Clemente Bros. Contr. Corp. v Hafner-Milazzo
2016 NY Slip Op 30500(U)
March 17, 2016
Supreme Court, Suffolk County
Docket Number: 21385-10
Judge: Elizabeth H. Emerson
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SHORT FORM ORDER

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INDEX NO.: 21385-10

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 12-18-15
SUBMITTED: 12-24-15
MOTION NO.: 003-MOT D

CLEMENTE BROS. CONTRACTING CORP. and JEFFREY A. CLEMENTE,

Plaintiffs,

-against-

APRILE HAFNER-MILAZZO a/k/a APRILEANNA MILAZZO and CAPITAL ONE, N.A.,

Defendants.

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Upon the following papers numbered 1-31 read on this motion for partial summary judgment ; Notice of Motion and supporting papers 1-20 ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 21-30 ; Replying Affidavits and supporting papers 31 ; it is,

ORDERED that the branches of the motion by the defendant Capital One, N.A., which are for partial summary judgment dismissing the fifth cause of action for attorney's fees and dismissing the plaintiffs' unpleaded claim for special or consequential damages are granted; and it is further

ORDERED that the motion is otherwise denied.

The plaintiff Clemente Brothers Contracting Corp. ("Clemente Brothers") was a customer of the defendant Capital One, N.A. ("Capital One"), where it had three corporate accounts, a line of credit, and a term loan. The line of credit and term loan were secured by a personal guarantee executed by the plaintiff Jeffrey Clemente and a security agreement. Capital One mailed monthly statements for the three corporate accounts to the business address provided by Clemente Brothers. The monthly statements for the corporate operating account included

copies of the cancelled checks drawn on that account. Capital One also mailed to Clemente Brothers monthly statements showing the principal balance due on the line of credit and the monthly payment of interest thereon. The interest was automatically debited from Clemente Brothers' operating account, the same account into which draw-downs on the line of credit were deposited. While the monthly statements for the line of credit showed the payment of interest, the draw-downs were not reflected thereon. They only appeared as credits on the operating-account statements.

The defendant Aprile Hafner-Milazzo was Clemente Brothers' bookkeeper. In 2010, she was arrested for forging Jeffrey Clemente's signature on draw-down requests drawn on the line of credit and on checks drawn on the operating account. Between January 2008 and December 2009, she drew down more than $700,000 from the line of credit, which she deposited into the operating account, and wrote checks from the operating account in the amount of approximately $386,000. After Clemente Brothers notified Capital One of the thefts, it determined that an event of default had occurred that adversely affected Clemente Brothers' ability to repay its debts and demanded immediate payment of all outstanding amounts due under both the line of credit and the term loan. This action ensued. The plaintiffs asserted three causes of action against Capital One: for a judgment declaring that it is barred from enforcing any of its claims against them under the line of credit (the third cause of action), to recover damages for negligence (the fourth cause of action), and for attorney's fees (the fifth cause of action). Capital One counterclaimed to recover the amounts due under the line of credit, the term loan, the guaranty, and the security agreement. Capital One moved for summary judgment on its counterclaims and for dismissal of the complaint insofar as asserted against it.

By an order dated February 8, 2011, this court, finding that UCC 4-406 (4) defeated the plaintiffs' claims, dismissed the complaint insofar as asserted against Capital One and granted summary judgment to Capital One on its counterclaims (2011 NY Slip Op 30384[U]). The Second Department affirmed in an order dated November 14, 2012 (100 AD3d 677). The Court of Appeals, however, found that Capital One was not entitled to judgment as a matter of law on the line-of-credit claims because the application of UCC 4-406 (4) was contingent on the bank providing Clemente Brothers with copies of the draw-down requests and the record did not show that they had been provided (22 NY3d 277, 285-287). Thus, the matter was remitted to this court for further proceedings on the line-of-credit claims. The Appellate Division's order was otherwise affirmed. On remittal, a trial was scheduled for April 4, 2016. Capital One has made a pre-trial motion for partial summary judgment dismissing the fourth cause of action for negligence, the fifth cause of action for attorney's fees, and the plaintiffs' unpleaded claim for special or consequential damages.

Contrary to Capital One's contentions, the fourth cause of action for negligence is not duplicative of the third cause of action for a declaratory judgment. The remedy in a declaratory-judgment action is simply a declaration of the rights of the parties (*see generally*, CPLR 3001; Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:1). Unlike a negligence action, a declaratory-judgment action does not end in a money

judgment. Thus, the plaintiffs may not recover their damages, if any, under the third cause of action, which merely seeks a judgment declaring that Capital One is "barred from enforcing any of its claims against the plaintiffs relating to the sums claimed to be due under the Line of Credit paid by CAPITAL ONE in reliance upon forged documents." Dismissal of the fourth cause of action for negligence would deprive the plaintiffs of a claim for money damages against Capital One.

Capital One contends that a cause of action for negligence cannot be based on breach of a contractual duty. Capital One contends that the plaintiffs' fourth cause of action, which alleges that Capital One was negligent when it accepted the forged draw-down requests, cannot be maintained as a matter of law because the relationship between a borrower and a bank is contractual in nature. The plaintiffs oppose dismissal of the fourth cause of action on the ground that it states claims under the Uniform Commercial Code and under contract law. In reply, Capital One contends that the plaintiffs may not raise new theories of recovery that were not pleaded in the original complaint in opposition to a motion for summary judgment.

Capital One is correct that a depositor may not sue his bank in negligence solely based on the contractual relationship between the bank and the depositor (**Tevdorachveli v Chase Manhattan Ban**, 103 F Supp 2d 632, 643 [EDNY 2000] [and cases cited therein]). However, although the fourth cause of action is couched in terms of negligence, it states claims under contract law and under the UCC, neither of which is a new theory of recovery. The third cause of action for a declaratory judgment is based on contract law, and the previous motion for summary judgment, which was litigated all the way up to the Court of Appeals, was based on the UCC. Moreover, the plaintiffs do not allege any new facts in support thereof. In the cases upon which Capital One relies, the new theories of recovery were based on facts that were not pleaded in the original complaint (*see*, **Mezger v Wyndham Homes, Inc.**, 81 AD3d 795 [new theory of recovery based on alleged existence of a different right-of-way or easement than the one described in the complaint]; **Penner v Hoffberg, Oberfest, Burger & Berger**, 44 AD3d 554 [new theory of liability based on affidavit of new accountant that contradicted the complaint]; **Scanlon v Styvesant Plaza**, 195 AD2d 854 [new theory of negligence based on engineer's affidavit that cause of fall was overpolished tile floor rather than liquid spill as originally alleged]). Here, the plaintiffs do not allege any new or different transactions or occurrences that are not found in the complaint.

The court declines to dismiss the fourth cause of action for negligence and deems it a cause of action to recover damages under contract law and under the UCC. The plaintiffs could have moved to amend the complaint. Such a motion may be made "at any time" (CPLR 3025 [b]), and it is error to deny a motion to amend when it merely adds new theories of recovery based on the underlying transactions in the original complaint (*see*, **Sample v Levada**, 8 AD3d 465, 468; **Walker v Pepsico, Inc.**, 248 AD2d 1015). Capital One cannot claim to be surprised or prejudiced by the addition of contract and UCC claims. As previously noted, the third cause of action for a declaratory judgment is based on contract law, and the previous motion for summary judgment, which was litigated all the way up to the Court of Appeals, was based on the

UCC. Moreover, the trial of this action has been adjourned to October 17, 2016, giving the parties an additional six months to prepare their cases.

The fifth cause of action is to recover attorney's fees. New York law is clear: attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless authorized by agreement of the parties, statute, or court rule (**Hooper Assocs. v AGS Computers**, 74 NY2d 487, 491). The plaintiffs' claim for attorney's fees is based on Capital One's alleged "improper and/or negligent acts" and a contractual provision that imposes an obligation on the plaintiffs to pay Capital One's legal fees "[i]n the event the Bank retains counsel with respect to the enforcement of this Note or any other document or instrument or instrument given to the Bank[.]" That provision does not impose a reciprocal obligation on Capital One to pay the plaintiffs' legal fees, and the court declines to read into it something that the parties have neglected to specifically include (*see*, **Vermont Teddy Bear Co. v 538 Madison Realty Co.**, 1 NY3d 470, 475). The court is unaware of any statute or court rule that authorizes payment of the plaintiffs' legal fees by Capital One. Real Property Law § 234, to which the plaintiffs cite, applies to residential leases of real property and is inapplicable to the facts of this case. Accordingly, the fifth cause of action for attorney's fees is dismissed.

Capital One contends that the plaintiffs seek to recover damages for the loss or destruction of their business following its declaration of default. Capital One contends that the plaintiffs seek to recover millions of dollars to start the business up again and to pay the taxes, outstanding loans, credit-card debt, and other obligations on which they defaulted after it was determined that an event of default had occurred and all outstanding amounts under the line of credit were immediately due and payable. Construing these claims as a claim for special or consequential damages, Capital One contends that the plaintiffs are not entitled to such relief as a matter of law.

Preliminarily the court notes that the complaint does not include a claim for special or consequential damages. However, in opposition to Capital One's motion, the plaintiffs contend that they are entitled to such relief. The plaintiffs contend that, although they continued to make payments on the line of credit after notifying Capital One of the thefts, Capital One declared the line of credit to be in default anyway, causing the collapse of their business and rendering it impossible to obtain credit from another source.

Under New York law, consequential and special damages are recoverable only in limited circumstances (**Nwachukwu v Chemical Bank**, US Dist Ct, SDNY, Aug. 6, 1997, Wood, J. [1997 WL 441941] at *2). Recovery is limited to those injuries that the parties could reasonably have anticipated at the time the contract was entered into (**Tevdorachveli v Chase Manhattan Bank**, 103 F Supp 2d at 641). When, as here, the damages claimed do not usually flow from the breach, it must be established that the special circumstances giving rise to them should reasonably have been anticipated at the time the contract was made (**Id.**). Thus, recovery is permitted only when the evidence supports a determination that the parties contemplated assumption by the defendant of liability for the damages at issue (**Nwachukwu v Chemical**

Bank, *supra*, *citing* **Kenford Co. Inc. v County of Erie**, 73 NY2d 312).

There is no evidence in the record that, when Capital One extended credit to Clemente Brothers in 2007, it was aware of or assumed liability for any of the obligations on which the plaintiffs defaulted after losing access to the line of credit. Moreover, after learning of the thefts, but before declaring the line of credit to be in default, Capital One offered to extend additional credit to Clemente Brothers "to help with an apparent working capital shortfall." Clemente Brothers rejected the offer. Thus, the alleged consequential damages were not proximately caused by Capital One's withdrawal of credit (*see*, **Bi-Economy Market, Inc. v Harleysville Ins. Co.**, 10 NY3d 187, 192-193 [consequential damages must be proximately caused by the breach]). Accordingly, the court finds that the plaintiffs are not entitled to recover consequential or special damages as a matter of law.

The plaintiffs seek summary judgment on their third cause of action for a declaratory judgment and vacatur of the judgment that was entered in this action after the previous motion for summary judgment was decided. The plaintiffs' application for such relief is not accompanied by a notice of cross motion as required by CPLR 2215. In the absence of a notice of cross motion, the plaintiffs are not entitled to any affirmative relief (**Lee v Colley Group McMontebello, LLC**, 90 AD3d 1000, 1000-1001 [and cases cited therein]).

The parties are directed to proceed to trial on the remaining issues.

Dated: March 17, 2016

HON. ELIZABETH HAZLITT EMERSON

J.S.C.