Zadar Universal Corp. v Lemonis
2019 NY Slip Op 32007(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 650902/2018
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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ZADAR UNIVERSAL CORP.,

Plaintiff,

- v -

MARCUS LEMONIS, ML FASHION, LLC, INKKAS LLC,

Defendants.

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INDEX NO. 650902/2018

MOTION DATE 04/17/2019

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion for DISMISSAL.

The Law Office of James C. Kelly (James C. Kelly of counsel), for plaintiff.
The Kagan Law Group, P.C. (Linda Susan Kagan of counsel), for defendants.

Gerald Lebovits, J.:

Background

Defendants Marcus Lemonis, Lemonis's company ML Fashion, LLC (ML), and Inkkas LLC n/k/a IHOLDCO, LLC (Inkkas) move to dismiss plaintiff Zadar Universal Corp.'s amended complaint.

On November 12, 2014, Inkkas issued a convertible $250,000 promissory note to Zadar payable with an 8% annual rate of interest in return for $250,000 cash. On June 6, 2017 Inkkas sold all of its assets, including all inventory, patents, and trademarks to ML Retail, LLC, alleged to be owned by Lemonis as well, in satisfaction of a portion of its debt owed to that entity as a secured lender. On October 9, 2017, Zadar elected to convert its debt into full ownership of Inkkas pursuant to a provision in the promissory note.

Zadar claims that Inkkas had been required at the time of the asset sale to provide Zadar five days notice before the sale closed and to pay a sum indicated in the promissory note. Zadar alleges that had it known of the sale of Inkkas' assets in June 2017 Zadar would not have elected to convert its debt into equity in October 2017.

Zadar sued defendants for breach of contract, fraud, and unjust enrichment. Defendants move to dismiss each of Zadar's claims under CPLR 3211 (a) (1) and (a) (7).

Discussion

A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a)(1) may be appropriately granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2d Dept 2012].)

On a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference. (*Dee v Rakower*, 112 AD3d 204, 208 [2d Dept 2013].) The court's role is limited to determining "only whether the facts as alleged fit within any cognizable legal theory"; whether "a plaintiff can ultimately establish [his or her] allegations is not part of the calculus." (*Id.*)

I. Defendants' Motion to Dismiss Zadar's Breach of Contract Claim

A. The CPLR 3211 (a) (1) Branch of the Motion to Dismiss

Zadar's breach of contract claim is based on its allegation that Inkkas's June 2017 asset sale constituted a sale of the company under § 3 (e) of the promissory note, and that Inkkas thereby became obligated both to provide Zadar notice of the sale and also to pay Zadar a sum in cash that was defined in the promissory note.

In moving to dismiss this claim under CPLR 3211 (a) (1), defendants assert that (i) Zadar's election to convert the debt it held into equity in Inkkas bars it from bringing an action to enforce the terms of the note, and in any event (ii) the asset sale was not a "sale of the company" under § 3 (e) of the note.

Defendants rely on a conversion agreement containing a provision stating that "the Note is considered to be fully paid and satisfied and of no further force or effect, and the Note is hereby canceled in its entirety." But the documents submitted by defendant reflect that this agreement, although executed by Lemonis as CEO of IHOLDCO, LLC, was not signed by anybody at Zadar.

To be sure, the documentary evidence does establish that Zadar elected to convert its debt into ownership of Inkkas, and requested in writing that Inkkas effect the conversion. But, crucially, the evidence does not indicate (let alone conclusively demonstrate) that Zadar then agreed to the specific terms of the conversion agreement on which defendants now rely to bar Zadar's breach of contract claim. Absent such an agreement, defendants' CPLR 3211 (a) (1) argument to dismiss the claim on this ground fails.

Defendants also argue that § 3 of the promissory note conclusively demonstrates that the asset sale was not a "Sale of the Company" triggering the additional obligations that Zadar alleges defendants failed to satisfy. This court disagrees.

Section 3 (d) of the note provides that in the event of a "Sale of the Company" that occurs before the conversion or full repayment of the note, Inkkas must provide Zadar with "at least 5

days prior written notice of the anticipated closing date of such Sale of the Company." Section 3 (d) also provides that at the closing of such a sale, Inkkas must pay Zadar "an aggregate amount equal to 1.5 times the aggregate amount of principal and interest then outstanding" under the note, which would fully satisfy Inkkas' debt to Zadar.

Section 3 (e)(iii) of the promissory note defines a "Sale of the Company" as including "a sale, lease, exclusive license or other disposition of all or substantially all of the assets of" Inkkas. Zadar argues that Inkkas' sale of all of its assets to ML Retail, LLC therefore constituted a "Sale of the Company," triggering the notification and payment obligations of § 3 (d).

Defendants contend that the terms of the note conclusively refute this argument because the undisputed sale of Inkkas's assets assertedly came within an exception in § 3 (e) (ii) to the definition of "Sale of the Company." Section 3 (e)(ii) states that the definition of "Sale of the Company" shall *not* include "any transaction or series of transactions principally for bona fide equity financing purposes in which cash is received by the Company or any successor or indebtedness of the Company is cancelled or converted or a combination thereof."

This contention, though, is undermined by the text and context of § 3 (e). The language on which defendants rely provides, in effect, that transactions in furtherance of equity financing do not require notice (and payment) to Zadar. But equity financing is not obtained through the sale of a company's assets, as occurred here, but rather through the sale of the company's stock. (*See Pergament v Roach*, 41 AD3d 569 [2d Dept 2007]; *Ladenburg Thallman & Co. v Tim's Amusements, Inc.*, 275 AD2d 243, 244-245 [1st Dept 2000]; *GCP Capital Group LLC v Monday Props. Invs.*, 2010 NY Slip Op 52387(U) [Sup Ct, NY County 2010], *affd.* 92 AD3d 554 [1st Dept 2012].)

This reading of the "equity financing" language in the note also makes sense of its surrounding context. As noted above, that language is not an exception to § 3 (e) (iii)'s "asset sale" provision. Instead, the language qualifies a provision in § 3 (e) (ii) that defines "Sale of the Company" to include a transaction or series of transactions that transfer an "excess of 50% of the Company's voting power" — i.e., transactions involving the sale of equity interests in the company. The asset sale at issue here was not such a transaction.

The language of the note supports, rather than conclusively refutes Zadar's factual allegations. Defendants' motion to dismiss the breach of contract claim pursuant to CPLR 3211 (a) (1) is denied. (*See Rabos*, 100 AD3d at 851.)

B. The CPLR 3211 (a) (7) Branch of the Motion to Dismiss

Defendants also move under CPLR 3211 (a) (7) to dismiss Zadar's breach of contract claim. Defendants argue that this claim fails to state a cause of action because Zadar waived its right under the terms of the debt-equity conversion agreement to enforce provisions of the note. But, as discussed above, this court has concluded that Zadar did not agree to the terms on which defendants rely, and thus that Zadar has not waived its ability to sue under the note's provisions.

With respect to claim for breach itself, the essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, plaintiff's performance pursuant to the contract, defendant's breach of his or her contractual obligations, and damages resulting from the breach. (*Dee*, 112 AD3d at 208-209.)

The court concludes that Zadar has sufficiently alleged the necessary elements of its breach-of-contract claim. The promissory note serves as a contract between the parties, plaintiff paid $250,000 to Inkkas pursuant to the promissory note, plaintiff claims defendants subsequently breached the terms of the promissory note, and plaintiff alleges damages of $475,000 plus legal expenses as a result of this breach. Defendants' motion to dismiss this claim under CPLR 3211 (a) (7) is denied.

II. Defendants' Motion to Dismiss Zadar's Fraud Claim

A. The CPLR 3211 (a) (1) Branch of the Motion to Dismiss

Defendants' argument for dismissal under CPLR 3211 (a) (1) of plaintiff's cause of action for fraud is again predicated on defendants' position that the debt-equity conversion agreement bars Zadar from bringing any cause of action arising out of the promissory note. The court again rejects this argument for the reasons stated above.

The court also concludes that the documentary evidence submitted by defendants does not refute Zadar's allegations that defendants made fraudulent misrepresentations in order to avoid litigation. Defendants' CPLR 3211 (a) (1) motion to dismiss Zadar's fraud claim is denied. (*Rabos*, 100 AD3d at 851-52, *accord Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Norment v Interfaith Ctr. of New York*, 98 AD3d 955, 955 [2d Dept 2012].)

B. The CPLR 3211 (a) (7) Branch of the Motion to Dismiss

Defendant's argument that Zadar has failed to state a fraud cause of action because Zadar waived its right to bring such a claim similarly fails. Therefore, the only question left for this court to consider is whether plaintiff has properly stated a claim for fraud.

A properly pleaded cause of action to recover damages for fraud must allege a material misrepresentation by defendant that is made with knowledge of the statement's falsity and an intent to induce reliance by the plaintiff, reasonable reliance by plaintiff, and damages resulting from such reliance. (*See Minico Insurance Agency, LLC v B & M Cleanup Services*, 165 AD3d 776, 777 [2d Dept 2018].)

Zadar's complaint alleges that defendants promised to pay the funds due under the promissory note, that defendants never intended to do so and only stated that they would in order to stave off the initiation of litigation by plaintiff, that plaintiff relied on these misrepresentations and was harmed as a result of such reliance. These allegations state a claim to recover damages for fraud and defendants' motion to dismiss pursuant CPLR (a)(7) is denied. (*Minico Insurance Agency, LLC*, 165 AD3d; *Dee*, 112 AD3d at 208.)

III. Defendants' Motion to Dismiss Zadar's Unjust Enrichment Claim

Zadar also brings a claim for unjust enrichment. But where both a breach of contract claim and unjust enrichment claim seek damages for events arising out of the same subject matter governed by an enforceable contract, such claims are duplicative and the unjust enrichment claim should be dismissed. (*See Bettan v Geico General Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002].) Here, this court has concluded that the promissory note is valid and enforceable; and Zadar's breach of contract and unjust enrichment claims each stem from defendants' alleged violation of the terms of the note. Zadar's unjust enrichment claim is therefore dismissed as duplicative of its breach of contract claim.

7/8/2019
DATE

GERALD LEBOVITS, J.S.C.

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