

Epstein Becker & Green, P.C. v Ball Constr., L.P.

2010 NY Slip Op 31687(U)

June 23, 2010

Supreme Court, New York County

Docket Number: 601000/10

Judge: Jane S. Solomon

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

PRESENT: SOLOMON
Justice

PART 55

EPSTEIN BECKER & GREEN, P.C.

INDEX NO. 601000/10

MOTION DATE 6/17/10

- v -

BALL CONSTRUCTION, L.P.,
ET AL.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits 1 for reply

PAPERS NUMBERED

1-6

7-13

11-14

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. -- preliminary conf. is scheduled for 7/26/10 @ 11 AM.

Dated: 6/23/10

JANE E. SOLOMON
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 55

-----X
EPSTEIN BECKER & GREEN, P.C.,

Plaintiff,

Index No.: 601000/10

-against-

DECISION

BALL CONSTRUCTION, L.P., STEVEN BALL
and LLOYD GOOD,

Defendants.

-----X
JANE S. SOLOMON, J.:

BACKGROUND

This is an action in which plaintiff Epstein Becker & Green, P.C. (EBG) moves for the imposition of a constructive trust and temporary injunctive relief against defendants Ball Construction, L.P. (Ball Construction) and Steven Ball (Ball) and Lloyd Good (Good). This court previously granted EBG's request for a temporary restraining order against defendants, which was subsequently modified on May 10, 2010, to continue the restraint against Ball Construction only, including any Ball Construction assets in the hands of Ball and/or Good.

According to the complaint, on or about March 24, 2010, EBG retained Ball Construction as a general contractor to renovate EBG's office located in Newark, New Jersey. Complaint, ¶ 10. In order to meet the construction schedule established by the parties, certain items, referred to as "long lead time"

items, were pre-ordered so as to be available for installation when required. *Id.*, ¶ 11.

On or about March 24, 2010, Ball Construction notified EBG that certain subcontractors and suppliers required deposits for the long lead time items, and submitted an invoice for \$160,500. Along with the invoice, Ball Construction provided a Certification for Payment, identifying the subcontractors, suppliers, and the amount each was to receive, and in which Ball Construction stated that none of the invoiced sums were for payment to Ball Construction, but that all were for the deposits on the long lead time items. *Id.*, ¶¶ 14,15; Ex. A.

According to the complaint, in addition to the written representation, Good also represented to EBG that the \$160,500 was being used solely to pay deposits to subcontractors and suppliers. Receipt of the payment allegedly was acknowledged by Good at a meeting held on March 30, 2010. Complaint, ¶ 17. EBG alleges that, instead of paying \$70,000 to an identified carpet supplier, Ball Construction paid \$15,000 to an unnamed carpet supplier, and "pocketed" the rest of the funds. *Id.*, ¶¶ 21 & 22.

EBG goes on to allege that Ball and Good misappropriated EBG's funds as part of a scheme to shield themselves from personal liability to other subcontractors under Article 3-A of the New York Lien Law (Lien Law). *Id.*, ¶ 23. EBG

further states that Ball Construction has ceased certain operations and has furloughed its employees. *Id.*, ¶ 24. On April 12, 2010, EBG terminated its contract with Ball Construction, and demanded the return of the funds that were not advanced, but none were returned. *Id.*, ¶¶ 27 & 28.

The complaint asserts five causes of action: (1) breach of fiduciary duty/constructive trust; (2) fraudulent misrepresentation; (3) aiding and abetting breach of fiduciary duty/constructive trust as against Ball and Good individually; (4) unjust enrichment; and (5) accounting.

In opposition, defendants assert that EBG is not entitled to any of the relief that it seeks because the premise under which EBG proceeds is based on a fiduciary relationship between the parties which defendants maintain does not exist. They refer to section 9.6.7 of the contract which states:

"... payment received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision."

Opp., Ex. B.

Further, Ball Construction and Ball assert that the Complaint

fails to allege any misrepresentation made by Ball.

In an affidavit submitted by Good, Good avers that he is no longer an employee of Ball Construction, having been laid off in April of 2010; he denies an allegation made by John E. Clark (Clark) of EBG that one month prior to EBG's payment, Good told Clark that Ball Construction was having financial difficulties and was unable to pay its bills; and, Good further maintains that he no longer is an employee, regardless of the fact that his name still appears on the company's letterhead and website.

DISCUSSION

CPLR 6301 provides, in pertinent part:

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

A preliminary injunction is a drastic remedy to be granted where the movant has demonstrated a clear legal right to the relief based upon undisputed facts. *Scotto v Mei*, 219 AD2d 181, 182 (1st Dept 1996). The movant must show a probability of success, the danger of irreparable injury in the absence of an injunction, and a balance of the equities in its favor. *Aetna*

Insurance Co. v Capasso, 75 NY2d 860, 862 (1990). If any one of these elements is missing, a preliminary injunction cannot be issued.

For the imposition of a constructive trust on property, four elements must be established: "(1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment." *Panetta v Kelly*, 17 AD3d 163, 165 (1st Dept), lv dismissed 5 NY3d 783 (2005).

EBG's motion is denied, because it cannot demonstrate a likelihood of succeeding on the merits. Except for the causes of action for fraudulent misrepresentation and unjust enrichment, all of the remaining causes of action require the existence of a fiduciary duty. EBG asserts that defendants owed it that duty, and cites *Murray Schwartz Enterprises Employee Pension Plan Trust v Four Corners Productions, Inc.* (293 AD2d 388 [1st Dept 2002]) and *Kern v Robert Currie Associates* (220 AD2d 255 [1st Dept 1995]), in support. In those cases a fiduciary relationship was found to exist between two contracting parties; however, both of those cases are distinguishable from the case at bar.

In *Murray Schwartz*, the decision is silent as to whether the contract involved contained a provision similar to the one here, which clearly and explicitly states that no fiduciary relationship was being created. In the *Kern* case, the

crux of the Court's determination in denying the defendant's motion to dismiss the complaint was the that the plaintiff relied on the expert advice of the defendant, which could have raised an issue of a fiduciary relationship. This element of reliance on defendants' expertise is not pled in the motion before this court.

As this court recently stated,

"A fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is well settled that the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by the contract but which is independent of the contract itself. However, a conventional business relationship does not create a fiduciary relationship absent other factors, such as the existence of a long-term relationship, lack of arms-length negotiations, or entrustment by an artist with a person who promises to manage and develop the artist's career Here, plaintiff had an arms-length relationship with defendants Taken as a whole, plaintiff does not allege more than a conventional business relationship [internal quotation marks and citations omitted]."

Reinhardt v John Family Trust of 1997, 21 Misc 3d 1112(A) *5,
2008 NY Slip Op 52056 (U) (Sup Ct, NY County 2008) (Solomon, J.)

Nothing in the Complaint alleges that the contract here was anything but an agreement negotiated at arm's-length, nor is there any indication that the parties had a pre-existing long-term relationship that might have engendered different obligations. By the very terms of the contract EBG, a law firm, specifically agreed that no fiduciary relationship was created.

"An agreement is unambiguous when its words have a

definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion. Where agreement is unambiguous on its face, it must be enforced in accordance with the plain meaning of its terms [internal quotation marks and citations omitted]."

Vintage, LLC v Laws Construction Corp., 13 NY3d 847, 849 (2009).

Since EBG and Ball did not create a relationship of higher trust than that which is found in the ordinary, mundane marketplace, no stricter duty may be imposed on Ball Construction than the one appearing in the written agreement. *Northeast General Corp. v Wellington Advertising, Inc.*, 82 NY2d 158 (1993); see also *Frank v Sobel*, 38 AD3d 229 (1st Dept 2007). Based on the preceding, the court finds that no fiduciary relationship exists between EBG and any defendant so as to indicate that EBG is likely to prevail on its causes of action for breach of fiduciary duty/constructive trust or for aiding and abetting a breach of fiduciary duty/constructive trust. Moreover, "[t]he right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest [internal quotation marks and citation omitted]." *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 23 (2d Dept 2008).

Since a court cannot compel an accounting absent a fiduciary relationship, EBG is likewise unlikely to prevail on

its fifth cause of action. Similarly, since there exists a valid contract covering the matter in dispute, that agreement precludes recovery under a theory of unjust enrichment, EBG's fourth cause of action. *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11 (2005).

Lastly, it is unlikely that EBG will prevail on its second cause of action, alleging fraudulent misrepresentation. That claim is premised on an alleged breach of the contract between the parties, and a mere allegation that Ball Construction misrepresented its intention to perform thereunder is insufficient to support that contention. *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755 (2d Dept 2009); *J. M. Builders & Associates, Inc. v Lindner*, 67 AD3d 738 (2d Dept 2009).

CONCLUSION

Based on the foregoing, it is hereby

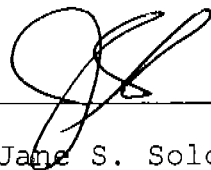
ORDERED that plaintiff's motion seeking a preliminary injunction and the imposition of a constructive trust is denied; and it is further

ORDERED that the temporary restraining order is vacated upon entry hereof; and it further is

ORDERED that the parties appear for a preliminary conference in Part 55 on July 26, 2010 at 11 AM.

Dated: June 23, 2010

ENTER:



Jane S. Solomon, J.S.C.

JANE S. SOLOMON

FILED
JUN 29 2010
COUNTY CLERK'S OFFICE
NEW YORK