Curcio v AAA & G Equip. Leasing Co. LLC
2012 NY Slip Op 32091(U)
July 6, 2012
Sup Ct, Nassau County
Docket Number: 2168412010
Judge: Michele M. Woodard
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

---x

JOSEPH V CURCIO,

Plaintiff,

-against-

AAA & G EQUIPMENT LEASING CO. LLC,

Defendants.

---x

Michele M. Woodard
J.S.C
TRIAL/IAS Part 8
Index No. 21684/2010
Motion Seq. No.: 01,02

DECISION AND ORDER

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Plaintiff Joseph V. Curcio (hereinafter "Curcio") moves by Notice of Motion for leave to amend his November 17, 2010 complaint and add Thomas Borek (hereinafter "Borek") as an additional defendant, pursuant to CPLR § 3025(b). Defendant AAA&G Equipment Leasing Co. LLC (hereinafter "AAAG") and proposed defendant Borek filed a cross motion to: oppose Plaintiff's motion; dismiss Plaintiff's accounting and breach of fiduciary duty causes of action; and extend the time to complete discovery.

FACTS

Plaintiff seeks to recover damages caused by the acts of AAAG and Borek that amount to several causes of action. Under an Intercreditor Agreement (hereinafter "Agreement") between AAAG and Federal Insurance Company (hereinafter "Federal"), a bonding company, AAAG acquired assets and liabilities of Samson Construction Co., Inc. (hereinafter "Samson"), including

ongoing Samson construction contracts. On October 16, 2008, AAAG contracted with Plaintiff, a key Samson employee, whereby AAAG agreed to pay Plaintiff, in exchange for performing certain services to complete the Samson construction contracts. Under the subject employment contract, payments to Plaintiff were to consist of compensation and percentages of revenues received by AAAG from an account established pursuant to the Contract.

Plaintiff alleges that he is entitled to recover damages based on AAAG's breach of the Contract by failing to fully compensate Plaintiff for his services. Plaintiff also alleges that AAAG breached its fiduciary obligation to receive and hold revenues in trust for Plaintiff's benefit, entitling Plaintiff to an accounting from AAAG. Furthermore, Plaintiff alleges that Borek, the proposed defendant, had a fiduciary duty to Plaintiff regarding the funds deposited into the account under the Contract and the funds received by AAAG from that account. Although the account was meant to pay for Plaintiff's costs to perform and complete certain Samson construction contracts, AAAG and Borek made payments from that account that did not constitute Plaintiff's incurred costs of performance. Since AAAG and Borek failed and refused to pay the remaining balance, Plaintiff seeks to recover his share as provided in the Contract of which he has been deprived. Furthermore, Plaintiff argues that he has a legal right to compensation by Borek from a "lock-box account" within Borek's control that was set up pursuant to the Agreement to pay for Samson's overhead, which included Plaintiff's compensation and benefits. Despite Plaintiff's demand for his owed compensation and benefits, Borek took possession of and converted the funds deposited into the lock-box.

Plaintiff commenced this action upon filing his complaint on November 19, 2010, to which Defendant served its Answer and Counterclaims on December 29, 2010. During discovery, Plaintiff learned that Borek breached his fiduciary duties to Plaintiff and converted funds that

were deposited into the lock-box account and were to be paid to Plaintiff.

ANALYSIS

NY CPLR § 3025(b) provides in relevant part that a "party may amend [its] pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just . . . ." In general, "leave to amend a pleading should be granted where there is no significant prejudice or surprise to the opposing party and where the documentary evidence submitted in support of the motion indicates that the proposed amendment *may* have merit." *Pike v. New York Life Ins. Co.*, 901 NYS2d 76, 80 (2d Dept 2010) (emphasis added); *accord, e.g.*, *Vista Props. v. Rockland Ear, Nose & Throat Assoc., P.C.*, 60 AD3d 846, 847 (2d Dept 2009); *Edenwald Contr. Co. v. City of New York*, 60 NY2d 957, 959 (1983); *Ingrami v. Rovner*, 45 AD3d 806, 808 (2d Dept 2007). "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is *palpably insufficient or patently devoid of merit*." *Lucido v. Mancuso*, 49 AD3d 220, 221-22 (2d Dept 2008); *accord Vista Props.*, 60 AD3d at 847; *Janssen v. Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27 (2d Dept 2008); *Ingrami*, 45 AD3d at 808 ("totally without merit or palpably insufficient as a matter of law"). Accordingly, "the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed amendment that is plainly lacking in merit will not be permitted." *Janssen*, 59 AD3d at 27 (2d Dept 2008); *accord Monteiro v. R.D. Werner Co.*, 301 AD2d 636, 637 (2d Dept 2003) (denying leave to amend on grounds of lack of notice, not because of meritless claims). "A determination whether to grant [] leave is within the trial court's broad discretion." *Ingrami*, 45 AD3d at 808.

Defendant opposes the motion for leave to amend and requests the Court to dismiss some

of Plaintiff's causes of action for being meritless. Plaintiff's cause of action of breach of fiduciary duty is likely to have merit. The Contract provides for payment to Plaintiff based in part on revenue percentages. The "agree[ment] to pay a percentage of gross revenues to plaintiff in reliance on an agreement, express or implied, may support a finding that defendant owed plaintiff a fiduciary obligation with respect to the allotted percentage of gross revenues." *Scaglione v. Castle Restoration & Constr., Inc.*, 2009 NY Misc. LEXIS 5793, at *6-7 (NY Sup. Ct., Queens Cnty., May 29, 2009) (citing *LoGerfo v. Trustees of Columbia Univ. in City of New York*, 35 AD3d 395 (2d Dept 2006)). Furthermore, ongoing conduct between the parties may give rise to a legally cognizable fiduciary relationship. *Sergeants Benevolent Ass'n Annuity Fund v. Renck*, 796 NYS2d 77, 79. Additionally, fiduciary liability is "necessarily fact-specific" and "not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 20 (2005). Therefore, Plaintiff's breach of fiduciary claim may have merit, so that cause of action will not be dismissed. Since a fiduciary relationship also serves as the basis for an accounting cause of action, there may be merit to Plaintiff's accounting cause of action as well. Therefore, the cause of action for an accounting will also stand.

Defendant also argues that Plaintiff's conversion claim is without merit. Conversion occurs when one, without authority, intentionally controls another's personal property and interferes with that person's possessory right. *Colavito v. New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." *Id.* Plaintiff alleges that he rightfully owed the funds in the account that was set up to pay him, that Borek controlled that account, and that Plaintiff

demanded but was refused payment. To show that Plaintiff's cause of action for conversion against Borek lacks merit, Defendant points to Paragraph 13 of the Agreement, which expressly excludes third-party beneficiary rights. However, Borek, AAAG, and Plaintiff are all parties to and signed Plaintiff's employment contract, so Plaintiff's conversion cause of action may have merit, precluding dismissal.

Defendant also argues that some of Plaintiff's causes of action should be dismissed for being duplicitous. First, Defendant contends that Plaintiff's cause of action for an accounting is duplicitous with his breach of fiduciary duty claim. The latter, though, unlike an accounting claim, also requires a showing that the fiduciary's misconduct caused Plaintiff to incur damages, which Plaintiff has alleged. *Kurtzman v. Bergstol*, 40 AD3d 588, 590 (2d Dept 2007). Therefore, these causes of action are not duplicitous, precluding their dismissal.

Defendant also contends that Plaintiff's accounting and breach of contract causes of action are duplicitous. The Court disagrees. A *prima facie* showing to recover damages for breach of contract consists of four elements: "[1] the existence of a contract, [2] . . . performance under the contract, [3] the defendant's breach of that contract, and [4] resulting damages." *JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 AD3d 802, 803 (2d Dept 2010). However, the "right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *LoGerfo*, 35 AD3d at 397 (2d Dept 2006); *accord Akkaya v. Prime Time Transport*, 45 AD3d 616 (2d Dept 2007). These different elements render these two causes of action distinct, not duplicitous, so they will not be dismissed.

Defendant wrongly contends that Plaintiff's breach of contract and breach of fiduciary duty claims are duplicitous to warrant dismissal. A breach of contract is not a tort, *Kopel v.*

Bandwidth Tech. Corp., 56 AD3d 320, 320, unless a legal duty independent of the contract was violated. *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 NY2d 382, 389. However, a fiduciary relationship, which Plaintiff alleges, if shown to exist, would establish such legal duty to allow the claim of conversion to proceed. *See Apple Records, Inc. v. Capitol Records, Inc.*, 137 AD2d 50, 55 (1st Dept 1988) ("[U]nless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated."); *see also Batas v. Prudential Ins. Co. of Am.*, 281 AD2d 260, 264 (1st Dept 2001) (quoting *Rich v. New York Cent. & Hudson Riv. R. R. Co.*, 87 NY 382, 390 (1882) (holding that although a tort is different from a mere contractual obligation, when a "duty grows out of relations of trust and confidence . . . , the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract.").

Defendant argues that the conversion cause of action should be dismissed for being duplicitous because there must be independent facts to constitute a separate taking that would give rise to tort liability. However, a breach of contract may occur without converting another's property. A breach of contract claim goes to conduct not in accordance with an agreement, not necessarily the wrongful taking of another's property that constitutes the tort of conversion. Therefore, the damages sought for the alleged conversion is not merely based upon the breach of contract, and the *prima facie* elements of those causes of action are very different, belying Defendant's contention of duplicity.

Defendant further argues that the money of a conversion claim must be specifically identified and segregated and that Defendant must be obligated to return or otherwise treat the specific fund in a particular manner. However, Plaintiff has adequately alleged this obligation and specifically identified the money that he seeks. Furthermore, an accounting would establish the

amounts, if any, owed to Plaintiff. Plaintiff has alleged legal ownership or an immediate superior right of possession and Borek's control of an identifiable fund. Therefore, these causes of action will stand.

Defendant also contends that Plaintiff's causes of action in equity should be dismissed since he has available causes of action at law. The Court will not dismiss Plaintiff's cause of action for an accounting because "[al]though plaintiff may have a legal remedy, []he is not precluded from seeking equitable relief by way of an accounting predicated upon . . . the existence of a fiduciary relationship." *Washington Tit. Ins. Co. v. Streamline Agency Inc.*, 26 Misc. 3d 1214A (Sup. Ct., Nassau County, 2010) (citing *Fur & Wool Trading Co., v. George I. Fox, Inc.*, 245 NY 215 (1927)).

However, Defendant is correct with respect to Plaintiff's causes of action for injunctive and declaratory relief. To obtain a preliminary injunction, the plaintiff must demonstrate, inter alia, "irreparable harm in the absence of the injunctive relief." *City of New York v. Untitled LLC*, 51 AD3d 509, 511 (1st Dept 2008). "Irreparable injury . . . mean[s] any injury for which money damages are insufficient," *Walsh v. Design Concepts*, 221 AD2d 454, 455 (2d Dept 1995); *McLaughlin, Piven, Vogel, Inc. v. W. J. Nolan & Co.*, 114 AD2d 165, 174 (2d Dept 1986), and the "harm must be . . . imminent, not remote or speculative," *Golden v. Steam Heat*, 216 AD2d 440, 442 (2d Dept 1995). Because Plaintiff cannot establish likely entitlement to damages, an injunction would be based upon speculation. Furthermore, Plaintiff already has adequate relief available in the form of causes of action at law. Since Plaintiff fails to explain why damages would inadequately relieve his loss, Plaintiff's cause of action for an injunction is dismissed.

Likewise, "[w]here there is no necessity for resorting to the declaratory judgment it should not be employed." *James v. Alderton Dock Yards*, 256 NY at 305; *accord* ***Brownell v. Board of***

Education, 239 NY 369; *Sartorious v. Cohen*, 249 NY 31. Declaratory judgment "is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action." *James*, 1931 NY LEXIS 1056, 13-14 (1931); *accord Hesse v. Speece*, 204 AD2d 514, 515 (2d Dept 1994) (noting that "not seeking a declaration as to the relative rights of the parties . . . [but rather] seeking a declaration that the defendants were negligent . . . is not the function of a declaratory judgment action . . . and should be dismissed . . . ."). Finally, in light of the Court's granting of leave to Plaintiff to amend his complaint to add a codefendant, the Court will extend, upon Defendant's request, the time for the parties to complete discovery.

UPON the Plaintiff's Notice of Motion dated August 10, 2911, seeking leave to amend his Verified Complaint pursuant to CPLR § 3025(b), affirmation of Lawrence M. Cohen, attorney for the Plaintiff dated August 10, 2011, setting forth all relevant facts required by law, together with exhibits annexed thereto, and upon all prior proceedings heretofore had herein, and due deliberation having been had thereon,

NOW on application of Friedman Harfenist Kraut & Perlstein LLP, attorneys for Plaintiff, it is

ORDERED, that the Plaintiff's application for an Order pursuant to CPLR § 3025(b) seeking leave to Amend his Verified Complaint dated November 17, 2010 is granted. It is further

ORDERED, that Defendant's motion to dismiss Plaintiff's causes of action for declarative judgment and injective relief are hereby ***granted***. It is further

ORDERED, that Defendant's request for an extension of time to conduct discovery is hereby ***granted***. It is further

ORDERED, that Plaintiff is directed to serve and file the Supplemental Summons and Amended Verified Complaint dated August 9, 2011 upon the Defendant AAA&G Equipment Leasing Co. LLC and Defendant Thomas Borek within ten (10) days of receipt of this order. It is further

ORDERED that the caption is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

---x

JOSEPH V CURCIO,

Plaintiff,

-against- **Index No. 21684/2010**

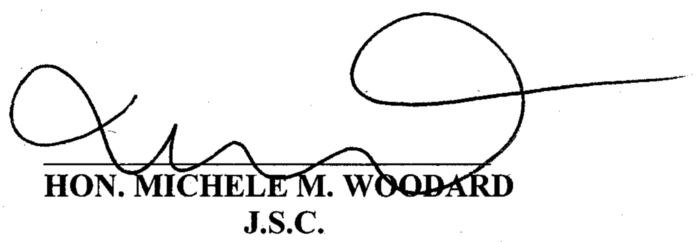
AAA & G EQUIPMENT LEASING CO. LLC and
THOMAS BOREK,

Defendants.

---x

DATED: July 6, 2012
Mineola, NY 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

F:\DECISION – LEAVE TO AMEND\Curcio Breach of Contract.wpd

ENTERED
JUL 31 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE