

**Specialized Indus. Servs. Corp. v Allan**

2010 NY Slip Op 30951(U)

April 9, 2010

Supreme Court, Suffolk County

Docket Number: 9401/2009

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
 Acting Justice Supreme Court

\_\_\_\_\_  
 SPECIALIZED INDUSTRIAL SERVICES  
 CORP.,

Plaintiff,

-against-

BRADLEY ALLAN,

Defendant.  
 \_\_\_\_\_

ORIG. RETURN DATE: JULY 16, 2009  
 FINAL SUBMISSION DATE: AUGUST 13, 2009  
 MTN. SEQ. #: 002  
 MOTION: MG

ORIG. RETURN DATE: JULY 23, 2009  
 FINAL SUBMISSION DATE: AUGUST 13, 2009  
 MTN. SEQ. #: 003  
 CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 8 read on this motion \_\_\_\_\_  
TO D SMISS AND CROSS-MOTION FOR CONSOLIDATION AND ATTACHMENT  
 Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Replying Affirmation in Further Support and supporting papers 7, 8; it is,

**ORDERED** that this motion by defendant for an Order, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5), and (a) (7), as follows:

- (1) dismissing plaintiff's first cause of action against defendant alleging breach of contract because it is barred by documentary evidence, the Statute of Frauds, and it fails to state a cause of action against defendant;

(2) dismissing plaintiff's second cause of action against defendant alleging quantum meruit because it fails to state a cause of action against defendant;

(3) dismissing plaintiff's third cause of action against defendant alleging an account stated because it fails to state a cause of action against defendant;

(4) dismissing plaintiff's fourth cause of action against defendant alleging breach of a third-party beneficiary contract because it is barred by documentary evidence, plaintiff lacks standing to assert this cause of action, and it fails to state a cause of action against defendant;

(5) dismissing plaintiff's fifth cause of action against defendant alleging negligence because defendant never owed a duty to plaintiff that is cognizable at law and thus it fails to state a cause of action against defendant; and

(6) in all events, dismissing plaintiff's entire Amended Complaint because it is barred by *res judicata* and/or collateral estoppel; or, in the alternative,

(7) if the Amended Complaint is not dismissed in its entirety, limiting plaintiff's remaining causes of action to those that accrued on and after March 12, 2003, in accordance with the applicable statute of limitations,

is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

**ORDERED** that this cross-motion by plaintiff for an Order: (1) pursuant to CPLR 602 (a), directing that the instant action be consolidated with the action entitled *Specialized Industrial Services Corp. v. Dave Sandel, Inc., Dave Sandel, Individually, and Long Island Crane & Rigging, Inc.*; and (2) pursuant to CPLR 6201, attaching the monthly payments defendant is currently making to Dave Sandel under a promissory note issued in connection with the sale of Dave Sandel, Inc. by Dave Sandel, is hereby **DENIED** as moot, in light of the Court's ruling herein.

Plaintiff, SPECIALIZED INDUSTRIAL SERVICES CORP., commenced this action on or about March 18, 2009, and by its Amended Verified Complaint dated May 12, 2009, has asserted five causes of action against the defendant herein, BRADLEY ALLAN, to wit: (1) breach of contract; (2) quantum meruit; (3) account stated; (4) breach of a third-party beneficiary contract; and (5) negligence. Plaintiff filed this action against defendant, the current owner of Dave Sandel, Inc., n/k/a Long Island Crane & Rigging, Inc., seeking to hold defendant personally liable for the alleged accounts payable to plaintiff of Dave Sandel, Inc. in the amount of \$615,057.22 based upon the terms of a Stock Purchase Agreement dated as of September 26, 2004, under which defendant acquired the capital stock of Dave Sandel, Inc. This action is one of many concerning the breach of an alleged barter agreement between Dave Sandel, Inc. and plaintiff. Dave Sandel, Inc. was a commercial construction business which rented cranes and crane operators. Plaintiff is a trucking company with both trucks able to haul such machinery and a storage yard in Holbrook, New York. Under the barter agreement, plaintiff had provided trucking services to Dave Sandel, Inc. to transport its man-lifts and equipment to construction projects throughout the New York area, and Dave Sandel, Inc. would provide its equipment and operators to plaintiff.

At an Inquest conducted on November 3, 2005, in a prior action involving the parties, Dave Sandel, Inc. acquired a judgment against plaintiff in the amount of \$412,366.98, which was allegedly the full amount of services provided to plaintiff, without inclusion of any setoff for the services plaintiff provided to Dave Sandel, Inc., in violation of the parties' barter agreement. Plaintiff alleges that this, in essence, adjudicated the accounts receivable of Dave Sandel, Inc. pertaining to plaintiff, and therefore plaintiff filed the instant action to determine the accounts payable of Dave Sandel, Inc. due and owing to plaintiff, which plaintiff claims is in the amount of \$615,057.22. Plaintiff argues that pursuant to the Stock Purchase Agreement, defendant assumed personal liability for the accounts payable of Dave Sandel, Inc., up to \$450,000, but seeks judgment against defendant in the full amount of \$615,057.22.

Defendant has now filed this pre-answer motion to dismiss based upon the grounds delineated hereinabove. Defendant argues that each cause of action relies upon the Stock Purchase Agreement to hold defendant liable for an alleged pre-2004 corporate liability of the corporation he acquired in 2004. For the following reasons, the Court finds that plaintiff's complaint must be dismissed.

Where a defendant moves to dismiss an action, pursuant to CPLR 3211 (a) (1), asserting the existence of a defense founded upon documentary evidence, the documentary evidence “must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

With respect to plaintiff’s first cause of action sounding in breach of contract, to establish the existence of a contract under New York law, a plaintiff must allege an offer, acceptance, consideration, mutual assent, and an intent to be bound. That meeting of the minds must include agreement on all essential terms (see e.g. *Kowalchuk v Stroup*, 61 AD3d 118 [2009]). The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant’s failure to perform; and (4) resulting damage (see e.g. *Flomenbaum v New York University*, \_\_\_ AD3d \_\_\_, 2009 NY Slip Op 8975 [1st Dept]; *Hecht v Components Intern., Inc.*, 22 Misc 3d 360 [Sup Ct, Nassau County 2008]). In order to survive a motion to dismiss for failure to state a cause of action, a complaint alleging breach of contract need only contain statements sufficiently particular to 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; such complaint is not required to meet any heightened level of particularity in its allegations (see CPLR 3013, 3016, 3211 (a) (7); *East Hampton Union Free School Dist v Sandpebble Builders, Inc.*, 66 AD3d 122 [2009]).

Here, plaintiff fails to allege that a contract was entered into between plaintiff and defendant. In addition, although defendant may have assumed liability for certain accounts payable of Dave Sandel, Inc., up to \$450,000, plaintiff acknowledges that the alleged accounts payable to plaintiff was not included in the Stock Purchase Agreement. Moreover, the Statute of Frauds requires that any agreement to answer for the debt of another person must be in writing (see General Obligations Law § 5-701 [a] [2]).

With respect to plaintiff's second cause of action for quantum meruit, as the plaintiff's services were performed at the behest of Dave Sandel, Inc., no claim in quantum meruit can be asserted against this defendant (*see Kirell v Vytra Health Plans Long Is., Inc.*, 29 AD3d 638 [2006]; *JLJ Recycling Contrs. Corp. v Town of Babylon*, 302 AD2d 430 [2003]; *Prestige Caterers v Kaufman*, 290 AD2d 295 [2002]).

Next, regarding plaintiff's third cause of action for an account stated, plaintiff alleges that it sent invoices to Dave Sandel, Inc. totaling \$615,057.22, which Dave Sandel, Inc. received without objection. As such, plaintiff seeks to hold defendant liable for such debt. However, again, plaintiff fails to allege an agreement between plaintiff and defendant pursuant to which the invoices were issued, or that the invoices were issued to defendant directly. An account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat the statements as an account stated. It cannot be used to create liability where none otherwise exists (*see M. Paladino, Inc. v J. Lucchese & Son Contr. Corp.*, 247 AD2d 515 [1998]).

Moreover, with respect to plaintiff's fourth cause of action under a theory of breach of a third-party beneficiary contract, namely the Stock Purchase Agreement, defendant has sufficiently demonstrated to the Court that plaintiff was not an intended third-party beneficiary of the Stock Purchase Agreement. A third party may recover as an intended beneficiary of a contract between others only if it is clear that the parties purposed to confer a benefit on that third party; furthermore, the benefit must be more than merely incidental to the benefits afforded the contracting parties; it must be such as to evince an intent to permit enforcement by the third party (*see Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38 [1985]; *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NYS2d 314 [1983]) and the best evidence of this is to be found in the language of the contract itself (*see Nepco Forged Products, Inc. v Consolidated Edison Co.*, 99 AD2d 508 [1984]). In the instant matter, the Court finds that the Stock Purchase Agreement does not expressly state that the intention of the contracting parties is to benefit plaintiff, and the language of the Agreement relied upon by plaintiff, to wit: "Buyer expressly assumes the payment of the . . . accounts payable and other liabilities" is insufficient to evince an intent that the parties thereto intended the Agreement to benefit plaintiff as a third-party beneficiary (*see Port Chester Electrical Constr. Corp. v. Atlas*, 40 NY2d 652 [1976]).

Finally, the Court finds that plaintiff's fifth cause of action sounding in negligence must fail, as defendant owed no duty to plaintiff in connection with his purchase of Dave Sandel, Inc., and therefore he cannot be found liable for his "negligent conduct pertaining to his purchase of Dave Sandel, Inc." (see *e.g. Blye v Manhattan & Bronx Surface Transit Operating Authority*, 124 AD2d 106 [1987]).

Accordingly, the Court finds that the documentary evidence submitted has conclusively disposed of plaintiff's first cause of action for breach of contract and fourth cause of action for breach of a third-party beneficiary contract (see CPLR 3211 [a] [1]). Further, upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submissions (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that plaintiff's second cause of action for quantum meruit, third cause of action for an account stated, and fifth cause of action for negligence, fail to state causes of action against defendant (see CPLR 3211 [a] [7]).

In view of the foregoing, defendant's motion to dismiss plaintiff's Amended Verified Complaint is **GRANTED** in its entirety. As such, plaintiff's cross-motion for consolidation and an Order of attachment is **DENIED** as moot.

The foregoing constitutes the decision and Order of the Court.

Dated: April 9, 2010

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court