TRN, LLC v Fabric Branding, LLC
2017 NY Slip Op 30138(U)
January 13, 2017
Supreme Court, New York County
Docket Number: 654091/2016
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

---X
TRN, LLC,

Plaintiff,

-against-

FABRIC BRANDING, LLC and SIMON PEARCE,

Defendants.

---X

DECISION/ORDER
Index No. 654091/2016

HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action asserting causes of action against defendants for breach of contract, gross negligence, negligence, fraud, unjust enrichment, equitable fraud, breach of the implied covenant of good faith and fair dealing and negligent misrepresentation. Defendants now move for an Order pursuant to CPLR § 3211(a)(1) and (7) dismissing plaintiff's complaint in its entirety. For the reasons set forth below, defendants' motion is granted in part and denied in part.

Plaintiff's complaint alleges as follows. On or about July 20, 2015, plaintiff retained defendant Fabric Branding, LLC ("Fabric") for the purpose of providing business consultation services pursuant to a written contract (the "contract"). The contract detailed a timeline for the provision of Fabric's consultation services (the "project"), including numerous "deliverables." Further, the contract required plaintiff to pay Fabric $70,000.00 and additional expenses but provided that, if Fabric breached the contract and failed to cure the breach within seven days of receiving notice, plaintiff could terminate the contract. At or about the time plaintiff entered into the agreement, defendant Simon Pearce ("Pearce"), the founder and CEO of Fabric, represented to plaintiff that there would be a team of workers assigned to the project. However, Fabric only assigned a virtual assistant and one independent contractor to the project and failed to deliver on several deliverables. On September 3, 2015, plaintiff expressed in an email to Fabric that it was not pleased with the progress on the project but Fabric and Pearce assured plaintiff in emails that Fabric would

accomplish certain tasks in the following weeks. Fabric subsequently failed to accomplish several promised tasks. On or about October 16, 2015, plaintiff "provided Fabric with written notice of termination and a request for refund" of the $50,000.00 it had already paid Fabric, to which Fabric failed to respond. On October 20, 2015, plaintiff followed-up with Fabric regarding its requested refund and stopped further payment of the remaining $20,000.00. Thereafter, the parties unsuccessfully attempted to settle their grievances. In or about December 2015, plaintiff attempted to commence mediation with Fabric but Fabric has refused to proceed with mediation. Thus, on or about August 1, 2016, plaintiff commenced the instant action.

As an initial matter, defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's claims against Pearce, which are premised on plaintiff's attempt to pierce the corporate veil, 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, 484 (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, 811 (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). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

A party seeking to pierce the corporate veil must allege that (1) the individual exercised complete domination of the corporation with respect to the transaction attacked and that (2) such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury. *See Love v. Rebecca Development, Inc.*, 56 A.D.3d 733, 733 (2d Dept 2008). "A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard." *Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 109 (1st Dept 2002). "Failure to plead in nonconclusory language facts establishing all the elements of a

wrongful and intentional interference in the contractual relationship requires dismissal of the action." *Id.* at 110. Indeed, an allegation that a corporation was completely dominated by its shareholders and acted as their alter egos, without more, is not sufficient to warrant the relief of piercing the corporate veil. *See Goldman v. Chapman*, 44 A.D.3d 938, 939 (2d Dept 2007). The general rule "is that an 'officer or director is liable when he acts for his personal, rather than the corporate interests.'" *Id.*, quoting *Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 230 (1st Dept 1998). Thus, "a pleading must allege that the acts complained of, whether or not beyond the scope of the defendant's corporate authority, were performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendant." *Id.*

In the present case, the court finds that the complaint fails to state a claim against Pearce as it does not allege specific facts sufficient to pierce the corporate veil. The complaint alleges that "[a]t all relevant times, Pearce operated complete dominion and control over Fabric with respect to the transaction detailed herein, and such dominion was used to enact a fraud upon the Plaintiff." Further, the complaint alleges that Pearce "was instrumental in getting the contract executed and agreed to, and abused the privilege of doing business in the corporate form in that he made false representations to Plaintiff in order to induce them into entering into a contract with Fabric that was knowingly overpriced and premised upon deliverables that could or would not be met." The complaint also alleges that Pearce "was utilizing Fabric for his own devices and disregarding the corporate form." These allegations are insufficient to allege a claim against Pearce individually based on piercing the corporate veil as they are merely conclusory and as plaintiff fails to allege that Pearce acted for his own personal profit.

The court next considers defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's cause of action for breach of contract against Fabric for failure to state a claim. To sufficiently state a cause of action for breach of contract, a complaint must allege (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802, 803 (2d Dept 2010).

In the present case, the court finds that plaintiff's allegations in the complaint sufficiently state a cause of action for breach of contract against Fabric. Plaintiff alleges in its complaint that it entered into the contract with Fabric, that it performed under the contract, that Fabric breached the contract by failing to accomplish several deliverables and that plaintiff sustained damages thereby.

Defendants' argument that plaintiff's cause of action for breach of contract against Fabric must be dismissed because plaintiff repudiated or breached the contract when it terminated the contract and announced its intention to stop payment of the $20,000.00, which was allegedly due on October 4, 2015, is without merit. Plaintiff would only be precluded from bringing a cause of action for breach of contract on this basis if plaintiff did not allege that the contract was first breached by Fabric. However, plaintiff here alleges that it fully performed under the contract until Fabric breached the contract, after which it justifiably terminated the contract and stopped payment of the $20,000.00.

Further, defendants' argument that plaintiff's cause of action for breach of contract against Fabric must be dismissed because plaintiff breached the provision of the contract requiring it to give Fabric notice of a breach and seven days to cure the breach before terminating the contract is without merit. Specifically, the notice and cure provision provides that if Fabric "breach[es] any term of this Engagement Letter, the Statement of Work or the NDA and fail[s] to cure such breach within seven (7) days of receiving notice thereof, you [plaintiff] may terminate the Engagement Letter and Statement of Work immediately upon the expiration of such cure period." In the present case, plaintiff has sufficiently alleged in its complaint that it gave Fabric notice of a breach and an opportunity to cure before terminating the contract as the complaint states that plaintiff told Fabric of its dissatisfaction regarding Fabric's performance of the work on or about September 3, 2015. Moreover, even assuming *arguendo* that plaintiff had not sufficiently alleged that it gave Fabric notice and an opportunity to cure before terminating the contract, plaintiff would nonetheless be entitled to seek recovery for damages for the breaches of contract that Fabric allegedly committed before the termination. The Court of Appeals has specifically held that a party that terminates a contract without giving proper notice and an opportunity to cure may still seek recovery of damages for prior breaches of contract. *See General Supply & Constr. Co. v. Goelet*, 241 N.Y. 28, 37 (1925).

Defendants' motion for an Order pursuant to CPLR § 3211(a)(1) dismissing plaintiff's cause of action for breach of contract against Fabric based on the documentary evidence of the contract and the invoice for the remaining $20,000.00 dated September 4, 2015 is also denied as the court finds that defendants' arguments based upon these documents are without merit for the reasons discussed above.

The court next considers defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's causes of action for negligence and gross negligence on the ground that these causes of action are duplicative of plaintiff's cause of action for breach of contract. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389 (1987). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract." *Id.*

In the present case, the court finds that plaintiff's causes of action for negligence and gross negligence must be dismissed as duplicative of plaintiff's cause of action for breach of contract. Plaintiff alleges that defendants owed plaintiff the duty of performing under the contract and subsequently breached this duty by failing to perform under the contract. Further, although plaintiff alleges that defendants represented in an email sent on or about September 3, 2015 that Fabric would perform certain tasks, including finalizing "customer journeys for on boarding and retaining customers" and identifying "initial customer acquisition tactics and collateral," and subsequently negligently failed to perform these tasks, these tasks are described in clearly similar terms in the contract as "understand user journeys" and "[u]pdate user experience, including acquisition plan, user journeys, and onboarding," among other listed tasks. Thus, plaintiff's causes of action for negligence and gross negligence are based solely on the alleged breach of contract, not on any circumstances extraneous to the contract.

The court next considers defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's cause of action for unjust enrichment on the ground that this cause of action is duplicative of plaintiff's cause of action for breach of contract. It is well-established that the "existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi

contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 388. In the present case, the existence of the written contract precludes plaintiff from asserting a cause of action for unjust enrichment seeking to recover what it had already paid for services Fabric was required to perform under the contract.

The court next considers defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing on the ground that this cause of action is duplicative of plaintiff's cause of action for breach of contract. A plaintiff cannot maintain a cause of action for breach of the implied covenant of good faith and fair dealing "where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract.'" *Deer Park Enters., LLC v. Ail Sys., Inc.*, 57 A.D.3d 711, 712 (2d Dept 2008) (internal citations omitted). *See also Canstar v. Jones Constr. Co.*, 212 A.D.2d 452, 453 (1st Dept 1995).

In the present case, the court finds that plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing must be dismissed on the ground that this cause of action is duplicative of plaintiff's cause of action for breach of contract. As plaintiff merely alleges in its complaint that defendants breached their duty of good faith and fair dealing by failing to perform under the contract, the alleged breach of the duty of good faith and fair dealing is intrinsically tied to the damages allegedly resulting from the breach of the contract.

The court next considers defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's causes of action for fraud, equitable fraud and negligent misrepresentation on the ground that these causes of action are duplicative of plaintiff's cause of action for breach of contract. A fraud-based cause of action can only lie "where the plaintiff pleads a breach of a duty separate from a breach of the contract." *Manas v. VMS Assocs., LLC*, 53 A.D.3d 451, 453 (1st Dept 2008). *See also Krantz v. Chateau Stores of Canada, Ltd.*, 256 A.D.2d 186, 187 (1st Dept 1998), citing *Wegman v. Dairylea Coop.*, 50 A.D.2d 108, 113 (4th Dept 1975) ("To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties"). However, even where a plaintiff pleads a breach of duty which is collateral to the

contract, a fraud cause of action must be dismissed if the damages alleged would also be recoverable under the breach of contract cause of action. *See Manas v. VMS Associates, LLC*, 53 A.D.3d 451 (1st Dept 2008).

In the present case, the court finds that plaintiff's causes of action for fraud, equitable fraud and negligent misrepresentation must be dismissed as duplicative of plaintiff's cause of action for breach of contract. Plaintiff does not allege that Fabric breached a duty separate from its alleged breach of the contract. Instead, plaintiff alleges that defendants made false representations that Fabric would perform under the contract when they knew or should have known that Fabric would not be able to perform under the contract, which are the same allegations that form the basis of plaintiff's cause of action for breach of contract. Further, to the extent that plaintiff alleges that defendants made false representations in an email sent on or about September 3, 2015 that Fabric would perform certain tasks, including finalizing "customer journeys for on boarding and retaining customers" and identifying "initial customer acquisition tactics and collateral," these tasks are also described in the contract, as discussed above. In addition, to the extent that Fabric's alleged misrepresentation that it would assign a team to work on the project is not a promise contained within the contract, the damages plaintiff allegedly sustained due to this failure, specifically Fabric's subsequent failure to perform under the contract, would also be recoverable under the breach of contract cause of action.

The court next considers defendants' motion for an Order pursuant to CPLR § 3211(a)(1) dismissing plaintiff's request for consequential, special and punitive damages in the complaint's prayer for relief on the ground that the contract prohibits the parties from seeking consequential, special or punitive damages. Pursuant to Section 5 of the Agreement, neither plaintiff nor Fabric "will be liable to the other in connection with this agreement, or any matter relating to or arising from this agreement, for any indirect, incidental, special, consequential or punitive damages, including loss of profits…[and Fabric]…will not be liable to you [plaintiff] in respect of any claim under this agreement for an amount in excess of the fees paid to us for the services to which the claim relates." The First Department has held that the "common business practice of limiting liability by restricting or barring recovery by means of an exculpatory provision, 'although disfavored by the law and closely scrutinized by the courts… is accorded judicial recognition where it does

not offend public policy.'" *Banc of Am Sec., LLC v. Solow Bldg. Co. II, L.L.C.*, 47 A.D.3d 239, 244 (1st Dept 2007) (internal citations omitted). However, such a provision is unenforceable where "the misconduct for which it would grant immunity smacks of intentional wrongdoing," where it is willful, "as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith," or where, as in gross negligence, "it betokens reckless indifference to the rights of others." *Id.* (internal citations omitted).

In the present case, defendants' motion for an Order dismissing plaintiff's request for consequential, special and punitive damages in the complaint's prayer for relief on the ground that the contract prohibits the parties from seeking consequential, special or punitive damages is granted. Although plaintiff alleges in its complaint that defendants acted in bad faith and in reckless indifference to plaintiff's rights in breaching the contract, under which they knew or should have known Fabric would be unable to perform, these allegations are merely conclusory. Moreover, even if the court accepts plaintiff's allegations as true, these allegations are insufficient to establish willful or grossly negligent behavior on the part of defendant that would render the exculpatory provision at issue unenforceable.

Accordingly, defendants' motion for an Order dismissing plaintiff's complaint is granted as to plaintiff's request for consequential, special and punitive damages in the complaint's prayer for relief and as to all causes of action except plaintiff's cause of action for breach of contract against defendant Fabric Branding, LLC. Fabric Branding, LLC is directed to answer plaintiff's complaint within twenty days. This constitutes the decision and order of the court.

DATE : 1/13/17

CSK

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.