

Iorio v Northern Bldg. Prods., Inc.

2008 NY Slip Op 30477(U)

February 20, 2008

Supreme Court, New York County

Docket Number: 0601894/2007

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN PART 57
Index Number : 601894/2007

IORIO, ROBERT

vs
NORTHERN BUILDING PRODUCTS INC

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Notice of Motion/ and cross-motion ~~Order to Show Cause~~ ~~Affidavits~~ ~~Exhibits~~ ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1, 2, 2a</u>
<u>3, 4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion
are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED
FEB 22 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/20/08

Marcy S. Friedman
MARCY S. FRIEDMAN 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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
ROBERT IORIO,

Plaintiff(s),

- against -

Index No.: 601894/2007

NORTHERN BUILDING PRODUCTS, INC., and
ROBERT J. PECORELLA,

Defendant(s).

DECISION/ORDER

FILED
FEB 22 2008
NEW YORK
COUNTY CLERK'S OFFICE

_____ x

In this breach of contract action, defendants Northern Building Products, Inc. (“Northern”) and Robert Pecorella move to dismiss plaintiff’s complaint on the ground, among others, that the action is barred by the Statute of Frauds. Plaintiff cross-moves for a default judgment against defendants based on their failure to answer plaintiff’s amended complaint, and for sanctions.

As a threshold matter, the court holds that plaintiff’s cross-motion should be denied, as defendants elected to have their motion to dismiss addressed to the amended complaint. (See Sage Realty Corp v Proskauer Rose L.L.P., 251 AD2d 35 [1st Dept 1998]. See also DiPasquale v Sec. Mut. Life Ins. Co., 293 AD2d 394 [1st Dept 2002].)¹ While plaintiff did not agree to defendants’ election, he had a full opportunity to address the issues related to the amended complaint. Thus, due process concerns are not implicated. (See id.) Plaintiff’s claim for

¹The authority cited by plaintiff largely addresses the circumstances under which an appeal from a decision on a motion to dismiss a complaint will be mooted by service of an amended complaint. (See e.g. Munn v New York City Housing Auth., 202 AD2d 210 [1st Dept 1994]; Elegantc Leasing, Ltd. v Cross Trans Svc, Inc., 11 AD3d 650 [2d Dept 2004]; Titus v Titus, 275 AD2d 409 [2d Dept 2000].) This authority does not support plaintiff’s contention that defendants did not have the option to have their motion to dismiss addressed to the amended complaint.

sanctions based on defendants' continued maintenance of their motion to dismiss after the complaint was amended is therefore also without merit.

In support of their motion to dismiss, defendants argue that plaintiff's breach of contract claim is barred by two provisions of the Statute of Frauds. First, defendants contend that the complaint pleads an oral agreement for a commission to plaintiff for the sale of defendants' products, and that the agreement accordingly requires a writing under General Obligations Law ("GOL") § 5-701(a)(10). This statute requires a writing where the agreement:

Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.

The Statute "applies to various kinds of intermediaries who perform limited services in the consummation of certain kinds of commercial transactions." (Freedman v Chemical Constr. Corp., 43 NY2d 260, 266 [1977].) Accordingly, it will bar agreements in which the intermediary's services are "limited and transitory" and are "so evidently that of providing 'know-how' or 'know-who', in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise." (Id. at 267.)

As defendants correctly argue, the Statute of Frauds bars oral agreements for sales commissions – i.e., commissions to the plaintiff for referrals of customers for the defendant's products. (See e.g. Ghaffari v Rima Investors Corp., 266 AD2d 111 [1st Dept 1999], lv dismissed 95 NY2d 778 [2000].) The Statute also bars oral agreements for a "finder's fee." (Kaminer v

Wexler, 40 AD3d 405 [1st Dept 2007].) In contrast, where a complaint alleges facts which, if believed by the trier of fact, demonstrate that the plaintiff's role was more extensive than merely negotiating a business opportunity, and that the plaintiff "was to render a wide variety of services," the claim will withstand a motion to dismiss under GOL § 5-701(a)(10). (See Super v Abdelazim, 108 AD2d 1040, 1041-1042 [1st Dept 1985]. See also Streit v Bushnell, 424 F Supp2d 633 [SD NY 2006] [applying New York law]; Riley v N.F.S. Servs., Inc., 891 F Supp 972 [SD NY 1995] [applying New York law].)

Plaintiff's original complaint alleged that defendants agreed to pay plaintiff a commission for locating a buyer for defendant Northern's products and services. (Complaint, First Cause of Action.) Plaintiff's amended complaint alleges not merely that plaintiff procured a buyer for Northern's products but that his agreement with defendants provided for him to represent Northern "from initial customer contact through installation whenever Northern products were chosen by a customer." (Amended Complaint, ¶ 14.) The amended complaint further alleges that "[i]f an authorized Northern dealer installed Northern products, Mr. Iorio would maintain his relationship with the customer on behalf of Northern" (id.), and that "Mr. Iorio was responsible for persuading customers to choose Northern's products, and, once chosen by the customer * * * to make certain that the customer was furnished with Northern products that met the customer's expectations and that were in compliance with the contracts." (Id., ¶ 15.) Similarly, in his affidavit, plaintiff attests that his work for Northern "was as a full-customer service position as Northern's outside, sales and marketing representative, past the consummation of the agreement to purchase windows and doors ("the sale") all the way through installation and the completion of each project." (Iorio Aff., at ¶ 17.)

On the motion to dismiss, the court is required to afford the pleading a liberal construction, to accept the facts as alleged in the complaint as true, and to accord the plaintiff the benefit of every possible favorable inference. (See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002]; Leon v Martinez, 84 NY2d 83 [1994].) Moreover the court may consider the plaintiff's opposing affidavits to amplify the pleadings. (Rovello v Orofino Realty Co., 40 NY2d 633, 635 [1976]; Eastern Consol. Props., Inc. v Lucas, 285 AD2d 421, 422 [1st Dept 2001].)

Applying these standards, the court holds that plaintiff's role, under the agreement alleged in the amended complaint, was more extensive than merely negotiating a business opportunity, and included the services of a sales representative who was to render a variety of services to defendants' customers. On the above authority, the amended pleading is sufficient to withstand the branch of the motion to dismiss under GOL § 5-701(a)(10).

Defendants also assert that plaintiff's breach of contract cause of action is barred by GOL § 5-701(a)(1), the provision of the Statute of Frauds that requires an agreement to be in writing where the agreement "[b]y its terms is not to be performed within one year from the making thereof." It is well settled that "[t]he statute encompasses only those agreements which, by their terms, have absolutely no possibility in fact and law of full performance within one year." (Foster v Kovner, 44 AD3d 23 [1st Dept 2007] [internal citation and quotation marks omitted]; Freedman, 43 NY2d at 265.) Thus, contrary to defendants' contention, it is irrelevant that it was "unlikely or improbable" that the agreement would be performed within one year or that plaintiff acknowledges that he in fact worked on the subject project from 2003 through 2007. (See id. at 265.) The branch of the motion to dismiss under GOL § 5-701(a)(1) must accordingly also be

denied, given the absence of any showing that the parties' agreement "'by its terms' [was] not to be performed within a year." (See id.)

Defendants also fail to demonstrate that plaintiff's unjust enrichment and quantum meruit causes of action should be dismissed. Defendants correctly contend that when a breach of contract claim is precluded by the Statute of Frauds, a plaintiff may not circumvent the Statute by asserting claims based in quasi-contract. (See American-European Art Assocs. v Trend Galleries, Inc., 227 AD2d 170 [1st Dept 1996].) Here, however, as plaintiff's breach of contract claim is not barred by the Statute of Frauds, plaintiff's quasi-contract claims also are not barred. Further, plaintiff is not required to elect whether to pursue his contract or quasi contract claims at this early procedural juncture, as there is a dispute as to the existence of a contract between the parties. (See Frank v Sobel, 38 AD3d 229 [1st Dept 2007]; Wilmoth v Sandor, 259 AD2d 252, 254 [1st Dept 1999].)

Plaintiff's cause of action for a constructive trust should be dismissed. The amended complaint does not allege any facts to show that a fiduciary relationship existed between the parties, and thus fails to plead an essential element of a constructive trust. (See Matter of Gupta v Tech Gem Corp., 38 AD3d 445 [1st Dept 2007].)

Finally, plaintiff's cause of action against defendant Pecorella for breach of an alleged oral personal guaranty should also be dismissed. The amended complaint alleges that defendant Pecorella "personally guaranteed that Plaintiff IORIO would be paid 'every penny' that NORTHERN owes IORIO." (Amended Complaint, ¶ 63.) This claim is barred by the Statute of Frauds, as it does not plead any facts to show that the promise to guarantee the debt was an "independent duty of payment, irrespective of the liability of the principal debtor" or that the

guarantee was based on "new consideration" beneficial to the guarantor. (See Karl Ehmer Forest Hills Corp. v Gonzalez, 159 AD2d 613 [2d Dept 1990]; Carcy & Assocs. v Ernst, 27 AD3d 261 [1st Dept 2006].)

It is accordingly hereby ORDERED that defendants' motion to dismiss is granted to the extent that it is

ORDERED that plaintiff's fourth cause of action for a constructive trust is dismissed; and it further

ORDERED that plaintiff's second cause of action against defendant Pecorella is dismissed, and the Clerk is directed to enter judgment accordingly; and is further

ORDERED that plaintiff's remaining claims are severed and shall continue; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety; and it is further

ORDERED that the parties are directed to appear in Part 57 (80 Centre Street, Room 328) for a preliminary conference on Thursday, March 20, 2008 at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
February 20, 2008

Marcy Friedman
MARCY FRIEDMAN, J.S.C.
FILED
FEB 22 2008
NEW YORK
COUNTY CLERK'S OFFICE