JMS AN's, LLC v Fast Food Enters., LLC
2011 NY Slip Op 33900(U)
September 28, 2011
Supreme Court, New York County
Docket Number: 603608/09
Judge: Richard B. Lowe III

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III Justice

PART 56

INDEX NO. 603608/09

MOTION DATE 2/28/11

MOTION SEQ. NO. 002

JMS

-v-

Fast Food Enterprises

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9/28/11

RICHARD B. LOWE III, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

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JMS AN's, LLC,

Plaintiff,

Index No. 603608/2009

-against-

DECISION AND ORDER

FAST FOOD ENTERPRISES, LLC and GLEN NELSON,

Defendants.

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RICHARD B. LOWE III, J.

Defendants Fast Food Enterprises, LLC and Glen Nelson ("Defendants") move to reargue this court's order dated November 30, 2010 which denied the motion to dismiss in its entirety.

BACKGROUND

Plaintiff JMS AN's LLC ("Plaintiff") and Defendants are both New York limited liability corporations. Defendant Nelson is the managing member of Fast Food Enterprises. On January 20, 2009, Plaintiff purchased from Defendants a Taco Bell franchise ("the Franchise") for $1,625,000. The Complaint alleges that shortly after Plaintiff began operating the Franchise, it discovered that the financial reports Defendants provided to Plaintiff when negotiating the sale of the Franchise were misleading. Plaintiff alleges it is incurring damages in excess of $100,000 per month as a result of Defendants' alleged misrepresentations. (Complaint ¶ 1-15). Plaintiff brought causes of action against both Defendants for breach of contract, breach of warranty, fraudulent misrepresentation, fraud, unjust enrichment, and indemnification. (Complaint ¶ 15-36). Defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(7) in its entirety.

On October 13, 2010 this Court heard oral argument for Defendants' motion, and on the record denied the motion in respect to the breach of contract claim. As noted in the hearing transcript, the Court only intended to deny the motion to dismiss as it pertains to the breach of contract claim, despite issuing a short-order form on November 30, 2010 which denied the motion in its entirety without addressing the remaining causes of action. Therefore, defendants move to reargue to allow the court to review the remainder of the complaint.

II. Discussion

A motion for leave to reargue pursuant to CPLR 2221 may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*Schneider v Solowey*, 141 AD2d 813 [2d Dept, 1988]. Further, when determining a motion to dismiss under CPLR 3211 (a)(7), Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman Milstein, Felder & Steiner, LLP.*, 96 NY2d 300, 303 [2001]). The Court will not accept as true factual and legal conclusions that are "either inherently or flatly contradicted by documentary evidence" (*Ullmann v Normal Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

A. Breach of Warranty

The Complaint alleges that Defendants breached an express warranty by representing to Plaintiff that Defendants' "books, records, [and] tax returns exhibited to [Plaintiff] reasonably reflect the financial condition of [Defendants] and all figures prior to closing are accurate and will be at [closing]." (Complaint ¶ 17). The allegation upon which the breach of warranty claim

rests is the exact same allegation upon which the breach of contract claim rests, mainly that Defendants failed to disclose material information about the Franchise, which information Plaintiff relied upon when entering into the Agreement. (Complaint ¶ 14). Indeed, the pleadings for this cause of action are verbatim of Paragraph 9 (h) of the contract governing the sale of the Franchise. If the representation in 9 (h) was false or misleading, Plaintiff will obtain any relief to which it is entitled under its breach of contract claim. The breach of warranty claim is dismissed as duplicative of the breach of contract claim (*New York Trans Harbor LLC v Derecktor Shipyards Conn., LLC*, 15 Misc3d 1140 (A) [NY Sup 2007] [finding breach of contract claim and breach of warranty claim duplicative]; *Orlando v Novurania of Am.*, 162 F Supp 2d 220, 225 [SDNY 2001] [disallowing both a breach of warranty claim and a duplicative claim to simultaneously proceed).

B. Fraud and Fraudulent Misrepresentation

"An actionable fraud claim requires proof that defendant made a misrepresentation of fact which was false and known to be false, [and] that the misrepresentation was made with the intent to induce another party's reliance upon it." (*New York City Housing Authority v Morris J. Eisen, P.C.*, 276 AD2d 78, 85 [1st Dept 2000]). Further, "a cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." (*Tierney v Capricorn Invs.*, 189 AD2d 629, 631 [1993]; *see also Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755 [2d Dept 2009] ["A cause of action premised upon fraud cannot lie where it is based on the same allegations as the breach of contract claim."]).

The fraud claim is duplicative of the cause of action for breach of contract. However, even if the fraud allegations were not duplicative, they are entirely conclusory and fail to meet

the heightened bar required by CPLR 3016 (b) ("[w]here a cause of action or defense is based upon misrepresentation [or] fraud...the circumstances constituting the wrong shall be stated in detail."]). The Complaint's most detailed claim in regard to the alleged fraud asserts only that "a misrepresentation was made with the intent to defraud plaintiff and defendants never intended to disclose the correct financial figures to the plaintiff." (Complaint ¶ 22). Accepting such a conclusory allegation as "detailed" entirely ignores CPLR 3016's heightened pleading requirements. The Complaint gives no description of the documents Plaintiff received from Defendants, what financial information was in those documents, and how that information was misleading. Further, there is no detail regarding Defendants' scienter, an essential element of a fraud claim (*Nottenberg v Walber 985 Co.*, 160 AD2d 574 [1st Dept 1990]). In short, nothing in the complaint's fraud allegations is detailed. As the fraud claim is duplicative of the breach of contract claim, and also fails to satisfy CPLR 3016's heightened pleading requirement, it must be dismissed.

The fraudulent misrepresentation claim must be dismissed for the same reasons. As well, it is duplicative of the breach of contract claim (*Rockefeller University v Tishman Const. Corp. of New York*, 240 AD2d 341, 342 [1st Dept 1997] ["[T]he motion court correctly held that [Plaintiff's] misrepresentation and fraudulent misrepresentation claims against Defendant are duplicative of its breach of contract since the identical contractual benefit of the bargain recovery is sought."]). And, as with fraud claims, CPLR 3016 requires that fraudulent misrepresentation claims be pleaded with particularity, which the claim here fails to do. Indeed, the fraudulent misrepresentation allegations are no more detailed than the fraud allegations. The Complaint gives no description of the documents Plaintiff received from Defendants, what financial

information was in those documents, and how Defendants fraudulently misrepresented that information to Plaintiff. The fraud and fraudulent misrepresentation claims are thus dismissed.

C. Unjust Enrichment

Unjust enrichment is a quasi-contract claim requiring "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." (*Deloitte* [*Cayman*] *Corporate Recovery Services, Ltd. v. Sandalwood Debt Fund A, LP*, 31 Misc3d 1225 (A) *8 [NY Sup., NY County, J. Kornreich 2011]). 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 (*Unisys Corp v Hercules Inc.*, 24 AD2d 365, 367 [1st Dept 1996] ["Plaintiff does not maintain that its contract with defendant is unenforceable and, thus, cannot establish its claim for damages based upon the inconsistent theory of unjust enrichment."]).

Here, Plaintiff has explicitly pleaded, and Defendants do not dispute, that the parties entered into an enforceable contract (*see e.g.*, Complaint ¶12 ["On or about January 29, 2009, the parties entered into a written contract for the purchase of a business..."]). Further, the subject matter of the contract is the same subject matter that would give rise to an unjust enrichment claim. Indeed, the crux of Plaintiff's argument for its unjust enrichment claim is that Defendants were enriched as a result of breaching the contract. The unjust enrichment claim must therefore be dismissed (*La Rose v Backer*, 11 AD2d 314, 320 [3d Dept 1960] *aff'd* 11 NY2d 760 [Allowing quasi-contract claims to proceed when the parties indisputably entered into an

enforceable written contract permits "any contractor who [makes] a poor contract [to] ignore it and recover in [quasi-contract]").

D. Indemnification

The Complaint alleges that "[p]ursuant to 12(d) of the Contract, Defendants agreed to indemnify Plaintiff against all damages resulting from any breach of a representation or warranty." (Complaint ¶ 34). Paragraph 12(d) of the Contract reads: "The Seller shall indemnify and hold Purchaser harmless from and against any and all damages resulting from any breach of a representation or warranty unless waived in writing by Purchaser." Plaintiff interprets this provision as including those damages Plaintiff incurs as a result of actions by Defendant. Under New York law, contracts must be read as a whole, and if possible, courts must interpret them to effect the general purpose of the contract. (*Empire Properties Corporation v Manufacturers Trust Co.* 288 NY 242 [1942]; [*County of Columbia v Continental Ins. Co.*, 189 AD2d 391, 595 NYS2d 988, 991 [3d Dept 1993] *aff'd*, 83 NY2d 618 [1994] [examining the broader context of the contract to interpret a specific indemnification provision]).

Section 12 [d] is thus properly interpreted in the context of other sections of the contract, most particularly the sub-sections immediately preceding it. Section 12 (a) reads:

> "Purchaser does not assume or agree to assume and shall not acquire or take over any union agreement or other liability or obligation of any kind or nature whatsoever of Seller, direct, contingent or otherwise, including any union agreement or obligation or payments to an attorney or otherwise arising out of Seller's obligation to a union."

Section 12 (b) reads:

> "The Seller and its shareholder agrees to indemnify and to hold the Purchaser harmless from any claim, suit, debt, contract, obligation, liability, action or proceeding presented by any disclosed or undisclosed creditor or third party claimant of the Seller, and from any claim made by the New York State Department of Taxation and Finance...Seller will obtain a release from liability from sales taxes from the New York State Department of Taxation and Finance."

Section 12 (c) reads:

> "If any claim by a creditor or any third party is made against the Purchaser which the Purchaser reasonably believes is chargeable to the Seller, or the Purchaser shall ascertain any unpaid debt chargeable to the Seller, the nature and amount of such claim or debt shall be transmitted to the Seller by the Purchaser...[t]he Seller shall undertake such steps as to satisfy said claim or debt in the event the claim or debt is deemed valid by the Seller...the Purchaser shall not enter into any settlement or agreement in compromise of any claim without the Seller's prior written consent..."

Each of these three sub-sections deals solely with relationships between Defendants and third-parties and how these relationships may, after Plaintiff's purchase of the Franchise, materially affect the Franchise. Thus, when read in the context of 12 (a), 12 (b) and 12 (c), 12 (d)'s indemnification provision, like the three sub-sections preceding it, deals with Defendants' relationships with third-parties and how they affect Plaintiff's purchase of the Franchise. 12 (d) can thus only be reasonably interpreted to mean that Defendants are to indemnify Plaintiff against damages he incurs as a result of Defendants' breaches of warranty or representation to third-parties. Under no reasonable interpretation could 12 (d) mean that Defendants will indemnify Plaintiff for damages incurred as a result of Defendants' misrepresentations to *Plaintiff.* (*Ullmann v Normal Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994] [On a motion to dismiss brought under CPLR 3211 (a)(7) the Court may dismiss those claims which are "either inherently or flatly contradicted by documentary evidence."]).

Even were the Court to interpret 12 (d) as Plaintiff proffers, it is still not an available remedy under the facts alleged in this case. "Indemnification involves the shifting of loss from one party vicariously liable to another for injuries, to a third party who 'should more properly bear responsibility for that loss because it was the actual wrongdoer.'" *50 Madison Ave. LLC v RCDolner LLC*, 30 Misc3d 1201 (A) [NY Sup, NY County 2010]), citing *Trump Village Section 3, Inc. v New York State Housing and Finance Agency*, 307 AD2d 891, 895 [1st Dept 2003]). Nowhere in the Complaint is it alleged that Plaintiff is vicariously liable for the injuries it incurred, which would have been an insensible allegation in any event. Plaintiff can thus not seek indemnification from Defendants. The indemnification claim is therefore dismissed.

Therefore, based on the foregoing, it is hereby

ORDERED that Defendants' motion to reargue is granted and the causes of action for breach of warranty, unjust enrichment, fraud, fraudulent misrepresentation, and indemnification are hereby dismissed, and it is further

ORDERED that cause of action for breach of contract survives pursuant to this court's order of November 13, 2010 and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of this order with notice of entry.

This constitutes the decision and order of this Court.

Dated: September 28, 2011

ENTER:

RICHARD B. LOWE III

J.S.C.