

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

PRESENT: JUSTICE CARR

PART 49

Index Number : 114972/2005

Justice

ALENICK, D. SCOTT

vs

PLAZA OPERATINGT PARTNERS

Sequence Number : 001

DISMISS ACTION

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

2/27/06

001

The following papers, numbered _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

FILED

JUL 19 2006

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

Dated: 7/17/06

New York

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check If appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X
D. SCOTT ALENICK and SUZANNE ALENICK,

Index No. 114972/2005

Plaintiffs,

- against -

PLAZA OPERATING PARTNERS LTD
d/b/a THE PLAZA HOTEL; FAIRMONT
HOTELS & RESORTS (U.S.) INC.;
CPS 1 REALTY LLC & EL AD PROPERTIES NY LLC,

Defendants.
-----X

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Herman Cahn, J.

Defendants move to dismiss the complaint, CPLR 3211 (a) (1), (5) and (7).

Background:

This well noted action¹ arises out the booking of the Plaza Hotel (the Plaza) for a Bas Mitzvah celebration.² On August 22, 2002, plaintiffs (the Alenicks) and defendant Plaza Operating Partners LTD, the then-owners of the Plaza, entered into an agreement (the Agreement) pursuant to which the Plaza reserved reception space at the hotel for a function to take place on May 22, 2005. The intended function was the Bas Mitzvah celebration of the Alenicks' daughter.

¹ See, e.g., Brad Hamilton and David Hafetz, *Plaza's not mitzvah, Parents suing over bash nix*, NY Post, Oct. 30, 2005. Kluger Aff, Exh D.

² A Bas, or "Bat," Mitzvah is the "term denoting both the attainment of religious maturity as well as the occasion at which this status is formally assumed" for Jewish girls. Encyclopaedia Judaica, Vol 4B, at 243, The Macmillan Co. [1971].

contract, defendants had breached their duty of care as innkeepers to keep the venue open for the booked event and to refrain from humiliating plaintiffs by not doing so; 4) negligent misrepresentation, asserting that the defendants misrepresented the conditions under which the Agreement would be cancelled and the status of the Alenicks' reservation; and 5) deceptive business practices, asserting that defendants breached Gen. Bus. Law § 349 by their deceptive business practices, in representing to plaintiffs, and to other members of the public with contracts, that their contracts would be honored.

It is noted that, as the deposit and out-of-pocket expenses were returned to the Alenicks, and accepted by them, they seemingly only here seek to recover damages for the emotional distress, etc, they allegedly suffered.

Discussion:

Accord and Satisfaction

Among the defenses raised, defendants assert that the monies paid by them to, and accepted by, the Alenicks constitute an accord and satisfaction, warranting dismissal of the action. The Alenicks argue that they did not agree to accept such payment in full satisfaction of all of their claims. They argue that the requirements of an accord and satisfaction are not met because accord and satisfaction requires (1) an amount in dispute and (2) a clear manifestation of intent, by the non-breaching party, to accept a lesser amount in full satisfaction of the disputed amount. The Alenicks assert that neither requirement is met here.

The payments made to the Alenicks constitute an accord and satisfaction. In fact, it was the Alenicks who made the offer that was then accepted by the defendants.

The Alenicks allege that they incurred out-of-pocket expenses in anticipation of the Plaza being the site for their daughter's Bas Mitzvah celebration. These included not only the cost of printing invitations to the celebration, but also such items as pins from the Plaza Hotel's gift shop and a specially created montage that featured pictures of many other family events that had been held at the Plaza. The Alenicks allege the total cost of these items was \$2,060.

On November 30, 2004, Suzanne Alenick sent an email to the defendants which stated, in pertinent part, that

This will further confirm that the Plaza Hotel currently has in an account on my behalf \$12,000.00 [representing my deposit] . . . I understand that you have made arrangements for the Plaza to refund this amount in full . . .

I mentioned in our conversation that I have suffered a financial loss of \$2060.00 as a result of the Plaza Hotel's unilateral decision not to honor our binding contract. . . .

In view of the circumstances, I do expect the Plaza to reimburse me the \$2060.00 that I lost due to its breach of our agreement. **I understand that you are working on obtaining this amount for me such that we can avoid resorting to court intervention.**

Kluger Aff, Exh C (emphasis added).

A check for \$ 12,000 was hand delivered to the Alenicks on December 1, 2004 and Mrs. Alenick picked up the second check for \$ 2,060 on December 6, 2004.

Mrs. Alenick wrote on the back of the \$ 12,000 check, which was a reimbursement of the Alenicks' deposit, "with full reservation of legal rights." Kluger Reply Aff, Exh 1. However, on the \$2,060 check, which was for reimbursement of the out-of-pocket expenses, there was no

reservation of rights any kind. The check was simply endorsed and deposited. Thus, the Alenicks did not reserve the right to seek additional damages.³

“As a general rule, the acceptance of a check in full settlement of a disputed, unliquidated claim, without any reservation of rights, operates as an accord and satisfaction discharging the claim.” *Nationwide Registry & Security Ltd. v B&R consultants, Inc., et al.*, 4 AD3d 298, 299 [1st Dep’t 2004]. “The theory underlying this common-law rule is that the parties have entered into a new contract discharging all or part of their obligations under their original contract.” *Id.* at 299-300. Here, the Alenicks entered into a new contract with the defendants, for the resolution of their dispute with regard to the cancelled reservation.

Indeed, it was the Alenicks who made the demand that was then accepted by the defendants. As such, having offered the specific terms of the new agreement, the Alenicks cannot later object when their offer was accepted. Where a plaintiff “had solicited and retained payment of the precise amount that he had determined that defendants owed him” and “which was the only amount in dispute at the time,” plaintiff “thereby clearly evinced an intent to accept such payment in discharge of the disputed obligation.” *Horn v PTJP Partners, LP., et al.*, 16 AD3d 103, 104 (1st Dep’t 2005). There is a finding of accord and satisfaction, irrespective of the fact that “the payment did not bear a legend indicating that it was in settlement of any outstanding dispute, or that defendants did not otherwise expressly inform plaintiff that acceptance of the payment would discharge” the claim. *Id.*

Here, Suzanne Alenick offered to avoid “resorting to court intervention” for the sum of \$ 2,060. Although she sent a letter to the Plaza months later, demanding \$ 45,000 for plaintiffs’

3 This is particularly notable because “Mrs. Alenick is a practicing attorney in New York who fully ‘understands the implications of her statements.’” Pl’s Opp Br at 15 n.3.

“emotional trauma,” (Alenick Aff, Exh F), the Alenicks’ offer had already been accepted. Any later protestations regarding the Alenicks’ intent to reserve their rights are of no consequence. Indeed, a later “affidavit submitted by plaintiff as evidence of contrary intent is insufficient to raise an issue of fact.” *Horn*, 16 AD3d at 104 (where the affidavit submitted was contradictory to earlier deposition testimony). That principle is certainly dispositive here, where it is the earlier and clear writings and actions of the Alenicks that are contradictory of the later claim.

A motion pursuant to CPLR 3211 (a) (1) will be granted if the movant presents documentary evidence that “definitively dispose[s] of the claim.” *Demas v 325 West End Ave. Corp.*, 127 AD2d 476, 477 [1st Dep’t 1987]. The defendants here have done just that. Inasmuch as defendants have established a defense of accord and satisfaction, the motion to dismiss is granted.

Damages

It is worth noting that the Alenicks also failed to sufficiently establish damages sustained.⁴ With regard to breach of contract claims, a party cannot recover for damages of only emotional distress or humiliation. *Johnson v Jamaica Hosp.*, 62 NY2d 523, 528 [1984]. *See also Campbell v Silver Huntington Enter., LLC*, 288 AD2d 416, 417 [2d Dep’t 2001] (where plaintiffs were denied recovery for the emotional distress for defendant caterer’s cancellation of the contract for their wedding reception).

⁴ In addition to the humiliation, indignity, distress of mind, mental suffering and inconvenience alleged by the Alenicks, they also allege that they suffered from physical discomfort. However, these conclusory allegations are of no moment. The Alenicks have not alleged how a cancellation of a reservation, six months before the planned event, could directly cause physical discomfort. This is particularly true here, where the celebration was ultimately held at another luxury venue in midtown Manhattan. Mot Br, at 4 (where the defendants allege upon information and belief that the celebration was held at the St. Regis Hotel).

Relatedly, even if the Alenicks had been able to sustain the claim for breach of an innkeeper's duty of care, they allege no facts that, if true, would support allegations of public humiliation. The Alenicks were not turned away from the Plaza in the presence of a large number of people, but rather via a one-on-one telephonic conversation six months prior to the event. *See Pollack v Holda Corp.*, 98 AD2d 265 [1st Dep't 1984] (where a plaintiff with a reservation was turned away from defendant hotel in a deserted lobby and was not subject to discourteous behavior, he could not recover for humiliation and distress of mind); *cf Harder v Auberge des Fougères, Inc.*, 40 AD2d 98, 99-100 [3rd Dep't 1972] (where a plaintiff with a reservation, together with his guests, was turned away from defendant restaurant in the presence of a large number of people, he could recover for humiliation).

Moreover, the emotional distress, and related injury, alleged in the verified complaint stems from the Alenicks' "special relationship with The Plaza," and their distress over the cancellation of the reservation "because no other place held the magic and tradition for them that The Plaza held" and the "unique and special meaning" of the particular rooms reserved for the celebration. Compl at ¶¶ 14, 21, 23. The Alenicks' assert that they suffered "special harm and special damage [since] Ashley Alenick's Bas Mitzvah Reception was not held at The Plaza." *Id.* at ¶ 49.

However, the Alenicks' claims regarding fraud, negligent misrepresentation and deceptive business practices all relate to the timing and manner in which they were informed that the reservation was cancelled. Inasmuch as the Alenicks allege that the Plaza "was the only place that held the fondest memories for them . . . spanning a period of nearly three decades," (Opp Br. at 1), and that they "considered no other place to celebrate this once-in-a-lifetime day,"

(Alenick Aff ¶ 3), the timing and manner of the cancellation were not central to the distress they allegedly experienced. Indeed, if the Plaza had been torn down in toto the day after their daughter was born, they may well have experienced precisely the same disappointment. Although the court can empathize with their desire to celebrate this important day in their daughter's life at the same place where they and their families had previously celebrated other important and happy family events, the court recognizes that time normally brings with it changes. The venue where they previously celebrated can not necessarily remain unchanged, and indeed, the Bas Mitzvah apparently was happily celebrated in another beautiful place.

Accordingly, it is

ORDERED that the motion to dismiss is granted; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: July 17, 2006

FILED

JUL 19 2006

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ENTER:



J.S.C