

Pringle v Diversified Constr. Sys., Inc.

2007 NY Slip Op 31904(U)

June 20, 2007

Supreme Court, Queens County

Docket Number: 0025497/2005

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

-----	Index
JOAN PRINGLE AND	No. 25497/05
KAREN BARNES,	
	Motion
Plaintiffs,	Date April 10, 2007
-against-	
	Motion
DIVERSIFIED CONSTRUCTION	Cal. No. 30
SYSTEMS, INC., D/B/A XL HOME	
IMPROVEMENTS, WAYNE DRINKWINE	Motion
AND MICHAEL SAVVIDES,	Seq. No. 2
Defendants.	

PAPERS
NUMBERED

Notice of Motion-Affid-Exhib.....	1-5
Answering Affid-Exhib.....	6-8
Reply.....	9-12

Plaintiffs commenced this action seeking to recover damages alleged to have been sustained due to breach of contract, misrepresentation and unjust enrichment with respect to home construction and remodeling work pursuant to a contract dated May 11, 2004.

Defendants Diversified Construction Systems, Inc. (Diversified) and Michael Savvides (Savvides) (collectively movants) move for an order dismissing with prejudice all claims as against defendant Savvides for lack of service of process, failure to comply with CPLR § 306 and for failure to state a cause of action; dismissing all claims as against defendant Diversified for failure to state a cause of

action; granting summary judgment pursuant to CPLR § 3019 against plaintiffs on all counterclaims for failure to answer within thirty days and deeming all counterclaims admitted; and granting judgment on all cross-claims as against defendant Wayne Drinkwine (Drinkwine) for failure to answer within thirty days pursuant to CPLR § 3019 and deeming all cross-claims admitted.

Contentions of the Parties

Movants' counsel asserts that the summons and complaint were never served upon defendant Savvides so that all causes of action as against him must be dismissed. No proof of service upon him has been filed with the court or sent to his counsel. On February 6, 2007, movants served plaintiffs' counsel with an answer with counterclaims and cross-claims and demands for a verified bill of particulars and discovery. As of the writing of the motion, March 16, 2007, no reply to the counterclaims had been received from plaintiffs and their time to reply has expired. Plaintiffs failed to appear at the preliminary conference on March 13, 2007 and cannot establish a reasonable excuse for the delay. More than twenty days have passed without a reply as required by CPLR § 3012(a). No answer to movants' cross-claims has been received from defendant Drinkwine, despite a written request therefor made pursuant to CPLR § 3011. Defendant Drinkwine has failed to serve an answer to the cross-claims within twenty days as required by CPLR § 3012(a).

Movants' counsel also argues that the complaint fails to state a cause of action as against defendant Savvides as there are no allegations that he committed any specific acts or exercised any control over the corporation to the extent necessary for a court to pierce the corporate veil. A cause of action is not stated against defendant Diversified as no allegations against it are set forth. Plaintiffs failed to plead that defendant Diversified ever entered into a contract with them so as to render it liable for the alleged breach of contract. The complaint merely states the corporate status and address. As there is no privity of contract between plaintiffs and defendant Diversified, all claims against it should be dismissed. The causes of action based on fraud do not set forth specific statements of fact.

Further, fraud does not lie where it only relates to a breach of contract. The causes of action based on negligent misrepresentation also lack specificity. Finally, punitive damages are unwarranted as they are not recoverable for an ordinary breach of contract.

Plaintiffs oppose the motion and argue that the motion is procedurally improper and fails to meet the evidentiary proof required under CPLR 3211 and 3212. The movants failed to submit an affidavit or a pleading verified by defendant Savvides averring or rendering evidentiary facts or proof in admissible form in support of the motion. Movants' attorney's affirmation by itself does not, as a matter of law, establish sufficient proof to warrant summary judgment. Even though movants' answer, counterclaims and cross-claims were captioned as verified, there was no verification by defendant Savvides. No proof or notice that a note of issue has been filed prior to the summary judgment motion has been shown. With respect to that branch of the motion seeking a default judgment on the counterclaims, plaintiff's counsel asserts that he had numerous contacts with movants' attorney. In good faith reliance on his representations and offers of settlement, plaintiffs' counsel withdrew a prior motion for default judgment. After receiving the answer with counterclaims, plaintiffs' counsel agreed to a settlement conference which was held on March 9, 2007. Although inconclusive, there were positive prospects of settling so that the parties stipulated to adjourn the preliminary conference scheduled for March 14, 2007 to April 16, 2007. Although plaintiffs' counsel had agreed to such adjournment to enable a settlement in this matter, movants' counsel served the subject motion for default and summary judgment on March 16, 2007. Further, the answer with counterclaims was not duly served as it was merely faxed to plaintiffs' counsel who did not waive due process requirements.

Plaintiffs' counsel argues that the complaint states a cause of action against defendant Diversified because agency principals operate to bind agents, employees, officers of a corporation, their employer or their principal. Being staff and/or employees of defendant Diversified, defendant Drinkwine's and defendant Savvides' actions during the scope of their employment bind their employer. The contract

clearly shows that it was between the plaintiffs and defendant Diversified.

Plaintiff Karen Barnes submits her affidavit in opposition to the motion. She states that she and her mother, plaintiff Joan Pringle, entered into a series of contractual binding agreements with defendant Diversified and on several occasions met with defendants Savvides and Drinkwine in their capacities as officers, agents and employees of the corporation. On many occasions and in correspondence, she was made to understand that defendants Drinkwine and Savvides were staff and/or employees of defendant Diversified. For over two years she demanded either a refund of her funds or the fixing of her house. All checks were made out to defendant Diversified.

In reply, movants' attorney asserts that no affirmation of service of process upon defendant Savvides has been provided. No answer with respect to the cross-claims has been received from defendant Drinkwine although a letter denying service was received on March 29, 2007. Plaintiffs failed to allege that defendants Drinkwine and Savvides entered into a contract with plaintiffs on behalf of defendant Diversified. The claims in the complaint are clearly solely as against the individual defendants. Plaintiffs are estopped from now arguing that said individuals were acting as agents when damages are sought against them individually. The proper party for plaintiffs to seek damages against is defendant Drinkwine against whom defendant Diversified has a federal action for fraud and conversion. Plaintiffs fail to set forth sufficient facts to justify piercing the corporate veil. There is no allegation that defendant Savvides exercised any control over defendant Diversified.

Defendant Diversified also asserts that the answer with counterclaims was properly served as per the annexed affirmation of service thereof. No extension of time to reply to the counterclaims was ever given and no settlement was ever effectuated. Even if taken as true, the allegations in the complaint do not allege any basis in law for judgment in plaintiffs' favor.

Decision of the Court

The motion by defendants Diversified and Savvides is denied as to that branch of the motion seeking dismissal as against defendant Savvides based upon lack of personal jurisdiction and failure to comply with CPLR 306. The motion is granted as to that branch seeking dismissal of the complaint as against defendant Savvides and dismissal of the claim for punitive damages based upon failure to state a cause of action. The motion is denied as to that branch seeking a default judgment on the counterclaims as against plaintiffs. Plaintiffs are granted leave to serve the reply to the counterclaims in the form proposed as annexed to the motion papers within 30 days of the entry date of this order. The motion is granted on default as to that branch seeking a default judgment on the cross-claims as against defendant Drinkwine. The matter will be set down for an assessment of damages with respect to defendant Drinkwine at the time of the trial of the entire action.

As to the claim of improper service of process, defendant Savvides has not submitted an affidavit denying proper service of process. The answer, with the affirmative defense of improper service, is verified by defendant Savvides' attorney. A review of the court records shows that an affidavit of service was filed on January 4, 2006. Absent a specific denial of service by defendant Savvides, said defendant has failed to rebut the presumption of proper service or even to raise an issue which would require a hearing. Doe v. North Shore University Hospital, 28 AD3d 603.

With respect to that branch of the motion seeking to dismiss the complaint for failure to state a cause of action, as noted by the court in International Oil Field Supply Services Corp., 35 AD3d 372: "On a CPLR 3211(a)(7) motion to dismiss, the facts alleged in the complaint must be accepted as true, and the court may freely consider additional facts contained in affidavits submitted by the plaintiff to remedy any defects in the complaint. Additionally, the plaintiff must be afforded the benefit of every possible favorable inference, as the court's function is limited to determining whether the facts alleged fit within any cognizable legal theory [citations omitted]. ' Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to

dismiss' (EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19, 799 NYS2d 170, 832 NE2d 26)."

Here, plaintiffs' complaint, the documentary evidence and plaintiff Karen Barnes' affidavit sets forth a sufficient basis to support the claims for breach of contract as against defendant Diversified. However, the claims based on misrepresentation and unjust enrichment as against the individual defendant Savvides must be dismissed. The allegations as against defendant Savvides based upon fraudulent and negligent misrepresentations and the claim for punitive damages are insufficient as a "cause of action to recover damages for fraud does not lie when the only fraud charged relates to a breach of contract (see, Marshall v. Farley, 21 AD3d 935, 800 NYS2d 760). Further, in opposition to Turner's prima facie demonstration of entitlement to judgment as a matter of law dismissing the plaintiff's claim for punitive damages, the plaintiffs failed to raise a triable issue that Turner's alleged conduct was so gross, wanton, or willful, or of such high moral culpability, as to warrant an award of such damages (see, Outside Connection v. DiGennaro, 18 AD3d 634, 795 NYS2d 669). Carle Place Union Free School District v. Bat Jac Construction, Inc., 28 AD3d 596."

Here, the allegations as against defendant Savvides relate to the underlying claim of the breach of the contract as between plaintiffs and defendant Diversified. Further, the statements in the complaint do not rise to the level of supporting a claim for punitive damages.

With respect to the counterclaims, the court noted in MMG Design, Inc. v. Melnick, 35 AD3d 823 that: "To successfully oppose the defendant's motion for leave to enter a default judgment upon the plaintiff's failure to serve a timely reply to his counterclaim, the plaintiff was required to demonstrate a reasonable excuse for its delay in serving a reply and a potentially meritorious defense (see Twersky v. Kasaks, 24 AD3d 657, 658, 808 NYS2d 366; Beizer v. Funk, 5 AD3d 619, 774 NYS2d 781; Bensimon v. Fishman, 242 AD2d 551, 664 NYS2d 726)."

In the instant case, plaintiffs' counsel has shown that there was no intent to abandon the action. It appears that

extensions of time to answer the complaint had been granted to movants as well as an adjournment of the preliminary conference due to ongoing settlement negotiations. Plaintiff Karen Barnes has submitted her affidavit with respect to the merits of the case and a proposed reply to the counterclaims verified by both plaintiffs. 65 North 8 Street HDFC v. Suarez, 18 AD3d 732. Therefore, plaintiffs are granted leave to serve the reply to the counterclaims, in the form proposed as annexed to the motion papers within 30 days of the entry date of this order. However, defendant Drinkwine has defaulted as to the cross-claims and on this motion. Therefore, that branch of the motion seeking a default judgment on the cross-claims as against defendant Drinkwine is granted on default.

Accordingly, the motion by defendants Diversified and Savvides is denied as to that branch of the motion seeking dismissal as against defendant Savvides based upon lack of personal jurisdiction and failure to comply with CPLR 306. The motion is granted as to that branch seeking dismissal of the complaint as against defendant Savvides and dismissal of the claim for punitive damages based upon failure to state a cause of action. The motion is denied as to that branch seeking a default judgment on the counterclaims as against plaintiffs. Plaintiffs are granted leave to serve the reply to the counterclaims in the form proposed as annexed to the motion papers within 30 days of the entry date of this order. The motion is granted on default as to that branch seeking a default judgment on the cross-claims as against defendant Drinkwine. The matter will be set down for an assessment of damages with respect to defendant Drinkwine at the time of the trial of the entire action.

Dated: June 20, 2007

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HON. DAVID ELLIOT