Ventures Soha LLC v USHA Soha Terrace LLC

2023 NY Slip Op 31246(U)

April 13, 2023

Supreme Court, New York County

Docket Number: Index No. 654830/2020

Judge: Mary V. Rosado

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO, *Justice*	**PART**	**33M**
VENTURES SOHA LLC, Plaintiff,	**INDEX NO.**	654830/2020
- v -	**MOTION DATE**	08/24/2022
USHA SOHA TERRACE LLC, Defendant.	**MOTION SEQ. NO.**	001
	DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, and after oral argument, which took place on January 24, 2023, where George Benaur, Esq. appeared for the Plaintiff Ventures Soha LLC ("Plaintiff" or "Ventures") and Brendan Kombol, Esq. ("Mr. Kombol") appeared for Defendant Usha Soha Terrace LLC ("Usha" or "Defendant"), Plaintiff's motion for summary judgment is denied.

Plaintiff commenced this action on September 30, 2020 (NYSCEF Doc. 1). Plaintiff alleged breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, promissory estoppel, and breach of fiduciary duties against Defendant (*id.* at ¶ 1). Allegedly, Plaintiff and Defendant agreed to share legal fees incurred during certain legal proceedings which occurred from 2017 to the present (*id.*). The parties were members of Soha Terrace LLC (the "LLC"), and the legal representation was allegedly conducted to protect the parties' common interests in the LLC against an individual named Hans Futterman ("Futterman") (*id.*). Plaintiff alleges Defendant refused to pay its agreed share of legal fees.

The agreement was allegedly an oral agreement entered in March of 2017 (the "Agreement") (*id.* at ¶ 7). It is alleged that the Agreement is evidenced by emails, legal invoices,

witnesses, and a draft co-manager agreement (*id.* at ¶ 9). Plaintiff alleges the legal fee invoices were being directed to both Plaintiff and Defendant, and that Defendant was aware legal fees were being incurred on its behalf (*id.* at ¶ 13). Allegedly, Defendant owes $137,521.37 (*id.* at ¶ 17).

Defendant filed its Answer on November 21, 2020 (NYSCEF Doc. 2). Defendant denied Plaintiff's allegations and asserted a number of affirmative defenses. Defendant asserts as an affirmative defense that Plaintiff has failed to credit the more substantial legal fees it would be obligated to share in the expense of, as incurred by Defendant, which would render the Plaintiff in debt to the Defendant (*id.* at ¶ 41). Defendant also asserted as an affirmative defense that Plaintiff failed to secure a joint litigation agreement with the Defendant, or a retainer with the firm they claim is owed the sums which are the subject of the complaint (*id.* at ¶ 43). The note of issue was filed on April 20, 2022 (NYSCEF Doc. 33). Plaintiff moved for summary judgment on August 10, 2022 (NYSCEF Doc. 34). Plaintiff seeks summary judgment on its causes of action for promissory estoppel, unjust enrichment, and breach of contract.

In support of its motion for summary judgment, Plaintiff offers the affidavit of Adam Friedman, Esq., ("Mr. Friedman") a partner in the Bankruptcy & Restructuring Group of Olshan Frome Wolosky LLP ("Olshan") (NYSCEF Doc. 35). Mr. Friedman states that it is his understanding that the parties entered into an oral agreement to share legal fees incurred by Plaintiff in connection with a bankruptcy dispute regarding the LLC (*id.* at ¶ 3). Mr. Friedman conceded in the affidavit that Olshan worked cooperatively with another firm, Yellen & Associates, to represent the joint interests of both Plaintiff and Defendant in the LLC (*id.* at ¶ 4).

Plaintiff also offered the affidavit of Stephen Muller, Plaintiff's principal ("Mr. Muller") (NYSCEF Doc. 36). Mr. Muller swears that the parties agreed to work with a "bankruptcy specialist" and "for this purpose they agreed to employ Mr. Friedman (*id.* at ¶ 11). Mr. Muller

testifies that on January 18, 2018, Plaintiff filed a joinder motion seeking to confirm an arbitration award seeking confirmation of Defendant's arbitration award against Futterman (*id.* at ¶ 12). Mr. Muller testified that in February of 2018, the parties jointly filed an omnibus limited objection, which was filed on behalf of both parties by Mr. Friedman of Olshan with Mr. Kombol as co-counsel (*id.* at ¶ 13). Mr. Muller argues that the court filings confirm the parties were aligned on the strategy to confirm an arbitration award removing Futterman as manager of the LLC and to be permitted to co-manage the LLC together (*id.* at ¶ 14). According to Mr. Muller, since Plaintiff owned 6% of the LLC and Defendant owed 14% of the LLC, their pro rata ownership was 30% to Plaintiff and 70% to Defendant. Mr. Muller claims that the agreement to co-manage is reflected in e-mails (*id.* at ¶ 16). Mr. Muller claims that from October 17, 2017 through 2019, Olshan and Yellen & Associates worked cooperatively in representing the common interests of both parties (*id.* at ¶ 18). However, certain claims by Mr. Muller are contradicted by the evidence submitted.

First, the joinder motion states that Mr. Friedman is only representing Plaintiff (NYSCEF Doc. 37). While joining in support of Defendant's position that an arbitration award granted to Defendant should be confirmed, nowhere does it state that Mr. Friedman was representing Defendant (*id.*). The joinder motion states that Defendant had made its own motion to confirm the arbitration award, and that Plaintiff was merely joining in support of that motion (*id.* at ¶ 1). It also appears that the arbitration award, which Plaintiff benefitted from, was obtained solely by Defendant. Moreover, the limited objection which Muller relies upon also states that Mr. Friedman was only representing Plaintiff (NYSCEF Doc. 38). In fact, the document expressly states that Mr. Kombol appeared for Defendant while Mr. Friedman appeared for Plaintiff (*id.*).

There is a string of e-mails which were presented by Plaintiff in support of its motion for summary judgment (NYSCEF Doc. 39). The e-mails appear to reflect negotiations regarding the

drafting of a co-manager agreement. There is an e-mail dated November 3, 2017, timestamped at 5:25 pm, from ushaholdings@yahoo.com sent to Atul Bhatara and Mr. Muller (*id.*). The subject of the e-mail is "co management agreement." The e-mail starts with bold font stating "Let me know your thoughts." There is a proposed clause titled "Litigation and Costs." That clause states "Business decisions on legal counsel, cost and structure will be on agenda to be finalized. Strategy needs to be determined ASAP. Any out-of-pocket costs to be split between USHA and Ventures Soha based on pro-rata share of deal." There is no confirmation e-mail or signed writing. Nor was the pro-rata share of the deal ever defined. There is no indication of how the "business decisions on legal counsel, cost and structure" were finalized. The e-mails show negotiations in November of 2017, but the Complaint alleges that an agreement was reached in March of 2017.

Plaintiff also submits a variety of invoices from Olshan (NYSCEF Doc. 40). The invoices are all sent to a Gmail account bearing Plaintiff's name but do not appear to have been directly sent to Defendant. Some invoice descriptions differentiate Plaintiff as client and Defendant as "USHA". For instance, on an invoice dated July 12, 2019, in a time entry for June 13, 2019, the description states "Prepare/attend call with client and USHA". Another invoice dated June 12, 2019 with an time entry dated May 9, 2019 states "Telephone call with client; telephone calls to Trustee counsel and B. Kombol". Likewise, in an invoice dated April 22, 2019, with a time entry dated March 20, 2019, the description states "Telephone call with client; telephone call with Atul [a member of Defendant]; telephone call with B. Kombol). Again, in an invoice dated July 13, 2018, in a time entry dated June 11, 2018, the time entry states "Emails with Herbst and USHA and client"; while a time entry for June 22, 2018 states "Telephone conferences with Trustee and USHA counsel". These are just a few examples of the invoices creating an issue of fact as to whether Olshan represented Defendant.

There is a one-page document which purports to be an undated reconciliation of fees due, which is annexed to Mr. Muller's affidavit (NYSCEF Doc. 41). This document states that Olshan's invoices were to be paid 70% by Defendant and 30% by Plaintiff. Although it is introduced by Mr. Muller's affidavit, it is unclear who created this document, as it was not introduced through the affidavit of Olshan Partner, Mr. Friedman.

Plaintiff also attached the deposition of Vishal Sharma ("Mr. Sharma") (NYSCEF Doc. 46). Mr. Sharma testified that he, along with Atul Bhatara (referenced in the Olshan invoices) and Vipal Kapoor own Defendant (*id.*, 11:23-25). When asked if he entered into a pro rata agreement to share in the legal fees of Olshan during the course of certain legal proceedings, Mr. Sharma responded "no." (*id.*, 18:4-13). Mr. Sharma testified that he received a Olshan invoice and replied to it, but he did not remember who sent it to him (*id.*, 21:7-21). Mr. Sharma testified that Mr. Kombol was his attorney during the proceedings giving rise to this dispute, and Mr. Friedman was Steve Muller's attorney (*id.*, 22:4-19). Mr. Sharma also testified that the only conversations he had with Mr. Friedman were when his attorney (Mr. Kombol) was present (*id.*, 22:20-25). Mr. Sharma further testified that he, Mr. Kombol, Mr. Friedman, and Mr. Muller all had telephone calls to discuss strategy regarding litigation against Futterman (*id.*, 24:8-23). When asked why he was not contributing to the Olshan legal fees, Mr. Sharma responded "My reason is I have an attorney. Why would I pay somebody else's attorney?" (*id.*, 29:7-22). When asked if Mr. Sharma offered to pay Olshan's legal fees at one point, he responded that he believed any offer was made due to nuisance value or for settlement (*id.*, 30:1-3).

Plaintiff argues it is entitled to summary judgment because Defendant and Plaintiff agreed to share legal fees (NYSCEF Doc. 43). Plaintiff argues the Olshan invoices reflect this agreement, as do the Muller and Friedman affidavits. Plaintiff argues Mr. Kombol's statements on the record

at Mr. Sharma's deposition as support its motion for summary judgment. Defendant did not submit opposition, but requested multiple adjournments.[1]

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.,* 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.,* 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.,* 1 NY3d 381 [2004]).

As a preliminary matter, the Court notes that it is within the Court's discretion whether or not it deems a plaintiff's entire statement of material facts admitted where a defendant fails to submit a counter-statement of material facts (*On the Water Productions, LLC v* Glynos, 211 AD3d 1480 [4th Dept 2022]; *Al Sari v Alishaev Bros., Inc.*, 121 AD3d 506 [1st Dept 2014]; *Abreu v Barkin & Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]). In reviewing the record, and taking the numerous emergencies stated on the record by Defendant to be true, the Court declines

[1] Defendant filed an adjournment of motion request on September 7, 2022 (NYSCEF Doc. 47). Defendant's counsel requested an adjournment stating that the principal of his client, who is severely disabled, lost his mother mere weeks ago and has been unable to work with his office to oppose the motion (*id.* at ¶ 4). Defendant's counsel also stated the parties were preparing for "a complex arbitration, related to these disputes, that begins in mere weeks, the conclusion of which may well obviate the claims at issue herein." (*id.* at ¶ 5). Although Defendant stated that a 30-day extension would suffice, Defendant never submitted opposition papers. By the time oral argument took place on January 24, 2023, there were still no opposition papers. Defendant sought an application for an adjournment on the record stating he has had numerous personal family emergencies, but the request was denied.

to deem Plaintiff's statement of material facts to be admitted. Plaintiff must still make prima facie showing and demonstrate the absence of material issues of fact (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]).

To make a prima facie showing of breach of contract, Plaintiff must prove the existence of a contract, Plaintiff's performance, Defendant's breach, and damages (see *Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]). There are numerous material issues of fact which Plaintiff has failed to eliminate in its *prima face* showing of breach of contract. The existence and terms of the alleged agreement are contested via sworn deposition testimony, and contradicted by the pleadings and evidence submitted. Therefore, summary judgment in favor of Plaintiff is inappropriate (*Sabre Intern. Sec., Ltd. v Vulcan Capital Management Inc.* 95 AD3d 434 [1st Dept 2012]; *Pryor & Mandelup, LLC v Sabbeth*, 82 AD3d 731 [2d Dept 2011] ["Defendant's denial of promise to pay law firm warranted denial of motion for summary judgment on breach of an oral contract"]; *Steele v Delverde S.R. L.*, 242 AD2d 414 [1st Dept 1997]).

Moreover, where the terms of an alleged oral agreement are vague or indefinite, it will not support a cause of action alleging breach of contract (*Martin Associates, Inc. v Illinois National Insurance Company*, 188 AD3d 572 [1st Dept 2020] ["presence of a contract will only be found where the material terms are reasonably certain"]; *Sud v Sud*, 211 AD2d 423 [1st Dept 1995]). To the extent that Plaintiff relies on the e-mails between the parties as evidence of the terms of the alleged oral agreement, the terms described are too vague and indefinite to enforce on a summary judgment motion (*Lowinger v Lowinger*, 287 AD2d 39, 39 [1st Dept 2001]). The e-mail merely states "Any out-of-pocket costs to be split between USHA and Ventures Soha based on pro-rata share of deal." Plaintiff asserts that because USHA owned a 14% interest and Ventures Soha owned a 6% interest, the pro rata share of the deal was 70% USHA and 30% Ventures. No party

provides definitive evidence of the definition of "pro-rata share." Mr. Muller and Mr. Friedman state it is "their understanding of the parties' agreement" that the pro rata share is 70/30, however, it is an issue of fact whether "their understanding" of the agreement is correct, as Mr. Sharma testified under oath at his deposition that there was no such agreement. On a motion for summary judgment, it is inappropriate for this Court to make credibility determinations.

Further, the e-mail describing a draft of a co-manager agreement upon which Plaintiff relies explicitly states "[b]usiness decisions on legal counsel, cost and structure will be on agenda to be finalized." Where a writing uses language reflecting that an agreement might be reached at some time in the future, but had not been reached so far, it is an issue of fact regarding whether there exists an enforceable contract (*Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept 2003]). The fact that multiple written drafts were exchanged between the parties, coupled with the disclaimer language in the parties' e-mails, and Mr. Sharma's testimony denying there was ever an agreement, makes the parties' intent to be bound to any contract an issue of fact (*Schutty v Speiser Kraause P.C.*, 86 AD3d 484, 485 [1st Dept 2011]). Moreover, these drafts evidence ongoing negotiations in November of 2017 while Plaintiff alleges the agreement was reached in March of 2017. Therefore, at best, there is a triable issue of fact as to whether an agreement exists, and if it does, on what terms.

Plaintiff seeks summary judgment on its promissory estoppel claim. To prevail on a theory of promissory estoppel, a party must show (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409 [1st Dept 2017]). As a general matter, an oral promise will not be enforced on promissory estoppel grounds unless it would be unconscionable to deny it (*Steele v Delverde S.R.L.*, 242 AD2d 414, 415 [1st Dept 1997] citing

Ginsberg v Fairfield-Noble Corp., 81 AD2d 318, 320-321 [1st Dept 1981]). Plaintiff has made no allegations of unconscionability in its Complaint, nor has it made any showing of unconscionability in its motion for summary judgment.

Moreover, there has been no showing of a "sufficiently clear and unambiguous" promise. If the e-mail drafts are considered the "promise", the definition of "pro-rata share of the deal" is not included and is therefore too ambiguous to grant summary judgment. Further, if Plaintiff relies on the e-mails as the alleged promise, there is an issue of fact as to whether it reasonably relied on an e-mail that expressly states that "business decisions on legal counsel, cost, and structure will be on the agenda and finalized." While Plaintiff states that "Usha's principal at one point agreed to pay for Olshan's services", this ignores the context in which that offer was made – which Mr. Sharma testified was to settle a dispute or "out of nuisance value" – not because, as Plaintiff argues, Defendant agreed to pay for 70% of Olshan's legal fees. While Plaintiff also states in its memorandum of law that Defendant "should offer evidence under oath", Plaintiff ignores the deposition testimony of Mr. Sharma, which was under oath.

Lastly, Plaintiff moves for summary judgment on its cause of action for unjust enrichment.[2] To prove unjust enrichment, a Plaintiff must show that it conferred a benefit upon the Defendant, and that the Defendant obtained such benefit without adequately compensating Plaintiff (*Alpert v M.R. Beal & Company*, 162 AD3d 491 [1st Dept 2018]). It is undisputed that Plaintiff, through employing Mr. Friedman, conferred a benefit upon Defendant (*see* NYSCEF Doc. 46, 130:14-16 ["There is also no dispute, and I would like the court to be aware of this, there is no dispute that Adam Friedman and Olshan provided value."]). It is similarly undisputed that Defendant did not pay Mr. Friedman for any benefits it might have obtained as a result of his legal services. However,

[2] Although Plaintiff has alleged breach of fiduciary duty and breach of the covenant of good faith and fair dealing, it has not moved for summary judgment on either cause of action (*see* NYSCEF Doc. 34).

Plaintiff fails to cite to the Court other important deposition testimony, immediately preceding the testimony it relies on, which states "My office on behalf of USHA Soha Terrace [the Defendant] … invested enormous amounts of effort, and continue to, for the benefit of the members" (*id.* 130:7-13). While Mr. Friedman provided a benefit to Defendant in terms of ousting Futterman, the attorneys that Defendant retained, according to the record submitted on this motion, also provided a benefit to Plaintiff in their legal efforts to oust Futterman, including obtaining an arbitration award.

The extent of the benefits conferred by the legal representation retained by both sides, and whether the services "cancel" each other out, as outlined in Defendant's affirmative defense, creates an issue of fact. Based on the evidence submitted, and the heavy burden Plaintiff must carry to obtain summary judgment, this issue of fact has not been eliminated and therefore summary judgment is inappropriate.

Accordingly, it is hereby,

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

ORDERED that within ten days of entry, counsel for Defendant shall serve a copy of this Decision and Order on Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

4/13/2023
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

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