintiffs' claim for "detrimental reliance" is dismissed.

Defendant argues that plaintiffs' claim for equitable estoppel should be granted because "equitable estoppel is not a basis to recover damages" (NYSCEF doc. no. 72, reply brief at 9). While defendant is correct on his recitation of the law (*see Kopelowitz & Co. v Mann*, 83 AD3d 793, 798 [2nd Dept 2011]), defendant fails to address plaintiffs' relief sought, including that defendant "[b]e estopped from enjoying the benefits of his conduct, misrepresentations, and/or concealment of facts including, but not limited to, any and all benefits derived from avoiding his obligations as aforesaid" (NYSCEF doc. no. 52 at ¶ 101). Further, as addressed above, defendant's argument that plaintiffs' claim for promissory estoppel should be dismissed is denied because defendant's affidavit fails to conclusively demonstrate the doctrine of unclean hands (*see Citibank, N.A. v Am. Banana Co.*, 50 AD3d 593, 594 [1st Dept 2008] ["Reliance upon the doctrine of unclean hands is applicable only 'when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct' "], quoting *Mehlman v Avrech*, 146 AD2d 753, 754 [2d Dept 1989]). Thus, the branch of defendant's motion to dismiss plaintiffs' claims for equitable and promissory estoppel is denied.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the compliant pursuant to CPLR 3211(a)(7) is granted to the extent that plaintiffs' claim for detrimental reliance is dismissed; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

6/13/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

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