SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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SYLVAN HOSPITALITY GROUP, INC.
Plaintiff,

- v -

ST. GILES HOTEL, LLC,
Defendant.

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INDEX NO. 150582/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for **DISMISS**.

Defendant St. Giles Hotel, LLC moves, by order to show cause, for an order canceling the Notice of Pendency filed by plaintiff Sylvan Hospitality Group, Inc., pursuant to CPLR 6514(b), as well as for costs and expenses, pursuant to CPLR 6514(c). Defendant also moves, pursuant to CPLR 3211(a)(7) and (a)(1), for an order dismissing the complaint.

For the reasons set forth below, defendant's motion to cancel the Notice of Pendency is granted. Defendant's motion to dismiss the complaint is granted with respect to dismissal of the first cause of action to quiet title, the second cause of action for unjust enrichment, and the fourth cause of action for constructive trust. However, the motion to dismiss is denied with respect to the third cause of action for breach of the lease.

Plaintiff is a New York corporation, with an address at 120 East 39th Street, New York, New York 10016 ("premises") (NYSCEF Doc. No. 1, complaint at ¶ 1]). Plaintiff's sole asset is a high-end New York City steakhouse, with rights to operate under a lease with defendant at the premises (*id.*). Defendant operated a now closed hotel, the St. Giles Hotel, at the premises (NYSCEF Doc. Nos. 9 ¶ 2, affidavit of Anupam Bhaumik, St. Giles' Controller; 1 ¶ 2, summons and complaint).

On January 14, 2019, defendant leased the restaurant space at the premises to plaintiff, pursuant to a written management agreement (NYSCEF Doc. Nos. 10, lease; 9, Bhaumik aff, ¶ 3; 1, complaint, ¶ 3). Plaintiff alleges that, although the lease was denominated a management agreement, it was a traditional lease (NYSCEF Doc. No. 1 at ¶ 3).

Defendant alleges that, on September 11, 2019, it terminated the lease pursuant to notice of termination to plaintiff (NYSCEF Doc. No. 11, notice of termination), based on plaintiff's alleged default and breach of the lease for failure to make certain payments due, and failure to provide required permits (NYSCEF Doc. No. 9 at ¶ 4). Defendant contends that, as a result of the service of the notice of termination, the lease ended on October 1, 2019 (*id.*).

Plaintiff remained in occupancy and as a result, on October 30, 2019, defendant commenced a holdover proceeding in the Civil Court, New York County to evict plaintiff from the premises (*St. Giles Hotel, Ltd. v Sylvan Hospitality Group*, Index No. 71107/19 [Civil Court, NY County 2019]) (NYSCEF Doc. No. 1 at ¶ 4). Plaintiff appeared and opposed the petition, denying that it had defaulted under the lease and counterclaimed that it was defendant who had defaulted under the lease (*id.* at ¶ 5). The counterclaim alleged the following:

> "A. The Petitioner has engaged in activity which constitutes an illegal constructive eviction.
>
> B. The Petitioner has denied the Tenant the enjoyment of the Premises.
>
> C. The Petitioner has failed to act in a manner that constitutes good faith and fair dealing.
>
> D. Petitioner forced Tenant to purchase $35,000 POS system to be able to post hotel guests charges and integrate the system with the hotel's system, and they disabled that function.
>
> E. Petitioner determined a breakfast price that was below market value to cause Tenant to lose money.
>
> F. Petitioner has sent their guests to other places and give [sic] vouchers for breakfast so they can go somewhere else and not dine with Tenant, denying Tenant the benefit of its bargain.
>
> G. Petitioner determined $3,000 booking fee for the rooftop so Tenant cannot book any events, despite that option in the lease, and has sent business to other caterers to put Tenant out of business.
>
> H. Petitioner disabled the ability of guests in the hotel to make room charges, which is a significant portion of the business.
>
> I. Petitioner has cameras that Tenant does not have access to (in the premises Tenant uses) so Tenant does not get the bargained for benefit of these services.
>
> J. Petitioner is not opening the account with Restaurant Depot so Tenant is unable to purchase the liquor at better prices and Petitioner is disparaging Tenant to liquor wholesalers so Tenant cannot buy liquor.
>
> K. Petitioner required Tenant to buy the alcohol inventory of the prior tenant, which was an Asian restaurant, so the liquor was non-salable.
>
> L. Petitioner required Tenant to buy the liquor for an adjoining premises which was illegal to do, and this liquor was largely expired and unsalable.

M. Petitioner has held back accounts due Tenant. It has admitted holding $30,852 due Tenant. Tenant believes this number is low. This has been held for no reason except to starve Tenants cash flow.

N. Tenant spent $1,000,000 renovating the space which Petitioner is trying to steal by throwing Tenant out after a few months of operation.

O. Tenant's principals are experienced restauranteurs, and Petitioner has deliberately undermined efforts of Tenant to build a successful brand for the term of the lease. Thus, there are damages for lost revenue for the lease term based on the undermining of the brand" (*id.*).

Plaintiff demanded judgment on its counterclaim for $3,000,000.00, interest, attorneys' fees, and costs of suit (*id.*).

According to plaintiff, after several adjournments, the case was marked final for trial. At the trial date, on January 27, 2020, the case was marked "settled," subject to a stipulation. Plaintiff alleges that the parties had agreed that defendant would either buy out plaintiff of its leasehold, or that defendant would allow plaintiff to sell its leasehold to someone else, but that the agreement was never materialized (*id.* at ¶ 6). Plaintiff further alleges that, despite defendant's unilateral attempt to terminate it, the lease was never terminated, but to the contrary, was agreed to be in place because the only issue in the holdover proceeding was whether it would be settled by a buyout or sale (*id.* at ¶ 6).

Defendant agrees that the holdover proceeding was never resolved, but alleges that, despite plaintiff's claims that it remains the lawful tenant, the lease was, in fact, properly terminated (NYSCEF Doc. No. 9 at ¶¶ 4, 9).

Subsequently, there were several developments that impacted the relationship of the parties. First, the COVID-19 pandemic required closure of the hotel in March of 2020, which also required closure of the restaurant (NYSCEF Doc. No. 1 at ¶ 7).

Second, when restaurants were allowed to reopen, plaintiff sought to reopen its restaurant at the premises, which allegedly required plaintiff to spend money creating an entry way, renovating its space after being closed for many months, and incurring related charges (*id.*, ¶ 8).

Third, on February 3, 2021, a flood occurred at the premises which caused severe damage to several areas of the hotel, including the premises where the restaurant was located (*id.* at ¶ 9; NYSCEF Doc. No. 9 at ¶ 5). As a result of the flood damage, plaintiff could no longer occupy the premises, and the restaurant remains closed (NYSCEF Doc. Nos. 1 at ¶ 9; 9 at ¶ 5). Insurers for both plaintiff and defendant, and adjusters retained by those insurers, have been involved in adjusting the losses arising from the flood ever since (NYSCEF Doc. No. 9 at ¶ 6).

Defendant asserts that, the damage was so severe that it determined that it would not be able to restore plaintiff to occupancy within 180 days and that, pursuant to paragraph 22(a)(ii) of the

lease, on March 18, 2021, it gave notice to plaintiff of the termination of the lease in accordance with the lease terms for giving notices (NYSCEF Doc. No. 9; 12, Notice, with proof of service).

Plaintiff alleges that it has recently learned that defendant has the entire building marketed for sale and that, upon information and belief, defendant is not telling potential buyers that plaintiff has a leasehold interest in the premises (NYSCEF Doc. No. 1 at ¶ 10). Plaintiff further alleges that, because the lease is not recorded, third parties have no knowledge of plaintiff's leasehold, memorialized in the lease, unless defendant discloses it (*id.* at ¶ 12).

On January 19, 2022, plaintiff filed the Notice of Pendency against the premises (NYSCEF Doc. No. 2, notice of pendency).

Defendant alleges that it is selling the hotel, that a closing of that sale is scheduled and that it will be unable to close if the Notice of Pendency remains in place (NYSCEF Doc. No. 9 at ¶ 13).

The complaint contains four causes of action: quiet title (first cause of action); unjust enrichment (second cause of action); breach of lease (third cause of action); and constructive trust (fourth cause of action).

CPLR 6501 provides that:

> "A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property."

CPLR 6514(b) authorizes a motion to cancel a notice of pendency where the plaintiff has not commenced or prosecuted the action in good faith. Additionally, CPLR 6514(c) authorizes an award to the defendant of costs and expenses occasioned by the filing and cancelation, as well as, costs of the action.

Defendant's motion to cancel the notice of pendency is granted, as the law is clear that a tenant cannot file a notice of pendency as to leased premises based on a lease dispute.

The controlling decision is *PK Rest., LLC v Lifshutz* (138 AD3d 434 [1st Dept 2016]). In that case, after a fire devastated leased restaurant premises, the tenant vacated and was not restored to possession. It ultimately filed suit seeking restoration to possession and other relief. The First Department ruled that the defendant's motion to cancel the notice of pendency filed by the plaintiff should be granted, stating:

> "'[A] lease for years is deemed personalty'" (*Matter of Grumman Aircraft Eng'g Corp. v Board of Assessors of Town of Riverhead*, 2 NY2d 500, 507 [1957], cert denied 355 US 814 [1957]). Accordingly, we have held that '[e]ven in the context of a summary proceeding to recover possession under a lease, a notice of pendency is unavailable' (*Rose v Montt Assets*, 250 AD2d 451, 452 [1st Dept 1998]). This is consistent with the notion that courts should apply 'a narrow interpretation in

> reviewing whether an action is one affecting the title to, or the possession, use or enjoyment of, real property' (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 321 [1984], quoting CPLR 6501)" (*id.* at 439).

Likewise, here, plaintiff is also a restaurant tenant. It has no greater right to file a notice of pendency than did the restaurant tenant in the *PK Rest.* case. Accordingly, the motion to cancel the notice of pendency is granted (*see American Standard Sheet Metal Supply Corp. v 36 Ave. Inc.*, Index No. 715045/2018 [Sup Ct, Queens County 2019] [canceling notice of pendency where action arose out of a lease for a commercial tenancy, and thus, plaintiff lacked "title or an ownership interest in the premises"]; *Leader v Parkside Group*, 2018 WL 4964620, * 1 [Sup Ct, NY County 2018] ["Here, the dispute concerns plaintiffs' alleged rights to a rent-stabilized lease and any damages arising from the landlord's failure to provide same. However, '[a] lease for years is deemed personalty,' and thus, a notice of pendency is unavailable in this action"]; *see also Tavor v 391 Broadway LLC*, 2018 WL 496790 [Sup Ct, NY County 2018] ["where, as here, the complaint seeks only money damages arising from an alleged breach of contract, there is no justification for a notice of pendency"]).

To the extent plaintiff relies on *Lawlor v 543 Second Ave., LLC* (49 AD3d 449 [1st Dept 2008]), and *Casanas v Carlei Group, LLC* (105 AD3d 570 [1st Dept 2013]), which relied exclusively on *Lawlor*, in support of its position that the notice of pendency was properly filed, this argument is unpersuasive. As noted in *PK Rest.*, *Lawlor* was decided on a unique set of facts which are not present here. Nevertheless, given plaintiff's reliance on *Lawlor* and *Casanas* that a notice of pendency filed by a possessory leaseholder could be viable, plaintiff had grounds to believe that it was justified in filing the notice of pendency. Therefore, defendant's request for costs and expenses is denied (*see PK Rest.*, 138 AD3d at 439; *Leader*, 2018 WL 4964620 at * 1).

In its first cause of action to quiet title, plaintiff alleges that "[b]ecause the [l]ease is not recorded, [p]laintiff demands that its leasehold be recognized in this case" (complaint, quiet title cause of action, ¶ 2).

Article 15 of the New York Real Property Actions and Proceedings Law provides that:

> "Where a person claims an estate or interest in real property . . . such person . . . may maintain an action against any other person, known or unknown . . . to compel a determination of any claim adverse to that of plaintiff which the defendant makes[.]"

Since, as set forth above, "a lease for years is deemed personalty" (*Matter of Grumman*, 2 NY2d at 507), plaintiff lacks the necessary interest in real property to support an action to quiet title. Accordingly, plaintiff's first cause of action is dismissed.

In its third cause of action, plaintiff alleges a breach of the lease based on defendant's "actions and omissions" (complaint, breach of lease cause of action, ¶ 2), including plaintiff's allegation that it "spent $1,000,000 renovating the space which [defendant] is trying to steal by throwing [plaintiff] out after a few months of operation" (complaint, ¶ 5 [N]). Defendant argues that "[t]his cause of action is not viable in view of the documentary evidence showing the proper termination of the [l]ease as a result of the flood and the inability to restore possession. Plaintiff has

no right of possession" (defendant's memorandum of law [NYSCEF Doc. No. 14], at 4-5). However, there has never been any determination by a court that the [l]ease has been validly terminated, or that plaintiff has no right of possession. Indeed, the Civil Court action is still open.

Moreover, plaintiff vigorously disputes that the lease has been terminated. In her affidavit in opposition to the motion, Aida Lekik, plaintiff's president alleges that: "I have never conceded that the tenancy was terminated, or that the lease no longer exists. I never signed a surrender. I never turned in the keys. I never vacated the premises. All of my equipment, to the extent not removed as a hazard after the flood, is there" (NYSCEF Doc. No. 23 at ¶ 9, Lekik aff). Accordingly, defendant's motion to dismiss the third cause of action for breach of the lease is denied.

In its unjust enrichment cause of action, plaintiff alleges that defendant has received the benefit of the work that plaintiff has put into the premises, and that if defendant were to be able to retain the benefit, without consideration, it would be unjustly enriched for the work done (complaint, unjust enrichment cause of action, ¶ 2).

It is well-settled under New York law that "a party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter" (*Cox v NAP Constr. Co.*, 10 NY3d 592, 607 [2008]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] ["[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]). Unjust enrichment is available only "'*in the absence of an actual agreement*'" (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012] [emphasis in original; citation omitted]).

The lease is such a contract, which governs the disputed subject matter – the work plaintiff allegedly put into the premises as required by defendant and/or the lease – and thus bars plaintiff's unjust enrichment claim (*see e.g. Remora Capital S.A. v Dukan*, 175 AD3d 1219, 1221 [1st Dept 2019] ["the unjust enrichment claim must be dismissed because it arises from matters covered by the contracts"]; *Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295, 295 [1st Dept 2002] ["the existence of a valid and enforceable written contract governing the disputed subject matter precludes plaintiffs from recovering in quantum meruit"]; *Scavenger, Inc. v GT Interactive Software Corp.*, 289 AD2d 58, 59 [1st Dept 2001] ["since the matters here in dispute are governed by an express contract, defendant's counterclaim for unjust enrichment was properly found untenable"].) Accordingly, the second cause of action for unjust enrichment is dismissed.

In the fourth cause of action, plaintiff seeks the imposition of a constructive trust on the premises because defendant allegedly took, and received the benefit of, the value of work that plaintiff performed on the premises (*see* complaint, constructive trust cause of action, ¶ 2). However, a constructive trust is not appropriate here. The imposition of a constructive trust is an extraordinary "'fraud-rectifying remedy'" designed to prevent unjust enrichment, not an independent cause of action (*Bankers Sec. Life Ins. Soc. v Shakerdge*, 49 NY2d 939, 940 [1980].) As a quasi-contractual remedy, a constructive trust cannot be imposed where a written agreement – here, the lease – already governs the subject matter at issue. (*Hamrick v Schain Leifer Guralnick*, 146 AD3d 606, 607 [1st Dept 2017] [dismissing constructive trust claim since the subject matter thereof was governed by an express written contract]; *Sotheby's Inc. v Mao*, 2016 NY Slip Op

30708[U], ** 14-15 [Sup Ct, NY County 2016] [dismissing unjust enrichment claim as barred by the companion breach of contract claim].)

In addition, a court will not impose a constructive trust absent: (1) a confidential or fiduciary relation; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment. (see *Bankers Sec. Life Ins. Soc.*, 49 NY2d at 940.) Plaintiff cannot show a confidential or fiduciary relationship as it was merely a commercial tenant, and it also cannot identify any transfer made in reliance on any promise by defendant.

Plaintiff does not respond to this argument in its opposition papers. Accordingly, this court deems this cause of action abandoned, and it is dismissed (see *Burgos v Premiere Props., Inc.*, 145 AD3d 506, 508 [1st Dept 2016] *see also Scekic v SL Green Realty Corp.*, 132 AD3d 563, 565 [1st Dept 2015].) The court has considered the remaining arguments and finds them to be without merit. Accordingly, it is

ORDERED that the motion to cancel the notice of pendency dated January 9, 2022 against the property known as 120 East 39th Street, New York, New York 10016 is granted, and the clerk is directed to comply upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendant's request for costs and expenses incurred in connection with the Notice of Pendency is denied; and it is further

ORDERED that the motion to dismiss is granted with respect to the first, second and fourth causes of action of the complaint and denied with respect to the third cause of action; and it is further

ORDERED that the action is severed and continued with respect to the third cause of action; and it is further

ORDERED that defendant shall interpose an answer in this action within twenty (20) days after service of the decision and order, with notice of entry; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon plaintiff, as well as, the Clerk of the Court, who shall mark its records accordingly; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on April 5, 2023, details which shall be provided no later than April 3, 2023.

January 23, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**