Gene Kaufman Architect, P.C. v Gallery at Chelsea, LLC
2005 NY Slip Op 30531(U)
July 25, 2005
Supreme Court, New York County
Docket Number: 101897/05
Judge: Kibbie F. Payne

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4

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GENE KAUFMAN ARCHITECT, P.C.
and **GENE KAUFMAN,**
Plaintiffs,

Index No.101897/05
Motion Sequence 01

- against -

THE GALLERY AT CHELSEA, LLC, THE GALLERY DEVELOPMENT GROUP, LLC, CJA GALLERY, LLC, JANI DEVELOPMENT II, LLC, COLESON MANAGEMENT, LLC, STANLEY R. PERELMAN, JOSEPH GENTILE, ARROW DEVELOPMENT CO, LLC, THE SEDONA GROUP, LLC, SEDONA DEVELOPMENT GROUP, LLC, TONI COBURN, STEPHEN E. MCARDLE, JMA AUTO TECH CORP., FREMONT INVESTMENT & LOAN, ULTRA CONSTRUCTION ASSOCIATES INC., VJB CONSTRUCTION 559 W 23RD STREET LLC, PETER SCALAMANDRE & SONS INC., BLUEPRINT PLUMBING LLC, NORTH AMERICAN ELEVATOR INDUSTRIES INC., ABCON BUILDERS CORP., JOHN OR JANE DOES 1-10 and XYZ ENTITIES 1-10,
Defendants.

DECISION/ORDER

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KIBBIE F. PAYNE, J.:

Defendants Stephen E. McArdle, Toni Coburn, Arrow Development Co., LLC, The Sedona Group, LLC and Sedona Development Co., LLC s/h/a Sedona Development Group, LLC, in this action, inter alia, to foreclose a mechanic's lien and for breach of contract, move to dismiss the complaint on the grounds that the statements in the complaint fail to plead a claim for fraud with the requisite particularity, there is a defense founded upon documentary evidence and the complaint fails to state a cause of action and (CPLR 3013, 3016 [b] and 3211 [a] [1], [a] [7], respectively).

Plaintiff Gene Kaufman, the named principal of a licensed architectural firm, defendant Gene Kaufman Architects, PC, claims that he was fraudulently induced by defendant Stephen E.

McArdle, to enter into an agreement with Arrow Development Co., LLC, to perform professional services in connection with defendants' development of real property located at 559 West 23rd Street, New York, New York, Block 695, Lot 6 (hereinafter "the site"). Kaufman claims that McArdle represented himself as the developer of the project and gave assurances that he would pay plaintiffs for the architectural work. As a consequence, plaintiffs commenced their work, but thereafter, memorialized the parties' intentions in a letter agreement executed by Kaufman and McArdle's wife, defendant Toni Coburn, on behalf of Arrow Development Co., LLC (hereinafter "Arrow"). A copy of the letter agreement dated July 9, 2002 is annexed as an exhibit to plaintiffs' opposition papers. Plaintiffs sent invoices to Arrow and to the Sedona Group, LLC., another entity associated with McArdle, requesting payment for work performed under the letter agreement. In his opposing affidavit, Kaufman avers further that he was subsequently induced by McArdle and his associates, to deliver the architectural files, plans, drawings, specifications and building department permits for development of the site. Kaufman claims that the plaintiffs' files were turned over to defendants on the express condition that plaintiffs' would be paid the outstanding balance owed for services performed. A termination agreement, dated January 14, 2004, was executed between Kaufman and defendant Stanley Perelman on behalf of The Gallery At Chelsea, LLC (hereinafter "Gallery"), apparently, concluding the parties' relationship. Gallery is the alleged successor corporation to Arrow and the present owner of record of the site. Kaufman also claims that once the plaintiffs turned over their file, defendants reneged by stopping payment on a bank check. Plaintiffs claims that defendants' by their actions, have sought to evade their liability under the parties' agreement by attempting to shift contractual obligations to other associated individuals or entities, by dissolving two related corporations and

arguing that plaintiffs' remedy is limited to the July 9, 2002 agreement with Arrow, a corporation which defendants have apparently dissolved.

To recover the outstanding balance of $74,155.59 owed under the July 9, 2002 agreement, plaintiffs filed two notices of a mechanic's lien against the premises, naming the former owner of the site, JMA Auto Tech Corp. (hereinafter "JMA") and the present owner, Gallery. Plaintiffs maintain that discovery is necessary to determine the involvement of each defendant. Plaintiffs argue further that there may be a basis for piercing the corporate veil of the various defendant corporations, to hold the individual defendants liable. Until it is determined which of the defendants is legally responsible for the contractual obligations of Arrow, plaintiffs assert it would be premature to dismiss the complaint.

In support of the motion to dismiss, defendant McArdle submits his affidavit, in which he does not contest plaintiffs' entitlement to the outstanding balance, but contends that Arrow is exclusively liable for the debt. However, whether Gallery or any of the other defendants assumed Arrow's obligations under the July 9, 2002 letter agreement, or plaintiffs' waived its right to payment, are issues which cannot be determined on this motion to dismiss. Notably, while McArdle admits he is "associated" with defendants, his affidavit is devoid of any information regarding the nature or extent of his association. As such, McArdle's averments lack persuasive force, since McArdle fails to demonstrate his authority to make any representation on behalf of Arrow, or the other "associated" defendant individual or corporation.

Turning to the motion to dismiss, the verified amended complaint dated February 9, 2005 interposes nine causes of action as follows: (1) to foreclose a mechanics lien, (2) fraud in the inducement, (3) breach of contract as to the termination agreement of January 14, 2004, (4)

breach of letter agreement dated July 9, 2003, (5) unjust enrichment, (6) to recover compensation for services performed on a quantum meruit basis, (7) account stated, (8) declaratory judgment piercing the corporate veil of Gallery to hold the individual defendants Stanley Perelman and Joseph Gentile personally liable and (9) declaratory judgment piercing the corporate veils of Arrow, the Sedona Group LLC and Sedona Development Group, LLC to hold the individual defendants Stephen McArdle and Toni Coburn personally liable.

In *Pace v Perk* (81 AD2d 444, 449-450), the Appellate Division, Second Department set forth a general rule governing review of motions to dismiss for failure to state a cause of action. Therein, the court stated:

> "Upon such a motion to dismiss a complaint for legal insufficiency, the court must assume that its allegations are true ... and must deem the complaint to allege whatever can be imputed from its statements by fair and reasonable intendment, however imperfectly, informally or illogically facts may be stated therein ... . In making its analysis, the court is not bound by the constructions and theories of the parties ... . The test of the sufficiency of a complaint is whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments ... . Where the motion to dismiss for failure to state a cause of action is made under CPLR 3211, the plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of his complaint"

Applying this rule to the present application to dismiss the verified amended complaint dated February 9, 2005, the second cause of action alleging fraud in the inducement, where the only fraud alleged pertains to the breach of the written agreements between the parties, fails to state a cause of action pursuant to CPLR 3211 (a) (7). The First Department has consistently followed the rule announced in *Briefstein v P. J. Rotondo Construction Co., Inc.,*

(8 AD2d 349, 351), that a cause of action "does not lie for fraud resting on an intention not to perform" and where the fraud relates only to a breach of contract (*see e.g., Leventhal v Martin,* 25 AD2d 508; *Miller v Volk & Huxley, Inc.*, 44 AD2d 810; *Tesoro Petroleum Corp. v Holborn Oil Co., Ltd.*, 108 AD2d 607; *Spellman v Columbia Manicure Mfg. Co.*, 111 AD2d 320, 323; *Metropolitan Transportation Authority v Triumph Advertising Productions, Inc.*, 116 AD2d 526, 527; *Krantz v Chateau Stores of Canada Ltd.*, 256 AD2d 186, 187). In this case, there is no dispute that there are two written agreements executed between the parties. Therefore, "[t]o plead a viable cause of action for fraud arising out of a contractual relationship, "the plaintiff must allege a breach of duty which is collateral or extraneous to the contract[s]" (*Id.* at 187; *Mastropieri v Solmar Construction Co., Inc.*, 159 AD2d 698, 700; *Americana Petroleum Corp. v Northville Industries Corp.*, 200 AD2d 646, 647). The plaintiffs' complaint does not interpose such an allegation. The breach of duty alleged is defendant McArdle's false statement that he, or his associates would pay plaintiffs for the work performed and the outstanding balance, once the architectural plans were turned over. This statement is not extraneous to the parties' agreements (*see, Metropolitan Transportation Authority v Triumph Advertising Productions, supra* at 527). The "mere addition of allegations that the contracting parties did not intend to meet the contractual obligations does not serve to convert a cause of action for breach of contract into one for fraud" (*Modell's N.Y. v Noodle Kidoodle,* 242 AD2d 248, 249 citing *Devlin v 645 First Avenue Manhattan Co.*, 229 AD2d 343, 344). In addition, because the measure of damages, i.e., the contract balance of $74,155.59, is readily ascertainable, this is further evidence that the claim for fraud is duplicative of the claim for breach of contract alleged under the third and fourth causes of action. Consequently, the claim for fraud alleged in the second cause of action is

dismissed (*see e.g., Tesoro Petroleum Corp. v Holborn Oil Co.*, 108 AD2d 607).

Similarly, the claim for unjust enrichment alleged under the fifth cause of action is dismissed as duplicative of the causes of action to recover damages for breach of contract (*see, Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644, 645). The sixth cause of action to recover damages on a quantum meruit basis is also dismissed, "since the existence of an express contract between the parties governing the particular subject matter precludes recovery under such a theory" (*id.* at 646; *see also, Clark-Fitzpatrick, Inc. v Long Island R. R. Co.*, 70 NY2d 382, 389-390).

At this pre-discovery stage of the action, there are no facts indicating the degree to which the individual defendants McArdle, Coburn, Perelman and Gentile may have dominated or misused their control of the several defendant corporations for their personal benefit. Moreover, defendants having moved to dismiss the complaint based on legal insufficiency, there is no obligation on the part of plaintiffs to show evidentiary facts to support the allegations of the complaint, because the plaintiffs are given the benefit of every possible inference to sustain a viable cause of action. The plaintiffs' complaint gives adequate notice of what is intended to be proved and the material elements of the claim for declaratory judgment piercing the corporate veil of the defendant corporations (*see e.g., Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633; *Underpinning & Foundation Constructors, Inc. v Chase Manhattan Bank, N. A.*, 46 NY2d 459). Consequently, the motion to dismiss the eighth and ninth causes of action is denied.

As to the first cause of action to foreclose a mechanic's lien, the allegations of the complaint, together with the affidavit of plaintiff Gene Kaufman and the notice of mechanic's lien filed dated February 26, 2004, state sufficient facts at this pleading stage to withstand the

motion to dismiss.

Since an account stated is an agreement, express or implied, independent of the underlying agreement, regrading the amount due on past transactions (*see, Corr v Hoffman*, 256 NY 254, 266; *Rodkinson v Haecker,* 248 NY 480, 484-485) and defendants do not dispute the existence of the parties' agreement, the receipt of the invoices, or the contractual obligation to pay for services performed, the motion to dismiss is denied as to the seventh cause of action. This pre-trial motion is inappropriate for a trial part, accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted only to the extent that the second cause of action for fraud in the inducement, the fifth cause of action for unjust enrichment and the sixth cause of action for quantum meruit are dismissed (CPLR 3211 [a] [7]) and is denied all other respects; and it is further

ORDERED that the clerk of the court shall re-assign this action to an all-purpose IAS part. The foregoing constitutes the decision and order of the court.

DATED: JUL 25 2005

ENTER:

J.S.C.