

Redlyn Electric Corp. v Dean Elec. Co., Inc.

2009 NY Slip Op 31258(U)

June 1, 2009

Supreme Court, Nassau County

Docket Number: 011190-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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REDLYN ELECTRIC CORP., d/b/a
LOUIS SHIFFMAN ELECTRIC,
Plaintiff,

TRIAL/IAS PART: 25
NASSAU COUNTY

-against-

Index No: 011190-08

DEAN ELECTRIC CO., INC. and
THOMAS OLIVIA
Defendants.

Motion Seq. No: 1

Submission Date: 5/8/09

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The following papers having been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibit.....X**
- Defendants' Memorandum of Law.....X**
- Affirmation in Opposition and Exhibits.....X**
- Reply Affirmation.....X**

This matter is before the Court for decision on the Motion to Dismiss filed by Defendants Dean Electric Co., Inc. ("Dean") and Thomas Olivia ("Olivia") (collectively "Defendants") on August 21, 2008, which was submitted on May 8, 2009.¹ For the reasons set forth below, the Court grants Defendants' motion in part and denies it in part. Specifically, the Court 1) denies Defendants' motion to dismiss the first and second causes of action; 2) grants Defendants' motion to dismiss the third and fourth causes of action; and 3) denies Defendants' motion to dismiss the fifth cause of action, with leave to renew the motion as to that cause of action after

¹ This Court assumed responsibility for this motion on May 8, 2009.

discovery is completed.

BACKGROUND

A. Relief Sought

Defendants request an Order, pursuant to CPLR §§ 3002(b), 3013, 3014 and 3016(f), dismissing Plaintiff's Verified Complaint ("Complaint") as to both Defendants.

B. The Parties' History

In October 2007, Redlyn, a wholesale electrical supplier located in Lynbrook, New York, sold and delivered certain electrical goods and materials to Dean, an electric company located in Brooklyn, New York, at the request of Olivia, a corporate officer of Dean. The total value of the goods that Redlyn sold and delivered to Dean, and that Dean and Olivia used for certain electrical jobs, was \$109,148.49. In its Complaint, dated June 9, 2008, Redlyn alleges that the sum of \$109,148.49 is now due and owing for the goods it sold and delivered, and that prior to the commencement of this action, Redlyn rendered an accounting to Dean and Olivia in the sum of \$109,148.49, which sum went unpaid.

The Complaint contains five (5) causes of action: 1) Defendants owe Plaintiffs the sum of \$109,148.49, plus interest and costs, for goods that Plaintiff delivered to Defendants, for which Defendants have not paid; 2) prior to the commencement of the lawsuit, an account stated was rendered to Defendants in the sum of \$109,148.49, plus interest and costs; 3) in violation of Sections 70 through 72 of the Lien Law of the State of New York ("Lien Law"), Defendant Olivia knowingly misappropriated and diverted trust property through Defendant Dean, consisting of payment that Olivia collected from use of Plaintiff's materials, causing damages to Plaintiff in the sum of \$109,148.49; 4) Defendants engaged in racketeering activity, in violation of 18 U.S.C. § 1961 *et. seq.*, the Racketeering Influenced and Corrupt Organizations Act ("RICO"), that defrauded Plaintiff, thereby entitling Plaintiff to treble damages as a result of Defendants' conduct; and 5) as a result of Defendants' breach of their obligation to Plaintiff, Plaintiff has incurred counsel fees in pursuing its claim against Defendants, for which Plaintiff seeks compensation from Defendants.

With respect to the first cause of action, the Complaint alleges, specifically, that "[f]rom on or about October 9, 2007, to present, the plaintiff, at the request of the defendants, sold and delivered goods" in the amount of \$109,148.49, "no part of which has been paid which was duly

demanded and the same ignored.” The second cause of action incorporates the allegations regarding the first cause of action and alleges, further, that, prior to the commencement of the lawsuit, an account stated was rendered to Defendants in the sum of \$109,148.49. As to the third cause of action, Plaintiff incorporates the allegations in the first and second causes of action and allege, further, that Olivia 1) took materials from plaintiff for use in various electrical jobs; 2) collected payment from their use of plaintiff’s materials; and 3) failed to remit those funds to Plaintiff. In the fourth cause of action (the RICO count), Plaintiff incorporates the prior allegations and alleges, further, that “by use of the mails and other devices not now known to plaintiff, the defendants were able to divert business opportunities, customers and assets to [Dean] for the benefit of [Olivia].”

C. The Parties’ Positions

Defendants submit that 1) the first cause of action fails to provide a sufficiently detailed itemization of the goods sold and delivered, as required by CPLR § 3016; 2) the second cause of action fails to provide sufficient detail regarding the goods and materials delivered to Defendants, as required by CPLR § 3013; 3) the allegations in the third cause of action, regarding violations of the Lien Law, fail to state essential facts constituting the elements of that cause of action; 4) the allegations in the fourth (RICO) cause of action fail to provide sufficient detail regarding the offending conduct; 5) the fifth cause of action, seeking counsel fees, is without merit as there is no statutory authority for such an award, and the facts of the instant case do not warrant a discretionary award of counsel fees; and 6) all Plaintiff’s claims against Olivia are barred because Plaintiff was dealing with Dean as a disclosed principal and, therefore, Olivia has no personal liability.

Redlyn opposes Defendants’ motion on procedural and substantive grounds. First, Redlyn contends that Dean and Olivia’s motion to dismiss should be declared null. Redlyn maintains that, on July 8, 2008, when the parties stipulated that Dean and Olivia’s time to answer would be extended, Redlyn did not stipulate as to Dean and Olivia’s bringing of a motion during that extended period, but only as to an extension of their time to serve an answer to Redlyn’s verified complaint.

Should the Court entertain Defendants’ motion, Plaintiff opposes Defendants’ motion to dismiss, submitting that the first four causes of action clearly put Defendants on notice of the

goods sold and delivered, and the nature of Plaintiff's claims. With respect to Plaintiff's application for counsel fees in the fifth cause of action, Plaintiff affirms that there is an applicable contract provision that permits Plaintiff to request counsel fees if an account is brought to collection, and that Plaintiff will produce that documentation during discovery.

RULING OF THE COURT

A. Court's Consideration of Defendants' Motion

A stipulation that extends the time in which a defendant may answer also extends the time in which a party may bring a motion, unless contrary intent is clearly stated. *E.g., Tatar v. Port Authority*, 291 A.D.2d 554 (2d Dept. 2002). Here, the parties affirmatively agreed to extend Dean and Olivia's time to answer and there is nothing in the signed stipulation to indicate any contrary intent with regard to motion practice. Consequently, Dean and Olivia's motion to dismiss is proper and the Court will consider it.

B. Sufficiency of Complaint

1. First Cause of Action

In an action for goods sold and delivered, a plaintiff must demonstrate that on a certain date, it sold and delivered certain goods to the defendant at the defendant's request; that the goods were of reasonable value or agreed price; and that payment was demanded by the plaintiff, but not made. *See United Consolidated Industries v. Mendel's Auto Parts, Inc.*, 150 A.D.2d 768 (2d Dept. 1989). A plaintiff may elect to include with the pleadings a schedule of goods or services rendered, listing the individual goods, the date of each transaction, and the agreed value or price. *See CPLR* §3014. *See also*, Siegel, *Practice Commentaries*, McKinney's CPLR § 3016(b), C3016:9 (1991); and *Duban v. Platt*, 23 A.D.2d 660 (2d Dept. 1965), *aff'd*, 17 N.Y.2d 526 (1966).

Generally speaking, statements in a pleading must "give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR § 3013; and *Sullivan v. Sullivan*, 180 Misc.2d 433 (Sup. Ct. Suffolk Co. 1999). CPLR § 3016(f) provides, in part: "In an action involving the sale and delivery of goods, or the performing of labor or services, or the furnishing of materials, the plaintiff may set forth and number in his verified complaint the items of his claim and the reasonable value or agreed price of each." Where an itemized schedule is included in the pleadings in an action for goods sold and delivered, and sets forth the elements of the plaintiff's claim and

reasonable value of the alleged sum due, the pleading requirements of CPLR § 3016(f) are satisfied. See *O'Callaghan v. Republic Western Insurance Co.*, 269 A.D.2d 114 (1st Dept. 2000).

CPLR §§ 3013 and 3016(f) require only that pleadings be sufficiently particularized so as to provide notice of the transactions that the plaintiff intends to prove, and the material elements of each claim. CPLR § 3026 states that a pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment. *Components Direct, Inc. v. European American Bank and Trust Co.*, 175 A.D.2d 227 (2d Dept. 1991).

Where there is sufficient detail to provide a defendant with notice of an alleged transaction and the elements of the claims, a motion to dismiss is properly denied. *Chaudhry v. Abdair*, 261 A.D.2d 499 (2d Dept. 1999). However, where a plaintiff does not demonstrate how a figure has been calculated, and fails to produce any records to shed light on the alleged transactions between the plaintiff and defendant, the plaintiff has failed to meet its burden of proof as to the identity of the goods sold and delivered, and as to the amounts owing on the open account. *United Consolidated Industries v. Mendel's Auto Parts, Inc.*, *supra* at 215.

Here, Redlyn was not required to submit an itemized schedule of goods or transactions in its pleadings. CPLR § 3016(f). Redlyn would have been better served, however, by demonstrating how the sum of \$109,148.49, allegedly due and owing to Redlyn, was calculated, and by producing a record to prove the alleged transactions between Dean and Olivia and Redlyn (*see Neuman Distributors, Inc. v. Falak Pharmacy Corp.*, 289 A.D.2d 310, 311 (2d Dept. 2001) to meet the pleading requirements of CPLR § 3016(f). Nevertheless, the Court concludes that the allegations in the Complaint, though bare, provide sufficient detail to provide Dean and Olivia with notice of the alleged transactions and the elements of the claim. See CPLR §§ 3016(f) and 3013; and *Chaudhry v. Abdair*, *supra*. Accordingly, the Court denies Defendants' motion to dismiss the first cause of action.

2. Second Cause of Action

For an action on an account stated, where the parties have agreed that the defendant owes the plaintiff a certain amount of money on an account, the plaintiff must prove that 1) there has been an accounting of the alleged debt; 2) there is a specific balance due to the plaintiff by the defendant; 3) the defendant expressly or impliedly promised to pay the plaintiff; and 4) the defendant has not paid. See *Bock v. Breindel*, 5 A.D.2d 1007 (2d Dept. 1958); *Tridee Assoc., Inc. v. Board of Educ.*

of *City of New York*, 22 A.D.3d 833 (2d Dept. 2005); and *United Consolidated Industries v. Mendel's Auto Parts, Inc.*, *supra*.

Courts permit recovery on an account stated theory because in such a case, the parties have, by their own conduct, evidenced an agreement as to the balance of a debt. *See Reisman, Peirez & Reisman, L.L.P. v. Gazzara*, 15 Misc. 2d 1113 (A) (Sup. Ct. Nassau Co. 2007). In determining whether there is a viable account stated cause of action, a court must consider whether the defendant has objected to the account within a reasonable time (*Id.*), and whether the account stated is the product of fraud or mistake, which renders it unenforceable as a matter of law. *Rodkinson v. Haecker*, 248 N.Y. 480 (1928). An account stated is not synonymous with open or running account. *See Romeo v. Bimco Industries Inc.*, 57 A.D.2d 947 (2d Dept. 1977).

To prove an account stated, a plaintiff need not show details of the original debt, but only that the defendant received the account and kept it for reasonable time without objection. *United Consolidated Industries v. Mendel's Auto Parts, Inc.*, *supra*. The defendant has the burden to prove fraud, mistake, or that it never accepted the account stated. *Id.*

Dean and Olivia contend that Redlyn has provided no itemized schedule of the account stated in its pleadings, and that Redlyn fails to set forth the date, time, quantity, and accepted price of the goods and materials as required by CPLR § 3013. Dean and Olivia maintain that Redlyn's single, conclusory allegation that Dean and Olivia owe Redlyn \$109,148.49 upon an account stated is insufficient to satisfy the notice requirement of CPLR § 3013. The Court declines to adopt this conclusion.

Pleadings must consist of "plain and concise statements," and each paragraph in a complaint must contain "a single allegation." CPLR § 3014. Essential facts giving notice of a claim must appear on the face of the pleading, and conclusory allegations will not suffice. *See* CPLR § 3013; and *DiMauro v. Metropolitan Suburban Bus Auth.*, 105 A.D.2d 236 (2d Dept. 1984). Prejudice to the defendant may exist when a plaintiff fails to conform to the requirements of CPLR § 3013. "Prejudice has been said to arise, *e.g.*, where a defendant 'has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.'" *Id.* at 240 citing *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981), *rearg. den.*, 55 N.Y.2d 801 (1981).

CPLR §§ 3013 and 3014 establish the primary rules for pleading. Inartful pleadings may

be overlooked if a proper cause of action may be gleaned from the “four corners” of the complaint, but courts cannot ignore a pleading that fails to set forth a *prima facie* cause of action. *Sullivan v. Sullivan, supra* at 380.

The Courts concludes that, although they are not detailed and lack specificity, the allegations in Redlyn’s pleadings comply with the requirements of CPLR § 3013, and Redlyn states the essential facts constituting the material elements of a cause of action for an account stated. *See Professional Health Services, Inc. v. City of New York*, 34 A.D.2d 918 (1st Dept. 1970). Accordingly, the Court grants Defendants’ motion to dismiss Redlyn’s second cause of action.

3. Third Cause of Action (Lien Law)

Article 3-A of the Lien Law is titled “Definition and Enforcement of Trusts.” § 70(1) of that Article, titled “Definition of Trusts,” provides in pertinent part as follows:

The funds described in this section received by an owner for or in connection with an improvement of real property in this state, including a home improvement loan, or received by a contractor under or in connection with a contract for an improvement of real property, or home improvement, or a contract for a public improvement in this state, or received by a subcontractor under or in connection with a subcontract made with the contractor for such improvement of real property including a home improvement contract or public improvement or made with any subcontractor under any such contract, and any right of action for any such funds due or earned or to become due or earned, shall constitute assets of a trust for the purposes provided in section seventy-one of this chapter.

Section § 71(1) provides in pertinent part:

The trust assets of which an owner is trustee under subdivisions five(a) to five(f), inclusive, of section seventy of this chapter shall be held and applied for payment of the cost of improvement. The trust assets of which an owner is trustee under subdivision five(g) of section seventy of this chapter shall be held and applied for payment of the cost of improvement and, in addition, for the purposes of the further trust provided in section seventy-one-a of this chapter.

A reading of these provisions, as well as related provisions of Article 3-A, strongly suggests that this Article relates to construction and public improvement projects, and does not apply to the transaction in the matter *sub judice*. Courts have held that Article 3-A of the Lien Law creates trust funds out of certain construction payments or funds to assure payment of

subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction. *Broadway Houston Mack Development v. Kohl et al.*, 22 Misc. 3d 1001, 1007 (Sup. Ct. Suff. Co. 2008), citing *Aspro Mechanical Contracting, Inc. v. Fleet Bank, N.A.*, 1 N.Y.3d 324 (2004). It is well settled, however, that the primary purpose of Article 3-A is to ensure that those who have “directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor receive payment for the work actually performed.” *Broadway Houston* at 1007, citing *RLI Insurance Co. v. New York State Dept. of Labor*, 97 N.Y.2d 256 (2002), quoting *Canron Corp. v. City of New York*, 89 N.Y.2d 147 (1996).

The Court concludes, based on the allegations in the Complaint as well as the applicable statutes and case law, that Plaintiff has not established that the trust provisions of Article 3-A are applicable to the matter at bar. Accordingly, the Court grants Defendants’ motion to dismiss the third cause of action. In light of the Court’s dismissal of the third cause of action, the Court need not address the issue of Olivia’s personal liability for an alleged breach of trust by Dean, a disclosed principal, as to Plaintiff.

4. Fourth Cause of Action (RICO)

The elements of a claim under RICO must be pled with particularity. *See* 18 U.S.C. §§ 1961-1968. To establish a RICO cause of action, plaintiff must prove the existence of an “enterprise” (18 U.S.C. § 1961[4]), and a pattern of “racketeering activity.” 18 U.S.C. 1961-1962. The furthering of a criminal enterprise by a pattern of racketeering activity violates RICO. *See, U.S. v. Phillips*, 664 F.2d 971, 1014, *cert. den.*, 459 U.S. 906 (1982). Anyone injured in his business or property by a violation of 18 U.S.C. § 1962 may bring a private action under 18 U.S.C. § 1964(c), which provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

The Court concludes that Plaintiff has failed to plead his RICO claim with sufficient particularity. Accordingly, the Court dismisses the fourth cause of action.

5. Fifth Cause of Action

Attorney's fees are an incident of litigation and are not recoverable unless a specific provision of a contract or statute so provides. *See Hooper Assocs. v. AGS Computers*, 74 N.Y.2d 487, 491 (1989); and *Levine v. Infidelity, Inc.*, 2 A.D.3d 691 (2d Dept. 2003).

Redlyn alleges that as a result of Dean and Olivia's breach of trust, it has been forced to expend attorneys' fees in pursuing this action. Redlyn offers no proof that the parties' contract provided that Dean or Olivia would pay Redlyn's counsel fees in the event of litigation between the parties. In its opposition, Redlyn contends that it has knowledge of a contractual provision entitling it to attorneys' fees in this action, but that it has not "been asked" to produce such provision and will produce that documentation during discovery. Under the circumstances, the Court denies Defendants' motion to dismiss the fifth cause of action, with leave to renew after discovery is completed.

The Court directs counsel to appear before the Court for a preliminary conference on July 28, 2009 at 9:30 a.m.

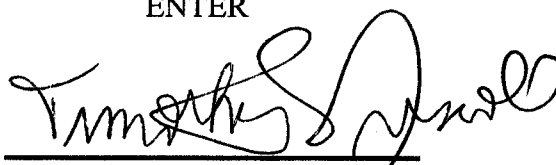
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

June 1, 2009

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUN 04 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**