Hoeppli v Urban Interiors Mgt., Inc.
2018 NY Slip Op 30893(U)
May 3, 2018
Supreme Court, New York County
Docket Number: 654586/2017
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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DIETER HOEPPLI and VERENA HOEPPLI,

Plaintiffs,

- against -

URBAN INTERIORS MANAGEMENT, INC., URBAN ARCHITECTURAL INTERIORS, INC., and NELSON SALAMANCA,

Defendants.

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Index No. 654586/2017

Motion Sequence No. 001

LEBOVITS, J.:

Plaintiffs Dieter Hoeppli and Verena Hoeppli bring this action against defendants Urban Interiors Management, Inc. (Urban Interiors), Urban Architectural Interiors, Inc. and Nelson Salamanca, seeking to recover no less than $100,000 in damages for defendants' alleged failure to complete, or to complete in a workmanlike fashion, contracted for renovations at plaintiffs' condominium unit, located at 304 East 65th Street, #32A, New York, New York. The four-count complaint asserts claims for (1) breach of contract; (2) unjust enrichment; (3) trespass; and (4) violation of General Business Law (GBL) § 771.

In their answer, defendants assert the following affirmative defenses: (1) contributory negligence; (2) failure to state a cause of action; (3) laches/unclean hands; (4) statute of limitations; (5) lack of personal jurisdiction; and (6) failure to mitigate damages. In addition, defendants assert the following counterclaims: (1) fraud; (2) contributory negligence; and (3) breach of contract.

Plaintiffs now move to dismiss defendants' affirmative defenses and counterclaims, pursuant to CPLR 3211 (a) (7) and (b), and seek an award of attorney fees and costs.

Plaintiffs contend that the answer is devoid of factual allegations and without merit in law. Defendants counter that plaintiffs' motion is premature, as discovery has not taken place, and that issues of fact preclude dismissal of their counterclaim for breach of contract.[1]

[1] The court accepts defendants' untimely opposition. *See* CPLR 2214 (c), 2004. Although, defendants failed to comply with the parties' September 22, 2017 stipulation, extending their time to oppose the motion to seven days before a new return date of October 27, 2017 (*see* NYSCEF document number 11), plaintiffs are not prejudiced by the lateness of the opposition, filed on November 10, 2017. In addition, defendants demonstrate good cause for the delay, explaining that a paralegal calendared the briefing schedule incorrectly. *See* NYSCEF document number 16.

CPLR 3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." On a CPLR 3211 (b) motion to dismiss affirmative defenses, "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed." *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541-542 (1st Dept 2011) (internal citations omitted). "[T]he plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law. . . . A defense should not be stricken where there are questions of fact requiring trial." *Id.* (internal citations omitted). "[I]n considering a motion to dismiss brought pursuant to CPLR 3211(a) (7), the court must presume the facts pleaded to be true and must accord them every favorable inference." *Leder v Spiegel,* 31 AD3d 266, 267 (1st Dept 2006). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003).

Here, the first affirmative defense for contributory negligence must be dismissed, "since negligence is not a defense to a cause of action for breach of contract . . . ." *Viacom Intl. v Midtown Realty Co.,* 235 AD2d 332, 332-333 (1st Dept 1997).

The second affirmative defense of failure to state a claim is not subject to dismissal, as it is mere "surplusage" and "may be asserted at any time." *Riland v Todman & Co.*, 56 AD2d 350, 352 (1st Dept 1977); *accord Mazzei v Kyriacou*, 98 AD3d 1088, 1089 (2d Dept 2012) ("[N]o motion by the plaintiff lies under CPLR 3211[b] to strike the defense [of failure to state a cause of action], as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim").

The third affirmative defense alleges, in its entirety, that "[t]he Verified Complaint is barred by the doctrine of laches/unclean hands." Answer, ¶ 52. The affirmative defense is dismissed it pleads "only a bare legal conclusion without supporting facts." *See Commissioners of State Ins. Fund v Ramos.* 63 AD3d 453, 453 (1st Dept 2009); *accord Robbins v Growney*, 229 AD2d 356, 358 (1st Dept 1996) (finding that the affirmative defenses of latches and bad faith, "set forth [with] no factual basis," should have been dismissed).

The fourth affirmative defense of statute of limitations is dismissed as meritless as a matter of law. Under the applicable statutes of limitations, plaintiffs were required to bring their breach of contract and unjust enrichment claims within six years of accrual, and their GBL and trespass claims within three. *See Maya NY, LLC v Hagler*, 106 AD3d 583, 585 (1st Dept 2013); *accord* CPLR 213 (1) and (2); CPRL 214 (2) and (4). Here, the verified complaint alleges that the occurrences giving rise to plaintiffs' claims took place between December 2016 and May 2017. *See* complaint, ¶¶ 11-12, 23-26; *see also* CPLR 105 (u) ("[a] 'verified pleading' may be utilized as an affidavit whenever the latter is required"). Defendants do not offer a contrary timeframe. The only reference they make to any dates is in their attorney's affirmation in opposition to the instant motion, which alleges that plaintiffs owe defendants $30,000 for an unpaid invoice dated July 23, 2017. *See* Koerner affirmation, ¶¶ 7, 8. As there appears to be no dispute about the pertinent timeframe (*i.e.* 2016 to 2017), the instant action, commenced in June

2017, was brought well within the applicable six and three-year statutes of limitations. Therefore, the fourth affirmative defense is dismissed.

The fifth affirmative defense, alleging "[t]hat the Court has no person jurisdiction over the answering Defendants," is dismissed as conclusory and without merit as a matter of law. Answer, ¶ 54. The assertion is conclusory and fails to give notice of the precise nature of defendants' defense (*e.g.* that no basis exists to call them before a New York court or that plaintiffs improperly commence the instant action). *See 157 Broadway Assoc., LLC v Edouard*, 28 Misc 3d 140 (A), *1, 2010 NY Slip Op 51545 (U), *1, 2010 WL 3431685, at *1 (App Term, 1st Dept 2010) (finding that affirmative defenses of lack of personal jurisdiction should have been dismissed where they consisted of conclusory assertions of improper service); *accord* CPLR 3013. Moreover, in their answer, defendants admit that defendants Urban Interiors and Urban Architectural Interiors, Inc. are New York corporations and that defendant Nelson Salamanca resides in the state of New York (*see* answer, ¶¶ 2-4), which subjects them to this court's general jurisdiction. *See IMAX Corp. v Essel Group*, 154 AD3d 464, 465-466 (1st Dept 2017). In addition, to the extent that defendants object to the sufficiency of service, having failed to move to dismiss on that ground "within sixty days after serving the [answer]," they have waived the defense. CPRL 3211 (e). Therefore, the fifth affirmative defense is dismissed.

The sixth affirmative defense asserts that "[a]ny recovery must be reduced to the extent that Plaintiffs failed to mitigate, minimize, or avoid any damages allegedly sustained." Answer, ¶ 55. Plaintiffs argue that the answer fails to set forth in what way they could have mitigated their damages and that "[n]o such opportunities ever presented themselves to Plaintiffs, and as a result, Defendants have neither plead [sic] nor can they maintain this defense." Plaintiffs' brief at 6. But the parties have not engaged in discovery. "Under such circumstances, the court should reserve decision on whether this affirmative defense should be dismissed pending completion of discovery." *Falk v Gallo*, 18 Misc 3d 1146 (A), *5, 2008 NY Slip Op 50451 (U), *5, 2008 WL 638419, at *5 (Sup Ct, Nassau County 2008); *accord Seiler v Ricci's Towing Servs.*, 210 AD2d 972, 973 (4th Dept 1994) (stating that it would have been "more appropriate to reserve decision on that part of plaintiff's motion [which sought dismissal of the affirmative defense of failure to mitigate damages for lack of a factual basis] until the completion of discovery"). Therefore, the motion to strike the sixth affirmative defense is denied.

Defendants' first counterclaim, alleging that "the Plaintiffs are willfully and knowingly committing an act of fraud against Defendants by claiming an unsubstantiated indebtedness to the Plaintiffs which never occurred, and in so doing has [sic] caused Defendants undue stress and mental anguish as well as unnecessary attorney's fees," fails to set forth the elements on a cognizable claim. Answer, ¶ 57. To the extent the counterclaim is for fraud, it fails to satisfy the pleading requirements of such a claim. *See* CPLR 3016 (b); *accord Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014) (stating that a claim for fraud "must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury"); *Central State Bank v American Appraisal Co.*, 33 AD2d 1009, 1010 (1st Dept 1970), *affd* 28 NY2d 578 (1971) ("Bare allegations of fraud without any allegation of details constituting the wrong are not sufficient to sustain such a cause of action"). To the extent the counterclaim seeks attorneys' fees for plaintiffs' allegedly baseless suit, "there is no legal authority for such relief." *C.I.T. Leasing*

Corp. v Pitney Bowes Credit Corp., 221 AD2d 211, 212 (1st Dept 1995). Therefore, the first counterclaim is dismissed.

Defendants' second counterclaim for contributory negligence is dismissed on the same ground as the first affirmative defense. *See Viacom Intl.*, 235 AD2d at 332-333.

The third counterclaim fails to state a claim for breach of contract. The counterclaim alleges, in its entirety, that: "there was [a] service contract entered between Plaintiff and Defendants"; "said contract was breached by Plaintiff's failure to perform"; and "[a]s a result of Plaintiff's failure to perform, Defendants are owed $30,000.00 for unpaid services rendered to Plaintiffs." Answer ¶¶ 61-63. These allegations "fail[] to allege, in nonconclusory language, as required, the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated." *Matter of Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Such "[v]ague and conclusory allegations are insufficient to sustain a breach of contract cause of action." *Marino v Vunk*, 39 AD3d 339, 340 (1st Dept 2007) (internal citation omitted).

The attorney affirmation and the annexed exhibit do nothing to correct the insufficiency of these allegations. Defendants' attorney merely states that plaintiffs owe defendants $30,000 for invoices dated July 23, 2017, without providing any other detail, and attaches documents entirely unrelated to the instant matter. *See* Koerner affirmation, ¶¶ 7, 8 and exhibit A (a check from defendant Urban Interiors to an insurance company, a receipt showing that Urban Interiors received a deposit for a project at another unit in plaintiffs' building, and a proposal by Urban Interiors prepared for another customer). Therefore, the third counterclaim is dismissed.

Plaintiffs also seek to recover costs and reasonable attorney fees incurred in connection with the instant motion, arguing that defendants' assertion of factually and legally baseless claims is frivolous. 22 NYCRR § 130-1.1 (a) authorizes the court, in its discretion, to award costs or sanctions "upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." Here, plaintiffs have not shown conduct that "is completely without merit in law" or "undertaken primarily to delay or prolong the resolution of the litigation." 22 NYCRR § 130-1.1 (c). Therefore, their request for reasonable costs and attorney fees is denied.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is granted to the extent of dismissing the first, third, fourth and fifth affirmative defenses and the first, second and third counterclaims of defendants Urban Interiors Management, Inc., Urban Architectural Interiors, Inc. and Nelson Salamanca, and the motion is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 7, Room

345, at 60 Centre Street, on May 16, 2018, at 10:00 a.m.

Dated: May 3, 2018

HON. GERALD LEBOVITS
J.S.C. J.S.C.