Bazaar v Vishnu
2019 NY Slip Op 33603(U)
December 5, 2019
Supreme Court, New York County
Docket Number: 450502/2019
Judge: Francis A. Kahn III

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 14

Acting Justice

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BOMBAY BAZAAR,

Plaintiff,

- v -

SAURABH VISHNU a/k/a SAM VISHNU and TRIFECTA INVESTMENTS NYC LLC,

Defendants.

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INDEX NO. 450502/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31-50 were read on this motion to/for DISMISS.

Upon the foregoing papers the motion is determined as follows:

Defendants move to dismiss the amended complaint pursuant to CPLR §3211[a][1] based upon the documentary evidence and CPLR §3211[a][7] claiming Plaintiff fails to state a cause of action. Alternatively, Defendants move to dismiss pursuant to CPLR §3211[a][10] for Plaintiff's failure to add Munesh Shamdasani and Younis Khan[1] as necessary parties.

In this case, Plaintiff and Defendants entered into a verbal agreement regarding the purchase of 250 Apple CPO iPhones for which Plaintiff paid Defendant $223,750.00 but claims never to have received the cellular phones. By its amended complaint, filed April 23, 2019, Plaintiff asserts four causes of action against Defendants in fraud/misrepresentation, breach of contract, conversion and unjust enrichment.

Defendants contend that they delivered the cellular phones. This purchase agreement was brokered over the phone by an individual named Munesh Shamdasani, who is identified as the owner of Plaintiff Bombay Bazaar. Initially, Defendants were instructed to both bill as well as ship the phones to Plaintiff in Singapore. Defendants sent an invoice to Shamdasani and subsequently Plaintiff wired the proceeds to Defendants. Afterwards, according to Defendants, Shamdasani phoned Defendants and instructed Defendants that instead of shipping the phones to Plaintiff, they were to give the phones to a man named "Younis." When Younis came to pick up the phones, he signed and dated the cell phone invoice. The signed and dated invoice constitutes Defendants' "documentary evidence." Plaintiff disavows knowing "Younis" or altering the plans from shipping the phones to Singapore.

[1] Defendants identify "Younis" as Younis Khan however they indicate that "Khan" might be an "Americanization" of his actual last name (*see* Defendants' Reply Affirmation, NYSCEF Document #49, pages 2-3, paragraph 5).

A motion to dismiss pursuant to CPLR §3211 (a)(1) may only be granted where "documentary evidence" submitted decisively refutes Plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see* Higgitt, *CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers,* 83 New York State Bar Journal 32, 34-35 [2011]). To be accepted, the submitted "documentary evidence" "must be explicit and unambiguous" (*see Dixon v 105 West 75th Street LLC*, 148 AD3d 623 [1st Dept 2017] *citing Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248 [1st Dept 1995]).

Here, the invoice purportedly signed by non-party "Younis," an individual Plaintiff claims not to know, does not qualify as "documentary evidence" since, at most, it establishes "Younis" received the phones and it does not decisively refute the allegation by Plaintiff, that he did not receive the phones and is neither explicit nor unambiguous (*see Calpo-Rivera v Siroka*, 144 AD3d 568 [1st Dept 2016]; *Play Knits, Inc., v Samuel Blue, Inc.*, 149 AD2d 301 [1st Dept 1989]; *see also Eshaghpour v Zepsa Industries, Inc.*, 174 AD3d 440 [1st Dept 2019]). Furthermore, to the extent movant relies on the affidavit of Saurav Vishnu to support its motion and the provenance of the purported invoice, it is not documentary evidence (*see eg Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.,* 10 AD3d 267 [1st Dept 2004]). Defendants' argument, citing NY UCC §2-509, that any risk of loss passed to the Plaintiff once a delivery took place is inapposite. Plaintiff is claiming that no delivery took place, a fact to be accepted as true for this motion practice. Therefore, this branch of Defendants' motion to dismiss is denied.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true and liberally construed (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also (*Morone v Morone,* 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634 [1976]).

In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the defendant (*see Guggenheimer*, supra; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, supra; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Stated differently, "[w]here the facts are not in dispute, the mere iteration of a cause of action is insufficient to sustain a complaint where such facts demonstrate the absence of a viable cause of action" (*Allen v Gordon*, 86 AD2d 514, 515 [1st Dept 1982]).

In support of this branch of the motion, Defendants only offered express arguments concerning two causes of action, to wit the third [conversion] and fourth [unjust enrichment] asserting both are duplicative of the breach of contract cause of action.

As to Plaintiff's third cause of action, "[a] conversion takes place when someone, (1) intentionally and without authority, (2) assumes or exercises control over personal property belonging to someone else, (3) interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49–50 [2006]). For its conversion claim, Plaintiff claims it paid for cell phones that Defendant failed to deliver which is duplicative of the breach of contract cause of action (*see Johnson v Cestone*, 162 AD3d 526 [1st Dept 2018]).

Regarding the claim of unjust enrichment, a plaintiff must set forth (1) that defendant was enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit the Defendant to retain what is sought to be recovered (*see Mandarin Trading Ltd, v Wildenstein*, 16 NY3d 173, 182 [2011]). A quasi-contract claim "contemplates an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties" (*Georgia Malone & Co, Inc. v Rieder*, 19 NY3d 511 [2012]; *Morningside Acquisition I, LLC, v Gandy*, __Misc3d__, 2019 NY Slip Op 29338 [Sup Ct. Bronx County, 2019]). In the affidavit submitted in support of the motion, Defendants acknowledge the existence of and the salient terms of the agreement. As there is no dispute as to the existence of an oral agreement between the parties covering the dispute at issue, the unjust enrichment claim also fails as duplicative of the breach of contract claim (*see Hudson Insurance Company, Inc. v City of New York*, 170 AD3d 622 [1st Dept 2019]; *see also Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382 [1987]).

To the extent Defendants may be asserting, although not expressly arguing how or why, its affidavit and documentary evidence demonstrates a basis for dismissal of the first [fraud] and second [breach of contract] causes of action, that branch of the motion is also denied. Contrary to Defendants' assertion, their proffered evidence does not flatly contradict the Plaintiff's allegations in the complaint, which are specific and based upon information from a person with personal knowledge of the transactions at issue. At most, this proof offers a contradictory set of facts and does not "conclusively" demonstrate the facts movant relies upon are undisputed (*see generally Allen v Gordon*, 86 AD2d 514, 515 [1st Dept 1082], *aff'd* 56 NY2d 780 [1982]).

Lastly, as to the branch of Defendants motion to dismiss for failure to join Munesh Shamdasani and Younis Khan as necessary parties, this branch of Defendants' motion is denied. CPLR §1001 (a) defines a necessary party as "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made Plaintiffs or Defendants." "In making the determination whether an absentee need be joined as an indispensable party, it must be decided if the proposed party has such an interest in the litigation that the court cannot settle the controversy without necessarily considering the interests of the proposed party" (*see Joanne S. v Carey*, 115 AD2d 4, 7 [1st Dept 1986]). Here, any interest of the non-parties is irrelevant as complete relief can be obtained by the current parties and neither Shamdasani nor Khan will be inequitably affected by a judgment in this action (*see General Elec. Capital Corp. v Pacheco & Lugo, P.L.L.C.*, 300 AD2d 185 [1st Dept 2002]). Shamdasani is the owner of Plaintiff and does not need to be named individually as a party. To the extent Defendants claims that Khan is liable

or has knowledge of the facts as to what occurred, Defendants are free to implead him into this matter to avoid perceived potential prejudice (*see Spector v Toys "R" Us, Inc.*, 2 Misc3d 1006[A] [Sup Ct. Nassau County, 2004]).

Accordingly, Defendants' motion to dismiss Plaintiff's amended complaint is granted only to the extent that the Plaintiff's third and fourth causes of action are dismissed and the balance of the motion is denied.

12/5/2019
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
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