Crossbeat N.Y., LLC v LIIRN, LLC
2018 NY Slip Op 32462(U)
October 1, 2018
Supreme Court, New York County
Docket Number: 652622/2017
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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CROSSBEAT NEW YORK, LLC,

Plaintiff

Index No. 652622/2017

v

DECISION AND ORDER

LIIRN, LLC,

Defendant.

MOT SEQ 002, 004

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages based on claims sounding in breach of contract, breach of the implied covenant of good faith and fair dealing, and quantum meruit, the defendant moves pursuant to CPLR 3211(a)(7) to dismiss the plaintiff's causes of action for breach of the implied covenant of good faith and fair dealing, and quantum meruit (SEQ 002). The plaintiff moves pursuant to CPLR 3025(b) to amend the complaint to assert additional causes of action against the defendant, and to add George Swisher, the founder and Chief Executive Officer of the defendant, as a named defendant (SEQ 004). The defendant's motion is granted, and the plaintiff's motion is granted in part.

II. BACKGROUND

The plaintiff alleges that it entered into a Statement of Work agreement dated September 13, 2016 (the 2016 SOW), under which the plaintiff agreed to provide consulting services and executive level support to the defendant in exchange for the defendant's payment of $250,000. The plaintiff avers that despite numerous demands for performance pursuant to the 2016 SOW, the defendant never paid the plaintiff what it was owed. The parties entered a second Statement of Work agreement dated January 5, 2017 (the 2017 SOW), under which the plaintiff agreed to design and launch the defendant's new website, in exchange for $150,000. The parties also executed a promissory note term sheet (the Term Sheet) extending the defendant's deadline to fulfill its obligation under the 2016 SOW until January 30, 2017. However, the defendant did not make any payment under either the 2016 SOW or the 2017 SOW, although its Chief Executive Officer, George Swisher, purportedly continued to represent to the plaintiff that the defendant would pay its outstanding debts. The plaintiff alleges that Swisher locked the plaintiff out of the defendant's website in an attempt to hijack the software code the plaintiff had written without making any payment to the plaintiff, and unilaterally attempted to convert the defendant's debt from the 2016 SOW into equity, in violation of the Term

Sheet. The plaintiff avers that it is now owed $400,000, plus pre-action interest.

III. DISCUSSION

A. Motion to Dismiss

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

The defendant asserts that the second and third causes of action, sounding in breach of the implied covenant of good faith and fair dealing, and quantum meruit, respectively, are inadequately plead because they are duplicative of the plaintiff's first cause of action, which seeks to recover 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." Dormitory Authority v Samson Construction Co., 30 NY3d 704 (2018) (citation omitted). However, the Court of Appeals has recognized that "a contracting party may be charged with a separate tort

liability arising from a breach of a duty distinct from, or in addition to, the breach of contract." North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171 (1968); see also Sommer v Federal Signal Corp., 79 NY2d 540 (1992).

"New York law . . . does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled." Harris v Provident Life and Acc. Ins. Co., 310 F3d 73, 81 (2nd Cir 2002); see Berkeley Research Group, LLC v FTI Consulting, Inc., 157 AD3d 486 (1st Dept. 2018); Deadco Petroleum v Trafigura AG, 151 AD3d 547 (1st Dept. 2017); Cambridge Capital Real Estate Investments, LLC v Archstone Enterprise LP, 137 AD3d 593 (1st Dept. 2016); Amcam Holdings, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423 (1st Dept. 2010).

The plaintiff's claims here for breach of contract and breach of the implied covenant of good faith and fair dealing are both based on the defendant's failure to pay in accordance with the terms of its agreements with the plaintiff, in spite of its representations that it would do so and its acceptance of the benefits of the plaintiff's performance. Moreover, both causes of action seek identical damages. See Netologic, Inc. v Goldman Sachs Group, Inc., 110 AD3d 433 (1st Dept. 2013); Amcam Holdings, Inc. v Canadian Imperial Bank of Commerce, supra.

As to the plaintiff's cause of action based on a theory of quantum meruit, parties may not recover in quantum meruit if, as here, they have a valid, enforceable contract that governs the same subject matter as the quantum meruit claim. See Clark-Fitzpatrick, Inc. v Long Island Rail Road Co., 70 NY2d 382 (1987); Ellis v Abbey & Ellis, 294 AD2d 168 (1st Dept. 2002); Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski, 14 AD3d 644 (2nd Dept. 2005). While the plaintiff would be permitted to proceed in the alternative upon a quasi-contractual theory such as quantum meruit if there were a question as to whether a valid and enforceable contract existed (see Forman v Guardian Life Ins. Co. of America, 76 AD3d 866 [1st Dept. 2010]), no party raises such issues or disputes the enforceability of the subject agreements in this case. Therefore, the plaintiff cannot plead a claim for quantum meruit in the alternative to its breach of contract claim.

B. Motion to Amend

The plaintiff moves to amend its complaint to add causes of action sounding in account stated, anticipatory repudiation, and quantum meruit as against the defendant, and to add Swisher as a named defendant and assert causes of action sounding in fraudulent inducement and conversion against Swisher.

CPLR 3025(b) provides that a party may amend his or her pleading by leave of court at any time. "Leave to amend pleadings is freely given absent prejudice or surprise (see CPLR 3025 [b]; Cherebin v Empress Ambulance Serv., Inc., 43 AD3d 364, 365 [1st Dept 2007]). Nevertheless, a court must examine the merit of the proposed amendment in order to conserve judicial resources." 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552, 553 (1st Dept 2011). Therefore, "leave to amend will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law." Davis & Davis v Morson, 286 AD2d 584, 585 (1st Dept 2001) (internal citations omitted).

The plaintiff's proposed amendment adding a claim based on an account stated as against the defendant fails to state a cause of action. "[A] claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract." Martin H. Bauman Associates, Inc. v H & M Intern. Transport, Inc., 171 AD2d 479, 485 (1st Dept. 1991); see Hagman v Swenson, 149 AD3d 1 (1st Dept. 2017); Sabre Intern. Sec., Ltd. v Vulcan Capital Management, Inc., 95 AD3d 434 (1st Dept. 2012). "If plaintiff can prove an enforceable contract, then it will be able to recover under [that] cause of action," and the account stated claim should be dismissed. Martin H. Bauman Associates, Inc. v H & M Intern. Transport, Inc., supra at 485. Here, the

plaintiff seeks exactly the same damages based on an account stated theory as it alleges it is entitled to under the terms of its agreements with the defendant. There is no basis for allowing the plaintiff to add this claim in addition to its breach of contract claim.

The plaintiff next proposes a cause of action against the defendant sounding in anticipatory repudiation. "In order to sustain a cause of action sounding in anticipatory repudiation, separate and distinct from a cause of action sounding in breach of contract, there must be . . . some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him [or her] to perform." QK Healthcare, Inc. v InSource, Inc., 108 AD3d 56, 63 (2nd Dept. 2013). The doctrine of anticipatory repudiation entitles the non-repudiating party to immediately claim damages for a breach of contract where there is a renunciation of the contract in which the repudiating party has indicated an unequivocal refusal to perform with respect to the entire contract. See Norcon Power Partners, L.P. v Niagara Mohawk Power Corp., 92 NY2d 458 (1998); Kaplan v Madison Park group Owners, LLC, 94 AD3d 616 (1st Dept. 2014); Fonda v First Pioneer Farm Credit, ACA, 86 AD3d 693 (3rd Dept. 2011). "By definition an anticipatory breach cannot be committed by a party already in material breach of an executory contract. It is well settled

that an anticipatory breach of contract is one that occurs before performance by the breaching party is due." Kaplan v Madison Park group Owners, LLC, supra at 618.

The plaintiff alleges that prior to its completion of its work on the defendant's website, as contemplated by the 2017 SOW, the defendant took actions to restrict the plaintiff's access to the website, thereby preventing the plaintiff from performing its obligations under the 2017 SOW and entitling it to the full amount owed under the 2017 SOW. The 2017 SOW provides that the defendant shall pay the plaintiff $150,000 for its services against a vesting schedule outlined in the agreement. It further provides that payment "is due upon the terms of convertible notes dated April 30, 2017." The Term Sheet governing the convertible notes states that "principal and accrued interest on the Notes will be due and payable April 30, 2017" and that vesting of the note amount will occur pursuant to the completion of work defined in the SOWs. The vesting schedule in the 2017 SOW divides the $150,000 total amount agreed to for work on the defendant's website into three payments of $50,000 each, vesting upon the completion of three separate phases of coding work. The plaintiff represents that it had completed the first two phases of coding work at the time that it was locked out of the website. Since the defendant's payment of $100,000 was already due at the time of its alleged anticipatory breach of the 2017 SOW, the

plaintiff may amend the complaint to add a cause of action sounding in anticipatory repudiation only to the extent that its claim is based on the $50,000 it would be owed if it were allowed to complete the remainder of the coding work, pursuant to the parties' agreement.

The plaintiff next proposes adding a new cause of action based on a theory of quantum meruit, that it alleges is distinct from its original quantum meruit claim. The plaintiff asserts that it provided proprietary scripts and processes to manage the deployment of code to the defendant, for use in the defendant's website. The plaintiff further asserts that the scripts were not required to be supplied by the agreements between the parties, and that the defendant took the scripts and has continued to possess and use them for its benefit. This assertion is somewhat belied by language in the 2017 SOW, which makes clear that ownership of "all deliverables," including code and all items categorized as the plaintiff's intellectual property, were contemplated and addressed in the parties' agreement, and by the plaintiff's own statement in the proposed amended complaint that the defendant terminated its access to the defendant's website "with the intention and purpose of using the services and products on [the defendant's] website, which were provided by [the plaintiff] *pursuant to the 2017 SOW*" (emphasis added). However, drawing all inferences in the plaintiff's favor, and

further noting that the plaintiff seeks different damages here, the plaintiff may amend the complaint to add a claim sounding in quantum meruit to the extent referable to the defendant's alleged improper use of proprietary scripts provided to the defendant outside the scope of the 2017 SOW.

Finally, the plaintiff's proposed claims against proposed additional defendant Swisher do not state causes of action. "A corporate officer is not subject to personal liability for actions taken in furtherance of the corporation's business under the well-settled rule that an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." Worthy v New York City Housing Authority, 21 AD3d 284, 286 (1st Dept. 2005). This presumption may be rebutted where a plaintiff meets the "heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." TNS Holdings v MKI Sec. Corp., 92 NY2d 335, 339 (1998); see Retropolis, Inc. v 14th St. Dev. LLC, 17 AD3d 209 (1st Dept. 2005).

There is no plausible argument here that Swisher was not acting in furtherance of the defendant's business with regard to the plaintiff's allegations. Moreover, there are no facts

alleged to indicate that Swisher acted on his own behalf or intended to bind himself personally for his actions, sufficient to rise to the level of dominating the transaction attacked. Based on the foregoing, that portion of the plaintiff's proposed amendments seeking to add Swisher as a defendant and to assert causes of action against him in his personal capacity are denied.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendant's motion pursuant to CPLR 3211(a)(7) to dismiss the plaintiff's causes of action for breach of the implied covenant of good faith and fair dealing, and quantum meruit (SEQ 002), is granted, and the second and third causes of action of the complaint are dismissed; and it is further,

ORDERED that the plaintiff's motion pursuant to CPLR 3025(b) to amend the complaint to assert additional causes of action against the defendant, and to add George Swisher as a named defendant (SEQ 004), is granted to the extent that leave is granted to amend the complaint with respect to the plaintiff's proposed causes of action sounding in (1) anticipatory repudiation, to the extent that such cause of action is referable to the $50,000 the plaintiff would be owed pursuant to the parties' agreement if the plaintiff had completed the remainder

of the subject coding work, and (2) quantum meruit, to the extent that such cause of action is referable to the defendant's alleged improper use of proprietary scripts provided to the defendant outside the scope of any enforceable agreement between the parties, and to this extent the proposed amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further,

ORDERED that leave to amend the complaint is denied with respect to the proposed causes of action sounding in account stated, fraudulent inducement, and conversion, and those causes of action are stricken; and it is further,

ORDERED that the defendant shall answer the amended complaint or otherwise respond thereto within 20 days from the date of service of a copy of this order with notice of entry; and it is further,

ORDERED that counsel are directed to appear for a preliminary conference before the court on November 15, 2018, at 2:30 PM.

This constitutes the Decision and Order of the court

Dated: October 1, 2018 ENTER: _____ J.S.C.

HON. NANCY M. BANNON