Awaken Advisors Ltd. v Atlas Tech. MGMT PTE
2024 NY Slip Op 32396(U)
July 2, 2024
Supreme Court, New York County
Docket Number: Index No. 654468/2022
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** — ***Justice*** | **PART** **38M**

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AWAKEN ADVISORS LTD.,

Plaintiff,

- v -

ATLAS TECHNOLOGY MGMT PTE, CTH GROUP, ATLAS TECHNOLOGY MANAGEMENT PTE. LTD., CTH GROUP HQ PTE. LTD. D/B/A THE CTH GROUP, ATLAS MINING LLC,

Defendants.

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INDEX NO. 654468/2022

MOTION DATE 08/03/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62

were read on this motion to/for DISMISS.

LOUIS L. NOCK, J.S.C.

This action arises out of a service agreement, pursuant to which plaintiff agreed to provide certain event management services to defendants Atlas Technology Management Pte. Ltd., CTH Group, and Atlas Mining, LLC (collectively, the "client"). Plaintiff alleges that it fully performed under the parties' agreement, but Atlas has failed to pay the remaining balance under the agreement. Defendants Atlas Technology Management Pte. Ltd. and CTH Group HQ Pte. Ltd. (collectively "Atlas") assert a counterclaim for breach of the agreement by plaintiff. Before the court is plaintiff's motion to dismiss Atlas' counterclaim, and Atlas' cross-motion for leave to serve an amended answer and counterclaim. Upon the foregoing documents, the motion is granted, and the cross-motion is denied, as set forth in the following memorandum decision.

Background

The agreement between plaintiff and the client provides that plaintiff was to provide certain event management services in conjunction with an event titled "Atlas Forum 2022," to be

held in Austin, Texas on June 7-8, 2022 (service agreement, NYSCEF Doc. No. 27). Plaintiff was to receive a $200,000 service fee for "(1) consulting, event planning, and management; (2) staging costs including set design, material, labor, insurance, taxes, and registration zone; and (3) minisite for RSVP, program updates, content management. (These services are reference in the budget plan Row 2, Row 12, and Row 13.)" (*id.*, ¶ 3). The client agreed to reimburse plaintiff for certain specified out-of-pocket expenditures, as well as an additional 20% percent services fee on facilities charges (*id.*). Any additional services relating to Atlas Forum 2022 "outside of the scope of work will be separately [sic] agreed responsibility outside of the budgeted scope of work and will be agreed with Client and [plaintiff] and billed separately" (*id.*). Plaintiff provided the client with a budget via email on March 24, 2022, and the line items covered by the service fee are listed in the budget in the locations identified by the service agreement (budget sheet, NYSCEF Doc. No. 30).

In its counterclaim, Atlas alleges that plaintiff breached the service agreement in several ways, specifically by erroneously charging Atlas for line items that were covered by the service fee (counterclaim, NYSCEF Doc. No. 28, ¶¶ 9-12), charging additional amounts for the increased size of the guest list without agreeing to services outside of the scope of the service agreement (*id.*, ¶¶ 13-14), charging Atlas for services either performed by Atlas rather than plaintiff or not performed at all (*id.*, ¶¶ 16-17), and incorrectly calculating late fees (*id.*, ¶¶ 19-23). Atlas also claims that plaintiff provided substandard services, including putting on a smaller event than originally promised, failing to account for a VIP guest's dietary requirements, failing to provide an on-site manager, and failing to set up the afterparty following the event (*id.*¸ ¶¶ 24-25). Atlas claims reputational and lost profits damages, as well as compensatory damages for its

employees staffing the event, out-of-scope services never approved, and discounts provided to clients to compensate for the substandard event (*id.*, ¶¶ 29-32).

In its proposed amended counterclaim, Atlas makes largely the same allegations. In addition, Atlas now alleges that plaintiff breached the service agreement by failing to provide a "60-foot-sized LED wall on site," "neglecting to take any remedial measures on any of [its] failures on the day of the event," and failing to request that the parties agree to terms for work outside the scope of the service agreement (proposed amended counterclaims, NYSCEF Doc. No. 43, ¶¶ 47-48). Atlas also claims that plaintiff generally failed to use its "best efforts to provide the services set forth in the service agreement (*id.*, ¶ 48). As well as the breach of contract counterclaim, Atlas now seeks to assert a counterclaim for unjust enrichment arising out of the same facts (*id.*, ¶¶ 56-67).

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the [pleading] as true, accord[ing the nonmovant] the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). Ambiguous allegations must be resolved in the nonmovant's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible

or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

"Leave [to amend] shall be freely given upon such terms as may be just" (CPLR 3025[b]). Absent undue delay, prejudice, or surprise, and provided the proposed amendment arises from the same transactions and occurrences as the original complaint, the motion should be granted (*Fellner v Morimoto*, 52 AD3d 352, 353 [1st Dept 2008]). A court must first, however, examine the merits of the proposed amendment (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.,* 40 AD3d 363, 365-66 [1st Dept 2007]). Leave should not be granted where the proposed new cause pleading is "palpably insufficient or patently devoid of merit" (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2d Dept 2015]).

Discussion

Atlas fails to state a counterclaim for breach of contract in its original responsive pleading. A claim for breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). As to certain of Atlas' allegations, Atlas cannot establish a breach of the service agreement. The agreement clearly defines what services are covered by the service fee (service agreement, NYSCEF Doc. No. 27, ¶ 3), which services are also reflected in the budget sheet provided by plaintiff and incorporated by reference into the service agreement (budget sheet, NYSCEF Doc. No. 30). While Atlas claims that the budget sheet was updated at some point closer to the event, the unambiguous terms of the service agreement indicate that the items which Atlas claims were covered by the service fee, were not, in fact, included therein. The service fee is expressly limited to "(1) consulting, event planning, and management; (2) staging costs including set design, material, labor, insurance,

taxes, and registration zone; and (3) minisite for RSVP, program updates, content management" (service agreement, NYSCEF Doc. No. 27, ¶ 3). The service fee did not cover does not include "VIP Meeting Room & Setup," "Hotel Bookings & Management," or "Transportation services" (counterclaim, NYSCEF Doc. No. 28, ¶¶ 9-11). Atlas suggests that these services should be included under other line items in the budget covered by the service fee, but the court is not empowered to disregard the unambiguous terms of the service agreement (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] ["courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing"]). The remainder of plaintiff's allegations amount to allegations that plaintiff is improperly overcharging them for various line items or provided insufficient services, which allegations sound in a defense to plaintiff's claim for breach of contract rather than a separate counterclaim.

Further, Atlas cannot establish damages from plaintiff's alleged breach. Atlas contends that the majority of its damages are in the form of reputational harms or lost profits, neither of which are generally recoverable on a breach of contract claim accept under certain circumstances (*Kantor v 75 Worth St., LLC*, 95 AD3d 718, 718 [1st Dept 2012] ["The allegations in the complaint and the supporting materials do not establish that plaintiff's lost profits were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty"] [internal quotation marks and citations omitted]; *Rather v CBS Corp.*, 68 AD3d 49, 55 [1st Dept 2009] ["Rather's claim for damages for loss of reputation arising from the alleged breach of contract is not actionable"]). Lost profits are only available where the parties expressly contemplate such damages at the time of contracting, and such damages are reasonably certain (*Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178, 183 [1st

Dept 2007], *affd*, 14 NY3d 791 [2010]). Atlas' allegations do not indicate that lost profits were contemplated by the parties, nor are such damages reasonably certain.

Turning to the cross-motion for leave to amend, the proposed amended counterclaims are palpably insufficient (*Yong Soon Oh*, 124 AD3d at 640) in the following respects. First, the proposed counterclaim for unjust enrichment is impermissibly duplicative of the breach of contract claim. "The 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" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Here, the alleged wrongdoing by plaintiff arises out of the same acts or omissions that are the basis for the breach of contract complaint. To the extent that Atlas claims certain of its damages are outside of the scope of the service agreement, Atlas fails to allege how plaintiff has been unjustly enriched at Atlas' expense (*245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC*, 223 AD3d 604, 607 [1st Dept 2024] ["As explained above, plaintiff has not sufficiently alleged that the HPS defendants received any of Tenant's funds"]).

Turning to the proposed amended counterclaim for breach of contract, Atlas fails to allege a breach of section 4 of the service agreement, as section 4 obligates Atlas to cooperate with plaintiff (service agreement, NYSCEF Doc. No. 27, ¶ 4 ["The Client further agrees to work closely and fully support in good faith the Services to be carried out by the Advisor"]). Further, the proposed amendment does not solve the problems related to Atlas' asserted damages as claimed in the original counterclaim. The remaining item of damages claimed is $80,000 for two certified public accountants to "spend more than forty hours away from their controllership work as a result of [plaintiff's] failure to perform the services it already paid for" (proposed amended counterclaim, NYSCEF Doc. No. 43, ¶ 53). This allegation is too vague to make clear how the

work done by the accountants relates to plaintiff's alleged breaches of the service agreement (*Jones v Voskresenskaya*, 125 AD3d 532, 534 [1st Dept 2015] ["The allegations supporting this cause of action are vague, speculative and unsupported by any facts"]).

Accordingly, it is hereby

ORDERED that plaintiff's motion to dismiss the counterclaim is granted, and Atlas' cross-motion for leave to amend the counterclaim is denied; and it is further

ORDERED that the counterclaim is severed and dismissed.

This constitutes the decision and order of the court.

7/2/2024
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER		
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE		