

Quintas v Event Now, Inc.

2011 NY Slip Op 30346(U)

February 2, 2011

Sup Ct, Nassau County

Docket Number: 019354/10

Judge: Jeffrey S. Brown

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 21**
PETER QUINTAS,

Plaintiffs,

- *against* -

EVENT NOW, INC.,

Defendants.

Index No. 019354/10
Mot. Seq. # 3
Mot. Date 1/27/11
Submit Date 1/28/11

-----X

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1,2
Answering Affidavit	3,4
Reply Affidavit.....	5

Defendant moves by notice of motion for an order, pursuant to CPLR 3211 (a)(7), dismissing the plaintiff's first, second and forth causes of action to the amended complaint for failure to state a cause of action.

Defendant states that the amended complaint references the written agreement entered into between the parties on or about January 26, 2010. The first cause of action seeks to declare the very contract sought to be enforced by plaintiff as having been "coerced" and "unconscionable," and as such, should be dismissed because under UCC 2-302 such a claim of unconscionability in New York can only be used as a defense to a claim and not as a basis for an affirmative claim. Additionally, other than those conclusory assertions in the complaint, there is no factual basis set forth to support such a claim. Finally, the first cause of action must be dismissed because it seeks money damages based upon a *quantum meruit* and unjust enrichment theory. Defendant contends that one cannot assert these theories where there is an express agreement, such in the case at bar.

Defendant asserts that the second cause of action, also for breach of contract, fails in that it is predicated entirely upon a provision which is “[i]mplied in the contract.”(complaint paragraph 47) According to this cause of action, defendant is alleged to have breached an “implied” term in the contract. Defendant argues that since the contract contains merger and integration clauses, at Articles 19 and 20, which bar any such oral or implied “understandings” which are not expressly set forth in the agreement or the agreement properly amended in a separate writing, this claim is also barred.

Lastly, defendant claims that the fourth cause of action for breach of contract is already a component of the second cause of action in that the damages claim in the fourth cause of action is already a component of the damages claim on the third cause of action. Thus, it is entirely duplicative. Plaintiff is impermissibly splitting one cause of action into three by asserting duplicative claims. Therefore, defendant asserts that the only cause of action which should remain is the third. The others must be dismissed.

Plaintiff opposes the motion in its entirety. With respect to the first cause of action, plaintiff argues that it is based upon the affirmative cause of action of rescission, not “unconscionable contract” as was initially pled.¹ The plaintiff states he amended the first cause of action from “unconscionable contract” to what is now alleged to be rescission based upon breach of New York Commercial Code 2-302: Unconscionable Contract. Since rescission is always available as an affirmative cause of action, defendant’s arguments are without merit. Furthermore, the doctrine of *quantum meruit* is an appropriate measure of damages in a rescission action and is available even where there is an express agreement. Since defendant actually received the value of plaintiff’s services under the unconscionable contract, defendant has been unjustly enriched.

Plaintiff additionally disputes that the first cause of action for rescission sets forth no factual basis to support a claim for unconscionability. It is alleged that plaintiff has stated adequate facts to warrant a finding that the term which allows compensation to be deferred until such time as the company received funding in the amount of \$700,000 “from angel investors or Series A investors” is unconscionable, pursuant to UCC 2-302, and therefore, should be rescinded. Plaintiff notes that he does not seek to have the entire contract deemed unconscionable, but rather, seeks to have one unconscionable clause excised.

With respect to the second cause of action, plaintiff states that the implied contract of good faith and fair dealing is not negated by any express term in the contract. While the clause in which defendant refers may preclude oral representations or modifications, it does not preclude the concept of the implied contract of good faith and fair dealing that exists in every express contract, regardless of its content.

¹The court notes that an application to amend the complaint was granted (Palmeiri, J., 12/10/10).

Finally, plaintiff asserts that the second, third and fourth causes of action are properly pled as alternative theories of the case, and as such, are not duplicative. Plaintiff contends that these three causes of action are each based on different sets of facts. Furthermore, a cause of action for breach of the implied covenant of good faith and fair dealing can be brought alongside a cause of action for breach of an express term of the same contract as long as it is based on facts different from the facts on which breach of an express term of the contract is based. In the instant case, plaintiff asserts that all three causes of action are based on separate and distinct infractions by the defendant. Each pled in the alternative, they must be allowed to stand alone and remain as part of plaintiff's pleadings.

In reply, defendant argues that plaintiff's affidavit in opposition goes well beyond the four corners of the contract, detailing extraneous materials and arguments and, thus, should not be considered. Defendant reiterates its prior arguments.

Based on the foregoing, the decision of the court is as follows:

When determining a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (see *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 N.Y.2d 300, 303, 751 N.E.2d 936, 727 N.Y.S.2d 688 [2001]; *Leon v Martinez*, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]); *Goldman v Metro. Life Ins. Co.*, 5 N.Y.3d 561, 570-571. CPLR 3211 dismissal "may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 N.Y.2d 425, 430-431, 694 N.E.2d 430, 671 N.Y.S.2d 429 [1998] [citation and internal quotation marks omitted]).

Defendant's application to dismiss the first cause of action of the amended complaint is **GRANTED**. UCC 2-302 does not create a cause of action to recover damages in favor of a party to an allegedly unconscionable contract (see, *Super Glue Corp. v. Avis Rent A Car System, Inc.*, 132 A.D.2d 604, 606; *Fortune Limousine Serv., Inc. v. Nextel Communications*, 35 A.D. 3d 350, 353-354; *Pearson v National Budgeting Sys.*, 31 AD2d 792; *Barco Auto Leasing Corp. v PSI Cosmetics*, 125 Misc 2d 68; *Vom Lehn v Astor Art Galleries*, 86 Misc 2d 1). The doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery. Under both the UCC and common law, a court is empowered to do no more than refuse enforcement of the unconscionable contract or clause (see, *Super Glue Corp. v. Avis Rent A Car System, Inc.*, supra; UCC 2-302; *Pearson v National Budgeting Sys.*, supra; *Cowin Equip. Co. v General Motors Corp.*, 734 F2d 1581, citing *Bennett v Behring Corp.*, 466 F Supp 689, affd on other grounds 737 F2d 982).

Although plaintiff states that the cause of action is one of rescission, the way it was pled is improper, to wit: rescission based on breach of New York Uniform Commercial Code 2-302:

Unconscionable Contract. Since UCC 2-302 does not allow a cause of action for affirmative relief to be used as a basis to void a contract, the pleading fails as a matter of law.

Furthermore, the express agreement between the parties with respect to the same subject matter precludes a cause of action alleging unjust enrichment and seeking recovery in *quantum meruit* (see *Goldman v Metropolitan Life Ins. Co.*, supra; *R.I. Is. House, LLC v. North Town Phase II Houses, Inc.*, 51 A.D.3d 890, 896 *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 516 N.E.2d 190, 521 N.Y.S.2d 653; *Hawthorne Group v RRE Ventures*, 7 AD3d 320, 324, 776 N.Y.S.2d 273; *Commer. Tenant Servs. v First Union Nat'l Bank*, 305 AD2d 210, 211, 762 N.Y.S.2d 342; *Kohn v Hartstein & Hartstein*, 294 AD2d 543, 742 N.Y.S.2d 879).

A cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is "intrinsicly tied to the damages allegedly resulting from a breach of the contract" (*Canstar v Jones Constr. Co.*, 212 AD2d 452, 453, 622 N.Y.S.2d 730; see *Deer Park Enters., LLC v. Ail Sys., Inc.*, 870 N.Y.S.2d 89; *Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323, 776 N.Y.S.2d 273;). Here, the conduct and resulting injury alleged in the second cause of action are identical to those alleged in the third cause of action alleging breach of contract. Therefore, the second cause of action is dismissed as duplicative of the breach of contract cause of action (see *R.I. Is. House, LLC v North Town Phase II Houses, Inc.*, supra; *TAG 380, LLC v ComMet 380, Inc.*, 40 AD3d 1, 8, 830 N.Y.S.2d 87).

The fourth cause of action purports to assert another cause of action for breach of contract similarly alleged in the third cause of action, encompassing the same damages claim. As such, it must be dismissed as a matter of law.

Accordingly, it is

ORDERED, that defendant's application pursuant to CPLR 3211(a) (7) is **GRANTED** to the extent that the first, second and fourth causes of action in the amended complaint are dismissed. The third cause of action shall remain.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
February 2, 2011

ENTER :

ENTERED
HON. JEFFREY S. BROWN
J.S.C.
FEB 07 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO:

Attorney for Plaintiff
Elise Schwarz, Esq.
225 Broadway, 41st Floor
New York, NY 10007
212-566-5500

Attorney for Defendant
Edward Weissman, Esq.
60 East 42nd Street, Ste. 557
New York, NY 10165
212-937-1520