

Patients Med., P.C. v Goshu, LLC
2020 NY Slip Op 34314(U)
December 28, 2020
Supreme Court, New York County
Docket Number: 656493/2016
Judge: Anthony Cannataro
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

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PATIENTS MEDICAL, P.C.,

Plaintiff,

- v -

GOSHU, LLC, PATRICK FOGARTY,

Defendant.

INDEX NO. 656493/2016
MOTION DATE 03/01/2020
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 were read on this motion to/for DISMISS.

In this breach of contract and negligence action, Esagoff Law Group, P.C. moves on behalf of defendants Goshu, LLC ("Goshu") and Patrick Fogarty ("Fogarty"), pursuant to CPLR 3211(a)(1), to dismiss the action or, in the alternative, pursuant to CPLR 3025(b), for leave to amend the defendants' answers. The Court entertains the motion only insofar as it is made on behalf of defendant Fogarty as Esagoff Law Group, P.C. has not filed a notice of appearance on behalf of defendant Goshu.

On or about March 5, 2015, plaintiff and Goshu entered into a license agreement, pursuant to which Goshu was to maintain computer equipment and internet services for plaintiff. On or about April 2, 2015, New York Medicine Doctors (named herein as Goshu, LLC) entered into a subcontract with HelpBox whereby HelpBox would provide computer services. Fogarty, an employee of HelpBox, provided the information technology services for Goshu necessitated by Goshu's agreement with plaintiff. At some point during the term of the license agreement, the software on the backup server to be maintained by Goshu stopped working properly and the PC board within the backup hard drive was damaged resulting in a loss of plaintiff's proprietary data and ultimately leading to this action.

Defendant argues that plaintiff's claims against Fogarty should be dismissed because defendant lacks privity of contract with him and, further, that documentary evidence absolves defendant of liability. Plaintiff asserts that questions of fact exist as to the authenticity of the license agreement produced by defendants, whether the parties' agreed upon the terms therein, and the proximate cause of plaintiff's damage. Plaintiff further argues that defendants' request for leave to amend their answers should be denied because the newly asserted defenses are palpably improper. Finally, plaintiff asserts that defendants breached the parties' mediation agreement by disclosing allegedly confidential materials.

"In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction" (*Goshen v Mut. Life Ins. Co. of New York*, NY 2d, citing *Leon v Martinez*, 84 NY 2d 83 [1994] and CPLR 3026). Further, the Court is to "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted]).

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.*). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VIX Lux Holdco S.A.R.L v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], citing *Fontanetta v John Doe 1*, 73 AD3d 78, 86-7 [2d Dept 2010]).

Fogarty argues that absent privity of contract a third party has no right to recover for negligence. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]). Further, the Court of Appeals in *Espinal v Melville Snow Contractors, Inc.* outlined three specific situations in which a party to a services contract may liable in tort to third persons:

- (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm;
- (2) where the plaintiff detrimentally relies on the continued performance of the contracting

party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (98 NY2d 136, 140 [2002] [internal citations omitted]).

The important inquiry here is whether a legal duty of care was owed. While it is indeed possible that no such duty of care was owed by Fogarty to plaintiff, the documentary evidence submitted here, namely the contract between defendant Goshu and non-party HelpBox, does not conclusively resolve the question. As such, the motion to dismiss pursuant to CPLR 3211(a)(1) is denied.

"Leave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies and Assoc., Inc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983], quoting CPLR 3025). "On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [citations omitted]). Here, defendant Fogarty seeks leave to amend in order to submit an individual answer with separate defenses from defendant Goshu. There should be no prejudice or surprise that individual answers would be submitted seeing as the complaint was filed against these two separate parties. Plaintiff has not established that the amendment is devoid of merit by simply alleging that the defenses have been copied from a template. Accordingly, leave to amend is granted as to defendant Fogarty.

At this stage, the Court will not consider the motion to dismiss or for leave to amend as to defendant Goshu. The Court also finds that as to plaintiff's application for costs and fees for breach of the mediation agreement, further discovery is needed as to whether this information was first produced during mediation or in response to prior discovery demands and would benefit from proper appearance of all parties.

Accordingly, it is

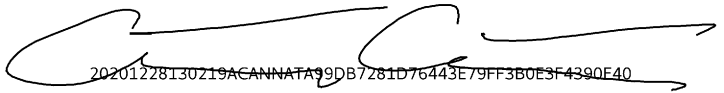
ORDERED that defendants' motion to dismiss is denied in its entirety; and it is further

ORDERED that the branch of the motion by defendant Fogarty which seeks leave to amend his answer is granted and the proposed answer attached to his motion papers is deemed served

upon service of a copy of this order with notice of entry thereof and thereby becomes defendant Fogarty's answer in this action; and it is further

ORDERED that defendant Goshu's motion for leave to amend their answer herein is denied; and it is further

ORDERED that counsel are directed to appear for a virtual status conference which the parties are to schedule by calling (646) 386-5429.


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12/28/2020
DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE