TS Staffing Servs., Inc. v Porter Capital Corp.
2016 NY Slip Op 31613(U)
August 24, 2016
Supreme Court, New York County
Docket Number: 162449/2014
Judge: Barry Ostrager
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

X

TS STAFFING SERVICES, INC. d/b/a TRI-STATE STAFFING

Plaintiff,

-against-

PORTER CAPITAL CORPORATION,

Defendant.

X

INDEX NO. 162449/2014

Motion Seq. No. 002

OSTRAGER, J:

This is the disposition of the defendant's pre-answer motion to dismiss the plaintiff's amended complaint. The plaintiff, TS Staffing Services ("TS Staffing") was a full-service staffing company that provided staffing services to various clients (Foley aff, ¶ 2)[1]. James Foley was the CEO of TS Staffing. Lumea Staffing ("Lumea"), a non-party, was also a full-service staffing company that provided staffing services to its clients (Foley aff, ¶ 3)[2]. Edmond Lonergan was the CEO of Lumea. The defendant, Porter Capital Corporation ("Porter"), is a commercial factoring company which provides short term capital to various businesses in various industries across the United States (Daniels aff, ¶ 12-13). Tania Daniels is the CEO of Porter. Porter had a factoring arrangement with Lumea in place prior to the events that give rise to this case.

This action arises out of a factoring arrangement between TS Staffing, Lumea, and Porter that was entered into subsequent to a Commercial Financing Agreement ("CFA") between Porter and Lumea dated July 19, 2011 (moving papers, Exh. 6). Under the CFA, Porter would from

[1] TS Staffing filed for Chapter 11 Bankruptcy in July of 2015 (Amended Complaint attached to moving papers as exhibit 1, footnote 1). The papers do not address TS Staffing's standing to sue as a bankrupt entity.
[2] Lumea went out of business at the end of 2012 (Daniels aff, ¶ 20) (Foley aff, ¶ 22).

time to time purchase Lumea invoices at a discount, as mutually agreed by the parties. Under the CFA, Porter had the right to offset any outstanding debt owed by Lumea to Porter against any other Lumea receivables that Porter purchased (*id.*, CFA, ¶ 12)[3] (Porter MOL in support at 3). It is undisputed that Porter acted as a factor for Lumea and had the right to collect multi-million dollar receivables of Lumea.

TS Staffing and Lumea entered into a Service Agreement dated July 28, 2011 whereby the two companies agreed to work together. Under the Service Agreement, TS Staffing would provide staffing services to Lumea customers, and TS Staffing would then bill Lumea for the services it provided (Foley aff, Exh. A). Lumea would pay TS Staffing once Lumea customers paid Lumea (Foley aff, ¶ 8).

The plaintiff alleges that on August 29, 2012, Lonegran of Lumea informed Foley of TS Staffing that Lumea would not be able to meet payroll obligations in the amount of $499,247.91 due on August 31, 2012 ("the Payroll Shortfall") (Foley aff, ¶ 9). According to Foley, Lumea was able to pay only $107,775.85 of the amount due, and Porter refused to advance Lumea the funds necessary to cover Lumea's payroll obligation. In an email dated August 31, 2012, Foley informed Daniels of Lumea's Payroll Shortfall (Foley aff, email attached as Exh. B).

It is undisputed that on August 31, 2012, TS Staffing, Lumea, and Porter agreed over the phone to help Lumea meet its Payroll Shortfall. The money appears to have been used to pay TS Staffing employees which is the only reason TS Staffing agreed to participate (Foley aff, Exh. A, ¶ 2(b)). Following the phone call that same day, Daniels of Porter sent an email to Foley and

[3] "12. Application of Payments – All moneys available to Porter Capital for application in payment or reduction of the Obligations may be applied by Porter Capital in such manner and in such amounts and at any such time or times and in such order, priority and proportions as Porter Capital may see fit to the payment or reduction of such portion of the Obligations as Porter Capital may elect." (*id.*).

Lonergan, summarizing the extent of the parties' agreement in that phone call (moving papers, Daniels' email attached as Exh. 5) (*see also* Daniels aff, ¶ 24).

Daniels' email states that Lumea would provide the $107,775.85 it had available, Porter would provide $151,472.06, and TS Staffing would provide $240,000 to meet Lumea's Payroll Shortfall of $499,247.91, at least some portion of which would be paid to TS Staffing employees (moving papers, Exh. 5). The email further provides that:

> Porter will collect the receivables being purchased today, assuming the IRS does not collect the receivables. If we are able to collect the receivables, Porter will retain the first $151,472.06 of collected funds to repay the money we are advancing today. Once it is accomplished, the next $240,000 worth of payments on the receivables purchased today will be forwarded to Tri-state [TS Staffing]. *This is void if the IRS takes action on these receivables or if Porter is unable to collect them or has a shortfall for any reason.* (emphasis added).

It is undisputed that TS Staffing, Porter, and Lumea complied with the terms of Daniels' email and each party advanced the agreed upon funds. Problems arose when Porter allegedly collected more than $391,472.06 under this arrangement and did not pay TS Staffing the $240,000 pursuant to Daniels' email ("...the next $240,000 worth of payments on the receivables purchased today will be forwarded to Tri-state [TS Staffing]") (*see also* Foley aff, ¶ 19-20). As a result, the plaintiff TS Staffing initiated this breach of contract action against the defendant Porter to recover the $240,000.

In April 2015, the defendant Porter made a pre-answer motion dismiss the complaint. On November 30, 2015, the Court denied the motion without prejudice and proposed that the plaintiff file an amended complaint particularizing its claims with greater clarity. The plaintiff filed an amended complaint in January 2016 and added two new causes of action, unjust

enrichment and promissory estoppel. Thereafter, in March 2016, the defendant made a pre-answer motion to dismiss the amended complaint under CPLR 3211(a)(1) and (7).

In support of its motion, the defendant Porter argues that each of the three claims in the plaintiff's amended complaint fail to state valid causes of action. The movant argues that the breach of contract claim should be dismissed because there is no valid and enforceable agreement between TS Staffing and Porter since no consideration was given to support it (Porter MOL at 6-7). Porter argues that the August 31, 2012 phone call and email were nothing more than an alleged oral agreement to agree. The defendant further contends that, assuming *arguendo* that the parties have an enforceable oral agreement, the express terms of Daniels' email bar this action because Lumea owed Porter $4,776,493.48 as of August 31, 2012 and the email expressly stated that the agreement is void if Porter has a "shortfall for any reason" (Daniels aff, ¶ 7) (Porter MOL at 9-10).

In addition, the defendant Porter argues that the quasi-contract claims, unjust enrichment and promissory estoppel, should be dismissed. A promissory estoppel claim requires a showing of (1) a promise that is sufficiently clear and unambiguous, (2) reasonable reliance on the promise by a party, and (3) an injury caused by the reliance. *Schroeder v Pinterest, Inc.*, 133 AD3d 12, 32 [1st Dept 2015]. The defendant Porter argues the promissory estoppel claim should be dismissed because Porter did not make a "promise" to TS Staffing, and TS Staffing could not have reasonably relied on this arrangement which contained several conditions that needed to be met prior to remitting the $240,000 to TS Staffing (e.g. "... assuming the IRS does not collect the receivables..." and so forth) (Porter MOL at 10-11). Further, the unjust enrichment claim requires the plaintiff to allege that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Schroeder* at 26). Porter argues that the unjust enrichment claim should be

dismissed because Porter and TS Staffing lack the close relationship required by *Schroeder* (Porter MOL at 12-13).

The defendant's pre-answer motion to dismiss the amended complaint is denied for the following reasons. A motion for dismissal under CPLR 3211(a)(7) will be denied where the factual allegations discerned from the four corners of the complaint when taken together give rise to any claim cognizable at law. *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 (2001). Here, it is undisputed that the plaintiff TS Staffing paid $240,000 pursuant to the arrangement stated in Daniels' August 31, 2012 email. Whether or not the August 31, 2012 created an enforceable contract between TS Staffing and Porter, the email coupled with TS Staffing's payment of $240,000 could, in the very least, constitute part performance of a contract. Furthermore, a plaintiff may plead alternative causes of action such as the quasi-contract claims in the plaintiff's amended complaint when it is unclear whether the parties entered into an express contract. *Beach v. Touradji Capital Management L.P.*, 85 AD3d 674 (1st Dept 2011). The issues of justifiable reliance and unjust enrichment cannot be resolved on a pre-answer motion to dismiss as they raise issues of fact in the context of this case. The defendant's pre-answer motion to dismiss is premature and further factual determination through discovery is necessary to resolve the issues raised by the complaint and the motion papers (*see* TS Staffing MOL in opposition at 9).

For all the foregoing reasons, it is hereby

ORDERED that the defendant's motion to dismiss is denied without prejudice to renew as a motion for summary judgment. Given that the defendant has filed an answer on August 15, 2016 following oral argument on this motion, and that a preliminary conference order was completed at the Court's direction on August 15, the parties shall appear in Room 341 for a compliance conference on December 6, 2016, at 10:00 a.m.

Dated: August 24, 2016

J.S.C.
BARRY R. OSTRAGER
JSC