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

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HARVEY PUBLIC ADJUSTER, LLC, and
MEIR ZARCHI,

Plaintiffs, Decision and order

- against - Index No. 522665/2022

VIET MEDIA AGENCY, MINH TAM TRAN A/K/A
TAMMY TRAN, ADAMS TRAN,

Defendants, August 25, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the second through fifth causes of action of the complaint. The plaintiffs oppose the motion. Papers were submitted by the parties and arguments held. After hearing all the arguments this court now makes the following determination.

On September 26, 2017 the plaintiff Harvey Public Adjuster entered into an agreement with defendant Viet Media Agency whereby the defendant would provide advertising and public relations services on behalf of the plaintiff. The plaintiff wired $280,000 to the defendant's account. The defendant never spent any of the money on behalf of the plaintiff and a second agreement was entered into on September 27, 2019 which abrogated the first agreement and stated that as of May 31, 2019 the defendant owed the plaintiff $396,666.67 and included a payment schedule which required full payment by January 2021. The second agreement is signed by Adams Tran twice, once in an individual capacity and once as the president of Viet Media Agency.

Further, the defendants issued a promissory note in the amount of $415,297. The note is signed by defendant Tammy Tran in her individual capacity and by a representative of Viet Media Agency. According to the amended complaint, the defendants paid $44,000 by January 2020 and ceased making any further payments and that $371,297 remains due. The complaint asserts two causes of action, for default and unjust enrichment. The defendant Adams Tran has moved seeking to dismiss both causes of action and the remaining defendants have moved seeking to dismiss the second cause of action. 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 claims as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the claims are deemed true and all reasonable inferences may be drawn in favor of the party that filed such claims (Federal National Mortgage Association v. Grossman, 205 AD3d 770, 165 NYS2d 892 [2d Dept., 2022]). Whether the claims will later survive a motion for summary judgment, or whether the party 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, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

There is no dispute that Adams Tran did not sign the promissory note. The plaintiffs argue that a review of the Texas taxable entity database reveals there is no entity in Texas called Viet Media Agency and that therefore the name 'Viet Media Agency' must be an assumed name for a sole proprietorship of Adams Tran. However, both the original complaint and the amended complaint assert that Viet Media Agency is a Texas "entity" with a Texas address (see, Amended Complaint, ¶ 4). The original and the amended complaint assert that Adams Tran is doing business as Viet Media Agency at the same address (id., at ¶ 6). However, there is no assertion in the complaint the entity Viet Media Agency is a sole proprietorship of Adams Tran. Further, Viet Media Agency was served as a corporation via the New York Secretary of State, an expedient only available for corporations pursuant to BCL §304 whereby the Secretary of State is the agent of every domestic and authorized foreign corporation upon whom process may be served. Moreover, while the first agreement is executed by Viet Media Agency, the second agreement is executed by Viet Media Inc. Thus, the parties proceeded under the reasonable assumption that Viet Media Agency, representing an umbrella organization, is a Texas entity and not the mere alter ego of Adams Tran. Indeed, the opposition to the motion raises

wholly new issues in this regard that contradict earlier assertions of the plaintiffs. To the extent any misnomer exists, the court in Long Island Minimally Invasive Surgery P.C. v. Outsource Marketing Solutions, 33 Misc3d 1228(A), 939 NYS2d 741 [Supreme Court Nassau County 1011]) observed that "mistakes or irregularities not affecting a substantial right of a party are not fatal. Mistakes relating to the name of a party involving a misnomer or misdescription of the legal status of a party fall within the category of irregularities which are subject to correction by amendment particularly where the other party is not prejudiced, and was aware from the outset that a misdescription was involved" (id).

Therefore, based on the foregoing, the motion seeking to dismiss the first cause of action as to Adams Tran is granted.

Turning to the motion seeking to dismiss the cause of action for unjust enrichment, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). The plaintiff does not dispute this but argues that unjust enrichment could be available if the contract were declared unenforceable at some later point and should not be dismissed "at this early stage of the proceedings"

(see, Memorandum of Law in Opposition to Defendant's Motion to Dismiss, page 4). However, unjust enrichment is usually reserved for cases where though the defendant committed no wrongdoing has received money to which he or she is not entitled (Corsello, supra) a truism inapplicable in this case. As the court explained in Corsello, "plaintiffs allege that Verizon committed actionable wrongs, by trespassing on or taking their property, and by deceiving them into thinking they were not entitled to compensation. To the extent that these claims succeed, the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects. The unjust enrichment claim should be dismissed" (id). Likewise, in this case, if for whatever reason the contract will be declared unenforceable, the unjust enrichment claim will not be available to remedy those defects. Consequently, the motion seeking to dismiss the claim of unjust enrichment is granted.

So ordered.

ENTER:

DATED: August 25, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC