SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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NAHUM DAVIDOVICH, individually and derivatively on behalf of Shimha LLC,

Plaintiff, Decision and order

- against - Index No. 515075/2023

SHIMHA LLC, DAVID SIMHA, SHIMON LEFKOWITZ, and MEDWAY COUNTRY MANOR, INC. d/b/a MEDWAY COUNTRY MANOR SKILLED NURSING & REHABILITATION CENTER,

Defendants, October 10, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1 & #2

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the amended complaint on the grounds the complaint fails to allege any causes of action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Amended Complaint, on May 2, 2014 the plaintiff and defendants Shimon Lefkowitz, David Simha and non-party Larry Goldfarb executed an operating agreement for defendant Shimha LLC for the purpose of acquiring and leasing or selling property located at 115 Holliston Street in Medway Massachusetts. The plaintiff loaned Shimha LLC one million dollars and maintained a fifty percent interest in the company. Further, on the same day defendant Medway Country Manor Inc., executed a lease of the premises as tenant from Shimha LLC as landlord. The lease provided for base rent of $800,000 plus one

percent of Medway's gross operating revenue as defined in the lease itself. Moreover, the operating agreement provided for monthly payments of $8,333.34 to be paid to the plaintiff until his loan was paid back. Moreover, the operating agreement provided that the plaintiff was to be paid the additional one percent of revenue that Medway was required to pay pursuant to the lease.

On December 1, 2016 Shimha entered into a Healthcare Regulatory Agreement with the Department of Housing and Urban Development which restricted Shimha's distributions. The members of Shimha, including the plaintiff, adopted resolutions permitting the manager of Shimha to make any modifications necessary in any of the contracts to which Shimha is a party, in order to obtain approval from HUD. Thus, on December 22, 2016 Shimha and Medway amended the lease and removed the revenue payment due the plaintiff each month. This lawsuit was commenced and the plaintiff alleges that the lease was modified wherein he was denied his valuable monthly payment. He has asserted causes of action for breach of contract, unjust enrichment, breach of fiduciary duty, breach of good faith and fair dealing, a constructive trust and a declaratory judgement. The defendants have now moved seeking to dismiss the complaint on various grounds. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Redwood Property Holdings, LLC v. Christopher, 211 AD3d 758, 177 NYS3d 895 [2d Dept., 2022]).

In Johnson v. Ward, 4 NY3d 516, 797 NYS2d 33 [2005] the court held that "long-arm jurisdiction over a nondomiciliary exists where (i) a defendant transacted business within the state and (ii) the cause of action arose from that transaction of business. If either prong of the statute is not met, jurisdiction cannot be conferred under CPLR 302(a)(1)" (id). In Agency Rent A Car System Inc., v. Grand Rent A Car Corp., 98 F3d 25 [2d Cir. 1996] the court explained that "the question of whether an out-of-state defendant transacts business in New York is determined by considering a variety of factors, including: (i)

whether the defendant has an on-going contractual relationship with a New York corporation...(ii) whether the contract was negotiated or executed in New York, and whether, after executing a contract with a New York business, the defendant has visited New York for the purpose of meeting with parties to the contract regarding the relationship...(iii) what the choice-of-law clause is in any such contract...and (iv) whether the contract requires franchisees to send notices and payments into the forum state or subjects them to supervision by the corporation in the forum state...Although all are relevant, no one factor is dispositive. Other factors may also be considered, and the ultimate determination is based on the totality of the circumstances" (id). Thus, a non-domiciliary may be subject to the jurisdiction of New York courts where that individual "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR §302(a)). "Although it is impossible to precisely fix those acts that constitute a transaction of business" case law has established that "it is the quality of the defendants' New York contacts that is the primary consideration" (see, Fischbarg v. Doucet, 9 NY3d 375, 849 NYS2d 501 [2007]).

In this case the amended complaint asserts the negotiations, communications and transactions between the parties as well as the execution of the operating agreement all took place in New

York (see, Amended Complaint, ¶¶ 12,14 [NYSCEF Doc. No. 19]). Further, the lease was also negotiated in New York and the vote to permit any modifications which is the real subject of this lawsuit also took place in New York (see, Amended Complaint, ¶¶ 18,33 [NYSCEF Doc. No. 19]). These facts provide sufficient basis for New York courts to maintain jurisdiction over the corporate defendants. Therefore, the motion seeking to dismiss the corporate defendants on this basis is denied.

Turning to the service of process upon defendant Simha, it is well settled that pursuant to CPLR §308(4) the plaintiff must exercise due diligence to demonstrate that personal service or service upon someone of suitable age and discretion could not be made. Thus, one attempt at personal service is insufficient (see, Markoff v. South Nassau Community Hospital, 91 AD2d 1064, 458 NYS2d 672 [2d Dept., 1983]). Likewise, service at the same times of the day is equally insufficient. In this case the affidavit of the process server indicates that service was attempted three times at three different times of day satisfying the due diligence requirement. The defendant asserts due diligence was not satisfied because the process server did not explain that service was attempted at the defendant's place of business. It is true that due diligence includes trying to ascertain the business address of the party to effectuate service there (Serrano v. Staropoli, 94 AD3d 1083, 943 NYS2d 201 [2d

Dept., 2012]). Therefore, where the affidavit from the process server fails to indicate efforts to locate defendant's business address for personal service there then service is improper (see, also, County of Nassau v. Letosky, 34 AD3d 414, 824 NYS2d 153 [2d Dept., 2006]). However, other than presenting that argument, there is no evidence the defendant even had a business address wherein service could be effectuated. The affidavit of David Simha does not mention a business address and Mr. Simha is listed in various documents as a manager of Shimha and the president of Medway which are both located in Massachusetts (see, Addendum to Operating Lease, page 9 [NYSCEF Doc. No. 11]). Thus, there is no basis to even speculate the defendant had a business address where service could have been effectuated.

Further, it is true that generally a process server's affidavit provides prima facie evidence of proper service (Household Finance Realty Corp., of New York v. Brown, 13 AD3d 340, 785 NYS2d 742 [2d Dept., 2004]). To contend that service was improper and that defendant is entitled to a hearing on the matter, the defendant must allege facts to support the contention (Mortgage Electronic Registration Systems, Inc., v. Schotter, 50 AD3d 983, 857 NYS2d 592 [2d Dept., 2008], Hannover Insurance Company v. Cannon Express Corp., 1 AD3d 358, 766 NYS2d 853 [2d Dept., 2003]). Likewise, conclusory denials are insufficient to entitle a defendant to a hearing concerning service (Deutsche

Bank National Trust Company v. Hussain, 78 AD32d 989, 912 NYS2d 595 [2d Dept., 2010]). Consequently, a defendant is generally required to issue a sworn denial concerning service (Ballancio v. Santorelli, 267 AD2d 189, 699 NYS2d 312 [2d Dept., 1999]). Thus a sworn denial by defendant that the location of the service was no longer his usual place of abode raises an issue whether service was proper (Johnson v. Motyl, 202 Ad2d 477, 609 NYS2d 34 [2d Dept., 1994]). In this case, there was service upon the premises pursuant to CPLR §308(4). Mr. Simha has not raised any specific objections concerning service of process in any significant way. He merely states in conclusory fashion that concerning service he never "observed that the Summons and Complaint was affixed to my front door" (see, Affirmation dated September 7, 2023, ¶6 [NYSCEF Doc. No. 43]) without explaining in any way the specific manner in which process was deficient. In Caba v. Rai, 63 AD3d 578, 882 NYS2d 56 [1st Dept., 2009] the court specifically held that merely asserting that "I was not served with a summons and verified complaint" is conclusory and insufficient to raise any issue of fact concerning service.

Therefore, based on the foregoing, any motion seeking to dismiss the case based upon jurisdiction or improper service is denied.

Turning to the statute of limitations issued raised, first, it is well settled that forum selection clauses only deal with

substantive law, not procedural law and the forum state generally determines whether such law is procedural or substantive (Kilberg v. Northeast Airlines Inc., 9 NY2d 34, 211 NYS2d 133 [1961]). Therefore, New York, the forum state, must first determine whether any statute of limitation questions is procedural or substantive. In Tanges v. Heidelberg North America Inc., 93 NY2d 48, 687 NYS2d 604 [1999] the court explained that "in New York, Statutes of Limitation are generally considered procedural because they are '[v]iewed as pertaining to the remedy rather than the right'...The expiration of the time period prescribed in a Statute of Limitations does not extinguish the underlying right, but merely bars the remedy...Nicely summarized elsewhere, '[t]he theory of the statute of limitations generally followed in New York is that the passing of the applicable period does not wipe out the substantive right; it merely suspends the remedy' (Siegel, N.Y. Prac § 34, at 38 [2d ed])" (id).

Therefore, while both the operating agreement and the lease both state that any disputes are governed by Massachusetts law, the statute of limitations applicable is governed by New York law. Thus, questions whether the action is within the statute of limitations must necessarily be examined before any substantive questions can be addressed.

Pursuant to CPLR §231(2) the statute of limitations for a breach of contract claim is six years. Moreover, the statute of

limitations begins to run when a cause of action accrues (CPLR §203(a)) which means "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (see, Aetna Life & Casualty Company v. Nelson, 67 NY2d 169, 501 NYS2d 313 [1986]).

There can really be no dispute the breach occurred on December 22, 2016 when the lease was amended allegedly curtailing payments due the plaintiff. Although the lawsuit was filed more than six years from that date, the plaintiff asserts the action is timely because "plaintiff's claims are all predicated on a breach of the Operating Agreement that is continuous and ongoing, and therefore may be asserted at any time regardless of when the first breach occurred, for all damages arising within the last six years" (see, Affirmation in Opposition, ¶17 [NYSCEF Doc. No. 41]). That argument is based on the fact the operating agreement required monthly payments to the plaintiff thereby requiring continuing performance which extended the statute of limitations. This continuing wrong doctrine "is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" (Henry v. Bank of America, 147 AD3d 599, 48 NYS3d 67 [2d Dept., 2017]). However, a distinction must be drawn between a single wrong that has continuing effects which does not extend the statute of limitations and a series of independent,

distinct wrongs, which does extend the statute of limitations (see, Salomon v. Town of Wallkill, 174 AD3d 720, 107 NYS3d 420 [2d Dept., 2019]). The key determinant is whether a single breach occurred with accruing damages as the breach continues or whether each breach gives rise to a new cause of action (see, Kahn v. Kohlberg, Kravis, Roberts & Co., 970 F.2d 1030 [2d Cir. 1992]). Thus, in Doukas v. Ballard, 135 AD3d 896, 24 NYS3d 174 [2d Dept., 2016] the court rejected the continuing wrong theory. In that case, in 1994 or 1995 Doukas agreed to invest in technology development with Ballard and he provided capital in exchange for a fifty percent interest in the company. In 2009 he sued Ballard alleging Ballard breached the contract and diverted the ownership interests to Ballard's wholly owned companies (see, Doukas v. Ballard, 39 Misc3d 1227(A), 972 NYS2d 143 [Supreme Court Suffolk County 2013]). The plaintiff argued the continuing wrong doctrine applied because even at this date he was still being denied profits that were due. The court, citing earlier authority, held the lawsuit time barred. The court explained that "this case is not an example of continuing contractual breaches in which new and timely claims continue to arise. The acts of which the plaintiffs complain are alleged to have occurred during a discrete period of time in the late 1990's and early 2000. It is irrelevant for purposes of the statute of limitations that the plaintiffs may continue to be damaged as a

result of those acts" (id). The Appellate Division affirmed holding that "the breach of contract causes of action accrued, at the latest, in 2000, when a certain patent application submitted by Ballard was approved. Therefore, the breach of contract causes of action, asserted against the defendants in 2011, were time-barred" (supra). In Comm Trade USA, Inc., v. INTL FCStone, Inc., 2014 WL 787912 [S.D.N.Y. 2014] the court explained that the continuing wrong doctrine only applies where action can give rise to future damages which cannot be predicted at the time of the initial act. However, "by contrast, assuming that a breach of the contract occurred, damages were apparent and calculable once defendants refused to pay plaintiff for introductions that plaintiff claimed to have made. To the extent that plaintiff asserts simply an ongoing breach of the contract-with damages increasing as the breach continued-the continuing wrong theory does not apply" (id).

In this case, as noted, the breach occurred when the lease was amended. The fact that payments due each month were no longer made to the plaintiff does not mean a new breach occurred each month. Rather, the damages from the initial breach simply accrued. The plaintiff asserts this is precisely the sort of continuing wrongs to which the doctrine applies. However, a careful examination of the cases cited by the plaintiff including Beller v. William Penn Life Insurance Company of New York, 8 AD3d

310, 778 NYS2d 82 [2d Dept., 2004] are factually distinguishable and do not demand the application of the doctrine. In Beller, (supra) the court applied the doctrine where a plaintiff sued alleging the defendant life insurance policy breached the agreement by failing to conduct rate reviews every five years. The court explained that "the subject insurance contract imposed a continuing duty upon the defendant to consider the factors comprising the cost of insurance before changing rates, and to review the cost of insurance rates at least once every five years to determine if a change should be made. Accordingly, the plaintiff's claim for damages accrued each time the defendant allegedly breached these obligations, and only claims for damages accruing more than six years before the commencement of this action are time-barred" (id). Clearly, in Beller, (supra) every five years a new breach occurred unrelated to any previous breach. Thus, the court properly applied the doctrine to extend the statute of limitations. As noted, once the breach occurred in December 2016 the only part of the contract that accrued was simply damages and that is not a basis upon which to apply the continuing wrong doctrine. Therefore, the plaintiff may not avail himself of the continuing wrong doctrine and consequently this lawsuit is time barred.

The plaintiff further argues the ninth cause of action of the amended complaint seeks a declaratory judgement the lease

amendment, which deprived the plaintiff of his stream of income, had no validity. Further, the plaintiff insists that cause of action has no statute of limitations and consequently that cause of action is timely. In Riverside Syndicate Inc., v. Munroe, 10 NY3d 18, 853 NYS2d 263 [2010] the court held that a contract that was void at its inception is not bound by any statute of limitations. In Faison v. Lewis, 25 NY3d 220, 10 NYS3d 185 [2015] the Court of Appeals explained, regarding deeds, that a deed that contains a forged signature is a fraudulent deed which is void and conveys no title and that such claims that flow from such forgery are not bound by any statute of limitations. However, a deed "where the signature and authority for conveyance are acquired by fraudulent means" is merely voidable and does convey good title. The court stated that a deed containing the title holder's actual signature reflects "the assent of the will to the use of the paper or the transfer, although it is assent induced by fraud mistake or misplaced confidence" (id). Consequently, such a deed "clothed with all the evidences of good title, may incumber the property to a party who becomes a purchaser in good faith" (id). Therefore, in Shau Chung Hu v. Lowbet Realty Corp., 161 AD3d 986, 78 NYS3d 150 [2d Dept., 2018] the court held an individual who executed a deed obtained by fraudulent means could convey the deed the bona fide purchasers since there was no allegation the individual's signature was

forged. The court further noted that Riverside (supra) articulated the same rule regarding contracts in general and not just deeds. Although the ninth cause of action states that "plaintiff is entitled to a declaratory judgment that the Lease Amendment is a legal nullity, void, and without any legal effect" (see, Amended Complaint, ¶105 [NYSCEF Doc. No. 19]) the amended complaint does not allege any forgery or any conduct on the part of the defendants that would render the lease void as opposed to voidable. This distinction is critical because only contracts that are void ab initio survive any statute of limitations normally applicable. Contracts that are merely voidable for a host of reasons are of course, bound by the relevant statute of limitations. As the court noted in Certain Underwriters at Lloyd's v. Milberg LLP, 2009 WL 3241489 [S.D.N.Y. 2009] "plaintiffs' claim concerns not an illegal agreement but rather an illegal act by one of the parties during contract formation...The London Insurers miss the distinction between a contract that is void from its inception, like the one in Riverside Syndicate, and a contract that is voidable for fraud, like the one at issue in this case...That the London Insurers mistakenly characterize the contract as "void ab initio"...rather than as voidable, is of no moment" (id).

Thus, since the lease amendment is not void ab initio the relevant statute of limitations applies (Rockwell v. Despart, 212

AD3d 27, 181 NYS3d 345 [3rd Dept., 2022]). The plaintiff failed to file this lawsuit within six years of the lease amendment and consequently has failed to timely file this lawsuit.

Therefore, the motion seeking to dismiss the lawsuit is granted.

So ordered.

ENTER:

DATED: October 10, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC