Ziya Rest. Inc. v Mulberry Dev. LLC

2018 NY Slip Op 30192(U)

January 31, 2018

Supreme Court, New York County

Docket Number: 656500/2016

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART 2

Justice

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ZIYA RESTAURANT INC., PRANA RESTAURANT LLC,

Plaintiffs,

- v -

MULBERRY DEVELOPMENT LLC, ROBERT LAVECCIA, MICHAEL BUONO

Defendants.

---X

INDEX NO. 656500/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 were read on this motion to/for DISMISSAL.

In this action, plaintiffs Ziya Restaurant, Inc. and Prana Restaurant LLC, the operators of a restaurant at 79 Madison Avenue, New York, NY, allege, among other things, that defendants Mulberry Development LLC, Robert Laveccia, and Michael Buono, collectively a general contracting company and its two owners and principals, were overpaid on a construction project in the amount of at least $226,444 and have wrongfully retained a $350,000 security deposit. Defendants now move, pre-answer, to dismiss the complaint on CPLR 3211 (a) (1) and (7) grounds. After oral argument, and upon a review of the papers submitted as well as the relevant statutes and case law, **the motion is granted, in part.**

According to the complaint, plaintiffs and Mulberry entered into a contract in May 2015 to renovate and improve the restaurant space they operate. (Doc. No. 5.) Plaintiffs allege that, within weeks after receiving payments, Mulberry fell behind on the work. They claim that, in October 2015, despite having been paid $635,344.55 and performing only $408,900 of work, Mulberry unjustifiably abandoned the project. In June 2016, Mulberry filed a mechanic's lien

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against the property for $461,925.20. Plaintiffs contend that, as a result of threats from their landlord, 79 Madison LLC, they paid Mulberry $350,000 in order to discharge the mechanic's lien. In December 2016, plaintiffs commenced this action.

"[R]egardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Ray v Ray*, 108 AD3d 449, 451 [1st Dept 2013]; *see Nomura Home Equity Loan Inc. v Nomura Credit & Capital, Inc.*, ___ NY3d ___, 2017 NY Slip Op 08622, *4 [December 12, 2017]; *Simkin v Blank*, 19 NY3d 46, 52 [2012].) For a complaint to be dismissed pursuant to CPLR 3211 (a) (1), documentary evidence must "conclusively establish that [the plaintiff] has no cause of action." (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d at 636; *see NRES Holdings, LLC v Almanac Realty Sec. VI, LP*, 140 AD3d 640, 640 [1st Dept 2016]; *see generally United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408, 409 [1st Dept 2014]; *Matter of Walker*, 117 AD3d 838, 839 [2d Dept 2014]; *State of N.Y. Workers' Compensation Bd. v Madden*, 119 AD3d 1022; 1028-1029 [3d Dept 2014].)

Turning to the first cause of action for breach of contract, there is no merit to defendants' argument that it fails to state a cause of action "because there is no proof that [Mulberry] was not entitled to the funds it received." (Doc. No. 4.) Plaintiff has no burden to defend its pleading with evidence at this stage of the litigation. (*See Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *Rovello v Orofino Realty Co.*, 40 NY2d at 635.) Attached as an exhibit to the complaint is an express contract between Ziya Restaurant, Inc. and Mulberry Development, LLC. Although the project is named "Pranna & Ziya New Restaurant," the name Prana Restaurant LLC appears nowhere in the contract, and the complaint does not explain the

difference between the two entities. Since the contract itself conclusively establishes that the only express contract was between Ziya and Mulberry, the cause of action is dismissed with respect to Prana. Ziya, on the other hand, has properly pleaded a cause of action for breach of contract against Mulberry.

Turning to the trust fund diversion claims, which make up the second, third, fourth, fifth, and seventh causes of action, article 3-A of the Lien Law, entitled "Definition and Enforcement of Trusts," was enacted "to ensure that those who have directly expended labor and materials to improve real property or a public improvement at the direction of the owner or a general contractor receive payment for the work actually performed." (*LeChase Data/Telecom Servs., LLC v Goebert*, 6 NY3d 281, 289 [2006] [internal quotation marks, citation, and brackets omitted].) The statute "creates a statutory trust for funds received by owners 'in connection with an improvement of real property in this state'" (*Matter of Bette & Cring, LLC v Brandle Meadows, LLC*, 81 AD3d 1152, 1153 [3d Dept 2011], quoting Lien Law § 70 [1]), as well as for funds "received by a contractor under or in connection with a contract for an improvement of real property" (Lien Law § 70 [1]). Defendants object to plaintiffs' diversion claims on the ground that they lack standing to assert them.

While plaintiffs assert in their brief that they are direct statutory beneficiaries to the trust fund that was created when they paid defendants for general contracting services, reasoning that they are owners who have been damaged, they cite to nothing in the Lien Law itself that supports this position. Indeed, Lien Law § 71 (4) quite plainly provides that beneficiaries are defined as "[p]ersons having claims for payment of amounts for which the trustee is authorized to use trust assets provided in this section." Plaintiffs do not fit this definition.

Rather, plaintiffs' true argument with respect to standing rests on a subrogation theory. The statute provides that, in addition to a "holder of any trust claim," an action to enforce the statutory trust may be brought by "any person subrogated to the right of a beneficiary of the trust holding a trust claim." (Lien Law § 77 [1].) For these purposes, plaintiffs, as owners, would become subrogated to the rights of beneficiaries to the extent that they have paid the general contractor for certain services, but are then compelled to pay the general contractor's subcontractors or suppliers for those same services upon the general contractor's failure to do so, in order to protect their interests. (*See Wallkill Med. Dev., LLC v Sweet Constructors, LLC*, 83 AD3d 695, 696 [2d Dept 2011]; *Broadway Houston Mack Dev., LLC v Kohl*, 71 AD3d 937, 937-938 [2d Dept 2010]; *Vanguard Constr. & Dev. Co., Inc. v B.A.B. Mech. Servs., Inc.*, 2015 NY Slip Op 31794[U], *4 [Sup Ct, NY County 2015, Kern, J.]; *Flintcock Constr. Servs. LLC v HPH Servs., Inc.*, 2014 NY Slip Op 33025[U], *3-4 [Sup Ct, NY County 2014, Friedman, J.].)

The allegations in the complaint are fatally deficient in that they fail to establish a basis for standing based on subrogation, since plaintiffs do not allege that they ever paid one of defendants' subcontractors or suppliers directly in order to satisfy defendants' debts and to protect plaintiffs' own interests. Plaintiffs' only claim is that they overpaid defendants, but they cite to no case standing for the proposition that overpayment is tantamount to paying third parties. Plaintiffs lack standing to bring claims pursuant to Lien Law article 3-A, and the second, third, fourth, fifth, and seventh causes of action must be dismissed.[1]

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[1] This determination makes it unnecessary to turn to defendants' alternative argument that the diversion claims are faulty because they were not brought in a representative capacity, as required by Lien Law § 71 (1). If the Court were to reach this argument, however, it would find that dismissal would not be appropriate on this basis, since the Court could simply direct that there be "a continuance to permit such potential beneficiaries to come forward." (*Scriven v Maple Knoll Apts.*, 46 AD2d 210, 215 [3d Dept 1974].)

As for the sixth cause of action, a claim for unjust enrichment may be pleaded in the alternative to breach of contract where "there is a genuine dispute over the existence of the contract" (*Goldin v TAG Virgin Is., Inc.*, 149 AD3d 467, 468 [1st Dept 2017]; *see e.g. Tot Payments, LLC v First Data Corp.*, 128 AD3d 468, 469 [1st Dept 2015]) or the "alleged wrongdoing [was] not covered by the contract" (*EBC I, Inc. v Goldman Sachs & Co.*, 7 AD3d 418, 420 [1st Dept 2004]). Conversely, where an "express contract[] govern[s] the subject of [a] claim," a cause of action for unjust enrichment is "properly dismissed." (*Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 579 [1st Dept 2015].) Broadly construing the complaint, since plaintiffs have alleged that they paid Mulberry $350,000 in order to discharge its mechanic's lien, and assuming that this payment was not related to the obligations encompassed by the parties' contract, plaintiffs have stated a cause of action for unjust enrichment that may be pleaded in the alternative to the breach of contract cause of action. Since this Court cannot discern on the papers which of the two plaintiffs made this alleged payment, the cause of action must also survive with respect to Prana at this preliminary stage.

Broadly construing the allegations in the fifth cause of action as for common law fraud, such a claim is duplicative of breach of contract, and will be dismissed on that basis, where the only misrepresentation alleged is as to an "intent to perform the contractual obligations at the time they were made." (*Demetre v HMS Holdings Corp.*, 127 AD3d 493, 494 [1st Dept 2015]; *see Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-65 [1st Dept 2017].) For a separate cause of action for fraud to be sustained, the plaintiff must allege a "violation of a legal duty independent of the contract." (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390 [1987]; *see Panattoni Dev. Co., Inc. v Scout Fund 1-A, LP*, 154 AD3d 555, 558 [1st Dept 2017].) Plaintiffs have failed to specify any misrepresentations made by defendants, much less one that

can be classified as relating to a duty distinct from performance under the contract. To the extent it alleges common law fraud, the fifth cause of action must be dismissed.

Broadly construing the allegations in the seventh cause of action as asserting a claim for common law conversion, it is also duplicative of the breach of contract cause of action. (*See Gleyzerman v Law Offs. of Arthur Gershfeld & Assoc., PLLC*, 154 AD3d 512, 513 [1st Dept 2017].)

Finally, with respect to a broad construction of the seventh and eighth causes of action, neither of the individual defendants signed the contract in their individual capacity, and plaintiffs do not allege that any ratification of Mulberry's obligations was reduced to writing. Thus, the allegations do not survive an application of the statute of frauds. (*See* General Obligations Law § 5-701 [a] [2]; *Castellotti v Free*, 138 AD3d 198, 203 [1st Dept 2016]; *Carey & Assoc. v Ernst*, 27 AD3d 261, 263 [1st Dept 2006].) To the extent that the causes of action are premised on a theory of piercing the corporate veil, they must be dismissed, since plaintiffs have made only conclusory statements of misconduct with respect to the individual defendants' treatment and control of the corporate defendant. (*See Springut Law PC v Rates Tech. Inc.*, ___ AD3d ___, 2018 NY Slip Op 00525, *1 [1st Dept 2018]; *American Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 477 [1st Dept 2016].)

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted, in part, the first cause of action is dismissed as to plaintiff Prana Restaurant, Inc., the second, third, fourth, fifth, seventh, and eighth causes of action are dismissed in their entirety, the complaint is dismissed with respect to

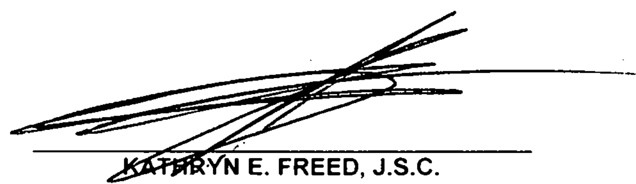
defendants Robert LaVeccia and Michael Buono, the caption is amended accordingly, and the motion is in all other respects denied; and it is further

ORDERED that counsel for defendants is directed e-file a completed Notice to County Clerk (Form EF-22), with a copy of this order attached thereto, and the Clerk is directed to mark this Court's records to reflect that defendants Robert LaVeccia and Michael Buono are no longer parties; and it is further

ORDERED that counsel for defendants is directed to serve a copy of this order, with notice of entry, on plaintiff within 20 days after it is entered; and it is further

ORDERED that Mulberry Development LLC shall file its answer to the complaint against it within 10 days after it is served with notice of entry of this order (*see* CPLR 3211 [f]); and it is further

ORDERED that the parties are directed to appear for a preliminary conference on April 10, 2018 at 2:15 p.m. at 80 Centre Street, Room 280.



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KATHRYN E. FREED, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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