

Zmod Process Corp. v American Legal Process, Inc.
2006 NY Slip Op 30359(U)
January 3, 2006
Supreme Court, New York County
Docket Number: 0602417/2005
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III

PART 56

Index Number : 602417/2005

ZMOD PROCESS CORP

vs

AMERICAN LEGAL PROCESS INC

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JAN 05 2006

Dated: 1/3/2006

RICHARD B. LOWE III J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
ZMOD PROCESS CORP. and WILLIAM SINGLER,
Plaintiffs,

Index No. 602417/05

- against -

**DECISION
AND ORDER**

AMERICAN LEGAL PROCESS, INC., and
SCOTT LEVINE,
Defendants.

-----X
RICHARD B. LOWE, III, J.:

Defendants American Legal Process, Inc. (ALPI) and Scott Levine (Levine) move to dismiss, pursuant to CPLR 3211(a)(7), the Verified Complaint in this action for, inter alia, rescission, breach of contract, common law fraud, fraudulent inducement, unjust enrichment, and breach of the covenant of good faith and fair dealing, for failure to state a cause of action.

BACKGROUND

Plaintiffs Zmod Process Corp. (ZMOD) and William Singler (Singler) bring this action to recover monies for alleged damages due to defendants ALPI and Levine's breach of contract under a Purchase Agreement, dated June 29, 2004, entered into between Zmod and ALPI, with respect to plaintiffs' purchase of the assets of ALPI.

Prior to July 14, 2004, ALPI was engaged in the business of legal process serving and related services. During this period, Levine was owner and president of ALPI. In early 2004, ALPI became interested in selling certain of its assets. Plaintiff Singler learned of this opportunity and formed ZMOD for the purpose of possibly purchasing certain assets of ALPI. During the spring and summer of 2004, ALPI and ZMOD negotiated the sale of certain ALPI assets to ZMOD.

On or about June 29, 2004, the parties entered in the Purchase Agreement which provided that ZMOD would purchase certain ALPI assets for \$750,000.00. The assets of ALPI under the Purchase Agreement includes goodwill, furniture, equipment and fixtures, a covenant not to compete, assignment of lease, and customer lists (the "purchased assets"). The Purchase Agreement contains representations as to the volume of ALPI's business, of which ALPI states as accurate and a material inducement for ZMOD to consummate the agreement. Further, ALPI provides that no covenant, representation, or warranty by ALPI contains any untrue statements of a material fact or omits to state a material fact necessary to make the statements of the Purchase Agreement not misleading.

The Purchase Agreement also makes provisions for nine new, but unnamed, clients that ALPI obtained just prior to the execution of the Purchase Agreement. Due to the uncertainty of estimating the amount of business to be generated by these new clients, the parties agreed that ZMOD would pay to ALPI a commission of \$2.00 for each document served for each of the new clients, in lieu of raising the purchase price of the transaction.

Pursuant to the Purchase Agreement, ZMOD executed and delivered to ALPI and Levine two non-negotiable promissory notes, one in the amount of \$400,000.00 (the "first note"), and the other in the amount of \$50,000.00 (the "second note"). The promissory notes were to secure a purchase money loan made to the plaintiffs in connection with the sale of the purchased assets. Also pursuant to the Purchase Agreement, Singler also signed a Guaranty Agreement to personally guaranty the payments due to ALPI pursuant to the two promissory notes.

ZMOD alleges that, during 2003, Levine's father directly or indirectly paid to ALPI a sum of \$1,000,000.00, in order to inflate ALPI's financial position. Further, ZMOD alleges that

representations regarding the number of services performed are false. Finally, ZMOD claims that ALPI concealed its problematic relationships with law firms such as Mullooly, Jeffrey, Rooney & Flynn, Mel Harris & Associates, and Malen & Associates, in order to complete the sale of the assets and the business.

ZMOD commenced this action by Summons and Verified Complaint on June 30, 2005, seeking rescission of all contractual agreements (first cause of action), breach of contract (second cause of action), common law fraud (third cause of action), fraudulent inducement (fourth cause of action), unjust enrichment (fifth cause of action), and breach of covenant of good faith and fair dealing (sixth cause of action).

DISCUSSION

In a motion to dismiss pursuant to CPLR 3211(a), the court takes the facts as alleged in the Complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]). The court addresses each of the plaintiff's claims according to the memoranda of law submitted by the parties.

A. Fraudulent Inducement and Common Law Fraud

Defendants argue that the plaintiffs have failed to state a cause of action for fraudulent inducement (fourth cause of action) and common law fraud (third cause of action) because the plaintiffs have failed to demonstrate reasonable reliance on the defendants' representations. Specifically, the defendants rely upon a specific disclaimer found in the Purchase Agreement which provides that there is no express or implied warranty by the defendants as to the purchased assets. Alternatively, the defendants assert that these two causes of action are merely restatements of their

causes of action for breach of contract, and, as such, these claims should be dismissed.

1. *Failure to State a Cause of Action*

To state a legally cognizable claim of fraudulent concealment and for common law fraud, the Complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). In addition, in any action based upon fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]). Nondisclosure of material facts may also constitute fraud where "concealment with intent to defraud of facts which one is duty-bound in honesty to disclose is of the same legal effect and significance as affirmative misrepresentations of fact" (*Nasaba Corp. v Harfred Realty Corp.*, 287 NY 290, 295 [1942]; *see also Schindler v Issler & Schrage, P.C.*, 262 AD2d 226, 229 [1st Dept 1999]).

The defendants rely upon paragraph 6.2(b) of the Purchase Agreement to demonstrate that there was no reasonable reliance on the representations made by the defendants that could be evidenced by the plaintiffs. Paragraph 6.2(b) of the Purchase Agreement provides:

Purchaser [ZMOD] has inspected and is familiar with the condition (physical or otherwise) of all of the assets of the Business and has had every opportunity to complete his due diligence and has investigated the Purchased Assets and the Business by himself and through his accountant and attorney and, except as otherwise provided in this Agreement, is purchasing the assets "AS IS" and acknowledges that THERE IS NO WARRANTY (EXPRESS OR IMPLIED) BY SELLER [ALPI] AS TO THE PURCHASED ASSETS, AND THAT PURCHASER, EXCEPT TO THE EXTENT SPECIFICALLY PROVIDED HEREIN, IS NOT RELYING UPON ANY REPRESENTATION, STATEMENT OR ANY OTHER ASSERTION WITH RESPECT TO THE NATURE OR QUALITY OF THE ASSETS SOLD HEREUNDER OR THE BUSINESS, OR THE PAST, PRESENT OR PROSPECTIVE PROFITS OR VOLUME OF THE SELLER OR THE BUSINESS.

(*See Purchase Agreement at 10-11*[emphasis in original]). The court disagrees.

Here, the defendants rely too heavily on Paragraph 6.2(b) in their motion to dismiss. First, there is nothing in this paragraph that involves the specific representations and warranties made by the defendants *in the Purchase Agreement* as to the accuracy of the volume of revenue or as to the veracity of the statements made to the plaintiffs in their inducement of ZMOD to purchase the assets. More importantly, defendants' interpretation of Paragraph 6.2(b) contradicts the various representations and warranties the defendants explicitly and specifically make to induce the plaintiffs to purchase ALPI's assets. For instance, as Paragraph 6.1(m) provides:

Seller has heretofore delivered to Purchaser its tax returns for the years 2001, 2002 and 2003, and Seller *represents* that the volume of revenue set forth therein (\$800,000; \$1,200,000; and \$2,300,00 [sic] respectively), *is accurate* for the years represented. Seller represents that the firm listed on said tax returns, American Legal Processing Inc., is the same firm as the Seller herein. Seller also represents that the information contained in Seller's general ledger and trial balance is accurately reflected in the aforesaid tax returns. Seller also represents that the number of services performed by Seller were as follows, plus or minus fifteen (15%) percent and subject to verification prior to Closing: 2002 - 21,529; 2003 - 39,683; and January 1, 2004-May 31, 2004 - 30,292. *Seller recognizes that these representations are a material inducement for Purchaser to consummate this Agreement.*

(*Id.* at 9 [emphasis added]).

Paragraph 6.1(o) provides:

No Misleading Statements. *No covenant, representation or warranty by the Seller in this Agreement, or in any lists, schedules, Exhibits or statements furnished or to be furnished to Purchaser pursuant hereto, or in connection with the transactions contemplated hereby, contains any untrue statements of a material fact or omits to state a material fact necessary to make the statements contained herein not misleading.* The Seller has herein disclosed to Purchaser all facts material to the assets, and business of the Seller.

(*Id.* at 10 [emphasis added]).

Paragraph 16.6 provides:

This Agreement and the exhibits hereto contain the full understanding of the parties with respect to the subject matter hereof and *there are no representations, warranties, agreements or understandings other than as expressly contained herein.*

(*Id.* at 17 [emphasis added]).

It is obvious that the plaintiffs relied upon the expressed representations found in section 6 as well as in the other sections of the Purchase Agreement in deciding to purchase the defendants' assets. Contrary to defendants' assertions that the plaintiff had all necessary information to make an informed decision, the evidence of three law firms that represent about 80% of ALPI's business provided affidavits of misrepresentation (*see Singler Aff.*, Exs. 3, 4, 5) shows that the defendants may have misrepresented material facts "necessary to make the statements contained" in the Purchase Agreement not misleading. Such representations made by the defendants allegedly were justifiably relied upon by the plaintiffs, and, as such, constitute a claim of fraudulent inducement and fraud.

These sections of the Purchase Agreement provide specific representations the defendants made to the plaintiffs in inducing the plaintiffs to purchase the assets of ALPI (*see Parker East 67th Associates, L.P., v Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York*, 301 A.D.2d 453, 454 [1st Dept 2003]; *see also Cotton Field, Inc. v Samsung Am., Inc.*, 295 AD2d 259, 260 [1st Dept 2002]). In giving all favorable inferences to the non-movant, the court finds that the plaintiffs have made viable claims for fraudulent inducement and common law fraud.

2. *Restatement of Breach of Contract Claim*

In the alternative, the defendants claims that fraudulent inducement and common law fraud are merely restatements of the breach of contract claim against the defendants and, as such, should be dismissed.

A fraud claim, as well as a claim for fraudulent inducement, will be dismissed where it is redundant to the breach of contract claim (*see First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999]). Conversely, such claims “will be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract” (*id.*, citing *Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 118 [1st Dept 1998]).

The First Department provides an example in *First Bank of the Americas* pertinent to the case at hand. As the First Department explains:

For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff’s breach of contract claims (*RKB Enters. v Ernst & Young*, 182 AD2d 971, 972-73 [3d Dept 1992]). Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty (*Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]).

(257 AD2d at 291-92). Here, the plaintiffs have sufficiently stated a cause of action for fraud and fraudulent inducement separate from the breach of contract claim. The plaintiffs allege that they were induced to enter into this transaction due to the material facts provided, and aver that they did in fact rely on these false representations and concealment of these material facts to their detriment (*see* Complaint, ¶¶ 61-68). In the case at bar, it was the misrepresentation of present facts, such as

the representations made as to the volume of ALPI's business (*id.* at ¶ 22), and not any future intent, that induced the plaintiffs to agree to the underlying contract. Accordingly, the plaintiffs have shown that the defendants breached a "separate [] duty," and, as such, have made viable claims for fraud and fraudulent inducement (*First Bank of the Americas*, 257 AD2d at 292). Because a representation is a statement of present fact, a fraud claim may be based on those misrepresentations, notwithstanding the existence of a breach of contract claim (*France & Canada S.S. Corp. v Berwind-White Coal Mining Co.*, 229 NY 89, 94-95 [1920]).

For the foregoing reasons, the defendants' motion to dismiss the causes of action for fraud and for fraudulent misrepresentation pursuant CPLR 3211(a)(7) is denied.

B. Rescission

The defendants also move to dismiss the plaintiffs' first cause of action for rescission, arguing that plaintiff's allegation of "improper actions of the defendants" (*see* Complaint, ¶ 56) is not enough to properly plead a cause of action for rescission, whether in contract or in fraud.

Rescission, as a matter of law, lies in equity and is a matter of discretion (*see Rudman v Cowles Communications, Inc.*, 30 NY2d 1, 13 [1972]). It is available "only where there is lacking [a] complete and adequate remedy at law and where the status quo may be substantially restored" (*id.*; *Alper v Seavey*, 9 AD3d 263, 264 [1st Dept 2004]). In order to justify the court's intervention to rescind a contract, a party must allege either fraud in the inducement of the contract or a breach of the contract which substantially defeats the purpose thereof (*see Callanan v Keeseville, Ausable Chasm & Lake Champlain R. R. Co.*, 199 NY 268, 284 [1910]; *Babylon Assocs. v County of Suffolk*, 101 AD2d 207, 215 [2d Dept 1984]). The insufficient pleading of a relevant cause of action to necessitate rescission "necessarily dooms the rescission cause of action as well since . . . it is

predicated upon the viable assertion of at least one of those claims” (*Gall v Summit, Rovins & Feldesman*, 222 AD2d 225, 226 [1st Dept 1995]).

Here, in according the benefit of inference to the non-movant and taking all the facts as alleged in the Complaint as true, the court finds that the plaintiffs have made out a viable claim for rescission of the various contracts entered into between the parties. In reading the Complaint, which is given liberal construction in a motion to dismiss, the plaintiff has made cognizable claims of fraud and fraudulent inducement. Furthermore, as noted below, ZMOD has made out a sufficient claim for breach of contract. Accordingly, because the relevant causes of action justifies intervention by the court to rescind these agreements, the motion to dismiss the cause of action to rescind the contracts pursuant to CPLR 2311(a)(7) is denied.

C. Breach of Contract

The defendants move to dismiss the cause of action for breach of contract for failure to state a cause of action. ALPI and Levine argue that because the plaintiffs failed to allege that the defendants failed to perform any of their obligations pursuant to the sale of the purchased assets, and, instead, alleges “misrepresentation, concealment of material facts, failure to provide services to plaintiffs, and antagonistic dealing with clients after the execution of the Purchase Agreement” (*see* Complaint ¶ 59), the plaintiffs have failed to state the requisite elements to a breach of contract action. The plaintiffs argue that they have adequately alleged breach of contract, contending that there was a breach of the contract where the defendants promised to procure services from nine clients and failed to do so. Further, the plaintiffs argue that Levine failed to provide services to plaintiffs as a consultant, and, as such, violated the Purchase Agreement. Finally, the plaintiffs argue that there are breaches of warranties on the part of the defendants, and, as such, a breach of contract.

In order to plead a cause of action for breach of contract, the pleading must clearly specify the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant (*see Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1994]; *Leigh Mgmt. Assocs. v Weinstein*, 251 A.D.2d 225, 226 [1st Dept 1998]; *Furia v Furia*, 116 AD2d 694 [2d Dept 1986]).

In giving all favorable inferences to the non-movant, the plaintiff has made out a viable claim for breach of contract. There is no dispute that there is a contractual agreement between the plaintiff and the defendant, nor is there is any serious dispute that there was performance on the part of the plaintiffs. Here, ZMOD and Singler have also asserted breaches of the contract where the defendants failed to procure services for the plaintiffs, as well as failure by Levine to act as a consultant under the Purchase Agreement. Such allegations, if taken as true, would constitute valid breaches of the Purchase Agreement. Accordingly, there is a cognizable claim for breach of contract.

In addition, the plaintiffs claim breach of warranties as another basis for their breach of contract claim. While the defendants argue that there could not have been reasonable reliance, which is required for a breach of warranty claim (*see CBS Inc. v Ziff-Davis Publishing Co.*, 75 NY2d 496, 503 [1990]), the court finds that the plaintiffs have properly plead such a claim. The plaintiffs claim that they have relied upon those warranties and allege breach on the part of the defendants. Such allegations are enough in a motion to dismiss to warrant a denial.

Accordingly, the defendants' motion to dismiss the cause of action for breach of contract is denied.

D. *Breach of the Covenant of Good Faith and Fair Dealing*

The defendants next move to dismiss the cause of action for breach of the covenant of good

faith and fair dealing, arguing that it is duplicative of the breach of contract claim.

A duty of good faith and fair dealing is implied in every contract. However, a breach of that duty will be dismissed if the conduct allegedly violating the implied covenant is also predicate for a claim for breach of covenant of an express provision of the underlying contract (*see Engelhard Corp. v Research Corp.*, 268 AD2d 358, 358-59 [1st Dept 2000], citing *In re Houbigant, Inc. v ACB Mercantile*, 914 F Supp 964, 989 [SD NY 1995]; *see also Cornhusker Farms, Inc. v Hunts Point Coop. Mkt., Inc.*, 2 AD3d 201, 206 [1st Dept 2003]).

Even in reading the Complaint liberally for the non-movants, the court agrees that the underlying cause of action in plaintiffs' claim for breach of the covenant of good faith and fair dealing is duplicative of the breach of contract claim. The plaintiffs claim this "concerns the actions of Levine after closing of title, in which he acted antagonistically towards the clients, thereby further alienating them and contributing to the loss of their business, which therefore destroyed the purported fruits of the original contract" (*see* Pl. Memo of Law at 26). However, in the cause of action for breach of contract, the plaintiffs assert the same allegation, namely, that the defendants continued to have "antagonistic dealings with clients after the execution of the Purchase Agreement" (*see* Complaint ¶ 59), as well as a myriad of other allegations. Here, the court fails to see where the breach of contract claim and the breach of the covenant of good faith and fair dealing differ, as both claims arise from the same set of facts and result in the same set of damages.

Accordingly, the defendants' motion to dismiss the sixth cause of action for breach of the covenant of good faith and fair dealing under CPLR 3211(a)(7) is granted.

E. Unjust Enrichment

Finally, the defendants move to dismiss the plaintiffs' fifth cause of action for unjust

enrichment, arguing that the events that the plaintiffs allege as the basis for this cause of action arise out of the same subject matter encompassed by the Purchase Agreement. Because the plaintiffs have not opposed the motion to dismiss as to this cause of action, the motion to dismiss is granted.

CONCLUSION

Accordingly, it is hereby


ORDERED that the defendants' motion to dismiss the fifth cause of action for unjust enrichment and the sixth cause of action for breach of the covenant of good faith and fair dealing is granted, and are otherwise denied as to the remaining causes of action; and it is further

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: January 3, 2006

ENTER:



RICHARD B. LOWE, III, J.S.C.

FILED
JAN 05 2006
COUNTY CLERK
MEMPHIS