Brooklyn Textiles LLC v TR Prime Equity LLC
2023 NY Slip Op 31652(U)
May 16, 2023
Supreme Court, Kings County
Docket Number: Index No. 514763/2021
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
--x
BROOKLYN TEXTILES LLC,
Plaintiffs, Decision and order

- against - Index No. 514763/2021

TR PRIME EQUITY LLC, DOVIE BRIKMAN a/k/a
DOVI BRIKMAN, and ISSER BRIKMAN,
Defendants May 16, 2023
--x
PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The defendants have moved pursuant to CPLR §3212 seeking summary judgement dismissing the complaint on the grounds it fails to state any cause of action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

According to the complaint the plaintiff purchased 12,790 boxes of nitrile white medical gloves from the defendants. Each box contained 100 gloves and the total price for the purchase was $172,800 which was paid on February 18, 2021. The complaint further alleges that upon random inspection of the gloves following delivery, seventy five percent of the gloves were made of latex, an inferior material to nitrile. Further, every box was labeled nitrile in an effort to deceive the plaintiff. The complaint further asserts the defendants acknowledged the goods were non-conforming and promised a full refund upon their return. The gloves were all returned and no refund was ever sent

precipitating this lawsuit. The complaint alleges causes of action for breach of contract, unjust enrichment, fraud and conversion. The defendants have now moved seeking summary judgement dismissing the complaint arguing the causes of action may not be maintained. As noted, the plaintiffs oppose the motion.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id).

The defendants argue there is no evidence of any breach since there is no evidence the gloves delivered were latex and not nitrile. However, the plaintiffs have presented the affidavit of George Popescu the plaintiff's managing member. The affidavit describes tests that were performed on a sampling of the gloves which demonstrated the gloves were not made of nitrile. Those tests surely raise questions of fact whether, indeed, the correct gloves were sold to the plaintiff. The defendants argue that the plaintiff has failed to demonstrate the tests used to determine the gloves were not nitrile have not been generally accepted in the scientific community (Frye v. United States, 293 F. 1013 (D.C. Cir., 1923). That question is one that may be properly raised prior to trial and will govern the admissibility of such evidence. As the court noted held in Adamy v. Ziriakus, 92 NY2d 396, 681 NYS2d 463 [1998] "'an expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor'...By contrast, when expert testimony is offered at trial, 'the technical or scientific basis for a testifying expert's conclusions ordinarily need not be adduced as part of the proponent's direct case'...Rather, it falls to the opponent of the testimony to bring out weaknesses in the expert's

qualifications and foundational support on cross-examination" (id).

Although not qualified as an expert, Mr. Popescu has sufficiently demonstrated the non-speculative conclusion the gloves delivered were not nitrile. The admissibility of such evidence will be considered at trial. Notwithstanding, that procedural issue does not undermine the questions of fact presented in this case. Consequently, the motion seeking to dismiss the breach of contract cause of action is denied.

Turning to the remaining causes of action, it is true that a misrepresentation of a material fact that is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain an action of fraud and is distinct from the breach of contract claim (<u>Selinger Enterprises Inc., v. Cassuto</u>, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only to the intent or ability to perform under the contract then such misrepresentation is duplicative of the breach of contract claim (<u>see</u>, <u>Gorman v. Fowkes</u>, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). In this case the fraud, if any, is not collateral to the breach of contract claim and therefore, the motion seeking to dismiss the fraud claim is granted.

Next, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional

contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Since the plaintiff has already pled a valid breach of contract claim the unjust enrichment claims is duplicitive and the motion to dismiss the unjust enrichment cause of action is granted.

Turning to the conversion claim, where such a claim arises from the same circumstances as the breach of contract claim then the conversion claim is duplicative (Connecticut New York Lighting Company v. Manos Business Management Company Inc., 171 AD3d 698, 98 NYS3d 101 [2d Dept., 2019]). "To determine whether a conversion claim is duplicative, courts look both to the material facts upon which each claim is based and to the alleged injuries for which damages are sought" (Medequa LLC v. O'Neill and Partners LLC, 2022 WL 2916475 [S.D.N.Y. 2022]). In this case the breach of contract claim essentially asserts the defendants delivered the wrong gloves and failed to return the money already paid. The conversion claim seeks a return of those very same funds. Thus, the conversion claim relies upon the same facts as the breach of contract claim and seeks the same damages. Therefore, "if Plaintiff were to recover on each claim, it 'would in effect be paid twice'" (id). Consequently, the motion seeking to dismiss the conversion claim is granted.

Thus, all the causes of action are dismissed except for the breach of contract claim.

So ordered.

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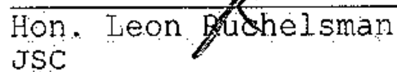

DATED: May 16, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC