LaPera v Cee-Jay Real Estate Dev. Corp.
2019 NY Slip Op 32262(U)
June 18, 2019
Supreme Court, Richmond County
Docket Number: 152814/2018
Judge: Jr., Orlando Marrazzo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

CAMILLE LAPERA and THOMAS LAPERA

Plaintiffs,

-against-

CEE-JAY REAL ESTATE DEVELOPMENT CORP. And CLIFFORD SIEGEL,

Defendants.

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 152814/2018

Motion No. 1 & 2

The following numbered 1 through 7 were marked submitted on April 16, 2019:

	Papers Numbered
Notice of Motion, dated December 17, 2018	1
Affirmation in Support of Motion, with Exhibits, dated December 17, 2018	2
Attorney Affirmation Opposing Defendants' Motion to Dismiss and In Support of Plaintiffs' Motion for Leave to Amend, with Exhibits, dated March 15, 2019	3
Reply Affirmation, dated March 18, 2019	4
Notice of Cross-Motion, dated March 18, 2019	5
Attorney Affirmation in Support of Plaintiffs' Cross-Motion for Leave to Amend Complaint, with Exhibits, dated March 18, 2019	6
Affirmation in Opposition to Cross-Motion, dated March 29, 2019	7

Defendants' Motion to dismiss Plaintiffs' third, fifth, and sixth causes of action, as well as Plaintiffs' Complaint against Defendant Clifford Siegel, is hereby granted.

On or about May 20, 2015, a contract was entered into by Plaintiff Camille LaPera (on behalf of Plaintiffs) and Aron Braha on behalf of Cee-Jay Real Estate Development Corp. ("Cee-Jay") for construction worked on Plaintiffs' premises at 119 Gladwin Avenue, Staten Island ("Property"). Braha, who is not a party to this Action, was a subcontractor of Cee-Jay. Defendants note that Clifford Siegel ("Siegel") is the President and Owner of Cee-Jay, but was not a signatory to the Contract. The Contract price was $54,138.09 and work began on June 15, 2015. Defendants claim that the deposit payment of $5,000.00 and subsequent additional payments for work performed were payable to Aron Braha, not the Defendants. According to Defendants, they never received any portion of the money that Plaintiffs paid to Braha and all work that was performed under the Contract was done by Braha. After approximately ten months, Braha ceased working on the project. Plaintiffs claim that the job was not completed, portions of the job that were finished were not performed correctly and complete replacement is necessary. Plaintiffs filed complaints against Cee-Jay with the New York City Department of Consumer Affairs in 2016, which resulted in a recommendation by the National Association of the Remodeling Industry, Staten Island Chapter's Grievance Committee that Cee-Jay pay Plaintiffs $11,294.00. Plaintiffs rejected the offer of such sum by Defendants. Plaintiffs also filed a complaint with the New York City Department of Consumer Affairs on May 16, 2018 before commencing this Action on October 11, 2018.

Defendants now seek dismissal of (1) Plaintiffs' third cause of action alleging fraud and misrepresentation, (2) Plaintiffs' fifth cause of action alleging unjust enrichment, (3) Plaintiffs' sixth's cause of action for a declaratory judgment and (4) Plaintiff's complaint in its entirety against Defendant Siegel. Plaintiffs cross-move, seeking permission to amend the Complaint to correct deficiencies alleged by Defendants in their Motion.

When considering a motion to dismiss under CPLR §3211(a)(7) for failure to state a cause of action, "the complaint must be construed liberally, the factual allegations must be deemed to be true, and the nonmoving party must be given the benefit of all favorable inferences." *Christ the Rock World Restoration Church Intl., Inc. v Evangelical Christian Credit Union*, 153 A.D.3d 1226, 1229, 62 N.Y.S.3d 396, 400 (App. Div. 2d Dept., 2017). *See Leon v. Martinez,* 84 N.Y.S.2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994). As the Second Department noted in *Guido v. Orange Regional Med. Ctr.*, "'Whether a plaintiff can ultimately establish its allegations is not part of the calculus.'" *Guido v Orange Regional Med. Ctr.*, 102 A.D.3d 828, 832, 958 N.Y.S.2d 195, 199 (App. Div. 2d Dept., 2013) (quoting *Sokol v Leader*, 74 A.D.3d 1180, 1181, 904 N.Y.S.2d 153, 155 (App. Div. 2d Dept., 2010)). The standard to consider when ruling on a motion to dismiss a complaint under CPLR §3211(a)(7) is not whether the proponent of the pleading has a cause of action, but rather whether the pleading states a cause of action. *See Guido v Orange Regional Med. Ctr.*, 102 A.D.3d 828, 831, 958 N.Y.S.2d 195, 199 (App. Div. 2d Dept., 2013).

It is well established that under CPLR §3016(b), a claim for fraud must be pleaded with specificity. *See Cheslowitz v Board of Trustees of the Knox Sch.*, 156 A.D.3d 753, 756, 68 N.Y.S.3d 103, 107 (App. Div. 2d Dept., 2017). In *Daly v. Kochanowicz*, the Appellate Division found that allegation of fraud against certain defendants were not pleaded with sufficient particularity under CPLR §3016(b), since there were no allegations concerning specific misrepresentations, who made such misrepresentations and when the alleged misrepresentations were made. *See Daly v. Kochanowicz*, 67 A.D.3d 78, 90, 884 N.Y.S.2d 144, 152-153 (App. Div. 2d Dept., 2009). In *Minico Ins. Agency, LLC v. AJP Contr. Corp.,* the Second Department held

> "In addition to alleging all of the elements of a fraud cause of action, CPLR 3016 (b) provides that "the circumstances constituting the wrong shall be stated in detail." However, the purpose of this heightened pleading requirement "is to inform a defendant with respect to incidents complained of" and "should not be confused with unassailable proof of fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d at 491-492). "[S]ection 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*id.* at 492).
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> *Minico Ins. Agency, LLC v AJP Contr. Corp.*, 166 A.D.3d 605, 607-608, 88 N.Y.S.3d 64, 66-67 (App. Div. 2d Dept., 2018).

It is also widely held that a plaintiff cannot sustain a claim for fraud that is duplicative of its breach of contract claim, as "'a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.'" *Junger v John V. Dinan Assoc., Inc.*, 164 A.D.3d 1428, 1431, 84 N.Y.S.3d 574, 578 (App. Div. 2d Dept., 2018) (quoting *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 390, 51 N.E.2d 190, 521 N.Y.2d 653 (1987)). The Court in *Junger* further determined that the claim for fraud lacked the requisite specificity and that "'generally, a cause of action alleging breach of contract may not be converted to one for fraud merely with an allegation that the contracting party did not intend to meet its contractual obligations.'" *Junger v John V. Dinan Assoc., Inc.*, 164 A.D.3d 1428, 1431, 84 N.Y.S.3d 574, 578 (App. Div. 2d Dept., 2018) (quoting *Refreshment Mgt. Servs., Corp. v. Complete Off. Supply Warehouse Corp.*, 89 A.D.3d 913, 914, 933 N.Y.S.2d 312, 314 (App. Div. 2d Dept., 2011)).[1] In *Fromowitz v. W. Park Assocs.*, the Second Department similarly held that "where a claim to recover damages for fraud is premised upon an alleged breach of contractual duties, and the allegations with respect to the purported fraud do not concern representations

[1] *See Orchid Constr. Corp. v Gonzalez*, 89 A.D.3d 705, 707-708, 932 N.Y.S.2d 125, 127-128 (App. Div. 2d Dept., 2011) (explaining that under CPLR 3016(b), the circumstances of the fraud must be stated in detail, including specific dates and times).

which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie." *Fromowitz v. W. Park Assocs., Inc.*, 106 A.D.3d 950, 951, 965 N.Y.S.2d 597, 599 (App. Div. 2d Dept., 2013).

Here, Plaintiff's allegations of fraud and misrepresentation are that Defendants "held themselves out to the public, and in particular to Plaintiffs", (1) "as having the ability and personnel to perform the contract in a workmanlike manner", (2) "as having the ability to perform the specific renovation work", (3) "as having the skill to perform the specific renovation work", (4) "as having the personnel to perform the specific renovation work." The Court finds that such allegations lack the requisite specificity to plead fraud under CPLR §3016(b) and that there is no claim that a duty outside those found in the Contract has been violated.

Plaintiffs attempt to correct these deficiencies in their Cross-Motion by amending the Complaint to state that on or before May 20, 2015, Defendants represented to Plaintiffs that (1) they possess the ability and personnel to perform the necessary work and repairs stated in the Contract, (2) they possess the ability to perform the specific renovation work detailed in the Contract, (3) they possess the skill to perform the specific renovation detailed in the Contract, and (4) they possess the personnel to perform the specific renovation work detailed in the Contract. Plaintiffs also wish to add the allegation that on or before May 20, 2015, Defendants lacked the ability, skill and personnel to perform the specific work detailed in the Contract.

The Court finds that the proposed amendments to Plaintiffs' third cause of action is not sufficient to overcome Defendants' Motion and Plaintiffs' cause of action for fraud and misrepresentation is hereby dismissed. The proposed Amended Complaint still lacks the required specificity under CPLR §3016(b) and Plaintiffs' claims fail to allege that a duty outside those provided for within the Contract has been violated. In fact, the proposed changes

specifically state that Defendants made misrepresentations regarding what was detailed in the Contract. Therefore, Plaintiffs' Cross-Motion to Amend their Complaint as to the third cause of action is hereby denied and this cause of action is hereby dismissed.

Unjust Enrichment

Defendants also seek to have Plaintiffs' fifth cause of action for unjust enrichment to be dismissed, arguing that Plaintiffs have failed to demonstrate that (1) Defendants were enriched, (2) at Plaintiffs' expense, and (3) that it is against equity or good conscience to allow the Defendant to retain what is sought to be recovered. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182, 944 N.E.2d 1104, 1110, 919 N.Y.S.2d 465, 471 (2011); *Citibank, N.A. v. Walker*, 12 A.D.3d 480, 481, 787 N.Y.S.2d 48, 49 (App. Div. 2d Dept., 2004). While Plaintiffs allege that Defendants have received payments totaling $41,100.00, Defendants claim there is no evidence that they have been paid anything in connection with the Contract and that the evidence shows Aron Braha was issued all of the checks issued by Plaintiff in connection with the Contract. Defendants also submit the affidavit of Defendant Siegal, in which he states that neither he nor Cee-Jay received any portion of the monies paid pursuant to the Contract.

The Second Department has consistently held that a claim for unjust enrichment cannot be duplicative of a breach of contract claim. *See Amrusi v Nwaukoni*, 155 A.D.3d 814, 815-816, 65 N.Y.S.3d 62, 64-65 (App. Div. 2d Dept., 2017). *See also Ochoa v. Montgomery,* 132 A.D.3d 287, 828, 18 N.Y.S.3d 410 (App. Div. 2d Dept., 2015). More specifically, the Second Department has also held that when there is a valid and enforceable written contract in place that dictates a certain subject matter, a party is typically prohibited from recovering for events rising out of the same subject matter which are based on a quasi-contract theory. *See Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388, 516 N.E.2d 190, 193, 521 N.Y.S.2d

653, 656 (1987). *See also IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142, 907 N.E.2d 268, 274, 879 N.Y.S.2d 355, 361 (2009). According to the Court of Appeals, "an unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790, 967 N.E.2d 1177, 1185, 944 N.Y.S.2d 732, 740 (2012).

Here, Plaintiffs claim that Defendants have received total payment in the amount of $41,100.00 pursuant to the Contract and that Defendants have been unjustly enriched to Plaintiffs' detriment in an amount at least equal to the payments Plaintiffs tendered to Defendants' for the faulty and incomplete construction that was performed. Citing the costs Plaintiffs have incurred to find another contractor to remove the faulty work and start the project over again, Plaintiffs allege they have suffered damages no less than $132,500.00 under this cause of action. The Court finds that since a written and enforceable contract exists governing the relevant subject matter, Plaintiffs' allegations under this cause of action are duplicative of their breach of contract claim and must be dismissed. Plaintiffs' Proposed Amended Complaint does not modify this cause of action and therefore is incomplete to overcome Defendants' Motion. Therefore, Plaintiffs' cause of action for unjust enrichment is hereby dismissed.

Defendants move to dismiss the Complaint against Defendant Siegel, citing that he did not sign the Contract either in his official or individual capacity. A plaintiff who wants to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. *See Conason v Megan Holding, LLC*, 25 N.Y.3d 1, 18, 29 N.E.3d 215, 225, 6 N.Y.S.3d 206, 216 (2015). *See also Town-Line Car Wash, Inc. v Don's Kleen Mach. Kar Wash, Inc.*, 2019 N.Y. App. Div.

LEXIS 1393, *3, 2019 NY Slip Op 01443, 1-2, 2019 WL 943837 (App. Div. 2d Dept., 2019). In determining whether the court should impose corporate obligations to the owners, factors to be considered include whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to LLC formalities, inadequate capitalization, commingling of assets, and the personal use of LLC funds. *Grammas v Lockwood Assoc., LLC*, 95 A.D.3d 1073, 1075, 944 N.Y.S.2d 623, 626 (App. Div. 2d Dept., 2012). Neither the original Complaint or the Proposed Amended Complaint make any allegations as to how Siegel exercised complete domination of the corporation in respect to the specific transaction or how such domination was used to commit a fraud or wrong against the plaintiffs which resulted in their injury. Mere allegations regarding Siegel's ownership of Cee-Jay and that he conducts and transacts substantial business in New York are not sufficient to pierce the veil. Therefore, Defendants' Motion to dismiss the Complaint in its entirety against Siegel is granted.

Defendants' Motion to dismiss Plaintiff's sixth cause of action seeking a declaratory judgment is also hereby granted, as the Mechanics' Lien at issue was not renewed in January 2018 and is therefore no longer in effect.

This constitutes the final Decision and Order of this Court.

Dated: June 18, 2019
Staten Island, New York

Orlando Marrazzo, Jr.,
Justice, Supreme Court

Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice