

**Stuart v Star Jets Intl. Inc.**

2022 NY Slip Op 33805(U)

October 31, 2022

Supreme Court, New York County

Docket Number: Index No. 656737/2019

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

BRETT STUART,

Plaintiff,

- v -

STAR JETS INTERNATIONAL, INC. and RICKY SITOMER,

Defendants.

-----X

INDEX NO. 656737/2019

MOTION DATE 07/15/2022

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186

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

I. INTRODUCTION

In this action to recover \$109,000.00, the purported credit balance on the plaintiff account with a predecessor entity of defendant Star Jets International, Inc. (Star Jets), a private charter jet brokerage service, and its principal, defendant Ricky Sitomer (Sitomer), the plaintiff moves pursuant to CPLR 3212 for summary judgment on the complaint upon theories of breach of contract, unjust enrichment and conversion. The defendants oppose. The motion is denied.

II. BACKGROUND

The plaintiff claims to have purchased approximately \$1,450,000.00 in charter flight services starting in 2010, which went to a "SkyCard Program Account" and that he used all but \$109,000.00 as of 2016. The payments were made by wire transfer to Blue Star Jets LLC ("Blue Star"), a predecessor entity of Star Jets LLC and defendant Star Jets. Sitomer and non-party Todd Rome were principals of Blue Star. A blank "SkyCard Agreement" from Blue Star Jets, LLC, was provided to the plaintiff but no written contract was ever signed between him and any entity, and seemingly no accurate records were kept by any party. In an email to the plaintiff dated February 1, 2010, Sitomer thanks him for his interest in the SkyCard program, and states that he has attached a brochure with information on Blue Star. In an email dated October 26,

2016, Sitomer told the plaintiff that he had sold Blue Star in April of that year and had started a new company, Star Jets International, Inc., and that the he “still had \$109,000 on account with me.” Sitomer added that “it would be my pleasure to assist you with any of your travel needs.” By an email dated September 13, 2019, to Sitomer, the plaintiff requested the return of his \$109,000.00. In response, Sitomer said only that “at that time, I was still doing trips through Apollo, Apollo was honoring all Skycards from Blue Star Jets.” The plaintiff maintains that he never used the \$109,000.00 account balance for flight services and was never refunded that amount although he demanded payment. At his deposition, he testified that he took several flights in 2016, but could not recall if he paid by check, wire transfer, or a debit from his account. He was uncertain if those flights were through Sitomer but denied they was through Apollo Jets LLC (Apollo), another company formed by Todd Rome.

Sitomer maintains that he owned 43.5% of Blue Star through a family trust and that the \$109,000.00 credit balance existed not with him or Star Jets, but only with Blue Star or Apollo, and that both Blue Star and Apollo Jets have been dissolved. Sitomer testified at his deposition that Blue Star was insolvent upon its dissolution and no funds were transferred to Apollo. When clients paid money on an account, it was not segregated or maintained separately but went into a general operating account which was eventually depleted. Sitomer further explained that that the transfer to Apollo was accomplished through yet another entity owned by Todd Rome, Fly Private Enterprises. Sitomer maintains that any obligations of Blue Star remaining upon its dissolution were transferred to Apollo pursuant to a written agreement. Sitomer also testified that Apollo paid Blue Star \$500,000.00 and agreed to buy the brokers and customers of Blue Star, including the SkyCard liabilities.

Sitomer had been told by Adam Hertz, a representative of Apollo and former CFO of Blue Star, that as of October 18, 2016, the plaintiff still had a credit of \$109,071.00 in his account, after taking two flights earlier that year. Sitomer asserts, however, that Apollo refused to honor former BlueSky clients’ SkyCard balances although contractually obligated to do so. Sitomer also testified that there was no cash in any account in the plaintiff’s name. He testified both that he does not know what happened to the monies deposited by the plaintiff but also that it was fully spent by Star Jets. Nonetheless, according to Sitomer, as of November 29, 2016, the plaintiff was still his client.

Sitomer denies being a principal of Apollo or receiving any funds or assets upon the transfer between Blue Star and Apollo. Sitomer claims that he received only a right to future earnings working as an independent broker for Apollo. According to Sitomer, in October of 2017, Star Jets LLC was acquired by Star Jets International, Inc., but does not explain that transaction. Even though he was one of the principals of Blue Star, the two Star Jets entities, and was closely associated with Apollo and the plaintiff obtained services through him, Sitomer denies any individual liability for any amount remaining on the plaintiffs' SkyCard account.

In his complaint, the plaintiff seeks the same relief, recovery of the \$109,000.00 balance, under theories of breach of contract, conversion and unjust enrichment. In support of his motion, he submits, *inter alia*, the pleadings, an affirmation of counsel, his own affidavit, bank records of wire payments to Blue Star Jets, and transcripts of his and Sitomer's depositions. He also submits the 2010, 2016 and 2019 email communications between him and Sitomer. In his affidavit, plaintiff avers, among other things, that despite the SkyCard Agreement not being signed, that the defendant demonstrated an intent to be bound, that that Blue Star Jets was bound by the agreement terms to keep client funds in a segregated bank account. In opposition, the defendants submit, *inter alia*, an affirmation of counsel, the parties' deposition transcripts, email communications, and Sitomer's affidavit. In his affidavit, Sitomer concedes that an agreement existed but avers that since it was never reduced to writing, neither he nor Star Jets are bound by any of the terms therein. Alternatively, he alleges that any contractual liability can lie only with Blue Star Jets, not him or Star Jets International, Inc.

### III. DISCUSSION

On a motion for summary judgment, the movant "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id. citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). 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 (2<sup>nd</sup> Dept. 2013); O'Halloran v City

of New York, 78 AD3d 536 (1<sup>st</sup> 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 (1<sup>st</sup> Dept. 1990) (quoting Nesbitt v Nimmich, 34 AD2d 958, 959 [2<sup>nd</sup> Dept. 1970] [internal citations omitted]).

A. Breach of Contract

To successfully prosecute a cause of action for breach of contract, the plaintiff is required to establish (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1<sup>st</sup> Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010). It is undisputed that Sitomer sent the plaintiff a blank Blue Star contract, which was never signed, and that Sitomer and the plaintiff operated under an initial oral agreement with Blue Star, through Sitomer, starting in 2010. Nor is there any dispute that the plaintiff paid \$1,450,000.00 to Blue Star for flight services and that the plaintiff received most of those services. However, the plaintiff fails to establish that defendant Star Jets International, Inc. is contractually liable to him for the account balance as a successor in interest to Blue Star. Even if the defendant corporation is found liable to the plaintiff based upon Sitomer's representations to the plaintiff, the defendants raise triable issues as to the value of services provided to the plaintiff against that \$109,000.00 balance. Further, if, as the plaintiff avers, the terms of the unsigned contract were to control on this claim, it should be noted that it contains an arbitration clause which would bar this action entirely. Therefore, the plaintiff is not entitled to summary judgment on his cause of action

Although pleaded as such in the instant complaint, alter ego liability is not an independent cause of action. See Matter of Morris v New York State Dept. of Taxation and Finance, 82 NY2d 135 (1993); Ferro Fabricators, Inc. v 1807-1811 Park Ave Dev. Corp., 127 AD3d 479 (1<sup>st</sup> Dept. 2015). To establish alter ego liability, a plaintiff must show a “complete domination of the corporation in respect to the transaction attacked” and “that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury” See Baby Phat Holding Co., LLC v Kellwood Co., 123 A.D.3d 405, 407 (1<sup>st</sup> Dept. 2014) quoting Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 (1993). Here, the plaintiff's submissions establish that Sitomer was a principal of both Blue Star and Star Jets. Indeed, Sitomer's deposition testimony reveals his involvement in these and several other companies including Apollo and Star Jets and, while he may have had different business

partners and varying roles in each company, he was the common denominator throughout. However, the submissions in opposition raise triable issues, *inter alia*, as to Sitomer's personal liability for the \$109,000.00 balance that existed on the plaintiff's account in 2016.

#### B. Unjust Enrichment

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). 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 (1<sup>st</sup> Dept. 2012). However, where the validity or scope of the contract is in dispute, a plaintiff may plead a claim for unjust enrichment in the alternative. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., *supra*; Henry Loheac, P.C. v Children's Corner Learning Center, 51 AD3d 476 (1<sup>st</sup> Dept. 2008); ME Corp. S.A. v Cohen Brothers LLC, 292 AD2d 183 (1<sup>st</sup> Dept. 2002). That is, "where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of [unjust enrichment] and will not be required to elect his or her remedies (Joseph Sternberg, Inc. v Wolber 36<sup>th</sup> St. Assocs., 187 AD2d 225)." American Telephone & Utility Consultants, Inc. v Beth Israel Med. Ctr., 307 AD2d 834, 835 (1<sup>st</sup> Dept. 2003).

As the existence an express agreement, or at least the terms of the agreement, as between these parties are in dispute, an unjust enrichment claim is not precluded. However, as with the breach of contract claim, the plaintiff is not entitled to summary judgment on the unjust enrichment claim. He demonstrates through his affidavit and other admissible proof only that some entity and possibly Sitomer were enriched at his expense by retaining his \$109,000.00 account balance, and that it would against equity and good conscience to allow them to retain those funds. However, as with the breach of contract action, the defendants have raised triable issues, *inter alia*, as to the value of services provided to the plaintiff against that \$109,000.00 balance and the extent of the liability, if any, of these two defendants.

#### C. Conversion

"Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of

plaintiff's rights" See Pappas v Tzolis, 20 N.Y.3d 228, 234, (2012) quoting Colavito v New York Organ Donor Network, Inc., 8 N.Y.3d 43, 50, (2006). However, "an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract." Peters Griffin Woodward, Inc. v WCSC, Inc., 88 A.D.2d 883, 884, (1<sup>st</sup> Dept. 1982). Further, for conversion of money, the money "must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" See McBride v KPMG Int'l, 135 AD3d 576, 580 (1<sup>st</sup> Dept. 2016), citing Republic of Haiti v Duvalier, 211 AD 2d 379, 384 (1<sup>st</sup> Dept.1995). Here, while the plaintiff's conversion claim concerns a sum of money, it is undisputed that the sum is specifically identifiable and was for the express purpose of payment for charter flight services. Although conversion is an equitable claim, here it is not precluded since there is a factual dispute as to viability of the legal claim of breach of contract. For the same reason that summary judgment was not available to the plaintiff on the breach of contract and unjust enrichment claims, the plaintiff has not established entitlement to summary judgment on this claim on the papers submitted. Even assuming that the plaintiff was owed \$109,000.00 in 2016, the submissions raise triable issues as to what portion of that balance remained thereafter and whether both or either of these defendants is liable for that amount.

Since all theories of liability against the defendants remain for trial, the parties are encouraged to pursue settlement.

IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion for summary judgment is denied in its entirety.

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

10/31/2022  
DATE

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

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART