

**Mana Am., Inc. v Christa Constr., LLC**

2010 NY Slip Op 32674(U)

September 22, 2010

Sup Ct, Suffolk County

Docket Number: 14906-2010

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

***Present: HON. EMILY PINES***  
J. S. C.

Original Motion Date: 06-18-2010  
Motion Submit Date: 07-27-2010  
Motion Sequence.: 001 MD  
PC 12-07-2010

FINAL DISP  
 NON - FINAL DISP

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**MANA AMERICA, INC.,**  
**Plaintiff,**

Attorney for Plaintiff  
Joseph P. Asselta, Esq.  
Agovino & Asselta, LLP  
170 Old Country Road, Suite 608  
Mineola, New York 11501

**-against-**

**CHRISTA CONSTRUCTION, LLC., and M & T**  
**BANK CORPORATION,**  
**Defendants.**  
\_\_\_\_\_ X

Attorney for Defendant  
Ernstrom & Drete, LLP  
By: Matthew D. Brown, Esq.  
180 Canal View Blvd. Suite 600  
Rochester, New York 11463

**ORDERED**, that the motion (motion sequence number 001) by defendants pursuant to CPLR §§3211(a), 3212 and 3211(c) to dismiss the Complaint is denied; and it is further

**ORDERED**, that a preliminary conference is scheduled for December 7, 2010 at 9:30 a.m. before the undersigned.

Plaintiff commenced this action against defendants by the filing of a Summons and Verified Complaint on April 23, 2010. According to the Complaint, defendant M&T Bank Corporation (“M&T”) entered into an agreement with defendant Christa Construction, LLC (“Christa”) for a construction project on M&T’s property located at South Gate Plaza, 3977 Seneca Street and Union Road, West Seneca, New York (the “subject premises”). Plaintiff alleges that it entered into an agreement with

Christa to furnish materials, equipment and labor to Christa in conjunction with the construction project at the subject premises. Plaintiff also claims that it entered into an agreement directly with M&T whereby plaintiff agreed to “furnish materials, equipment and labor at the specific request and direction of M&T in connection with the Project, and M&T agreed to pay Mana America for the materials, equipment and labor furnished.” Complaint at ¶7. Plaintiff alleges that it furnished the requisite materials, equipment and labor and the amount due and owing from defendants is \$103,840.00. Plaintiff asserts claims against both defendants for breach of contract and unjust enrichment and against M & T only for promissory estoppel.

Defendants now move to dismiss the Complaint pursuant to CPLR §3211(a)(7), or in the alternative, converting to a motion for summary judgment pursuant to CPLR §3212. Defendants explain that on or about June 30, 2009, Christa, as contractor, entered into a Purchase Order agreement with plaintiff whereby plaintiff would furnish certain materials for the construction project at the subject premises. Specifically, plaintiff was to supply fabricated fiberglass siding facade panels and their reinforcements, as described in the Purchase Order. Plaintiff did not enter into a written agreement with M & T and since the agreement was for the sale of goods in excess of \$500, defendants assert that the breach of contract claim against is barred by the statute of frauds as set forth in UCC §2-201(1). Additionally, defendants argue that the breach of contract cause of action must be dismissed as against both defendants since plaintiff failed to attach the alleged contract and failed to set forth the terms of any alleged agreement.

Turning to the second cause of action, defendants argue that the complaint fails to state a cause of action for unjust enrichment. Initially, defendants argue that the unjust enrichment claim must be dismissed as against M&T because it is duplicative of the breach of contract claim. Defendants also argue that such claim must be dismissed as against both defendants because plaintiff has failed to allege the elements required to sustain such claims, to wit, that defendants were enriched, at plaintiff’s expense and that it is against equity and good conscience to permit defendants to retain what is sought to be recovered. Instead, defendants assert that the allegations of the cause of action for unjust enrichment is the same as the breach of contract claim and must be dismissed. Additionally, since the subject matter of the unjust enrichment claim is covered by the Purchase Order agreement between plaintiff and Christa, defendants claim such cause of action is barred as against defendants.

Finally, defendants argue that the third cause of action against M&T sounding in promissory estoppel must be dismissed because the Complaint fails to allege the necessary elements for such claim, to wit, a clear and unambiguous promise, a reasonable and foreseeable reliance by the party to whom the promise was made, and an unconscionable injury suffered by plaintiff as a result of said reliance. Here, defendants assert that plaintiff has failed to allege a clear and unambiguous promise and an unconscionable injury. Rather, the damages claim is identical to the contract damages claim and cannot serve as a basis for a finding of an unconscionable injury.

Based on the foregoing, defendants seek dismissal of the Complaint in its entirety.

Plaintiff opposes the motion and asserts that after it entered into the Purchase Order agreement with Christa, it entered into an oral agreement with M&T wherein M&T agreed to pay it for the materials, equipment and labor furnished. Moreover, plaintiff argues that its claim is not barred by the statute of frauds because the materials fall within the “specially manufactured” goods exception to UCC §2-201. Plaintiff asserts that, at M&T’s request, it fabricated “custom design panels that were specially manufactured to meet the needs of M&T”. Affidavit of Marc Anassis, President of Mana, at ¶6. Mr. Anassis states that defendants required unique specifications and the fiberglass panels are not suitable for sale to others in the ordinary course of Mana’s business. He further states that he met with employees of M&T on numerous occasions and they requested certain modifications to the panels.

Plaintiff argues that the Complaint properly pleads the elements of a breach of contract cause of action as against both defendants. Moreover, plaintiff asserts that it pled the necessary elements of an unjust enrichment claim in that it alleges plaintiff furnished materials, equipment and labor between June 30, 2009 and January 8, 2010, that defendants received the benefit of same and that plaintiff has suffered damages as a result of the defendants’ failure to pay. Further, plaintiff notes that the damages claimed are not identical in the first and second causes of action and the claims must not be dismissed. Additionally, since there is a dispute as to whether M&T entered into a contract with plaintiff, the Complaint may include causes of action based upon both breach of contract and quasi contract. Finally, plaintiff argues that the Complaint states a claim for promissory estoppel against M&T in that it alleges a clear and unambiguous promise that plaintiff would be paid, that plaintiff relied on such promise and

was damaged as a result thereof by the failure of M&T to pay for the materials, equipment and labor. Therefore, plaintiff urges the Court to deny the motion to dismiss in its entirety.

In reply, defendants challenge plaintiff's claim that M&T entered into an agreement for "specially manufactured" panels such that the exception to the statute of frauds rule applies. Instead, defendants reiterate that the panels were supplied and manufactured pursuant to the written Purchase Order and if M&T intended to be liable for the debts of Christa, a written agreement evidencing such intent was required pursuant to the General Obligations Law. Additionally, defendants emphasize that the unjust enrichment cause of action must be dismissed as duplicative of the breach of contract claim and also because here, there is an alleged express agreement between the parties governing the same subject matter. Lastly, defendants argue that the promissory estoppel cause of action must be dismissed because plaintiff failed to allege an unconscionable injury, but rather merely damages for breach of contract, which are insufficient. Therefore, defendants ask the Court to dismiss the Complaint in its entirety.

It is well settled that in "reviewing a motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action, the allegations of the complaint are deemed to be true. The pleading will be deemed to allege whatever may be implied from its statements by reasonable intent and the court must give the pleader the benefit of all favorable inferences that may be drawn from the complaint...". *Dunn v. Gelardi*, 59 A.D.3d 385, 872 N.Y.S.2d 528 (2d Dept. 2009)(internal quotations omitted). *See also, Peterec-Tolino v. Harap*, 68 A.D.3d 1083, 892 N.Y.S.2d 154 (2d Dept. 2009). When evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, the Court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated a cause of action. *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 46 A.D.3d 530, 846 N.Y.S.2d 368 (2d Dept. 2007).

A complaint adequately states a cause of action for breach of contract when it alleges (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) damages as a result of the breach. *JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802, 893 N.Y.S.2d 237 (2d Dept. 2010). The elements of a cause of action sounding in unjust enrichment are allegations that the defendant was enriched at the plaintiff's expense and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. *Anastasia*

*Assoc. of Mount Kisco v. Northern Westchester Hospital Center*, 59 A.D.3d 473, 873 N.Y.S.2d 679 (2d Dept. 2009). Finally, the elements of a cause of action based upon promissory estoppel are “a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise.” *Williams v. Eason*, 49 A.D.3d 866, 854 N.Y.S.2d 477 (2d Dept. 2008). *See also, Gurreri v. Associates Insurance Co.*, 248 A.D.2d 356, 669 N.Y.S.2d 629 (2d Dept. 1998); *Rogers v. Town of Islip*, 230 A.D.2d 727, 646 N.Y.S.2d 158 (2d Dept. 1996).

In the case at bar, a review of the Complaint establishes sufficiently the elements of a case of action for breach of contract. The Complaint alleges that plaintiff entered into an agreement with defendants to supply certain labor, materials and equipment, plaintiff performed pursuant to the terms, and defendants failed to pay. Plaintiff alleges it entered into the Purchase Order agreement referenced above with Christa, and subsequently, an oral agreement with M&T. Although defendants assert that any purported oral agreement would be unenforceable under the statute of frauds, plaintiff alleges in the complaint sufficiently that the items were specially manufactured at the request of M&T, such as to plead the exception to the statute of frauds. While ultimately such claim may not survive, at this early juncture in this litigation, the Court will not dismiss the first cause of action.

Likewise, the Complaint also sets forth a cause of action sounding in unjust enrichment and will not be dismissed. Although defendants argue that this cause of action must be dismissed as duplicative of the breach of contract claim, such is not the case. First, where there is a bona fide dispute as to the existence of a contract, plaintiff may proceed upon a theory of quasi contract and breach of contract and will not be required to elect his remedies. *Plumitallo v. Hudson Atlantic Land Company, LLC*, 74 A.D.3d 1038, 903 N.Y.S.2d 127 (2d Dept. 2010); *AHA Sales, Inc., v. Creative Bath Products, Inc.*, 58 A.D.3d 6, 867 N.Y.S.2d 169 (2d Dept. 2008). Thus, since defendants allege M&T did not enter into an agreement with plaintiff, it may properly plead both contractual and quasi-contract claims against M&T. With regard to the unjust enrichment claim against Christa, it is well settled that a plaintiff may plead both breach of contract and unjust enrichment claims in the alternative. *See, e.g., Auguston v. Spry*, 282 A.D.2d 489, 723 N.Y.S.2d 103 (2d Dept. 2001). Finally, plaintiff has pled the elements of a cause of action for promissory estoppel against M&T.

Based on the foregoing, defendants' motion to dismiss is denied in its entirety. Defendants shall serve a Verified Answer within twenty (20) days of service of a copy of this Order with Notice of Entry.

A preliminary conference is scheduled for December 7, 2010 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: September 22, 2010  
Riverhead, New York

  
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EMILY PINES  
J. S. C.

FINAL DISP  
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