

**ROC Funding Group v Savannah Quality Upholstery
LLC**

2024 NY Slip Op 31332(U)

April 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 500262/2023

Judge: Lisa S. Ottley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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ROC FUNDING GROUP,

Mot. Seq. # 1

Plaintiff,

Index # 500262/2023

-against-

DECISION AND ORDER

SAVANNAH QUALITY UPHOLSTERY LLC AND
HAI N. NGUYEN

Defendants.

-----x

HON. LISA S. OTTLEY

2024 APR 12 A 10:57
KINGS COUNTY CLERK
FILED

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion to dismiss complaint submitted on January 28, 2023.

Papers	Numbered
Notice of Motion and Affirmation	1,
Affirmation/Affidavit in Opposition.....	2[Exh. A-D]
Memoranda of Law.....	3 and 4 [Exh. A-D]

Plaintiff, Roc Funding Group (hereinafter “Roc Funding”), commenced this action against defendants, Savannah Quality Upholstery, LLC (hereinafter “Savannah”) and Hai N. Nguyen, for breach of contract, personal guarantee, and unjust enrichment. It is alleged that the plaintiff and defendants entered into a merchant cash advance/future receivables agreement, which the defendants have breached by failing to pay the sum of \$70,442.45 to the plaintiff. Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action and pursuant to 3211(a)(8) for lack of personal jurisdiction. Plaintiff opposes defendants’ motion on the grounds that causes of action for breach of contract and unjust enrichment have been stated. Plaintiff opposes the lack of jurisdiction argument on the ground that service was properly effectuated.

In the case at bar, the plaintiff, Roc Funding, alleges in their summons and complaint that on or about August 21, 2019, plaintiff and defendants entered into an agreement in which plaintiff agreed to buy all rights of Savannah’s future receivables. Plaintiff funded the face value of \$125,033.75, at a purchase amount of \$83,915.27. The Agreement was structured so that plaintiff did not have to fund the entire purchase price at the outset, but instead funded defendant’s weekly installments. The total weekly funding was for \$69,152.87 to purchase \$103,037.78 of the Savannah’s future receivables. In addition, Hai Nguyen as Guarantor, agreed to guarantee all amounts owed to the plaintiff by Savannah. Defendants made payments totaling \$37,595.33 to plaintiff but failed to make any additional payments after October 3, 2022, leaving

a balance owed of \$65,442.45. Defendants also incurred a blocked account fee of \$5,000.00, increasing the total amount owed to plaintiff to \$70,442.45.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff the benefit of every possible favorable inference. See, AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 N.Y.3d 582, 591, 808 N.Y.S.2d 573 (2005); Leon v Martinez, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972 (1994). Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery. See, Pierce Coach Line, Inc. v. Port Washington Union Free School District, 213 A.D.3d 959, 185 N.Y.S.3d 187 (2nd Dept., 2023). The test of the sufficiency of a complaint is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments. See, Pace v Perk, 81 A.D.2d 444, 440 N.Y.S.2d 710 (2nd Dept., 1981). Applying these principles to the instant matter, the court finds that the complaint adequately alleges all the essential elements of a cause of action for breach of contract, to wit: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages. See, Alliance Natl. Ins. Co. v. Absolut Facilities Mgt., LLC, 140 A.D.3d 810, 31 N.Y.S.3d 806 (2nd Dept. 2016); Furia v Furia, 116 A.D.2d 694, 695 498 N.Y.S.2d 12 (1986).

Plaintiff also alleges that the defendants have been unjustly enriched by receiving the purchase price for the future receivables but failing to pay the outstanding balance and an incurred block account fee of \$5,000.00, resulting in \$70,442.45 due to plaintiff pursuant to the agreement. Defendants argue that the plaintiff has failed to state a viable cause of action for unjust enrichment because the complaint also alleges the existence of a contract between the parties.

The theory of unjust enrichment lies as a quasi-contract claim. See, Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 572, 807 N.Y.S.2d 583 (2005). It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties. Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded. See, Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653 (1987). Where there is a bona fide dispute as to the existence of a contract or the application of a contract to the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract. See, Parkash v Utilisave Corp., 295 AD2d 330, 743 N.Y.S.2d 889 (2nd Dept., 2002). Defendant does not dispute the fact that a valid contract exists between the parties but argues that the plaintiff has failed to state a cause of action for breach of contract.

The complaint alleged the existence of an agreement that controls the subject matter of the action, and the existence of the agreement is not a matter in dispute. See, Cortazar v

Tomasino, 50 A.D.3d 668, 54 N.Y.S.3d 89 (2nd Dept., 2017). Therefore, the unjust enrichment cause of action should be dismissed. See, Pierce Coach Line, Inc. v. Port Washington Union Free School District, 213 A.D.3d 959, 185 N.Y.S.3d 187 (2nd Dept., 2023).

Defendants also move to dismiss pursuant to CPLR 3211(a)(8). Defendants argue that the plaintiff failed to assert personal jurisdiction over the defendants due to lack of service. According to the defendants, Hai. N. Nguyen was not served pursuant to CPLR sections 308, 312-a, and 313. Defendants allege that Savannah Quality is an unauthorized foreign corporation from the State of Georgia. Defendants further allege that service on a Savannah as an unauthorized corporation was not performed pursuant to Business Corporation Law § 307, by serving the New York Secretary of State, paying the fee therein, and filing an affidavit of compliance. In opposition, plaintiff argues that pursuant to section 4.3 of their agreement, defendants consented to personal jurisdiction in any federal or state court sitting in the state of New York and service of process by certified mail in lieu of personal service. Plaintiff further argues that service of process was deemed properly effectuated on January 4, 2023, which is the date plaintiff mailed the summons and complaint to defendants via certified mail-return receipt requested.

Both the plaintiff and defendants have fallacies in their arguments. Savannah is not an unauthorized foreign corporation, but rather an unauthorized foreign limited liability company. Service on an unauthorized foreign limited liability company may be accomplished through CPLR §§ 302 and 311-a, or in the alternative, Limited Liability Company Law § 304.

CPLR Section 302(a)(1) reads as follows:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state

CPLR Section 311-a reads as follows:

(a) Service of process on any domestic or foreign limited liability company shall be made by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. Service of process upon a limited liability company may also be made pursuant to article three of the limited liability company law.

CPLR Section 313 reads as follows:

A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction.

Limited Liability Company Law Section 304. Service of process on an unauthorized limited liability companies is as follows:

(a) In any case in which a non-domiciliary would be subject to the personal or other jurisdiction of the courts of this state under article three of the civil practice law and rules, a foreign limited liability company not authorized to do business in this state is subject to a like jurisdiction. In any such case, process against such foreign limited liability company may be served upon the secretary of state as its agent. Such process may issue in any court in this state having jurisdiction of the subject matter.

(b) Service of such process upon the secretary of state shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, a copy of such process together with the statutory fee, which fee shall be a taxable disbursement.

(c) Such service shall be sufficient if notice thereof and a copy of the process are:

(1) delivered personally outside this state to such foreign limited liability company by a person and in the manner authorized to serve process by law of the jurisdiction in which service is made; or

(2) sent by or on behalf of the plaintiff to such foreign limited liability company by registered mail, return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official or body performing the equivalent function, in the jurisdiction of its formation, or if no such address is specified, to its registered or other office specified, or if no such office is specified, to the last address of such foreign limited liability company known to the plaintiff.

(d) Where service of a copy of process was effected by personal service, proof of service shall be by affidavit of compliance with this section filed, together with the process, within thirty days after such service, with the clerk of the court in which the action or special proceeding is pending. Service of process shall be complete ten days after such papers are filed with the clerk of the court.

(e) Where service of a copy of process was effected by mailing in accordance with this section, proof of service shall be by affidavit of compliance with this section filed, together with the process, within thirty days after receipt of the return receipt signed by the foreign limited liability company or other official proof of delivery or of the original envelope mailed. If a copy

of the process is mailed in accordance with this section, there shall be filed with the affidavit of compliance either the return receipt signed by such foreign limited liability company or other official proof of delivery or, if acceptance was refused by it, the original envelope with a notation by the postal authorities that acceptance was refused. If acceptance was refused, a copy of the notice and process together with notice of the mailing by registered mail and refusal to accept shall be promptly sent to such foreign limited liability company at the same address by ordinary mail and the affidavit of compliance shall so state. Service of process shall be complete ten days after such papers are filed with the clerk of the court. The refusal to accept delivery of the registered mail or to sign the return receipt shall not affect the validity of the service and such foreign limited liability company refusing to accept such registered mail shall be charged with knowledge of the contents thereof.

(f) Service made as provided in this section shall have the same force as personal service made within this state.

(g) Nothing in this section shall limit or affect the right to serve any process required or permitted by law to be served upon a foreign limited liability company in any other manner now or hereafter permitted by law or applicable rules of procedure.

The fallacy in the plaintiff's argument lies in the fact that section 4.3 of the agreement does not subject the defendants to personal jurisdiction in any federal or state court sitting in the state of New York. In fact, Section 4.3 of the agreement is in reference to Notices being delivered by certified mail, return receipt requested to the respective parties to the agreement at the addresses set forth in the agreement being effective upon receipt. To the contrary, section 4.5 of the agreement addresses the governing law, venue and jurisdiction and states that said agreement should be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania and any suit, action, or proceeding arising hereunder, or the interpretation, performance, or breach hereof, shall if the purchaser so elects, be instituted in any court sitting in Pennsylvania. In addition, paragraph 4.5 states that "should such proceeding be initiated in any other forum, Merchant waives any right to oppose any motion or application made by Purchaser to transfer such proceeding to an Acceptable Forum."

Moreover, there is no evidentiary support to the plaintiff's argument that service was completed on January 4, 2023, upon the certified mailing of the summons and complaint to the defendants. The affidavits of service filed by the plaintiffs do not reflect any certified mailing to the defendants. The affidavits of service reflect that both defendants, Savannah and Hai N. Nguyen, were personally served on January 12, 2023.

However, specific personal jurisdiction, sometimes referred to as long-arm jurisdiction, refers to jurisdiction over an individual or entity for the purpose of adjudicating a particular controversy that arises from the entity's contacts with the forum state. See, Bizfund LLC v. Holland & Sliker Steel, LLC, 71 Misc.3d 1226(A), 146 N.Y.S.3d 465 (Sup. Ct., Kings Co., 2021), citing, Mejia-Haffner v Killington, Ltd., 119 AD3d 912, 913, 743 N.Y.S.2d 561 (2d Dept., 2014). CPLR 302 (a)(1), the section of New York's long-arm statute, grants New York court's jurisdiction over non-domiciliaries or out of state defendants when the action arises out of the non-domiciliaries' transaction of any business within the state or contract to supply goods or services in the state.

When a defendant objects to the court's exercise of general or specific personal jurisdiction, the ultimate burden of proof rests upon the plaintiff. See, *Skutnik v Messina*, 178 A.D.3d 744, 113 N.Y.S.3d 195 (2nd Dept., 2019). However, in opposing a motion to dismiss the complaint on the ground of lack of personal jurisdiction, a plaintiff need only make a *prima facie* showing that such jurisdiction exists. See, *Skutnik, supra*. A guarantor of a contract is also deemed to have consented to personal jurisdiction in New York when he or she signs a guaranty that incorporates the terms of the contract, including the forum selection clause. See, *Professional Merchant Advance Capital, LLC v Your Trading Room, LLC*, 123 A.D.3d 1101, 1102, 1 N.Y.S.3d 208 (2nd Dept., 2014).

The court ascertains that the defendants have not objected to the long-arm jurisdiction and forum of the State of New York, but rather to personal jurisdiction based on the statutory manner in which service was accomplished. Nonetheless, long-arm jurisdiction is appropriate in this matter where the defendants have purposefully availed themselves of the privilege of conducting activities in our jurisdiction by contracting with a New York Limited Liability Company, thus invoking the benefits and protection of our laws. See, *Hi Fashion Wigs v. Hammond Adv.*, 32 N.Y.2d 583, 347 N.Y.S.2d 47, (1973). The court further finds that the parties had an ongoing contractual relationship in that the defendants were obligated to continue making payments to plaintiff. See, *Opticare Corp. v. Castillo*, 25 A.D.3d 238, 806 N.Y.S.2d 84 (2nd Dept., 2005).

The defendants erroneously point to Business Corporation Law §307 as the only lawful method of service on Savannah, yet service on said defendant can be satisfied through either CPLR §§ 302 and 311-a or Limited Liability Company Law §304. This court finds that personal jurisdiction over the defendant, Savannah, has been effectuated in accordance with CPLR sections 302 and 311-a, based upon Hai. N. Nguyen being personally served as the registered agent of Savannah.


Furthermore, personal jurisdiction has been effectuated over the defendant, Hai N. Nguyen, in accordance with CPLR sections 302, 308, and 313, based upon Hai. N. Nguyen being personally served.

Accordingly, defendants' motion to dismiss the complaint pursuant to 3211(a)(8) for lack of personal jurisdiction is hereby denied in the entirety. The defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action is only granted to the extent that the unjust enrichment cause of action is hereby dismissed.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
April 8, 2024

2024 APR 12 A 10: 27
KINGS COUNTY CLERK
FILED



HON. LISA S. OTTLEY, J.S.C.

