Astor Place, LLC v NYC Venetian Plaster Inc.
2016 NY Slip Op 31801(U)
September 28, 2016
Supreme Court, New York County
Docket Number: 651978/15
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

_____X

ASTOR PLACE, LLC,

Plaintiff,

-against-

NYC VENETIAN PLASTER INC.
D/B/A DECORFIN, INC.,

Defendant.

_____X

INDEX NO. 651978/15

Motion Seq. No. 001

OSTRAGER, J:

Before the Court is defendant's motion to dismiss the Verified Second Amended Complaint ("Complaint"), pursuant to CPLR §3211(a)(5) and (7), on the grounds that plaintiff's claims are barred by the Statute of Frauds and fail to state claims upon which relief can be granted. The Complaint, verified by plaintiff's agent, pleads claims for (1) breach of contract based on four written agreements; (2) breach of contract based on an alleged fifth oral agreement; (3) conversion; (4) unjust enrichment; and (5) promissory estoppel. The Complaint also requests punitive damages. The defendant in its Answer has asserted counterclaims for (1) breach of contract based on the written agreements and (2) unjust enrichment based on work allegedly performed pursuant to the agreements. No discovery has yet been conducted.

Plaintiff Astor Place, LLC ("Astor") is a single purpose Delaware limited liability company and the owner of residential condominium unit 7D at The 21 Astor Place Condominium located at 21 Astor Place in Manhattan (the "Premises")(Complaint ¶2). Defendant NYC Venetian Plaster, Inc. is an incorporated entity doing business as Decorfin, with a principal place of business at 227 East 57th Street in Manhattan. (Complaint ¶3).

Between approximately March 14, 2011 and June 3, 2011, defendant Decorfin entered into four written agreements with plaintiff Astor wherein Decorfin agreed to provide high-end Venetian plaster renovation services at the Premises for a specified price. (Complaint ¶¶8-20). Each of the first three agreements ("Agreements 1-3") explicitly required a "deposit upon signing" of $109,365.12, $25,263.00, and $52,920.00, respectively. It is undisputed that Astor paid these amounts to Decorfin. (Answer, Affirmative Defenses, and Counterclaims to Amended Complaint or "Answer" ¶56, 60, 64). The fourth agreement ("Agreement 4") did not require a deposit but instead simply included a quote for "total payment due" of $93,510.00 after a credit from a prior invoice, which Astor paid in full. (Answer ¶68). Astor thus paid to Decorfin a total of $281,058.12 in connection with the four written agreements (Exhibit 1, 2, 3, 4). None of the four agreements contains any provision that speaks to whether the payments to Decorfin would be refundable or nonrefundable, a point central to this dispute between the parties.

In March 2012, Astor hired a new general contractor in charge of the renovation project, and Astor's plans for the Premises then changed significantly. Astor claims that, around this time, it had discussions with Decorfin in which Decorfin orally agreed to allow Astor to expand or reduce the scope of the work to be performed by Decorfin pursuant to the four written agreements or, in the alternative, to cancel the four agreements and receive a full refund of the monies paid. (Complaint ¶25). In exchange, according to Astor, Decorfin was to be allowed to bid on altered plans for plastering services.

Astor argues these discussions constitute a separate oral agreement ("Agreement 5"). (Complaint ¶26). Astor further claims that in various interactions from mid-2012 to October 2014 Decorfin expressly represented that all monies paid pursuant to the four written agreements were fully refundable. (Complaint ¶27, 30). Astor claims it relied on these representations as it

moved forward with renovations, as well as a bidding process for plastering services. (Complaint ¶28). Decorfin, however, denies that it ever agreed to allow Astor to cancel Agreements 1-4, let alone fully refund the monies paid, particularly since it completed some work.

On October 2, 2014, Astor, through its counsel, informed Decorfin that it had selected a different contractor to provide plastering services at the Premises, and Astor demanded a full refund of all monies paid pursuant to the four written agreements. (Complaint ¶32). When Decorfin refused to return the monies, Astor commenced this suit against Decorfin. Astor has claimed Decorfin did no work on the Premises related to Agreements 1-4. (Complaint ¶55). Decorfin disputes this allegation and contends it has completed certain work related to Agreements 1-4 (Answer ¶79, 80) and that it remains ready, willing and able to perform the balance of the work agreed upon in Agreements 1-4 (Defendant's Memorandum of Law in Support of Motion to Dismiss).

Accepting all the allegations in the Complaint as true and liberally construing these allegations in favor of the plaintiff, as the Court must on a 3211 motion to dismiss, the issue is whether these allegations, without more, state claims upon which relief can be granted and are not barred by the Statute of Frauds.

The First Cause of Action: Breach of Written Agreements

Defendant moves to dismiss the first cause of action for breach of contract based on the four written agreements for failure to state a cause of action. The following elements must be established on a breach of contract claim: (1) a valid and enforceable contract; (2) the plaintiff's performance of the contract; (3) breach by the defendant; and (4) damages. *See Noise in The Attic Prods., Inc. v London Records*, 10 AD3d 303, 307 (1st Dep't 2004), citing *Furia v Furia*, 116 AD2d 694, 695 (2d Dep't 1986). Plaintiff pleads all four elements, if, as plaintiff contends,

the contracts' silence on the refundability of the deposits can mean that the deposits were fully refundable.

However, defendant argues that plaintiff's desired interpretation of Agreements 1-4, in which plaintiff could cancel the agreements at will and obtain a full refund, would render the agreements illusory on their face and unenforceable due to a lack of mutual obligations. Plaintiff counters that the obligations are, in fact, mutual in that plaintiff is obligated to pay a deposit and defendant is obligated to begin preparations to perform the work. Significantly for the case as a whole, plaintiff's counsel adds (memo p 4) that: "If Astor changes the scope of the project and chooses another contractor, it would still be obligated to pay for any work already undertaken by Decorfin." Plaintiff further argues that since the written agreements are ambiguous due to the omission of any reference to the subject of a refund, extrinsic evidence is needed to determine the true intent of the parties, and discovery should therefore proceed.

The Court finds no well-established, intrinsic meaning to the word "deposit" in this type of transaction. Since the agreements are ambiguous, the Court must look beyond the four corners of the documents to determine the intent of the parties as to whether the deposits were, in fact, refundable and whether the required mutuality of obligation exists. As further fact-finding is needed, discovery should proceed. Accordingly, defendant's motion to dismiss the first cause of action for breach of written agreements is denied.

The Second Cause of Action: Breach of Oral Agreement

In its second cause of action, plaintiff alleges that the parties entered into a fifth oral agreement that was breached when defendant refused to refund monies paid in connection with the four written agreements after defendant lost a competitive bidding process ("Agreement 5"). In its motion to dismiss, defendant argues that plaintiff's claim for breach of an oral agreement

fails as a matter of law because Agreement 5 was not in writing and lacked consideration and thus would be barred by the Statute of Frauds. The Statute of Frauds, codified in General Obligations Law § 5-1103, states in relevant part that:

> An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any contract, [or] obligation ... shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or discharging such contract, [or] obligation ... shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge, or by his agent.

Since the alleged Agreement 5 was oral in nature, its enforceability depends on whether the Agreement had valid consideration that obviated the need for a writing. Plaintiff has pled consideration in that, due to significant changes to the renovation plans, the defendant offered and the parties agreed to allow plaintiff to expand, reduce, or cancel Agreements 1-4 in exchange for defendant's right to bid on any new plaster work. (Complaint ¶25-26). Defendant disputes that any such agreement was made and urges that, in any event, such an agreement would lack consideration as it would render the four written agreements unilaterally voidable by plaintiff.

Consideration to support an agreement exists where there is "either a benefit to the promisor or a detriment to the promisee." *Hollander v Lipman*, 65 AD3d 1086, 1087 (2nd Dep't 2009), *quoting Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 (1982). The moving defendant argues that the purported oral agreement allowing plaintiff to cancel the written agreements and obligating defendant to refund the deposits included no benefit to Decorfin as the promisor, as Decorfin was not obligated to bid on the new project and Astor was not obligated to accept or even consider the bid. Nor does the alleged oral agreement include any detriment to Astor as the promisee; Astor only received a benefit from the alleged agreement, Decorfin contends. Astor counters that consideration exists in that Decorfin did, in fact, agree to submit a bid for the new work and Astor did, in fact, agree to seriously consider Decorfin's new bid.

As issues of fact exist with respect to the nature of any alleged oral agreement and whether valid consideration and mutuality of obligations exist, the Court declines to dismiss the second cause of action at this time based on the Statute of Frauds. However, the motion may be renewed after discovery as one for summary judgment.[1]

The Third Cause of Action: Conversion

In the third cause of action, plaintiff alleges conversion as an alternative theory of recovery, claiming that defendant unlawfully withheld monies. The defendant correctly notes in its motion to dismiss that a conversion claim cannot be predicated on a mere breach of contract. "Since an action for conversion cannot be predicated on a mere breach of contract, plaintiff's conversion claim was properly dismissed." *Yeterian v. Heather Mills N.V. Inc.*, 183 AD2d 493, 494 (1st Dept 1992), *citing Peters Griffin Woodward, Inc. v WCSC*, 88 AD2d 883 (1st Dep't 1982).

Here, there is no dispute that the issue involves an alleged breach of contract; i.e., written Agreements 1-4. The Court's determination hinges on the proper interpretation of Agreements 1-4. If the evidence indicates the parties intended and agreed to treat the monies paid as refundable, then defendant arguably breached Agreements 1-4 by not refunding the monies. If, on the other hand, the evidence indicates the opposite is true, then defendant was arguably within its right to withhold monies. In either scenario, the issue involves an alleged breach of contract. Thus, the conversion claim is dismissed.

The Fourth Cause of Action: Unjust Enrichment

Plaintiff alleges in its fourth cause of action a claim of unjust enrichment in the event the Court determines Agreements 1-4 are unenforceable based on the claim that it paid Decorfin

[1] The Court rejects plaintiff's claim that the motion to dismiss pursuant to CPLR 3211(a)(5) is untimely, as it was made before plaintiff's time to amend its pleadings had expired.

monies which were not refunded, despite plaintiff's demand and defendant's failure to complete the work at the premises (Complaint ¶45-59). To state a claim for unjust enrichment, a plaintiff must allege that: (1) the defendant was enriched; (2) at plaintiff's expense; and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. *Schroeder v Pinterest Inc.*, 133 AD3d 12, 26 (1st Dep't 2015), *quoting Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 (2012). Damages cannot be sought when there is a valid and enforceable written agreement governing the subject matter in dispute. *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987). Relying on these principles of law, defendant moves to dismiss, arguing that the resolution of the dispute is governed by Agreements 1-4 and that a quasi-contract claim for unjust enrichment is barred.

Here, plaintiff does not dispute the validity of Agreements 1-4, nor that it paid monies pursuant to the agreements. However, should the Court find that the agreements are unenforceable or were somehow modified or superceded by a subsequent fifth oral agreement, Decorfin would remain in possession of the deposits and other monies paid and Astor would arguably have a quasi-contract claim for the return of all or part of those monies, depending on the value of the plaster work Decorfin performed. Therefore, the Court declines to dismiss the fourth cause of action, asserted as an alternative to the breach of contract claim.

The Fifth Cause of Action: Promissory Estoppel

Plaintiff alleges in its fifth cause of action promissory estoppel claim based on a violation of Agreement 5. The elements of a promissory estoppel claim are: (I) a promise that is sufficiently clear and unambiguous; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance. *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-42 (1st Dept 2011), *lv denied* 21 NY3d 853 (2013). When a party denies a promise was

made, promissory estoppel is not available. *Binkowski v. Hartford Acc. & Indem. Co.*, 60 A.D.3d 1473, 1475 (4th Dep't 2009),*citing Rogowsky v McGarry*, 55 AD3d 815 (2nd Dep't 2008).

Here, defendant denies that it agreed to allow plaintiff to modify Agreements 1-4 by making an oral promise to refund the monies paid. Thus, promissory estoppel is not available, and defendant's motion to dismiss that claim is granted.

Punitive Damages

Plaintiff alleges that as a result of defendant's actions, plaintiff is entitled to punitive damages. The following four elements must be pled to sustain a claim for punitive damages based on an alleged breach of contract: (1) conduct must be actionable as an independent tort; (2) the conduct must be egregious in nature; (3) the egregious conduct must be directed at plaintiff; and (4) the conduct must be a pattern directed at the public generally. *New York Univ. v. Continental Ins. Co.*, 87 NY2d 308, 316 (1995). Punitive damages are available only in those limited circumstances where the conduct is "morally reprehensible" and of "such wanton dishonesty as to imply a criminal indifference to civil obligations." *Rocanova v. Equit. Life Assur. Soc. of U.S.*, 83 NY2d 603, 614 (1994), quoting *Walker v. Sheldon*, 10 N.Y.2d 401, 404–405 (1961).

As the defendant correctly states in its motion to dismiss, defendant's refusal to refund monies paid pursuant to the written agreements is not the type of conduct that rises to the level of egregious conduct so dishonest as to imply criminal indifference to civil obligations. Additionally, the general public is not at risk due to this contract dispute between private parties. As a result, plaintiff's request for punitive damages is dismissed.

For all the foregoing reasons, it is hereby

ORDERED that the defendant's motion to dismiss is granted to the extent of directing the Clerk to enter judgment severing and dismissing the Third Cause of Action for Conversion, the

Fifth Cause of Action for Promissory Estoppel, and the request for punitive damages; and it is further

ORDERED that defendant's motion to dismiss the First, Second and Fourth Causes of Action is denied; and it is further

ORDERED that all parties shall appear in Room 341 for a preliminary conference on October 25, 2016 at 9:30 a.m. with knowledge of the case and full settlement authority.

Dated: September 28, 2016

J.S.C.

BARRY R. OSTRAGER
JSC