

Hurwitz v Sears Brands, L.L.C.
2014 NY Slip Op 32191(U)
August 13, 2014
Supreme Court, New York County
Docket Number: 150501/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MICHAEL L. HURWITZ,

Plaintiff,

Index No.
150501/2014

Decision and
Order

- against -

Mot. Seq. 001

SEARS BRANDS, L.L.C.,
SEARS HOLDINGS CORPORATION,
“XYZ CORP. #1 – 10”, said names being fictitious,
it being the intention of Plaintiff to designate additional
entities having liability for the complained of incident
upon discovery of their identity.

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Michael L. Hurwitz, Esq. (“Plaintiff” or “Hurwitz”), *pro se*, brings this action based on the alleged non-delivery of a consumer product (the “Item”) that Plaintiff purportedly purchased from defendants, Sears Brands, L.L.C. and Sears Holdings Corporation (collectively, “Movants” or “Sears”), via their website, kmart.com. Plaintiff claims to have purchased the Item for seventy dollars on or about January 13, 2013. Plaintiff claims that the Item was never delivered to Plaintiff, even though Plaintiff entered his delivery address into the K-Mart website on the date of purchase and received a confirmation email from Sears to this effect. Plaintiff also claims to have made multiple inquiries to Sears regarding the status of the subject purchase, and that Sears negligently failed to respond to Plaintiff’s inquiries. Plaintiff asserts causes of action for violation of New York General Business Law (“GBL”) §§ 349 and 350, unjust enrichment, carrier liability, consumer fraud, negligence, breach of contract, bad faith, public nuisance, and injunctive relief.

Sears moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the first, second, fourth, fifth, sixth, seventh, and eighth causes of action of Plaintiff's complaint¹; and, pursuant to CPLR § 325, remanding this action to Civil Court of the City of New York, New York County.

Plaintiff opposes, and cross-moves for discovery.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

In order to state a claim under GBL § 349 a plaintiff must allege: 1) a deceptive act or practice directed toward consumers; and, 2) that such act or practice resulted in actual injury to the plaintiff. (*Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 205-06 [2004]). Thus, as a threshold matter, a plaintiff must allege "consumer-oriented" conduct, i.e. conduct that affects consumers at large. "Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute." (*Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 [1995]). Likewise, GBL § 350, which prohibits false advertising, requires a similar showing of consumer-oriented conduct. (*Cruz v. NYNEX Info. Resources*, 263 A.D.2d 285 [1st Dep't 2000]).

Here, the four corners of Plaintiff's complaint do not contain factual allegations suggesting that Movants' purported conduct had a broader impact on consumers at large. Rather, Plaintiff's complaint alleges that Plaintiff purchased an Item from kmart.com, that the Item was not delivered, and that Movants did not respond to Plaintiff's inquiries regarding the status of Plaintiff's online purchase.

¹ Movants do not address Plaintiff's third cause of action for carrier liability, which Plaintiff's complaint asserts as against a fictitious corporation, denominated XYZ Corp, and not against Sears.

Thus, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's complaint fails to adequately plead "consumer-oriented conduct" for purposes of maintaining an action under GBL §§ 349 or 350.

As for Plaintiffs' second cause of action, to prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]). Generally speaking, "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 Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]). However, a plaintiff may plead causes of action alternatively. (CPLR § 3014). Additionally, a party is not precluded from proceeding on breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue. (*Curtis Properties v. Grief Cos.*, 236 A.D.2d 237, 238 [1st Dep't 1997]). Accordingly, Plaintiff's second cause of action stands.

As for Plaintiff's fourth cause of action, "[t]he elements of a cause of action sounding in fraud are material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation and damages." (*Orchid Constr. Corp., v. Gottbetter*, 89 A.D.3d 708 [2d Dep't 2011]). Additionally, CPLR §3016 requires particularity in the pleading of a fraud cause of action. Here, Plaintiffs' complaint alleges that, "Defendants engaged in a consumer-oriented misleading practice that injured the Plaintiff" and that, "By reason of the foregoing, the Plaintiff is entitled to actual damages in an amount to be proven at trial, together with injunctive relief, reasonable or actual attorneys' fees and disbursements, against the Defendants joint and severally." Accordingly, even accepting these allegations as true, the allegations contained in the four corners of Plaintiff's complaint do not plead with particularity facts sufficient to support a cause of action for fraud.

With respect to Plaintiff's fifth cause of action, for negligence, "A tort may arise from the breach of a legal duty independent of the contract, but merely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort." (*Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 551 [1992]). Here, Plaintiff's complaint alleges, "Sears owed a duty to Plaintiff to fill Plaintiff's order for the Item and to respond to his follow-up enquiries", that,

“Sears breached that duty by failing to deliver the Item to Plaintiff and ignoring his follow-up emails”, and that, “As a result of that breach, Plaintiff has been injured.” Even accepting Plaintiff’s allegations as true, these allegations are insufficient to plead a breach of a legal duty independent of Plaintiff’s purported contract with Sears for the purchase and/or sale of Item.

As for Plaintiff’s sixth cause of action, “[t]he elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dep’t 2009]). Here, Plaintiff’s complaint adequately pleads the formation of a contract between Plaintiff and Sears, for the purchase and/or sale of the Item. Plaintiff’s complaint alleges that Plaintiff paid seventy dollars in performance thereof, that Sears failed to perform, and that Plaintiff suffered damages as a result of Sears’ alleged breach. Accordingly, accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff’s complaint adequately states a claim for breach of contract.

As for Plaintiff’s seventh cause of action, for bad faith, “it is unnecessary for a party to a contract dispute to raise the issue of good faith. The duty of good faith and fair dealing is implicit in the performance of contractual obligations, to the extent that a separately stated cause of action asserting breach of that duty is routinely dismissed as redundant.” (*Banc of Am. Sec. LLC v. Solow Bldg. Co. II, L.L.C.*, 47 A.D.3d 239, 243 [1st Dep’t 2007] [internal citations omitted]). Thus, even accepting Plaintiff’s allegations as true, Plaintiff’s seventh cause of action is duplicative of Plaintiff’s breach of contract claim.

With respect to Plaintiff’s eighth and final cause of action, for public nuisance and injunction, a public nuisance “consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.” (*Copart Industries, Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 568 [1977]). In order to maintain a private action for public nuisance, a plaintiff must allege “a private and peculiar injury” beyond that suffered by the community at large. (*Wakeman v. Wilbur*, 147 N.Y. 657, 663 [1895]). To obtain a permanent injunction, a plaintiff must show: 1) the violation of a right that is presently occurring or imminent; 2) that the plaintiff has no adequate remedy at law; 3) that serious and irreparable injury will result if the injunction is not granted; and, 4) that the equities are balanced in the plaintiff’s favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Here, Plaintiff's complaint alleges that, "the above complained of facts and circumstances constitute a public nuisance" which is "actionable by the Plaintiff because the Plaintiff suffered a special injury beyond that suffered by the community at large." Plaintiff's complaint further alleges that an injunction, "enjoining Sears' use of their e-mail enquiry service until processing safeguards are implemented and confirmed" is warranted to abate the claimed public nuisance, "due to the risk of irreparable harm to consumers shopping on the K-Mart website, at risk of not receiving their purchases nor receiving a response to their enquiries regarding same, and due to the lack of prejudice to the Defendants from being barred from offering an e-mail enquiry service while of compliance with industry standards for processing of same".

Even accepting Plaintiff's allegations as true, the alleged non-delivery of the purchased Item and Movants' purported failures to respond to Plaintiff's email inquiries do not constitute an actionable public nuisance. Moreover, a cause of action for public nuisance is not stated where a plaintiff alleges damages that are "merely for economic loss occasioned by breach of a contract . . . and not for personal injuries or property damage independent of defendant's failure to fulfill said contractual obligations." (*Chemical Bank v. Stahl*, 255 A.D.2d 126, 127 [1st Dep't 1998]). Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint are insufficient to support a cause of action for public nuisance. Likewise, even accepting Plaintiff's allegations as true, Plaintiff's claim for injunctive relief fails. Plaintiff's complaint does not plead factual allegations to support its claim that Sears' purported conduct poses an imminent risk of future harm to Plaintiff, or that Plaintiff lacks an adequate remedy at law for the injuries alleged.

As far as removal is concerned, CPLR § 325(d) permits the Supreme Court to remove an action, "without consent to such lower court where it appears that the amount of damages sustained may be less than demanded, and the lower court would have had jurisdiction but for the amount of damages demanded." (CPLR § 325[d]).

To the extent that Plaintiff's complaint is based on the alleged non-delivery of the Item, which Plaintiff purportedly purchased for seventy dollars, the amount of damages sustained may be less than the amount of damages demanded, which is upwards of \$25,000, together with costs, attorney's fees, and disbursements. Furthermore, Plaintiff's complaint fails to state a claim for injunctive relief, and Plaintiff's remaining causes of action "ha[ve] an adequate remedy at law (obviating

the consideration of plaintiff's equitable claims), which is within the jurisdictional cognizance of the Civil Court." (*Haskin v. Denoyer*, 250 A.D.2d 458, 459 [1st Dep't 1998]; CPLR 325[d]; 22 NYCRR 202.13). Accordingly, this action is properly removed to Civil Court.

Finally, Plaintiff's cross motion to compel discovery is deficient. Plaintiff fails to submit the required affidavit of a good faith effort to resolve any disclosure dispute. (*see* 22 NYCRR 202.7[a][2]).

Wherefore it is hereby,

ORDERED that Sears' motion to dismiss is granted only to the extent that Plaintiff's first, fourth, fifth, seventh, and eighth causes of action are dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff's second, third, and sixth causes of action are severed and shall continue; and it is further

ORDERED that Plaintiff's remaining causes of action are hereby removed from this Court and transferred to the Civil Court of the City of New York, County of New York; and it is further

ORDERED that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: August 13, 2014



Eileen A. Rakower, J.S.C.