

Morawiec v Royal Precast Concrete, Inc.

2009 NY Slip Op 31305(U)

June 1, 2009

Supreme Court, Nassau County

Docket Number: 0703-08

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
EDWARD MORAWIEC,

Plaintiff,

-against-

**ROYAL PRECAST CONCRETE, INC., ROYAL
PRECAST CONCRETE CORP. AND
WILLIAM KOMAZANSKI**

Defendants.

-----x

**TRIAL PART: 19
NASSAU COUNTY**

INDEX NO: 703/08

MOTION SEQ. NO: 01

SUBMIT DATE: 5/14/09

The following papers having been read on this motion:

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Motion by plaintiff, Edward Morawiec (“Morawiec”), for an Order, pursuant to CPLR §3212, granting summary judgment and directing the entry of judgment in the sum of \$30,000.00 plus interest from April 8, 2007, against the defendants; and,

Cross motion by defendants, Royal Precast Concrete Inc., Royal Precast Concrete Corp. (collectively referred to herein as “Royal”), and William Komazanski (“Komazanski”), for an Order, pursuant to CPLR §3212, granting summary judgment dismissing plaintiff’s complaint, and directing the entry of judgment in favor of defendant, Royal, on its counterclaims in the sum of \$22,752.75 plus interest from September 24, 2007; the motions are determined as herein set forth below.

This action was commenced by plaintiff, Edward Morawiec against defendants, Royal and Komazanski, with regard to the renovation of plaintiff’s residence. The complaint alleges four theories of recovery; to wit: breach of contract, unjust enrichment, conversion, and breach of fiduciary duty. Defendants generally deny the allegations in the amended complaint and interpose

ten affirmative defenses including improper parties, corporate shield, equitable estoppel, wrongful termination of the contract and unclean hands. Defendants also assert four counterclaims against the plaintiff: the first and second are premised on breach of contract; the third is based upon the value of goods and services performed; and the fourth counterclaim seeks damages based on plaintiff's breach of the implied covenant of good faith and fair dealing in the course of performance.

The following facts are undisputed:

On August 8, 2007, the parties entered into a contract whereby defendant, Royal agreed to provide goods, labor and materials to the plaintiff in connection with the renovation of his residence. The parties agree that Royal's obligations and duties to the plaintiff were set forth in the contract between the parties. It is undisputed that the plaintiff paid the defendant the sum of thirty thousand dollars (\$30,000.00) pursuant to the terms of the contract. Plaintiff has since then demanded the return of said sum of money which, it is undisputed, has not been returned by the defendant, Royal.

With the exception of these bare facts, the parties herein disagree as to virtually every nuance surrounding their contractual arrangement. Nevertheless, the parties herein move, at this juncture, for summary judgment.

Essentially, plaintiff claims that after accepting the thirty thousand dollars (\$30,000.00) deposit, the "defendants failed to provide any of the contractually required labor and/or materials, instead converting the aforesaid payment and failing to provide [him] with any services and/or materials whatsoever in consideration thereof" (*Plaintiff's Aff. In Support of Motion*, ¶6). Plaintiff maintains that the defendants breached their contract with him and thus, he is entitled to a return of his \$30,000.00 deposit.

Defendants, in turn, claim that after closely monitoring and approving the work commenced by the defendants, plaintiff, without cause or justification, terminated and thus breached the contract with the defendants on September 24, 2007. Defendants claim that they are entitled to retain the \$30,000.00 deposit and are further entitled to recover their lost profits and damages.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate

determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2nd Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, 68 NY2d 320).

However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id.*). Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 NY2d 557, 562) even if alleged by an expert (*Alvarez v Prospect Hospital*, *supra*; *Aghabi v. Sebro*, 256 AD2d 287).

To the extent that both parties advance identical claims against each other, including for breach of contract, said claims will be addressed simultaneously herein.

To establish a cause of action for breach of contract, one must demonstrate: (1) the existence of a contract between the plaintiff and defendant; (2) consideration; (3) performance by the plaintiff; (4) breach by the defendant; and (5) damages resulting from the breach (*Furia v. Furia*, 116 AD2d 694 [2nd Dept. 1986]). While the existence of a contract between the plaintiff and defendant, and the contractual consideration, are not in dispute, the “he-said she-said” stories proffered by the parties as to their performance or lack thereof and their resulting breach, precludes this Court from awarding summary judgment on this cause of action.

“[T]o prevail on a claim of unjust enrichment, a Plaintiff must establish that the Defendant benefitted at the Plaintiff’s expense and that equity and good conscience require restitution” (*Whitman Group Realty, Inc. v. Galano*, 41 AD3d 590, 593 [2nd Dept. 2007]), *citing Kaye v. Grossman*, 202 F.3d 611, 615-616 [2nd Cir. 2000]; *City of Syracuse v. R.A.C. Holding*, 258 AD2d 905, 906 [1999]). However, “[r]ecovery for unjust enrichment is barred by a valid and enforceable contract” (*Whitman Group Realty, Inc. v. Galano*, *supra*, *citing Samiento v. World Yacht Inc.*, 38 AD3d 328, 329 [1st Dept. 2007]; *Start v. City of New York*, 31 AD3d 530, 531 [2nd Dept. 2006]). In this case, plaintiff’s second cause of action sounding in unjust enrichment is duplicative of his first

cause of action sounding in breach of contract. Accordingly, to the extent that this Court has denied summary judgment as a matter of law on plaintiff's first cause of action for breach of contract, the parties' motions are also denied as to their unjust enrichment claims.

Plaintiff's third cause of action sounds in conversion. To establish a cause of action for conversion, plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and that defendant exercised an unauthorized dominion over the thing in question to the exclusion of plaintiff's rights (*Eight in One Pet Products v. Janco Press, Inc.*, 37 AD3d 402 [2nd Dept. 2007]). Money may be the subject of conversion if it is specifically identifiable and there is an obligation to return it or treat it in a particular manner (*Hoffman v. Unterberg*, 9 AD3d 386, 388 [2nd Dept. 2004]). When funds are provided for a particular purpose, the use of those funds for an unauthorized purpose constitutes conversion (*Hoffman v. Unterberg, supra*). Here, as there remains a question of fact as to the parties' performance (or lack thereof), there is a question as to the obligation of the defendants to return it to the plaintiff. Accordingly, plaintiff's motion for summary judgment on this third cause of action is also denied.

Finally, plaintiff's last cause of action is for the breach of fiduciary duty. Here, plaintiff claims that defendants owed a fiduciary duty to the plaintiff to act in good faith and to ensure that their services and materials would be provided in exchange for the \$30,000.00 payment which they received from the plaintiff. Plaintiff claims that the defendants breached their fiduciary duty to him by failing to provide the plaintiff with any labor and/or materials whatsoever in consideration of the \$30,000.00 payment which defendants accepted in bad faith from the plaintiff.

A fiduciary relationship exists when one party "... reposes confidence in another and relies on the other's superior expertise or knowledge (citations omitted)" (*WIT Holding Corp. v. Klein*, 282 AD2d 527, 529 [2nd Dept. 2001]). Arm's length business transactions do not give rise to fiduciary relationships (*Id.* at 529; *see also, Wiener v. Lazard Freres & Co.*, 241 AD2d 114 [1st Dept. 1998]). The relationship between Royal and Morawiec is contractual. Thus, in that respect, while plaintiff's motion for summary judgment is denied as to his last cause of action, defendant's motion for summary judgment dismissal of plaintiff's fourth cause of action is granted.

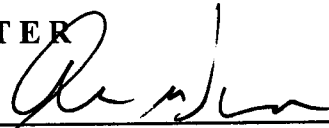
Turning to defendants' cross motion for summary judgment on their counter claims, which are in large part, identical to plaintiff's causes of action, to the extent that this Court has determined

that there remain issues of fact as to plaintiff's first three causes of action, summary judgment is also denied to the defendant on his first three counterclaims.

Defendants' motion for summary judgment on their fourth counterclaim for damages based upon plaintiff's breach of the implied covenant of good faith and fair dealing in the course of performance, is also denied and the counterclaim is dismissed. "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Dalton v. Educational Testing Serv.*, 87 NY2d 384, 389 [1995]), which precludes a party from doing "anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v. Educational Testing Serv.*, *supra*). A separate cause of action for breach of the implied covenant of good faith and fair dealing is duplicative of the a cause of action for breach of contract and thus, New York does not recognize a separate cause of action for violation of the implied covenant of good faith and fair dealing (*Cohen v. Nassau Educators Fed. Credit Union*, 37 AD3d 751 [2nd Dept. 2007]; *Jacobs Private Property, LLC v. 450 Park LLC*, 22 AD3d 347 [1st Dept. 2005]). Accordingly, defendants' last counterclaim is herewith dismissed.

This shall constitute the decision and order of this Court.

DATED: June 1, 2009

ENTER

HON. ARTHUR M. DIAMOND
J. S.C.

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ENTERED

JUN 10 2009
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