Serdula v Reis
2019 NY Slip Op 30188(U)
January 22, 2019
Supreme Court, New York County
Docket Number: 157799/2018
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH, *Justice* — PART IAS MOTION 32

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JOHN SERDULA,

Plaintiff,

- v -

DINA REIS,

Defendant.

---X

INDEX NO. 157799/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISSAL.

The motion by plaintiff to dismiss defendant's affirmative defenses and for leave to amend his complaint is granted in part and denied in part. The cross-motion by defendant to dismiss certain of plaintiff's claims is denied.

Background

This action concerns the professional relationship between plaintiff and defendant. Plaintiff claims that he was hired by defendant to perform a variety of tasks including painting her home, changing drapery, hanging artwork and helping defendant sell her collection of artwork and furniture. Plaintiff contends that defendant agreed to pay him $45 per hour for this work, but defendant refused to pay him. Plaintiff also claims that he was hired to do three paintings in the style of various famous artists. Plaintiff contends he was to be paid $4,000 for each piece but was only paid a total of $2,475.

Defendant offers a drastically different story. She claims that she hired plaintiff as an independent contractor to paint three paintings in the styles of Yves Klein, Mark Rothko and Gerhard Richter. For the Klein piece, defendant claims she paid plaintiff $2,000 in advance as full payment but plaintiff failed to complete the work in a timely manner. Then defendant purportedly paid plaintiff another $2,500 (including $500 for supplies) for the Rothko piece, but plaintiff failed to complete this job. Defendant decided to hire plaintiff again to do the Richter piece and he failed to deliver.

Discussion

"It is settled that a motion for dismissal pursuant to CPLR 3211(a)(7) must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. The pleading is to be liberally construed. The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, here defendants, the benefit of every possible favorable inference to determine only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Street Realty Corp.*, 104 AD3d 401, 403, 960 NYS2d 404 [1st Dept 2013] [internal quotations and citations omitted]).

Plaintiff moves to dismiss defendant's affirmative defenses of abuse of process, breach of contract and unjust enrichment.

Abuse of Process

"Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in

a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116, 480 NYS2d 466 [1984]).

Plaintiff acknowledges that he brought a New York Department of Labor claim, two civil court cases and a small claims action against plaintiff all arising out of the same facts as this action. Nevertheless, plaintiff claims that those actions were taken while he was self-represented and once he hired counsel, those other claims were discontinued in favor of the instant action.

Defendant argues that plaintiff improperly used the court process by improperly initiating and maintaining four separate actions in four venues with the intent to harass defendant. The answer alleges that plaintiff is liable for abuse of process because he "has filed multiple actions for the exact same relief" and his collateral objective is to seek an award of treble damages in this lawsuit (as opposed to his other claims) (NYSCEF Doc. No. 3, ¶¶ 25, 26). Defendant contends that plaintiff is intending to do harm because his prior actions sought only $65,019 in damages while this case seeks $195,057.

The fact that a self-represented litigant brought four prior actions is not enough to state a counterclaim for abuse of process because those cases were discontinued once plaintiff hired an attorney. Those cases were not decided on the merits; plaintiff has decided to pursue his claims only in this forum. Seeking relief via one pending action is not an abuse of process (*see Curiano*, 63 NY2d at 116 [finding that bringing a civil action by summons and complaint cannot be considered an abuse of process]). And defendant only offered a conclusory allegation regarding plaintiff's intent to do harm. Commencing an action is not sufficient. Moreover, the fact that plaintiff seeks more money in this case than in prior cases is not an impermissible collateral objective. It may be a realization, after consultation with counsel, that plaintiff is

entitled to more money if he is successful in litigation. It is not an impermissible collateral objective to seek full redress afforded by law.

Breach of Contract & Unjust Enrichment

Plaintiff claims that defendant failed to cite any provision of an agreement between plaintiff and defendant regarding when plaintiff was supposed to deliver the Rothko painting. Plaintiff also points out that it makes little sense why defendant would hire him to do a third painting if, as alleged by defendant, he failed to deliver the second painting.

Defendant claims that she had an agreement with plaintiff to produce artwork and plaintiff failed to perform. This states a counterclaim for breach of contract. Defendant refers to an agreement where plaintiff failed to satisfy his part of the bargain. And to the extent that plaintiff claims defendant failed to plead resulting damages, that claim is without merit. "At the pleading stage, however, it is not necessary for the [pleading] to plead the precise measure of damages. The [pleading] need only allege facts from which damages may reasonably be inferred" (*Fed. Hous. Fin. Agency for Fed. Home Loan Mtge. Corp. v Morgan Stanley ABS Capital I Inc.*, 59 Misc3d 754, 784, 73 NYS3d 374 [Sup Ct, NY County 2018]).

Plaintiff correctly points out that, at first glance, it does not make sense why defendant would hire plaintiff to do a second and third painting given that the first painting was late and the second painting was allegedly never completed. But, at the motion to dismiss stage, the Court cannot evaluate the credibility or reasonability of allegations; it can only assess whether a cause of action exists. And the fact that defendant seeks $200,000 in damages is not dispositive either. Defendant, if she is successful, will have to show why she is entitled to damages far exceeding what she alleges she paid plaintiff to do the paintings.

The claim for unjust enrichment also remains. It is not duplicative of defendant's breach of contract counterclaim because it asserts that plaintiff used defendant's premises "for his own personal and professional dealings without payment for use and occupancy" (NYSCEF Doc. No. 3, ¶ 43). That is separate from the purported agreement for plaintiff to produce the paintings.

Leave to Amend

"Under CPLR 3025, a party may amend a pleading at any time by leave of court, before or after judgment to conform the pleading to the evidence. A request to amend is determined in accordance with the general considerations applicable to such motion, including the statute's direction that leave shall be freely given upon such terms as may be just. This favorable treatment applies even if the amendment substantially alters the theory of recovery" (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411, 998 NYS2d 740 [2014] [internal quotations and citations omitted]).

Plaintiff moves for leave to amend his complaint to add a cause of action for retaliation under Labor Law § 215(1)(a). Plaintiff claims that the genesis for this claim is a text message from defendant to plaintiff where she purportedly threated plaintiff that if he pursued his claims in Supreme Court, she would countersue (*see* NYSCEF Doc. No. 9). By that point plaintiff and defendant had entered into stipulations dismissing the civil court cases and the small claims matter.

Defendant claims that plaintiff is not entitled to seek a Labor Law claim because he has not established that he was an employee. Defendant contends that plaintiff was only an independent contractor.

At the motion to dismiss stage, the Court cannot simply credit defendant's argument that plaintiff was not an employee. The complaint alleges that plaintiff was supposed to be paid $45 an hour—that suggests he was defendant's employee. Discovery may support defendant's claim that there was no employer-employee relationship, but it is premature to make that finding now. Therefore, plaintiff is entitled to amend the complaint to add a Labor Law cause of action.

Defendant's Cross-Motion

Defendant cross-moves to dismiss plaintiff's Labor Law §§ 191 and 193 claims on the ground that plaintiff was not an employee. For the same reason cited above, the cross-motion is denied because it is premature. Determination of whether plaintiff was an employee is a fact-based inquiry involving a variety of factors (*Bynog v Cipriani Group*, 1 NY3d 193, 198-99, 770 NYS2d 692 [2003]). This Court is unable to find that plaintiff was not an employee merely because defendant claims he was not. The fact is that plaintiff insists he was supposed to be paid an hourly wage to perform certain tasks—that is enough at the pleading stage to allege Labor Law causes of action.

Accordingly, it is hereby

ORDERED that the portion of plaintiff's motion to dismiss defendant's counterclaims is granted to the extent that the abuse of process counterclaim is severed and dismissed and denied as to the remaining counterclaims; and it is further

ORDERED that the branch of plaintiff's motion for leave to amend is granted, plaintiff is directed to e-filed the proposed amended complaint (NYSCEF Doc No. 17) as a separate e-filed document, and defendant is directed to answer pursuant to the CPLR; and it is further

ORDERED that the cross-motion by defendant is denied.

Next Conference: February 26, 2019 at 2:15 p.m.

1.22.19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART		[X] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	