

Sprecase v Tenreiro

2023 NY Slip Op 30496(U)

February 15, 2023

Supreme Court, New York County

Docket Number: Index No. 652830/2018

Judge: Sabrina B. Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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WALTER L STIPA SPRECASE,

Plaintiff,

- v -

DANIEL TENREIRO, CARLA M BRASCHI-KARAM DE
TENREIRO,

Defendant.

-----X

INDEX NO. 652830/2018

MOTION DATE 02/03/2023

MOTION SEQ. NO. 020 021

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 020) 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 392, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 427, 428, 429, 430

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 021) 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 421, 422, 423, 424, 425, 426, 431, 432, 433, 434

were read on this motion to/for SUMMARY JUDGMENT

BACKGROUND

This case arises out of a \$500,000 loan from JPMorgan Chase Bank, N.A. (JPMorgan) to Defendants that Defendants received on or about May 7, 2013 (the "Loan") to purchase a residential Cooperative Apartment Unit 8E located at 470 Park Avenue, New York, New York, 10022 (the "Park Avenue Apartment"). The total purchase price of the Park Avenue Apartment was \$910,000. As a condition for granting the Loan to Defendants, JPMorgan required that the entire amount borrowed by Defendants be fully collateralized and secured by funds held on deposit at JPMorgan.

Plaintiff put up the \$500,000.00 in collateral. Eventually Defendants defaulted on the loan and the collateral put up by Plaintiff was seized by JP Morgan.

Plaintiff maintains that said sum is due him from Defendants. Defendants claim that they were entitled to the \$500,000 pursuant to an alleged oral agreement and had no obligation to pay Plaintiff back.

PENDING MOTIONS

Plaintiff has moved for summary judgment on its claims (Mo. Seq. No. 20) and for summary judgment and dismissal of Defendants' counterclaims (Mo. Seq. No. 21).

The motions were fully briefed and submitted on February 3, 2023, and the court reserved decision. The motions are consolidated herein for disposition.

For the reasons stated below, the motion for summary judgment is denied and the motion to dismiss the counterclaims is granted.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]). “On a motion for summary

judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Questions of Fact on Plaintiff's Claim of Unjust Enrichment Must be Resolved at Trial

Under New York law, it is well established that to succeed on a claim for unjust enrichment, a plaintiff need only establish that "that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182.

Plaintiff did make out a *prima facie* case for summary judgment by alleging that Defendants were unjustly enriched as they received and still retain the fruits of Plaintiff's \$500,000 collateral, and it would be inequitable to permit Defendants to reap a windfall and retain the \$500,000 in Loan proceeds based upon JPMorgan's liquidation and seizure of Plaintiff's \$500,000 collateral – all while continuing to live in the Park Avenue Apartment.

However, in response Defendants have raised a triable issue of fact. Defendants' primary defense is that they are not legally obligated to repay Plaintiff because of a previous oral agreement between the parties that allegedly entitled them to keep the funds as payment.

Plaintiff correctly counters that such an agreement is not enforceable because it violates the statute of frauds. New York's Statute of Frauds provides that an agreement is void if it is not in writing when the agreement "by its terms is not to be performed within one year from the

making thereof.” *Hamburg v. Westchester Hills Golf Club, Inc.*, 96 A.D.3d 802, 802 (2012); *see also* General Obligations Law § 5-701(a)(1).

It is clear that the alleged January 6, 2013 oral agreement, which contemplated “extensive” work including “purchasing, financing, combining, renovating, insuring and decorating” three apartments in Manhattan, could not be performed within one year. Defendants readily admits that the “services” that were the subject of the purported January 6, 2013 oral agreement required several years of performance.

However, while this is a bar to the enforcement of the agreement, it does raise a question of fact requiring denial of the summary judgment motion on unjust enrichment. If indeed such an agreement were made between the parties, it would not be against equity and good conscience to permit Defendants to have benefitted from the payment contemplated by the alleged oral agreement.

Plaintiff argues Defendant’s credibility has been marred in this action by his previous submission of an admittedly fraudulent document. Additionally, the Court notes there is email correspondence where Defendant agreed that he would repay the money after the loan default. However, the bottom line is questions of credibility may not be resolved on a summary judgment motion.

Disputes as to the underlying facts cannot be resolved on a motion for summary judgment (*Harris v. City of New York*, 147 A.D.2d 186, 191). The credibility of the parties is not an appropriate consideration for the court (*Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338), and statements made in opposition to the motion must be accepted as true (*Patrolmen’s Benevolent Assn. v. City of New York*, 27 N.Y.2d 410, 415). Notwithstanding Defendant’s previous perjury in this action, any conclusion that defendants’ allegations are not credible would constitute an

impermissible determination of an issue that must await trial (CPLR 3212[c]; Siegel, NY Prac § 284, at 413; § 271, at 400 [2d ed]).

Based on the foregoing, Plaintiff's motion for summary judgment is denied.

DEFENDANTS' COUNTERCLAIMS ARE DISMISSED

Defendants assert four counterclaims: breach of oral agreement, promissory estoppel, *quantum meruit* and unjust enrichment.

Defendants' counterclaim for breach of an alleged oral agreement is dismissed for the reasons stated above.

Defendants' First Counterclaim includes a claim for alleged unpaid commissions for the purchase of various artwork pursuant to the purported January 2013 oral agreement. As Defendants allege this claim is a term of the purported January 2013 oral agreement, it also fails because that purported agreement is barred by New York General Obligations Law § 5-701(a)(1). This claim must also be dismissed because it is barred by the Statute of Frauds applicable to finders. *See* General Obligations Law § 5-701 (a)(10) (McKinney's 2020). *See also, Leist v. JMC Pharmacy Inc.*, 163 A.D.3d 431 (1st Dept. 2018); *Fitz-Gerald v. Donaldson, Lufkin & Jenrette, Inc.*, 294 A.D.2d 176 (1st Dept. 2002). Finally, this claim is also barred by the applicable six-year statute of limitations. *See* NY CPLR § 213(2) (McKinney's 2015).

Defendants allege that in May 2012, they purchased seven (7) works of art at major art auctions at Sotheby's and Christie's for Plaintiff and/or the Third-Party Defendants in May 2012. However, the Counterclaim claiming a breach of agreement related to the alleged unpaid commissions for the artwork purchases was not filed until July 18, 2018, over six years after the claim accrued.

The Counterclaim for Promissory Estoppel Is Dismissed

The elements of promissory estoppel are: (i) a clear and unambiguous promise; (ii) a reasonable and foreseeable reliance by the party to whom the promise is made; and (iii) an injury sustained by the party asserting the estoppel by reason of his reliance. *See Ripple's of Clearview, Inc. v Le Havre Assoc.*, 88 AD2d 120, 122 [2d Dept 1982]). Typically, a claim for promissory estoppel is asserted as an alternative claim to enforce an oral promise, in the absence of a written agreement, to avoid dismissal under the Statute of Frauds. However, in the *Matter of Hennel*, 29 N.Y.3d 487 (June 29, 2017), the Court of Appeals severely restricted the application of the doctrine of promissory estoppel to overcome the statutory requirements of the Statute of Frauds.

In the *Matter of Hennel*, the Court of Appeals reversed the Appellate Division, holding that Petitioners' claim against the decedent's estate seeking to enforce an oral promise was barred by the Statute of Frauds. *Id.*, at 494 - 496. The Court of Appeals held that the most important factor in overcoming the Statute of Frauds is whether the resulting injustice is, in fact, unconscionable. *Id.*, at 495 - 496.

The strongly held public policy reflected in New York's Statute of Frauds would be severely undermined if a party could be estopped from asserting it every time a court found that some unfairness would otherwise result. For this reason, the doctrine of promissory estoppel is properly reserved for that limited class of cases where the circumstances are such as to render it unconscionable to deny the promise upon which the plaintiff has relied.

Id., at 495.

When invoking promissory estoppel to overcome the Statute of Frauds, the claimant must satisfy an extremely high bar – the claimant must show that not enforcing the verbal agreement would be unconscionable; not merely unjust or unfair. *Id.* Unconscionable injury is harm well beyond what is expected from breaking a promise. *Merex A.G. v Fairchild Weston Sys., Inc.*, 29 F.3d 821, 826 (2d Cir. 1994). In general, “lost profits, lost fees, forgone business opportunities or

damage to business reputation” will not show unconscionable harm. *Darby Trading Inc. v. Shell Int'l Trading & Shipping Co.*, 568 F. Supp. 2d 329, 341 (S.D.N.Y. 2008) (internal quotations and citation omitted).

Both the Second Circuit and the New York Court of Appeals have held that a finding of unconscionable injury should be “limited” and “rare.” *Aleem v. Experience Hendrix, L.L.C.*, 413 F. Supp. 3d 251, 262 (S.D.N.Y. 2019). Defendants have failed to allege, let alone demonstrate, any injury beyond that which flows naturally from the non-performance of an unenforceable agreement. Thus, given the lack of any egregious circumstances or an unconscionable injury, the promissory estoppel counterclaim must be dismissed. *Darby Trading Inc. v. Shell Int'l Trading & Shipping Co.*, 568 F. Supp. 2d 329, 341 (S.D.N.Y. 2008).

***The Counterclaims for Quantum Meruit and Unjust Enrichment
Are Duplicative of the Claim for Breach of an Oral Agreement***

The counterclaims for *quantum meruit* and unjust enrichment must be dismissed because they are duplicative of the underlying, unenforceable oral contractual claims and “thus constitute an impermissible attempt to circumvent the statute of frauds.” *See Komolov v. Segal*, 144 A.D.3d 487 (1st Dept 2016) (affirming trial court’s grant of summary judgment dismissing plaintiff’s claims because “[t]hese quasi-contractual and tort claims were duplicative of underlying, unenforceable contractual claims and thus constituted an impermissible attempt to circumvent the statute of frauds.”). The *quantum meruit* and unjust enrichment claims are barred because General Obligations Law § 5-701(a)(10) applies to “contract[s] implied in fact or in law”. *See Fitz-Gerald v. Donaldson, Lufkin & Jenrette, Inc.*, 294 A.D.2d 176 (1st Dept 2002) (citation omitted). Since the purported January 2013 oral agreement is void by reason of the Statute of Frauds, Defendants cannot use the same alleged promise as a basis for a duplicative causes of action sounding in quantum meruit or unjust enrichment. *See Wings Assocs. v. Warnaco, Inc.*,

269 A.D.2d 183, 184 lv. denied 95 N.Y.2d 759 (1st Dept 2000). Accordingly, the counterclaims for quantum meruit or unjust enrichment must both be dismissed.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further


ORDERED that Plaintiff's motion to dismiss Defendants' counterclaims is granted in its entirety and the first, second, third and fourth counterclaims are dismissed, and the clerk shall enter judgment accordingly; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court

<u>2/15/2023</u>						HON. SABRINA B. KRAUS		J.S.C.	
DATE									
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE	