

**Scarsini Interiors, Inc. v Just In Time Furniture
Warehouse, Inc.**

2009 NY Slip Op 31702(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 100920/2009

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 100920/2009
SCARSINI INTERIORS, INC.
 vs.
JUST IN TIME FURNITURE
 SEQUENCE NUMBER : 001
 CHANGE VENUE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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

FILED
 JUL 31 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

*motion (s) and cross-motion(s)
 decided in accordance with
 the annexed decision/order
 of even date.*

PC to be held on 10/1/09 @ 9:30am.

Dated: 7/29/09

 J.S.C.

JUDITH J. GISCHE, J.S.C.
 Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 10

-----X
SCARSINI INTERIORS, INC., d/b/a CASABELLA,

Plaintiff,

-against-

JUST IN TIME FURNITURE WAREHOUSE, INC.,
DAVID DAMAGHI, and,
EBENEZER LARTEY.

Defendants.
-----X

Decision/Order

Index No.: 100920/2009

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Def. not. mot. [dis COA 2&4 & ven.], affirm (AKP), affid (UC) exhibts.....	1
Plt. not. cros-mot. [amd. comp.]	2
Plt. affirm. in oppos. to def. mot. (JTAR)	3
Affid. in oppos. to def. mot. (UC), exhibts.....	4
Def. affirm. supp. of mot (AKP), exhib.....	5

FILED
JUL 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

Numbered

Upon the foregoing papers, the decision and order of the court is as follows:

This action is for breach of contract, unjust enrichment, goods sold and delivered and fraud. Defendants, *Just In Time Furniture Warehouse, Inc.* ("Just in Time"), David Damaghi ("Damaghi"), and Ebenezer Lartey ("Lartey") (collectively "defendants") move, pre-answer, to dismiss the unjust enrichment claim, and the fraud claim. CPLR § 3211(a)(1) and (7). Defendants also move for change of venue for trial to Bronx County. CPLR § 511(b). Plaintiff Scarsini Interiors, Inc., d/b/a Casabella ("Scarsini"), opposes all aspects of the motion and has cross-moved for leave to amend its complaint. CPLR § 3025(b).

Plaintiff and Just in Time are each a New York corporation dealing in furniture. Damaghi and Lartey are shareholders and seemingly employees at Just in Time, although their exact roles are unclear at this time.

The following claims are based upon the allegations contained in the Verified Complaint, verified by Umberto Calastri ("Calastri"), Treasurer and Agent for Scarsini, and documentary evidence.

Plaintiff alleges that Just in Time, through representations by Damaghi and/or Lartey, entered into an agreement ("the Agreement") on or about August 19, 2008. Plaintiff claims that, in the Agreement, Damaghi and/or Lartey, acting as an agent/the agents for Just in Time, agreed to pay \$52,884.00 for the furniture and other goods. Plaintiff also agreed, under the Agreement, to deliver the furniture and other goods to locations requested by Just in Time. Just in Time would pay for the furniture pursuant to the Agreement, in installments of equal amounts at the end of September, 2008, at the end of October, 2008, and at the end of November, 2008.

On ten separate occasions between August 20 and September 29, 2008, plaintiff delivered furniture to locations as requested by Just in Time. Plaintiff invoiced Just in Time for each delivery.

Plaintiff also states that on August 27, 2008, it sold and delivered furniture and other goods to Just in Time, invoiced at \$6,455.00. Plaintiff states Just in Time paid \$4,000.00 as partial payment on that invoice. Plaintiff claims no other payments, at any time, were made pursuant to the Agreement or any other invoices. Plaintiff alleges it made written demands for payment from Just in Time, but it was never paid.

Plaintiff claims Just in Time breached the Agreement, was unjustly enriched, and did not pay for goods sold and delivered. (first, second, and third causes of action, respectively). Plaintiff also claims that Damaghi and Lartey committed fraud by falsely representing their intention to pay pursuant to the Agreement. (fourth cause of action).

Arguments of Parties

Defendants seek to dismiss the second cause of action for unjust enrichment because the Agreement constitutes a valid contract, where defendants agreed to purchase furniture and other goods from plaintiff for approximately \$15,000.00. Defendants claim the relief plaintiff seeks is reserved only for circumstances where no valid contract exists. Plaintiff argues that the Agreement was an oral contract with unclear terms; therefore, it may proceed on both breach of contract and unjust enrichment theories.

Defendants seek to dismiss the fourth cause of action, claiming the defendants "made no representations aside from the terms contained" in the Agreement and that the \$4,000.00 partial payment is evidentiary proof that the defendants did not fraudulently enter the agreement. Plaintiff claims Damaghi and/or Lartey never intended to pay pursuant to the Agreement and fraudulently represented to it that they could pay "ASAP" for all furniture and goods.

Relying on a computer print out from the New York Department of State showing a Suffolk County address for plaintiff, defendants seek a change of venue to Bronx County, arguing that neither the plaintiff's nor any defendants' residence are in New York County. Plaintiff contends a change of venue is inappropriate because its principal place of business is in New York County, and it relies on business documents with a

Manhattan address. Plaintiff claims the Suffolk County address is a summerhouse used by it years ago.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction. See CPLR § 3026; Leon, *supra* at 87 (1994). The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference, EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19 (2005); Sokoloff v. Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); P.T. Bank Central Asia v. ABN AMRO Bank NV, 301 AD2d 373, 375-76 (1st Dept. 2003), unless clearly contradicted by evidence submitted in connection with the motion. See Zanett Lombardier, Ltd. V. Maslow, 29 AD3d 495 (1st Dept. 2006).

Under CPLR § 3211 (a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law." Leon v. Martinez, 84 NY2d 83, 87 (1994). Additionally, in asserting a motion under CPLR § 3211 (a)(7), the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Leon, *supra* at 87 (quoting Guggenheimer v. Ginsburg, 43 NY2d 268 (1977)).

A plaintiff will freely be given leave to amend a complaint when interest of justice is served. CPLR §3025(b). However, leave to amend may be denied when the proposed amendment still fails to state a cause of action. Davis & Davis, P.C. v. Morson, 286 AD2d 584, 584 (1st Dept. 2001) (citing Tishman Construction Corp. v City of New York, 280 AD2d 374, 377 (1st Dept. 2001); Stroock & Stroock & Lavan v

Beltramini, 157 AD2d 590, 591 (1st Dept. 2001)). Since the relief sought in the cross-motion directly impacts the Court's analysis of whether dismissal is warranted, the Court will address the parties' arguments in the context of the proposed amended claims, thereby affording plaintiff every favorable inference. See Leon, *supra* at 87.

At the outset, the Court rejects plaintiff's argument that defendants' counsel's affirmation should not be considered because it is not based upon personal knowledge. In support of the motion, defendants have submitted the affidavit of Damaghi, which is based upon personal knowledge, and documentary evidence. Defendants' counsel's affirmation is merely a vehicle to introduce evidentiary support for the instant motion. See Weinstein, Korn Miller, NY Civ. Prac., par. 2312.09; see also Getlan v. Hofstra University, 41 AD2d 830, 831 (2d Dept. 1973).

Unjust enrichment cause of action

A plaintiff may seek relief for unjust enrichment where the defendant has received a benefit at the plaintiff's expense (3105 Grand Corporation v. City of New York, 288 NY 178, 181 [1942]), and equity and good conscience dictate the plaintiff be compensated for the benefit gained by the defendant (Paramount Film Distributing Corp. v. State, 30 NY2d 415, 421 [1972]).

A plaintiff may recover under unjust enrichment only where no valid contract existed. Clark-Fitzpatrick, Inc. v. Long Island Railroad Corp., 70 NY2d 382, 388 (1987). However, a plaintiff may plead causes of action alternatively. CPLR § 3014. A plaintiff is permitted to plead both breach of contract and unjust enrichment claims where there is a *bona fide* dispute regarding the existence of a contract. Curtis Properties v. Grief Cos., 236 AD2d 237, 238 (1st Dept. 1997).

A contract exists where there was an offer, an acceptance of that offer, consideration, mutual assent, and intent to be bound. See Rozsa v. May Davis Group, Inc., 152 F. Supp. 2d 526 (S.D.N.Y. 2001) (applying New York law). However, in this case, it is unclear if a contract actually existed. Plaintiff states there was an oral contract where the plaintiff would sell and deliver furniture and other goods for \$52,844.00 to be paid by defendants. Defendants' state there was a written contract where plaintiff would sell and deliver furniture and other goods for approximately \$15,000.00 to be paid by defendants. Neither plaintiff nor any defendants have provided documentary evidence of the existence of any contract. If there was no mutual acceptance of the terms of the Agreement, by either plaintiff or defendant, then there was no contract, See Rozsa, *supra* at 533. If no agreement is proven, then plaintiff should still alternatively be able to prove that defendants unjustly benefited by the delivery of goods and furniture to third parties at defendants behest.

Defendants' motion to dismiss the unjust enrichment claim is denied because defendants have, on this motion, failed to conclusively prove that the parties have a contract, see Rozsa, *supra* at 533, and plaintiff is permitted to plead claims in the alternative. CPLR § 3014.

Plaintiff also seeks on this motion to amend its complaint to claim the Agreement was an oral contract. Plaintiff's proposed amendments may introduce new facts pertinent to the dispute about the parties' contract. Since defendants will face no prejudice from this amendment, the court grants plaintiff's cross-motion to amend its complaint in regards to its claim for unjust enrichment. CPLR § 3025(b).

Fraud Cause of Action

The elements of a *prima facie* case of fraud are “allegations of a representation of a material fact, falsity, scienter, reliance, and injury.” Small v. Lorillard Tobacco Co., 94 N.Y.2d 43, 55 (1999); Bernstein v. Kelso & Co., 231 A.D.2d 314, 321 (1st Dept 1997). ““A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract . . . [and] a mere representation of an intention to perform under the contract is insufficient to allege fraud.” WIT Holding Corp. v. Klein, 282 A.D.2d 527, 528 (2d Dept. 2001); see also Clark-Fitzpatrick, *supra* at 389; Lee v. Matarrese, 793 AD3d 539 (2d Dept. 2005); Hoydal v. City of New York, 154 AD2d 345 (2d Dept. 1989).

Defendants’ alleged failure or refusal to pay pursuant to the Agreement is a breach of the contract. Plaintiff alleges in its Verified Complaint that Damaghi and/or Lartey entered into the Agreement while “knowing or with reasonable belief” that they would not pay the agreed amounts on the agreed dates. Defendants’ legal responsibility under the Agreement was to pay plaintiff, and defendant has allegedly failed. Plaintiff seeks to amend its complaint, alleging Damaghi claimed in emails that Just in Time can “pay [plaintiff] ASAP” if plaintiff is “flexible on the prices.”

Plaintiff’s claims, given their most favorable inference, still do not state a cause of action for fraud. Plaintiff’s allegations, including the proposed amendment, only involve representations that defendants’ would perform under the Agreement. They do not allege actions separate or distinct from the defendants’ duties under the Agreement. Since the plaintiff’s pleading, even if amended, will still fail to allege a false material representation separate and distinct from legal obligations under the Agreement, plaintiff’s cross-motion for leave to amend the fraud cause of action is denied, and

defendants' motion to dismiss the fraud cause of action is granted. See WIT Holding Corp., *supra* at 528.

Motion for Change of Venue

The court may grant a motion for change of venue for trial when the county designated for trial is improper. CPLR § 510(a). Where all parties are New York State residents, venue is improper when the action is filed in a county in which neither the plaintiff nor defendant resides at the commencement of the action. CPLR § 503(a).

In its filings with the New York Department of State plaintiff designates Suffolk count as its residence of Principal Executive Office and as the residence of its Chairman. A domestic corporation is a resident of the county in which its principal office is located. CPLR § 503(c). The county of the principal office is determined by the location of the corporation office, as reflected on the certificate of incorporation filed with the Secretary of State, Discolo v. River Gas & Wash Corp., 41 AD3d 126, 126 (1st Dept. 2007); Hill v. Delta International Machine Corp., 16 AD3d 285, 286 (1st Dept. 2005); Panco Development Corp. v. Platek, 262 A.D.2d 292, 293 (2d Dept 1999); see also Weinstein, Korn Miller. NY Civ. Prac., par. 2312.09, regardless of other, more productive or more widely utilized offices. United Credit Corp. v. Le Roy Adventures, Inc., 61 A.D.2d 742 (1st Dept. 1978).

Plaintiff's argument that the Suffolk County residence was just a summer home and that no business is conducted there, is rejected in the face of its corporate filings. Plaintiff is a Suffolk County resident and will remain a Suffolk County resident until it changes its incorporation information with the Department of State.

Plaintiff also contends that defendants' documentation from the New York Department of State website, showing that plaintiff lists Suffolk County as its residence, is inadmissible because it is not a certified copy. CPLR § 4518(a) provides that an electronic record "used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record." CPLR § 4518(a). Furthermore, New York State Technology Law § 306 provides that an electronic record may be admitted into legal proceedings, pursuant to the CPLR.

While the printout from the New York Department of State appears to be an accurate representation of plaintiff's incorporation information, an equally compelling factor is that plaintiff does not dispute the accuracy of the information on the website printout. Plaintiff merely seeks to have the evidence disregarded on a technicality.

Two other New York courts have taken up the admissibility of uncertified incorporation information from the New York Department of State website. Tener Consulting Services, LLC v. FSA Main Street, LLC, No. 27254/08, 2009 WL 1218891, at *5 (NY Sup. Ct. April 24, 2009); Brown v. SMR Gateway 1, LLC, No. 12280/08, 2009 WL 806792, at *6 (NY Sup. Ct. March 26, 2009). In both Brown, 2009 WL 806792, at *6, and Tener Consulting, 2009 WL 806792, at *6, the courts found a printout from the New York Department of State was admissible because it was printed from a government maintained website. Furthermore, the Appellate Division, Second Department recently favorably noted numerous cases in which courts took judicial notice of documents downloaded from government websites. Kingsbrook Jewish Medical Ctr. V. Allstate Insurance Co., 61 AD3d 13, 20 (2d Dept. 2009) (J. Dillion, in dictum) (*citing* Munaron v. Munaron, 21 Misc.3d 295 (NY Sup. Ct. 2008); Parrino v.

Russo, 19 Misc.3d 1127[A], 2008 WL 1915133, at *3 (NY Civ. Ct. 2008); Nairne v. Perkins, 14 Misc.3d 1237[A], 2007 WL 656301, at *1 (NY Civ. Ct. 2007); Proscan Radiology of Buffalo v. Progressive Casualty Insurance Co., 12 Misc.3d 1176 [A], 2006 WL 1815210, at *5 (NY City Ct. 2006); see also Bernstein v. City of New York, 2007 N.Y. Slip Op 50162[U], 14 Misc.3d 1225[A] (NY Sup. Ct. 2007); Miriam Osborn Memorial Home Assn. v. Assessor of City of Rye, 9 Misc.3d 1019 (NY Sup. Ct. 2005)).

Since the uncertified copy was printed from a government maintained website, it is exempt from CPLR hearsay rules. CPLR § 4518(a). Therefore, the facts claimed in plaintiff's proposed amended pleading are irrelevant because they do not introduce information that, as a matter of law, moves its residence to New York County. See Discolo, 41 AD3d at 126.

Venue is proper for trial where it occurs in "the county in which one of the parties resided when [the action] was commenced." CPLR 503(a). Since defendants designate their residence as Bronx County, and plaintiff's residence is Suffolk County, New York County is an improper venue and Bronx County is a proper venue. See CPLR 503(a); Discolo, 41 AD3d at 126. Therefore, defendants' motion for change of venue for trial to Bronx County is granted.

The court also *sua sponte* raises the issue of whether the venue of the entire action should also be changed to Bronx County. The parties should be prepared to address such issue at the preliminary conference scheduled at the date and time indicated below.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that the motion by Just in Time Furniture Warehouse, Inc., David Damaghi, and Ebenezer Larley, defendants in this action, for dismissal of plaintiff Scarsini Interiors, Inc. unjust enrichment cause of action, is hereby denied, and it is further;

ORDERED that the motion by Just in Time Furniture Warehouse, Inc., David Damaghi, and Ebenezer Larley, defendants in this action, for dismissal of plaintiff Scarsini Interiors, Inc. fraud cause of action, is hereby granted; and it is further;

ORDERED that the motion by Just in Time Furniture Warehouse, Inc., David Damaghi, and Ebenezer Larley, defendants in this action, for change of venue for trial, against plaintiff Scarsini Interiors, is hereby granted; and it is further;

ORDERED that the cross-motion by Scarsini Interiors, Inc., plaintiff in this action, for leave to amend its complaint, against defendants Just in Time Furniture Warehouse, Inc., David Damaghi, and Ebenezer Larley, is granted with respect to its unjust enrichment claim and denied in respect to its fraud claim and to information regarding venue; and it is further;

ORDERED that an amended complaint shall be served on defendants on or before August 28, 2009, and that defendant's answer shall be due within twenty (20) days thereof; and it is further;

ORDERED that a preliminary conference is scheduled before this Court for October 1, 2009 at 9:30 a.m. at which time the parties should be prepared to address, among other things, whether this action should be transferred to Bronx County at this

This shall constitute the decision and order of the court.

Dated: New York, New York
July 29, 2009

So Ordered:

FILED
JUL 31 2009
COUNTY CLERK'S OFFICE
NEW YORK, N.Y.
HON. JUDITH J. GISCONE, CLERK