

Glick v Sara's New York Homestay, LLC

2013 NY Slip Op 31719(U)

July 25, 2013

Sup Ct, New York County

Docket Number: 651607/2012

Judge: Ellen M. Coin

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

PRESENT: HON. ELLEN M. COIN

PART 63

DEBORAH GLICK,

Plaintiff,

-against-

SARA'S NEW YORK HOMESTAY, LLC, et al.,

Defendants.

INDEX NO. 651607/2012
MOTION DATE May 22, 2013
MOTION SEQ. NO. 1
E-FILED

The following papers, numbered 1, were read on this motion for summary judgment :

<u>Papers</u>	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits	1
Answering Affidavits-Exhibits	2
Reply Affidavits	3
Cross-Motion	X No

This case arises out of an agreement for plaintiff's purchase of an interest in defendant Sara's New York Homestay, LLC (the "Company"). The essential facts are undisputed.

On or about January 24, 2011, plaintiff, as purchaser, entered into an agreement with defendants Bernard and Shirley Zagdanski, as sellers, and Patrick Zagdanski, to buy a 33% interest in the Company. The agreement contained a provision entitled "Option to Revoke: Escrow" (Ex A to Swergold Aff., ¶1.5):

Any party shall have the option to revoke this Agreement until September 30, 2011 (The "**Revocation Date**"). The party electing revocation shall notify the other party in writing of his or her intent to do so by FedEx or certified mail received before the Revocation Date. Until the Revocation Date, all sums paid by Buyer under **Section 1.2**, including principal and interest paid on the Note, and under **Section 1.4**, shall be held in a non-interest bearing escrow account of the Escrow Agent. If either party elects to revoke this Agreement pursuant to this **Section 1.5**,

then all sums paid under **Section 1.2** and **Section 1.4** shall be refunded to Buyer within ten business days of receipt of the notice to revoke. After the Revocation Date, all sums held by the Escrow Agent shall be transferred to Sellers.

On September 15, 2011, plaintiff and the Zagdanskis executed an amendment to the purchase agreement, which extended the revocation date in Section 1.5 to October 31, 2011. By amendment dated October 18, 2011, plaintiff and the Zagdanskis executed another amendment to the purchase agreement, further extending the revocation date to January 10, 2012. It is uncontested that on December 30, 2011, counsel for the Zagdanskis notified plaintiff by letter of their termination of the purchase agreement (Ex E to Swergold Aff.). Nor is it disputed that plaintiff received and cashed a check from the firm of the escrow agent in the amount of \$273,608.04 (Ex F to Swergold Aff.).

Plaintiff brings this action, alleging that she maintained a 33% interest in the Company from January 1, 2011 to December 31, 2011, and therefore was entitled to a percentage of all earnings, minus draws, for 2011. She asserts claims against all defendants, including the Company, for breach of contract (First Cause of Action), alleging waste of the Company's assets (Second Cause of Action), for unjust enrichment (Third Cause of Action), and against the Zagdanskis for breach of fiduciary duty to protect and enhance the Company's assets (Fourth Cause of Action).

Defendant moves for summary judgment dismissing the complaint. For the reasons stated below, the motion is granted.

"Revoke" is defined as cancel, rescind, repeal or otherwise reverse. (Black's Law Dictionary 1485 [4th ed 1968]). Where an agreement alleged to have been breached has been rescinded, the claim is determined by reference to the rescission agreement, "and in general no such claim can be made unless expressly or impliedly reserved upon the rescission" (*Mallad Constr. Corp. v County Fed. Savings & Loan Assn.*, 32 NY2d 285, 293 [1973][citing, *inter alia*, *Eames Vacuum Brake Co. v Prosser*, 157 NY 289, 295 (1898)]; *Milan Music, Inc. v Emmel Communications Booking, Inc.*, 37 AD3d 206, 206 [1st Dept 2007]; *M.J. Posner Constr. Co., Inc. v Valley View Dev. Corp.*, 118 AD2d 1001, 1001-1002 [3d Dept 1986]).

Here the rescission agreement was not a subsequent, separate agreement, but was contained in Section 1.5 of the purchase agreement itself. Although Section 6.2 of the agreement provided

for payment of draws and division of earnings at year's end, the rescission agreement did not call for payment of such earnings, but only for refund to plaintiff of "all sums paid under **Section 1.2** and **Section 1.4.**" Significantly, Section 1.5 did not reserve to plaintiff the right to assert a claim for breach in the event of the sellers' proper exercise of their right of revocation. (See, e.g., *Can-Am Organic Foods v Philips Bus. Sys.*, 83 AD2d 528, 529 [1st Dept 1981]).

The effect of rescission of an agreement is to put the parties back in the same position they were in prior to the making of the contract. (*Holdeen v Rinaldo*, 28 AD2d 947, 949 [3d Dept 1967][citations omitted]). Once a valid contract is properly terminated, neither party can maintain a cause of action for breach thereof. (*Staten Is. Univ. Hosp. v Comprehensive Habilitation Servs., Inc.*, 19 Misc3d 1102(A), *3 [Sup Ct, Richmond County 2008] [citing *Eames Vacuum Brake Co. v Prosser*, 157 NY 289]; see *Napster, LLC v Rounder Records Corp.*, 761 F Supp2d 200, 207 [SD NY 2011]["[C]laims based on a rescinded contract do not survive the rescission"). Here plaintiff does not dispute that the purchase agreement was terminated. In the absence of express or implied reservation of her right to make further claims under the terms of the revocation provision, plaintiff's First Cause of Action for breach of contract must be dismissed (*Staten Is. Univ. Hosp.*, *supra*).

Similarly, plaintiff's claim for waste and dissipation of the Company's assets is vitiated by the Zagdanskis' revocation of the purchase agreement. Having received the return of all of her investment, her interest in the Company, which was never finalized, ceased. Accordingly, she has no standing to assert such a claim. Thus, her Second Cause of Action is dismissed.

Plaintiff's Third Cause of Action for unjust enrichment is predicated on her contention that the defendants manipulated the Company's books and records to damage her, and retained the Company's assets.¹ Since the basis for this claim is plaintiff's assertion of her rights under the purchase agreement, none of which were reserved, its revocation precludes her from making such a claim.

Plaintiff's Fourth Cause of Action alleges that the Zagdanskis breached their fiduciary duty to protect and enhance

¹The Company itself is a defendant in this cause of action. The complaint fails to allege how the Company retained for its own "personal" use its assets.

the Company's assets. This claim, like those preceding it, must fall, since plaintiff failed to reserve in the revocation clause any right to maintain such a claim, and she has no standing to assert it.

Plaintiff received the return of all funds she invested in the Company. Having received the benefit of her bargain under the revocation section of the purchase agreement, she cannot maintain this action.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 25, 2013



Ellen M. Coin, A.J.S.C.

Case disposed