Mociun v Herschenfeld
2020 NY Slip Op 33668(U)
October 5, 2020
Supreme Court, Kings County
Docket Number: 501968/2018
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part 91

CAITLIN MOCIUN,

Plaintiff,

against

ROBERT "ROB" HERSCHENFELD, RHD PROJECTS, ROB HERSCHENFELD DESIGN INC.,

Defendants.

Index Number 501968/2018
SEQ# 001 & 002

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2-3
Replying Affidavits	3
Exhibits	
Other	

Upon the foregoing papers, plaintiff's motion for summary judgment, to dismiss and for an adverse inference (Mot. Seq. 001), and defendant's cross-motion to dismiss or for summary judgment (Mot. Seq. 002), are decided as follows:[1]

Factual Background

There appears to be no dispute that plaintiff hired defendant to renovate plaintiff's commercial space. Plaintiff paid defendant a retainer of $25,000 for the work before it began. There arose a dispute between the parties about, among other things, the scope of work and progress of the work, and defendants ceased working. Plaintiff commenced this action asserting causes of action for breach of contract, fraud, unjust enrichment, malpractice, conversion, negligent misrepresentation, misappropriation of funds and breach of good faith and fair dealing claims. Plaintiff seeks the return of the entire retainer of $25,000 based on each of these claims, except for her malpractice claim, for which she seeks $37,892. Defendants answered and

[1] The court is disregarding defendants' reply in further support of their cross-motion. CPLR 2214 does not authorize such papers.

asserted counterclaims for breach of contract and payment pursuant to quantum meruit. Defendants seek damages in the amount of at least $10,000.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

As an initial matter, defendant argues that plaintiff's motion is defective because she did not annex the pleadings as required by CPLR 3212(b). Rather than annexing the pleadings, plaintiff may refer to the docket numbers of the pleadings on the court's electronic filing system pursuant to CPLR 2214(c). In plaintiff's counsel's moving affirmation, plaintiff does so for every pleading except for the complaint. However, defendants annex the complaint to their cross-motion, and so the court will excuse this technical defect (*Long Island Pine Barrens Society, Inc. v County of Suffolk*, 122 A3d 688, 691 [2d Dept 2014])

1. *Plaintiff's Motion for Summary Judgment on Her Claims for Breach of Contract and Unjust Enrichment*

To establish a claim for breach of contract, including an implied-in-fact contract, plaintiff must show: (1) the existence of a contract; (2) her performance pursuant to the contract; (3) defendants` breach of their obligations; and (4) damages resulting from the breach (*Kiss Const., Inc. v Edison Elec. Contractors, Corp.*, 152 AD3d 575, 576 [2d Dept 2017]). The existence and terms of an implied-in-fact contract are proven by the acts and words of the parties (*id.*).

Plaintiff contends that the contract was formed through emails between her and Rob

Herschenfeld and Chris Rucker of Rob Herschenfeld Design Inc. ("RHD") that discuss the scope of the work. These emails, as well as a letter from Mr. Herschenfeld and Mr. Rucker, dated February 13, 2017, requesting a retainer in the amount of $25,000, are annexed to the complaint. Defendants provide a copy of the complaint with exhibits as part of their cross-motion.

In the emails, plaintiff and Mr. Herschenfeld exchange a document that describes the scope of work for the renovation. This scope of work discusses the work to be done, such as the floors, wall dividers, lighting and electrical work, two bathrooms, kitchenette, and cabinetry, as well as retail fixtures, such as counter tops, shelves and glass cases. The scope of work also delineates between plaintiff's responsibilities and defendants' responsibilities.

The parties both contend that there was an agreement. However, an agreement for construction services must have certain material terms, such as price and a schedule for performance (*Total Telcom Group Corp. v Kendal on Hudson*, 157 AD3d 746, 747 [2d Dept 2018]; *Miranco Contr., Inc. v Perel*, 29 AD3d 873, 874 [2d Dept 2006]; *Allied Sheet Metal Works, Inc. v Kerby Saunders, Inc.*, 206 AD2d 166, 171 [1st Dept 1994], citing *Cobble Hill Nursing Home, Inc. v Henry and Warren Corp.*, 74 NY2d 475, 482 [1989]).

Counsel for the parties appear to agree that the "price" was $250,000. However, in his email to plaintiff, dated February 9, 2017, defendant claims that this was only a "conceptual budget", which did not even constitute "actual estimates". Plaintiff also contends that the work was to be done in a "commercially reasonable amount of time". However, the parties submit no evidence of any schedule for the work. Indeed, the parties' seeming disagreement about the scope of work, the price for the work, and the schedule for the work, apparently during the design phase and before much of the physical work began, suggests that there was not a meeting of the

minds as to the material terms of the agreement. Accordingly, the record presented on summary judgment does not contain sufficient evidence to conclusively find an enforceable agreement here.

Even assuming there were an enforceable agreement, there are triable issue of fact concerning the purported breach. Plaintiff argues that defendant breached the agreement after becoming frustrated by the scope of work and refusing to perform. However, plaintiff submits little, if any, admissible evidence of defendants' purported breach. Plaintiff submits a few pages of her deposition transcript, which is not signed by her or certified by the court reporter (CPLR 3116). In her memorandum of law, plaintiff refers to, and quotes from, passages in additional emails that were not attached to the complaint. Plaintiff does not submit copies of these emails, but some or all of them are attached to defendants' cross-motion. While plaintiff submits an affidavit and a full copy of her deposition transcript on reply, the court cannot accept new evidence submitted for the first time on reply (*Matthews v Bright Star Messenger Ctr., LLC*, 173 AD3d 732, 734 [2d Dept 2019]).

In opposition, Mr. Herschenfeld states in his affidavit that it was plaintiff who breached the agreement by hiring a different contractor to complete the work. Accordingly, there are triable issues of fact that prevent an award of summary judgment on plaintiff's claim for breach of contract.

Plaintiff argues in the alternative that she is entitled to summary judgement on her claim for unjust enrichment. To prove her unjust enrichment claim, plaintiff must establish that: (1) defendants were enriched; (2) at her expense; and (3) that it is against equity and good conscience to permit the defendants to retain the enrichment (*Main Omni Realty Corp. v Matus*,

124 AD3d 604, 605 [2d Dept 2015]). Defendants' receipt of some benefit, standing alone, is not sufficient to support an unjust enrichment claim (*Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013]). There must have been a transaction between the parties that the court determines is unjust (*id.*). Plaintiff claims that defendants fail in their answer to deny plaintiff's unjust enrichment claims. This is simply incorrect. In their answer, defendants deny these claims or allege they cannot admit or deny the claims on the basis that the claims represent legal assertions.

Plaintiff contends that she paid defendants the retainer of $25,000, and that defendants refused to commence work when work was scheduled to begin. Although plaintiff submits little evidence of payment herself, Mr. Herschenfeld admits in his affidavit that defendants received the check. That said, it is not clear which of the defendants physically received the check, or cashed the check. Mr. Herschenfeld also alleges that plaintiff used the drawings RHD prepared for the project. He argues that the drawings took significant effort and time due to the irregular shape of the space. In addition, he states that there were a number of revisions to the scope of work due to changes made by plaintiff, which required additional site visits.

Defendants argue that plaintiff's unjust enrichment claim should be dismissed because they have admitted to the existence of a contract. Defendants are correct that the existence of a contract typically precludes a claim for unjust enrichment (*McMorrow v Angelopoulos*, 113 AD3d 736, 739 [2d Dept 2014]; *Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 353 [2d Dept 2006]). However, as described above, the court finds that the parties have not yet established the material terms of an enforceable contract. Furthermore, it is not clear whether these corporate defendants or Mr. Herschenfeld himself received and deposited the retainer. Accordingly, there is not sufficient basis to dismiss plaintiff's unjust enrichment claim

against defendants.

2. *Defendants' Motion for Summary Judgment and to Dismiss Plaintiff's Claims for Fraud, Malpractice, Conversion, Negligent Misrepresentation, Misappropriation of Funds, and Breach of Good Faith and Fair Dealing*

Defendants argue that plaintiff's claim for fraud, conversion, misappropriation of funds, and negligent misrepresentation should be dismissed because they are an improper attempt to convert a breach of contract claim into a tort claim (*see*, *e.g.*, *Countrywide Home Loans, Inc. v United Gen. Tit. Ins. Co.*, 109 AD3d 953, 954 [2d Dept 2013]). As explained above, the present record does not establish an endorsable agreement between the parties. Accordingly, these tort claims will not be dismissed on that basis alone.

Likewise, defendants argue that plaintiff's claim for breach of the covenant of good faith and fair dealing should be dismissed as duplicative of a breach of contract claim. This claim is not duplicative when a plaintiff shows that defendant deprived plaintiff of the overall benefit of the contract, rather than just a specific contractual term (*Travelsavers Enterprises, Inc. v Analog Analytics, Inc.*, 149 AD3d 1003, 1006 [2d Dept 2017]). Here, the contractual terms have not been fully established. Accordingly, plaintiff's claim for breach of the covenant of good faith and fair dealing is not dismissed.

Next, with regard to plaintiff's tort claim for fraud, defendants argue that plaintiff has not pled the claim with particularity. To plead fraud with the requisite particularity, plaintiffs must provide details about the alleged fraudulent statements (*Scott v Fields*, 92 AD3d 666, 668 [2d Dept 2012], citing *Moore v Liberty Power Corp.*, LLC, 72 AD3d 660, 661 [2d Dept 2010]). Here, plaintiff alleges that defendants misled plaintiff about how long it would take to complete the work and how much the work would cost. However, plaintiff references no specific

statements made by defendant, or even a general intent to deceive. In opposition, plaintiff asks this court to be guided by a Third Department case that concerns fraudulent inducement (*see RKB Enterprises Inc. v Ernst & Young*, 182 AD2d 971, 972 [3d Dept 1992]). Leaving aside whether opinions of the Third Department are authoritative on this court, plaintiff's claim does not sound in fraudulent inducement to a contract, but rather allegations of fraud about a present and ongoing relationship with defendants.

Defendants argue that plaintiff's malpractice claim should be dismissed because defendants are not professionals (*see Chase Sci. Research, Inc. v NIA Group, Inc.*, 96 NY2d 20, 24 [2001]). Plaintiff argues that defendants need not be professionals to have a malpractice claim asserted against them, but this argument is contrary to established law. However, plaintiff also argues that defendants held themselves out to be professionals and that they claimed to have had the requisite license to design plaintiff's store. Under the circumstances, there are triable issues of fact that prevent summary judgment dismissing this claim.

In addition, defendants move to dismiss claims against Mr. Herschenfeld entirely. Defendants argue that Mr. Herschenfeld was not a party to the agreement with plaintiff, and otherwise only acted in his corporate capacity (*see Stamina Products, Inc. v Zintec USA, Inc.*, 90 AD3d 1021, 1022 [2d Dept 2011]). As explained above, the terms of the purported contract are not clear. Thus, the court cannot determine, at this time, who were the parties to any contract.

3. *Plaintiff's Motion to Dismiss Defendants' Defenses and Counterclaims*

Plaintiff argues that defendants' defense of a failure to state a claim should be stricken because, she argues, such a defense can be raised only in a motion to dismiss pursuant to CPLR §3211(a)(7). Pursuant to CPLR 3211(e), this defense may be raised by motion or in an answer.

Plaintiff also argues that defendants' sixth and seventh affirmative defenses, that "Plaintiff consented to Defendants' use of $25,000" and "Defendants' use of $25,000 was reasonable and necessary" should be stricken, because plaintiff denied them at her deposition. As explained above, there are issues of fact regarding whether Mr. Herschenfeld or the corporate defendants were enriched, must less unjustly enriched, by plaintiff's retainer payment, and so this defense is not dismissed.

Plaintiff argues that the portion of defendants' sixteenth affirmative defense that includes the defense of laches should be dismissed because plaintiff commenced her action within the statute of limitations for unjust enrichment (*Premier Capital, LLC v Best Traders, Inc.*, 88 AD3d 677, 678 [2d Dept 2011]). Defendants do not contend that plaintiff's action is untimely. Accordingly, this defense is dismissed.

Plaintiff also seeks dismissal of defendants' eleventh defense, that plaintiff caused his own damages, and the portion of defendants' sixteenth affirmative defense that includes estoppel and waiver because, she argues, defendants have not averred facts to support these defenses. There is no requirement in CPLR 3018 to do so and to the extent that plaintiff wants additional information that supports the defenses, plaintiff may request such information in a demand for a bill of particulars (*see* David D. Siegel, 2015 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3018:16A).

Finally, plaintiff asks this court to dismiss defendants' counterclaims pursuant to CPLR 3211(a)(7). In a post-answer motion such as this, seeking to dismiss pursuant to CPLR 3211(a)(7), the court may consider evidentiary material. Under these circumstances, the motion must be denied "unless it has been shown that a material fact as claimed by the pleader to be one

is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Sokol v Leader,* 74 AD3d 1180,1182 [2d Dept 2010], quoting *Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]). Plaintiff submits little, if any, admissible evidence against defendants' allegations, who support their claims with an affidavit from Mr. Herschenfeld and emails between the parties. Accordingly, the court will not dismiss defendants' counterclaims outright.

Plaintiff also argues that defendants' counterclaims of breach of contract and quantum meruit cannot both exist. A party cannot assert a claim for quantum meruit if there is an enforceable agreement (*First Class Concrete Corp. v Rosenblum*, 167 AD3d 989, 990 [2d Dept 2018]). Here, although counsel for the parties each claim there was an agreement, the court has determined that no such enforceable agreement has been established by the record to date. Accordingly, defendants' counterclaims for breach of contract and quantum meruit are not dismissed.

4. *Plaintiff's Request for an Adverse Inference*

In plaintiff counsel's moving affirmation, though not in the memorandum of law, plaintiff requests an adverse inference against defendants because defendants did not respond to plaintiff's interrogatories. In keeping with the rules and procedures of Kings County Supreme Court, this portion of plaintiff's motion is denied without prejudice, and with leave to move for the relief in the proper discovery part.

Conclusion

For the foregoing reasons, plaintiff's motion is granted to the sole extent that the portion of defendants' sixteenth affirmative defense related to laches is stricken. Defendant's motion is granted to the extent that plaintiff's claim for fraud is dismissed.

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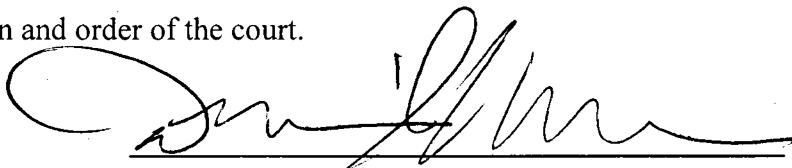
This constitutes the decision and order of the court.



October 5, 2020
DATE

DEVIN P. COHEN
Justice of the Supreme Court

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