Franco Belli Plumbing & Heating & Sons, Inc. v Dimino
2013 NY Slip Op 34205(U)
March 22, 2013
Supreme Court, Kings County
Docket Number: 10280/12
Judge: Bernadette Bayne
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At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 22nd day of March 2013.

PRESENT:

HON. BERNADETTE BAYNE

Justice.

FRANCO BELLI PLUMBING & HEATING & SONS, INC.,

Plaintiff,

- against -

CHARLES A. DIMINO and CHARLES A. DIMINO, INC.,

Defendants.

DECISION AND ORDER

Index No. 10280/12

The following papers numbered 1 to 2 read on this motion:	Papers Numbered
Notice of Motion/ Affidavits (Affirmations) Annexed	1
Affirmations in Opposition	2
Affirmation in Reply	

In this action for libel per se, injurious falsehood, intentional interference with a contract, and tortious interference with business relations, the defendants, prior to filing their Answer, move this Court for an Order, pursuant to CPLR §3211(a) (1) and (7), dismissing the plaintiff's complaint in its entirety, based upon the defendants' contention that "[t]he verified complaint

fails to assert any cognizable causes of action against the defendants, thereby requiring dismissal of the verified complaint in its entirety." Alternatively, the defendants seek an Order, pursuant to CPLR §3211(c), "[a]warding the defendants summary judgement and dismissing the Verified Complaint".

In support of their motion, the defendants offer an attorney's affirmation and memorandum of law; a copy of the summons with notice; a copy of the notice of appearance and demand; a copy of the verified complaint, which includes a copy of the letter that the plaintiff claims is the subject of the within lawsuit; a copy of a stipulation extending the time in which the defendants may interpose an answer to the complaint; an affidavit from defendant CHARLES A. DIMINO; and a copy of the contract between the New York City Department of Education and the defendants for the defendants to perform certain repairs to the "gas system" at a school located in the Bronx.

Substantively, the defendants argue that "[t]he June 20th correspondence", the contents of which are the basis of the plaintiff's claims, "[i]s an opinion"; "[d]id not reference the plaintiff"; and "[i]s subject to a qualified privilege". The defendants also argue that "[t]he plaintiff has failed to allege special damages". Based upon the foregoing, the defendants contend that the plaintiff cannot maintain the causes of action for libel per se, injurious falsehood, intentional interference with a contract, or tortious interference with business relations.

In opposition to the motion, the plaintiff offers an attorney's memorandum of law and an affidavit from Paul Belli, the vice president of the plaintiff's company. The plaintiff argues that "[t]he complaint does state a cause of action for the four pleaded torts"; that "[t]here is no basis to dismiss the case based upon documentary evidence"; and that "[t]here is no basis to grant

summary judgement dismissing the complaint".

Substantively, the plaintiff contends that "[t]he complaint does state a cause of action for libel", arguing that "[b]eyond the statement of opinion, the defamatory letter clearly contains specific representations of fact about the work performed by Franco Belli", and that "[t[he defendant's letter sufficiently identifies Franco Belli as the subject of the defamation". The plaintiff further contends that "[q]ualified privilege does not protect the alleged false statements of fact, which were made as part of a bad faith scheme to harm Franco Belli" and that the defendants' argument that the complaint fails to allege special damages "[i]s specious" because "[a]llegations of special damages are not even necessary for a case of libel per se", and because "[t]he complaint does allege special damages". The plaintiff also contends that "[i]t is beyond cavil that Franco Belli's complaint states" a cause of action for injurious falsehood."

The plaintiff also argues that "[t]he complaint states a cause of action for intentional interference with a contract", as well as "[a] cause of action for tortious interference with business relations", arguing that "[t]he defendants erroneously assert that" the cause of action for intentional interference with a contract "[i]s based entirely upon the defamatory letter. That is not the case. This particular cause of action arises out of Dimino's deliberate and reckless approach in illegally tampering with other plumbers' work under an open permit", and that the cause of action for tortious interference with business relations is "[b]ased upon specific misrepresentations of fact by Dimino about use of lampwick, defective pipe threads and failure to tighten the gas pipes. The context of those misrepresentations is also pleaded, consisting of a malicious scheme to damage Franco Belli to Dimino's benefit."

Finally, the plaintiff contends that the only documentary evidence offered by the

[redacted]

defendants **"[i]s the service** contract between Dimino and the **Board of** Education", arguing that the "[c]ontract proves nothing with respect to the relevant disputed issues of fact in this case". The plaintiff also contends that the defendants have "[p]rovided no basis for the granting of summary judgement at the pleading stage", arguing that the defendants have failed to eliminate all questions of fact.

The Court is not in receipt of any reply papers.

Discussion

CPLR §3211(a) enumerates eleven grounds upon which a motion may be brought to dismiss one or more causes of action. In this case, the defendant moves this Court for dismissal pursuant to CPLR §3211(a)(1), based upon a claim that "a defense is founded upon documentary evidence"and CPLR §3211(a)(7), based upon the claim that "the pleading fails to state a cause of action".

CPLR §3211(a)(1) provides that a party may move for judgement dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." The nature and quality of the evidence upon which the moving party relies will often govern counsel's determination of whether to move for dismissal under CPLR §3211 or to move for summary judgment under CPLR §3212. Where the evidence relied on is provided by affidavits, depositions and other similar supporting proof, it is preferable to move for summary judgment rather than for dismissal. The limited usefulness of affidavits in the determination of motions to dismiss is demonstrated by the court's approach to CPLR §3211(a)(1), which authorizes a motion to dismiss a cause of action on the ground that "a defense is founded upon documentary evidence." The courts have held that this provision is restricted to "documentary

evidence" that resolves all the factual issues as a matter of law and conclusively disposes of the plaintiff's claim. Fernandez v. Cigna Property and Cas. Ins. Co., 188 A.D.2d 700, 590 N.Y.S.2d 925, (3rd Dept., 1992). *See also* Siddiqui v. Nationwide Mut. Ins. Co., 255 A.D.2d 30, 32, 687 N.Y.S.2d 457, 458 (3d Dep't 1999); Scadura v. Robillard, 256 A.D.2d 567, 683 N.Y.S.2d 108, 109 (2d Dep't 1998); Fern v. International Business Machines Corp., 204 A.D.2d 907, 909, 612 N.Y.S.2d 492, 494 (3d Dep't 1994). Affidavits and similar types of supporting proof are insufficient to establish the movant's case. However, such proof will be considered where it explains the essential facts established by other documentary evidence.

Thus, in Standard Chartered Bank v. D. Chabbott, Inc., 178 A.D.2d 112, 577 N.Y.S.2d 9 (1st Dept., 1991), the plaintiff sued to recover an amount owed for merchandise sold to the defendant. The defendant moved to dismiss the complaint pursuant to CPLR §3211(a)(1), submitting "documentary evidence" which established that payments were made to the plaintiff's predecessor in interest, in excess of the debt owed for the merchandise. The defendant also submitted an affidavit which purported to establish the link between the payments and the actual debt. The court held that the defendant's documentary evidence and affidavit were sufficient to entitle the defendant to dismissal of the complaint. However, the court noted that the affidavit alone did not establish the fact of the payment; rather, its function was to establish the link between the payment and the debt claimed.

In this case, the Court finds that the documentary evidence submitted in support of the defendants' motion fails to conclusively eliminate all of the questions of fact relative to any of the four causes of action contained in the plaintiff's complaint. In the opinion of this Court, the letter that the plaintiff claims is the genesis of this action, and the contract between the

defendants and the New York City Department of Education, which are the only two documents offered, present more questions of fact than they resolve, and neither one individually, nor the two when read in tandem, establish the defendant's entitlement to summary judgement as a matter of law.

In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action, the Court must determine whether, accepting as true the factual averments of the complaint, the plaintiff can succeed on any reasonable view of the facts stated, and the Court is required to accord the plaintiff the benefit of all favorable inferences which may be drawn from the pleading, without expressing an opinion as to whether the plaintiff can ultimately establish the truth of the allegations before the trier of fact. *See* Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 631 N.Y.S.2d 565, 655 N.E.2d 661, (1995). When a cause of action may be discerned, no matter how poorly stated, the complaint should not be dismissed for failure to state a cause of action. L. Magarian & Co., Inc. v. Timberland Co., 245 A.D.2d 69, 665 N.Y.S.2d 413, (1st Dept., 1997). However, vague and conclusory allegations are insufficient to sustain a breach of contract cause of action. Fowler v. American Lawyer Media, Inc., 306 A.D.2d 113, 761 N.Y.S.2d 176, (1st Dept., 2003).

In this case, after hearing the oral arguments of the parties and upon review of the papers submitted in support of and in opposition to the motion, this Court is of the opinion that the plaintiff has satisfactorily pled the elements for each of the four causes of action contained in the verified complaint.

The defendants have yet to interpose an answer to the verified complaint and no discovery has been conducted in this case. At this stage, the Court finds that numerous questions

of fact remain and, as such, it would be inappropriate for this Court to treat the defendant's motion as one for summary judgement.

The Court also notes that both the plaintiff and the defendants rely upon affidavits from the parties in support of their motion and opposition papers. This Court cannot make a ruling as a matter of law when the credibility of the parties plays such an intricate role in the ultimate determination of the matter. "The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that issues are not genuine, but feigned.", Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 N.Y.2d 439, 293 N.Y.S.2d 93, 239 N.E.2d 725, (Ct. Of Appeals, 1968). *See*, *also*, Chase v. Skoy, 146 A.D.2d 563, 536 N.Y.S.2d 512, (2nd Dept., 1989); *appeal dismissed* 73 N.Y.2d 995, 540 N.Y.S.2d 1006, 538 N.E.2d 358; Consolidated Edison Co. of New York, Inc. v. Jet Asphalt Corp.,132 A.D.2d 296, 522 N.Y.S.2d 124, (1st Dept., 1987); Krupp v. Aetna Life & Cas. Co., 103 A.D.2d 252, 479 N.Y.S.2d 992, (2nd Dept., 1984); Cruse v. Pepsico Truck Rental, Inc., 1978, 61 A.D.2d 1022, 403 N.Y.S.2d 85, (2nd Dept., 1978); Penato v. George, 52 A.D.2d 939, 383 N.Y.S.2d 900, (2nd Dept., 1976), *motion denied* 41 N.Y.2d 839, 393 N.Y.S.2d 402, 361 N.E.2d 1050, *appeal dismissed* 42 N.Y.2d 908, 397 N.Y.S.2d 1004, 366 N.E.2d 1358; Bisbing v. Sterling Precision Corp., 34 A.D.2d 427, 312 N.Y.S.2d 305, (3rd Dept., 1970). "[The] credibility of persons having exclusive knowledge of facts should not be determined by affidavit submitted on summary judgment motions, but, rather, at trial by trier of facts.", Fisher v. Kavoussi, 90 A.D.2d 597, 456 N.Y.S.2d 439, (3rd Dept., 1982), citing Koen v. Carl Co., 70 A.D.2d 695, 416 N.Y.S.2d 396, (3rd Dept., 1979). *See*, *also*, Krupp v. Aetna Life & Cas. Co., 103 A.D.2d 252, 479 N.Y.S.2d 992, (2nd Dept., 1984); Di Donna v. Sachs, 9 A.D.2d 576, 189 N.Y.S.2d 514, 3rd Dept., 1959).

Conclusion

Accordingly, it is

ORDERED, that the defendants' motion to dismiss the plaintiff's action in its entirety, is denied in all respects.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE
J. S. C.

BERNADETTE BAYNE
Supreme Court Justice