H.O. Penn Mach. Co., Inc. v Ocean Pac. Interiors, Inc.
2015 NY Slip Op 32233(U)
November 19, 2015
Supreme Court, New York County
Docket Number: 651380/15
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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H.O. PENN MACHINERY COMPANY, INC.,

Plaintiff,

Index No. 651380/15

-against-

DECISION/ORDER

OCEAN PACIFIC INTERIORS, INC. and OLIVER PAPRANIKU,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross-Motion and Answering Affidavits	2
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff H.O. Penn Machinery Company, Inc. commenced the instant action seeking to recover an outstanding balance for rental and servicing of certain equipment arising out of a contract entered into by the parties. Plaintiff now moves for an Order pursuant to (1) CPLR §§ 3211(a)(1), (5) and (7) dismissing defendants' first, second and third counterclaims; and (2) CPLR § 3211(b) dismissing the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second and twenty-third affirmative defenses. Defendants Ocean Pacific Interiors, Inc. ("Ocean") and Oliver Papraniku ("Papraniku") (hereinafter collectively referred to as "defendants") cross-move for an Order pursuant to CPLR §§ 3211(a)(3) and (10) dismissing the complaint. The motions are resolved as set forth below.

The relevant facts according to the complaint are as follows. In a credit application agreement dated November 30, 2010, plaintiff provided Ocean with an open account for rental of certain machinery and equipment and the purchase of parts and service for said rental (the "Contract"). Pursuant to the Contract, Papraniku, the owner of Ocean, personally guaranteed prompt and immediate payment of any credit sums advanced to Ocean. Additionally, pursuant to the Contract, defendants agreed to pay a finance charge of 2% per month on all delinquent or overdue payments and that in the event any matter was placed in the hands of an attorney for collection, defendants agreed to pay the reasonable attorneys' fees and costs incurred by the plaintiff.

Based on the Contract, at defendants' request, plaintiff rented certain equipment to Ocean and provided parts and services for defendants' benefit for which Ocean was invoiced. Plaintiff asserts that the equipment, services and parts were accepted and used by defendants. Ocean paid over $500,000 under the Contract in a series of three checks. However, plaintiff asserts that approximately $47,000 remains due and owing under the Contract in addition to the legal fees and costs plaintiff has incurred in attempting to recover said amount. Thus, plaintiff commenced the instant action against defendants asserting causes of action for breach of contract, account stated, quantum meruit and unjust enrichment.

Thereafter, defendants interposed an answer in which they asserted twenty-three affirmative defenses, which include (1) statute of limitations; (2) failure to state a cause of action; (3) lack of subject matter jurisdiction; (4) estoppel, release, accord, satisfaction, waiver and/or laches; (5) failure to join a necessary party; (6) lack of privity; (7) lack of personal jurisdiction; (8) lack of standing; (9) no justifiable controversy; (10) statute of frauds; (11)

unclean hands; (12) statute of limitations; (13) failure to mitigate damages and follow contractual procedures; (14) doctrine of discharge; (15) doctrine of release; (16) fraudulent inducement; (17) violation of General Business Law ("GBL") § 349; (18) negligence; (19) lack of good faith; (20) failure to accept the guarantee, failure to provide notice of said acceptance and failure to provide consideration for the guarantee; (21) breach of the implied warranty for goods; (22) failure to form a guarantee; and (23) reservation of rights to assert additional defenses. Additionally, defendants asserted three counterclaims alleging that no agreement exists between the parties and seeking damages and attorneys' fees. Specifically, the answer asserts that defendants do not have a duty to pay for any servicing of the equipment on the grounds that defendants used a third-party to service the equipment and that they did not know that they were being charged for such service by plaintiff. Additionally, the answer alleges that defendants had requested that all invoices be issued at once so that defendants could make payment on them and that based on said request, plaintiff issued all invoices and defendants paid them in full. However, defendants assert that plaintiff later issued service invoices after the fact and claimed defendants were responsible for payment of same. Further, defendants assert that they objected to said service invoices. Plaintiff now moves to dismiss defendants' affirmative defenses and counterclaims and defendants cross-move to dismiss the complaint in its entirety.

The court first turns to defendants' cross-motion to dismiss the complaint. As an initial matter, defendants' cross-motion for an Order pursuant to CPLR § 3211(a)(3) dismissing the complaint is denied. Pursuant to CPLR § 3211(a)(3), a party may move to dismiss a cause of action if the party asserting the cause of action lacks legal capacity or standing to sue. "A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or

her zone of interest. *Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001). "The existence of an injury in fact – an actual legal stake in the matter being adjudicated – ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution.'" *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 772 (citing *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 220-21 (1974)).

Here, defendants' cross-motion for an Order pursuant to CPLR § 3211(a)(3) dismissing the complaint must be denied on the ground that defendants have failed to establish that plaintiff lacks standing to sue. Defendants allege that plaintiff lacks standing to sue based on their assertion that H.O. Penn Leasing, a separate entity that actually leases the rental equipment, is the party with standing to sue and that thus, plaintiff is not the proper party. However, such allegation is belied by the facts that the Contract with defendants was entered into by both H.O. Penn Leasing *and* plaintiff; that all of the invoices pursuant to the Contract were sent from plaintiff and not H.O. Penn Leasing; and that all communication with defendants was sent by a representative of plaintiff and not H.O. Penn Leasing. Indeed, Jeanine Iavarone, Rental Sales Engineer of plaintiff's Power Systems Division, has affirmed that plaintiff was the entity involved in the transaction at issue and not H.O. Penn Leasing and that she, as an employee of plaintiff, was the engineer who actually handled the transaction and many of the communications with defendants. Thus, as plaintiff clearly has a stake in the outcome of the action, it has standing to sue on the Contract.

Additionally, defendants' cross-motion for an Order pursuant to CPLR § 3211(a)(10) dismissing the complaint is denied. Pursuant to CPLR § 3211(a)(10), a party may move to dismiss an action on the ground that the plaintiff failed to join a necessary party. CPLR §

1001(a) provides that necessary parties include those "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action."

Here, defendants' cross-motion for an Order pursuant to CPLR § 3211(a)(10) dismissing the complaint must be denied on the ground that they have failed to establish that plaintiff failed to join a necessary party. Specifically, defendants allege that H.O. Penn Leasing, the entity that actually leases the equipment, is a necessary party to this action and that thus, the action must be dismissed. However, defendants have failed to establish that H.O. Penn Leasing is a necessary party as they have failed to show that complete relief cannot be accorded between plaintiff and defendants or that H.O. Penn Leasing may be inequitably affected by a judgment in this action. Indeed, plaintiff was the entity who communicated with and invoiced defendants and plaintiff is the entity that defendants had to pay. Thus, as defendants have not established that H.O. Penn Leasing is a necessary party to this action, their cross-motion to dismiss the action on that basis is denied.

The court next turns to plaintiff's motion for an Order pursuant to CPLR § 3211(b) dismissing defendants' affirmative defenses. Pursuant to CPLR § 3211(b), "[a] party may move for judgement dismissing one or more defenses, on the ground that a defense is not stated or has no merit." On such a motion, defenses that consist of bare legal conclusions without supporting facts will be stricken. *See Robbins v. Growney*, 229 A.D.2d 356, 358 (1st Dept 1996). However, the First Department has made clear that the assertion of the defense of failure to state a cause of action in an answer, while surplusage as it may be asserted at any time even if not pleaded, "should not be subject to a motion to strike." *Riland v. Todman & Co.*, 56 A.D.2d 350,

353 (1977).

As an initial matter, plaintiff's motion to dismiss defendants' second affirmative defense which alleges that the complaint fails to state a cause of action is denied as such affirmative defense is not subject to a motion to strike as a matter of law. *See Riland*, 56 A.D.2d at 353.

However, plaintiff's motion to dismiss defendants' fifth affirmative defense which alleges that plaintiff failed to join all necessary and/or indispensable parties to this action and eighth affirmative defense which alleges that plaintiff lacks standing is granted based on this court's finding that plaintiff does indeed have standing to sue in this action and that H.O. Penn Leasing is not a necessary party to this action.

Additionally, the remainder of plaintiff's motion to dismiss defendants' first, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second and twenty-third affirmative defenses is granted as they each consist of nothing more than a one sentence legal conclusion. Such bare legal conclusions are insufficient to make out an affirmative defense as a matter of law and as such they should be dismissed. *See Robbins*, 229 A.D.2d at 358.

Finally, the court turns to plaintiff's motion for an Order pursuant to CPLR § 3211 dismissing defendants' counterclaims. As an initial matter, plaintiff's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing defendants' first and second counterclaims is granted. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists."

Rosen v. Raum, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

In the instant action, plaintiff's motion to dismiss defendants' first and second counterclaims on the ground that they fail to state causes of action is granted. Defendants' first counterclaim alleges as follows:

> Plaintiff has breached NY State and Federal Law, as asserted in the defenses above, causing Defendants to suffer damages...Contrary to the assertions of Plaintiff no Agreement exists and no guarantee exists. The Credit Application should be declared void. Judgment should be awarded in favor of Defendants and against the Plaintiff in this amount together will (sic) all actual, consequential and punitive damages if available.

Further, defendants' second counterclaim alleges as follows:

> Plaintiff's deceptive practices by naming a document a Credit Application and then turning around and alleging it is an agreement and/or guarantee has caused harm to the Defendants credit rating in an amount that should be determined by the trier of fact thereof. Plaintiff must also report their errors to all the major credit reporting agencies pursuant to court order.

The only law that the answer asserts plaintiff has breached is GBL § 349. To sufficiently allege a cause of action for a violation of GBL § 349(h), "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 621 (2009). "[S]ection 349 is 'directed at wrongs against the consuming public' and...plaintiffs must demonstrate that the complained-of acts or practices 'have a broader impact on consumers at large.'" *Smokes-Spirits.Com, Inc.*, 12 N.Y.3d

at 623 (*citing Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 24-25 (1995)). Indeed, "certain disputes, such as '[p]rivate contract disputes, unique to the parties...would not fall within the ambit of [section 349].'" *Smokes-Spirits.Com, Inc.*, 12 N.Y.3d at 624 (*citing Oswego*, 85 N.Y.2d at 25).

Here, the court finds that both the first and second counterclaims fail to state a claim against plaintiff for a violation of GBL § 349. As an initial matter, the first and second counterclaims fail to allege that the conduct was "consumer-oriented" or that the conduct was materially misleading. Indeed, defendants have not alleged that the conduct was directed against the consuming public or that the conduct had a broader impact on consumers at large but only that the conduct damaged defendants. Additionally, the nature of this lawsuit, a private contract dispute between the parties, precludes defendants from recovery under GBL § 349.

Further, to the extent the second counterclaim is asserting a fraud claim against plaintiff, it must also be dismissed because defendants have failed to plead any of the elements of fraud or misrepresentation and have ignored the statutory requirements of CPLR § 3016(b) which require such claims to be pled with specificity.

Additionally, plaintiff's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing defendants' third counterclaim is granted. The third counterclaim asserts that defendants have incurred legal fees and costs which should be paid by plaintiff. However, it is well-settled that "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491 (1989). Here, the Contract only requires that defendants jointly and severally indemnify plaintiff for attorney's fees and does not give

defendants any such rights. Thus, as defendants have not asserted any basis for their alleged entitlement to attorney's fees, the third counterclaim must be dismissed.

Accordingly, the motions are resolved as set forth herein. This constitutes the decision and order of the court.

Date: 11/19/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.