

**Wellington Farms of Massachusetts, Inc. v Capital
Area Food Bank**

2013 NY Slip Op 34178(U)

September 5, 2013

Supreme Court, Dutchess County

Docket Number: 2510/13

Judge: Maria G. Rosa

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SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:
JUN 12 10 15 AM '13

Hon. MARIA G. ROSA

Justice.

WELLINGTON FARMS OF MASSACHUSETTS, INC.
Plaintiff, x

DECISION AND ORDER

-against-

Index No: 2510/13

CAPITAL AREA FOOD BANK,
Defendant.
_____ x

The following papers were read and considered on defendant's motion to dismiss.

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBIT 1
MEMORANDUM OF LAW IN SUPPORT

AFFIDAVIT IN OPPOSITION
MEMORANDUM OF LAW IN OPPOSITION

REPLY MEMORANDUM OF LAW

Plaintiff commenced this action seeking to recover damages based on the defendant's alleged failure to pay for a shipment of frozen ground turkey. Defendant now moves to dismiss all causes of action asserted in the complaint with the exception of plaintiff's breach of contract claim.

In reviewing a CPLR §3211 motion to dismiss, the court must accept the facts alleged by the plaintiff as true and must liberally construe the complaint, according it the benefit of every possible favorable inference. See Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409 (2001). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 NY2d 83 (1994). A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. Orvello v. Orofino Realty, 40 NY2d 633 (1976).

The facts set forth in plaintiff's complaint and affidavit in opposition establish that in May 2012 the defendant placed an order with plaintiff for 2,772 cases of frozen ground turkey at a price

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of \$74,705.40 with an anticipated delivery date of June 1, 2012. On May 23, 2012, the defendant requested a later delivery date based on the defendant's need to find cold storage space for the order. The parties agreed upon a new delivery date of June 28, 2012. The order shipped on June 27, 2012. The following day, after the order was en route, defendant contacted plaintiff requesting that the order be delayed until July 1, 2013 as defendant needed time to secure funds to pay for the order. On June 28, 2012 the order was delivered to an outside cold storage facility.

On September 12, 2012, plaintiff contacted the defendant about the order which remained in the cold storage facility. Defendant replied that there was no valid order and refused to take delivery of the shipment. On November 6, 2012 plaintiff demanded payment for the order and on January 3, 2013 sent an invoice for \$77,169.40. Such amount represents the initial order price in addition to cold storage fees incurred based on defendant's refusal to accept delivery of the order. Plaintiff has asserted causes of action for breach of contract, promissory estoppel, unjust enrichment, negligent misrepresentation, fraud, and an account stated.

Plaintiff has failed to state causes of action for negligent misrepresentation, unjust enrichment, or an account stated. A claim for negligent misrepresentation requires the plaintiff to demonstrate: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correction information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information. J.A.O. Acquisition Corp. v. Stavitsky, 8 NY3d 144 (2007). Plaintiff has failed to allege any special relationship of trust or confidence between the parties. An arm's length business relationship in and of itself is insufficient to support a cause of action for negligent misrepresentation. See Greenberg, Trager & Herbst, LLP v. HSBC Bank USA, 17 NY3d 565 (2011). Accordingly, the complaint fails to state a cause of action for negligent misrepresentation.

Plaintiff further fails to state a claim for unjust enrichment. The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Paramount Film Distrib. Corp. v. State of New York, 30 NY2d 415 (1972). Thus, to state a claim for unjust enrichment a plaintiff must allege that defendant was enriched at plaintiff's expense. See Old Republic Nat. Title Ins. Co. v. Luft, 52 AD3d 491 (2nd Dept., 2008). Here, plaintiff fails to allege that the defendant was enriched based on its failure to accept delivery of the frozen turkey. It is alleged that the turkey remains in the custody of a third party acting in its capacity as a storage agent for the plaintiff. As defendant has not received the product, it has not been enriched. Wherefore, plaintiff fails to state a claim for unjust enrichment.

Plaintiff further fails to state a claim for an account stated. An account stated is an agreement between parties as to an account and the correctness of account items and a specific balance due on them. See Stephan B. Gleich & Associates v. Gritsipis, 87 AD3d 216 (2nd Dept. 2011). Here, the complaint as supplemented by an affidavit establishes that plaintiff sent a letter demanding payment on November 6, 2012 and thereafter sent an invoice to defendant on January 3, 2013 seeking \$77,169.40. The complaint further alleges that on September 12, 2012, prior to plaintiff's demand for payment, defendant disputed the validity of the order. Hence, the complaint is devoid of any

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allegation of an agreement, express or implied, of a specific balance due. Wherefore, plaintiff fails to state a claim for an account stated.

A claim for fraudulent misrepresentation requires a plaintiff to allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance on the misrepresentation or omission, and injury. Lama Holding Co. v. Smith Barney, 88 NY2d 413 (1996). Here, plaintiff's fraud claim is based on an allegation that defendant made a representation that if shipment was delayed until shortly after July 1, 2012, defendant would take delivery for the shipment and pay for the shipment and the additional cold storage charges incurred based on the delay. According plaintiff every possible favorable inference, plaintiff has stated a claim for fraudulent misrepresentation to the extent that it is seeking damages incurred based on the cost of keeping defendant's alleged order in cold storage from the contemplated delivery date of June 28, 2012 through September 12, 2012 when defendant disputed the validity of the underlying purchase agreement. To the extent that plaintiff premises its fraud claim on defendant's alleged failure to make payment for the order, such claim is duplicative of plaintiff's breach of contract claim and thus is insufficient to sustain an independent fraud action. See O.P. Solutions, Inc. v. Crowell & Moring, LLP, 72 AD3d 622 (1st Dept. 2010).

A cause of action for promissory estoppel requires an oral promise that is sufficiently clear and unambiguous, reasonable reliance on the promise, and injury caused by the reliance. See Knight Securities L.P. v. Fiduciary Trust Co., 5 AD3d 172 (1st Dept. 2004). While the existence of a valid and enforceable contract precludes recovery under a cause of action for promissory estoppel, here plaintiff's claim for promissory estoppel is based not on the underlying alleged contract, but the oral promise made on June 28, 2012 that payment would be made for storage costs incurred based on a delayed delivery of the purchase order. Thus, to the extent that plaintiff is seeking damages under a theory of promissory estoppel for storage costs incurred after the alleged agreed upon delivery date of June 28, 2012, plaintiff has stated a valid cause of action for promissory estoppel. Wherefore, it is further

ORDERED that defendant's motion is granted to the extent that plaintiff's causes of action for unjust enrichment, negligent misrepresentation, and an account stated is granted and those causes of action are stricken from the complaint. It is further

ORDERED that defendant's motion is further granted to the extent that plaintiff may not recover damages under its claims of promissory estoppel and fraud for the same conduct underlying plaintiff's breach of contract claim. Such claims, however, do survive to the extent that plaintiff is seeking damages based on storage costs incurred based on alleged promises made on June 28, 2012 pertaining to a delayed delivery date. It is further

ORDERED that defendant's motion is denied to the extent that plaintiff has adequately stated a cause of action for promissory estoppel and fraud based on storage costs incurred after the agreed upon June 28, 2012 delivery date. It is further

ORDERED that defendant shall have twenty (20) days from the date of this decision and order to serve and file an answer. It is further

ORDERED that provided an answer is filed, a preliminary conference is hereby scheduled for October 3, 2013 at 9:45 a.m. If the parties complete the enclosed preliminary conference and stipulation order and it is signed prior to October 3, 2013 no appearances will be required.

The foregoing constitutes the decision and order of this court.

Dated: September 5, 2013
Poughkeepsie, New York

ENTER:


MARIA G. ROSA, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Rosa's Chambers, please do not submit any copies. Submit only the original papers.