

Defilippo v Ridge Contr. Corp.

2023 NY Slip Op 31450(U)

May 1, 2023

Supreme Court, New York County

Docket Number: Index No. 655053/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

VINCENT DEFILIPPO,

Plaintiff,

- v -

RIDGE CONTRACTING CORP., JIMMY VELEZ, LINO
CONSTRUCTION CORP., AQUILINO AUGUSTO

Defendants.

-----X

INDEX NO. 655053/2022

MOTION DATE 04/11/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7
were read on this motion to/for DISMISS.

Defendants Lino Construction Corp. and Aquilino Augusto (“Moving Defendants”)’s
motion to dismiss is granted in part and denied in part.

Discussion

Plaintiff contends that he hired defendants Ridge Contracting Corp. (“Ridge”) and Velez
(Velez is a fifty percent owner of Ridge) to do a home renovation job at his home in Manhattan.
Plaintiff alleges that he paid Ridge and Velez an initial \$65,000 for the job. He observes that
contracted separately with defendant Lino Construction Corp. (“Lino”) for the excavation of the
cellar slab and for new cement to be poured on the cellar floor.

Plaintiff maintains that a few months later, in June 2022, he found out that Ridge had
outstanding unpaid penalties and so the permits for the project would be delayed. He contends
that Velez told him that Ridge lacked the funds to pay the penalties so plaintiff agreed to
purchase a fifty percent share of Ridge in exchange for plaintiff paying these penalties.

He contends that Lino retained a different company (“CTI”), unbeknownst to plaintiff, to get the permit for the cellar work. Plaintiff observes that one of Ridge’s employees fell on the job and sued CTI, Ridge, and plaintiff. He claims that defendants attempted to pressure him to backdate an agreement as part of a scheme to commit insurance fraud.

In August 2022, plaintiff received an offer to buy the Manhattan property. At this point, according to plaintiff, little work had been performed due to the outstanding license and permit issues. However, plaintiff contends that Velez told the real estate agents that the project would be done by September 30, 2022 a representation that plaintiff later had to admit would not come true and he declined the offer.

Plaintiff then claims that Velez threatened to walk off the job if certain change orders were not paid. He insists that he was charged \$150,000 in connection with the sale of his New Jersey home due to Ridge’s delays and has had to live at a hotel since September 30, 2022 due to the delays. He brings eight causes of action against the defendants. Plaintiff seeks to recover over a 17 million dollars in damages against the Moving Defendants as well as \$50 million in punitive damages.

In this motion, the Moving Defendants seek to dismiss the fourth, sixth and eighth causes of action alleged against Lino as well as the entire complaint against defendant Aquilino Augusto. They do not seek to dismiss the breach of contract claim against Lino. They claim that the fourth cause of action against Lino for unjust enrichment should be dismissed because plaintiff has already pled a breach of contract claim and so this claim is duplicative. The Moving Defendants maintain that the fraud claims should be dismissed because the allegations relating to this claim are duplicative of the breach of contract claim and simply allege that the Moving Defendants promised to do the work specified in the contract.

They also seek to dismiss the conversion claim on the ground that plaintiff only seeks to recover the money plaintiff paid to Lino for doing the work under the contract and that does not state a conversion cause of action. With respect to the claims against Mr. Augusto, the Moving Defendants point out that there are no allegations against him other than that he owns Lino.

In opposition, plaintiff claims he met the standard for a cause of action for fraud and points to allegations that Lino promised it was a licensed contractor who would complete the work in the timeline discussed with plaintiff. He insists that his claims for unjust enrichment and conversion are alternative theories and so they should not be dismissed. Plaintiff argues that he has no idea whether or not the Moving Defendants will challenge the validity of the contract and so he should be permitted to pursue the quasi-contract theories.

Plaintiff also insists that the claims against Mr. Augusto should remain because he has stated a valid veil piercing theory. He claims that “It is simply offensive that Augusto would ask this Court to absolve him of any personal liability when it was his own actions that led to many of Plaintiff’s damages” (NYSCEF Doc. No. 6, ¶ 27). Plaintiff maintains that Mr. Augusto misrepresented that his company was licensed and then retained a different company that led to a lawsuit for which plaintiff was not properly served.

In reply, the Moving Defendants insist that plaintiff failed to save his claims for fraud, unjust enrichment, or conversion. They insist that plaintiff did not state allegations sufficient to pierce the corporate veil and seek liability against Mr. Augusto in his individual capacity.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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, 614 NYS2d 972 [1994]).

Fraud

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]). “A fraud-based claim is duplicative of breach of a contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract” (*MMCT, LLC v JTR Coll. Point, LLC*, 122 AD3d 497, 499, 997 NYS2d 374 [1st Dept 2014] [internal quotations and citation omitted]).

Here, the fraud cause of action contends that the Moving Defendants promised they would perform under the project, that they were properly licensed, and that they would complete the project in the timeline discussed with plaintiff (NYSCEF Doc. No. 1, ¶¶ 83-89). The Court finds that these claims are duplicative of the breach of contract claim as they are simply promises that the Moving Defendants would meet their obligations under the terms of the parties’ contract.

The Court recognizes that plaintiff asserts that the Moving Defendants misrepresented that they were properly licensed and that they hired another contractor without plaintiff’s knowledge. The pleading also contains concerning allegations that all defendants, including the Moving Defendants, pressured plaintiff to back date an agreement.

But the complaint does not detail what damages these alleged misrepresentations caused or how plaintiff justifiably relied upon those claims. Instead, paragraph 41 simply claims that the defendants abandoned the agreement. The tenor of the allegations related to the fraud cause of action do not establish a proximate cause for any damages; rather they detail a situation where

defendants allegedly missed completion dates and eventually walked off the job, forcing plaintiff purportedly to get new contractors. The complaint does not detail how any misrepresentations were material or distinct from the breach of contract; even after plaintiff found out the company did not possess the license, plaintiff continued to do business with defendants. Simply put, the complaint does not plead this claim with the requisite particularity to state a claim for fraud against the Moving Defendants as is required under the CPLR (*Eurycleia Partners, LP*, 12 NY3d at 559).

Moreover, the claim that the Moving Defendants failed to inform him about the lawsuit by one of Ridge's employees is not an actionable claim. Plaintiff contends that one of Ridge's employees sued various entities, including plaintiff, but does not assert that the injured party sued the Moving Defendants. Plus, plaintiff admits he was served at a residence in Nevada; that he claims he didn't know about the case before he was served is not relevant.

There is no basis to find that the Moving Defendants had an obligation to tell plaintiff about this case or that plaintiff can recover from movants based on this alleged failure.

Conversion

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50, 827 NYS2d 96 [2006]).

The Court finds that this claim is duplicative of the breach of contract claim as plaintiff merely alleges that the Moving Defendants assumed control over the money plaintiff paid them. "A cause of action for conversion cannot be predicated on a mere breach of contract. Here, plaintiff[']s conversion claims allege no facts independent of the facts supporting their breach of

contract claims” (*Jeffers v Am. Univ. of Antigua*, 125 AD3d 440, 443, 3 NYS3d 335 [1st Dept 2015] [internal quotations and citation omitted]). Therefore, the conversion claim against the moving defendants is dismissed.

Unjust Enrichment

Similarly, the Court finds that the unjust enrichment claim is duplicative of the breach of contract claim alleged against the Moving Defendants as it repeats the same allegations as those alleged in the breach of contract cause of action (*Shear Enterprises, LLC v Cohen*, 189 AD3d 423, 425, 137 NYS3d 306 [1st Dept 2020]).

The Court observes, however, that plaintiff is correct that courts permit a party to plead causes of action in the alternative. That situation is appropriate here where the Moving Defendants have not acknowledged the existence of a valid contract. Accordingly, this branch of the motion to dismiss is denied.

Veil Piercing

“Piercing the corporate veil requires a showing that: (1) the owner exercised complete domination over the corporation with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff’s injury” (*First Capital Asset Mgt., Inc. v N.A. Partners, L.P.*, 300 AD2d 112, 116, 755 NYS2d 63 [1st Dept 2002]).

The allegations in the complaint fail to allege a sufficient basis to pierce Lino’s corporate veil and permit plaintiff to pursue claims against Mr. Augusto personally. As the Moving Defendants point out, there is only a single allegation against Mr. Augusto in the complaint and it contends he is the owner of Lino (*see* NYSCEF Doc. No. 1, ¶ 5). The remaining allegations


describe the “Lino Defendants,” defined as both Lino and Mr. Augusto. That is not sufficient to sustain claims against an individual defendant in this pleading.

Conflating the actions of the two defendants is not enough. There are no allegations in the complaint describing how Mr. Augusto, in his individual capacity, ignored the corporate form or used his domination over Lino to commit a fraud. To the extent that plaintiff attempts to make additional arguments in opposition, those efforts are without merit as they were not contained in an affidavit from plaintiff. Only an affirmation from plaintiff’s attorney is included.

Accordingly, it is hereby

ORDERED that defendants Lino Construction Corp. and Aquilino Augusto’s motion is granted only to the extent that the sixth and eighth causes of action alleged against Lino Construction Corp. and all claims against defendant Augusto is granted and defendant Lino Construction Corp. shall answer pursuant to the CPLR.

Conference: July 31, 2023 at 11 a.m. By July 24, 2023, the parties are directed to upload 1) a discovery stipulation signed by all remaining parties, 2) a stipulation of partial agreement about discovery that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. Based on these submissions, the Court will assess whether an in-person conference is required. The failure to upload anything by July 24, 2023 will result in an adjournment of the conference.

05/01/2023					
DATE			ARLENE P. BLUTH, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	