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SHORT FORM ORDER

INDEX NUMBER: 21629-2010

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

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

Original Motion Date: 09-24-2010
Motion Submit Date: 02-15-2010
Motion Sequence No.: 001 MG
002 MG

[ ] FINAL
[X] ~~NON~~ NON FINAL

_____X

HONEYWELL INTERNATIONAL INC., by its division ADI,

Plaintiff,

-against-

SERVICE SELECT LLC., and O'NEILL PATRICK QUINLAN, III,

Defendant.
_____X

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ORDERED, that the motion (motion sequence # 001) by defendant O'Neill Patrick Quinlan, III, to dismiss the complaint as asserted against him is granted; and it is further

ORDERED, that the cross-motion (motion sequence # 002) by plaintiff for leave to amend the complaint is granted.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2006, defendant Service Select, LLC ("Service Select") applied for a credit line with ADI, a division of plaintiff Honeywell International Inc., a low voltage products supplier. A "New Account Application" was signed by Service Select's President, defendant O'Neill Patrick Quinlan III ("Quinlan"). The Application requested a credit line of $10,000 and provides, among other things, that

"[a]ll invoices are due on a net 45 day basis" and that "[i]n consideration of ADI extending credit to the Company shown on this application, the undersigned jointly and severally agree to be personally liable for the payment of any amounts owing to ADI."

In August 2006, Service Select completed a second application for a credit line with ADI. The second application requested a credit line of $135,00. It was also signed by Quinlan as President of Service Select and provides, among other things, that "[a]ll invoices are due on a net 45 day basis" and that "[i]n consideration of ADI extending credit to the Company shown on this application, the undersigned jointly and severally agree to be personally liable for the payment of any amounts owing to ADI." Additionally, the second application states that ADI "may at any time require the undersigned to execute a personal guarantee or require Company to give ADI a secured interest in product sold."

Plaintiff commenced the instant action against Service Select and Quinlan in 2010. The complaint alleges, among other things, that Quinlan personally guaranteed Service Select's obligations under the credit agreements with ADI; that from February through May 2008, Service Select placed orders for goods and materials from ADI on credit; that Service Select failed to make any payment for any of the goods reflected on purchase orders; that payment was duly demanded by ADI; upon information and belief, that Service Select and/or Quinlan undertook a practice of liquidating or otherwise transferring the goods at severely discounted rates or without charge; and, upon information and belief, that defendants are engaged in a scheme whereby assets are purchased on credit and sold and/or transferred to another (or) newly formed entity whereupon defendants cease operations of the entity that purchased the property in a deliberate attempt to avoid payment.

The complaint contains four causes of action. The first cause of action is asserted against Service Select only and seeks $775,621.94 in damages for breach of contract based upon Service Select's failure to pay for goods sold and delivered pursuant to the credit agreements. The second cause of action is asserted against Quinlan and seeks damages of $775,621.94 pursuant to the purported personal guaranty contained in the credit agreements executed by Quinlan. The third cause of action is asserted against both Service Select and Quinlan for unjust enrichment and seeks restitution in the amount of $774,621.94. The fourth cause of action alleges that the defendants violated Debtor and Creditor Law §§ 276 and 279 by disposing, selling and/or transferring the property purchased from plaintiff on credit with the actual intent to defraud plaintiff as a creditor and seeks an injunction preventing defendants from further alienation of property purchased from plaintiff on credit and a declaration that such sales or transfers are void.

Quinlan now moves, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss the complaint as asserted against him. With regard to the second cause of action, Quinlan contends that the complaint fails to state a claim for breach of contract against him because he is not a party to the contract between ADI and Service Select. Next, Quinlan argues that plaintiff's claim to enforce the purported personal guaranty by Quinlan is barred by the Statute of Frauds. Quinlan also argues that the credit agreements reflect that they were executed by him solely in his capacity as President of Service Select and that he is not personally obligated even though the credit agreements state that he agrees to be personally liable. With regard to the third cause of action for unjust enrichment, Quinlan contends that this claim should be dismissed pursuant to CPLR 3211(a)(1) because the credit agreements expressly govern the dispute and he is not a party to the agreements. With regard to the fourth cause of action for an injunction and declaration regarding allegedly fraudulent conveyances, Quinlan contends that this claim fails to state a cause of action because it fails to plead with particularity any allegations regarding Quinlan's intent to defraud its creditors and any facts in detail that would support an inference of an actual intent to defraud, as required by CPLR 3016(b). Thus, Quinlan seeks dismissal of the fourth cause of action pursuant to CPLR 3211(a)(7).

Plaintiff opposes Quinlan's motion and cross-moves for leave to amend the complaint. Plaintiff submits factual affidavits from Joshua Foster, Assistant General Counsel for the Security business unit of Honeywell, and Leslie Vaughan-Wilson, Senior Finance Manager at ADI. In opposition to Quinlan's motion to dismiss, plaintiff argues that the plain meaning of the language in the credit agreements demonstrates that Quinlan intended to be personally liable for the payments of Service Select's debts to ADI. Plaintiff contends that Quinlan's assertion that he signed the credit agreements solely in his capacity as an officer of Service Select compels the illogical conclusion that the purpose of that provision was to provide, in the case of non-payment by Service Select, that only Service Select would be liable, which would render the clause meaningless. Plaintiff also claims that Quinlan provided his personal credit card number to be charged in the event of a default by Service Select, which demonstrates that he intended to personally guarantee Service Select's obligations. Additionally, plaintiff argues that the language of the credit agreements satisfies the Statute of Frauds. With regard to the unjust enrichment claim, plaintiff states that it has properly pled this claim in the alternative to the claim that Quinlan has breached his obligation under the credit agreements. In other words, plaintiff asserts an unjust enrichment claim against Quinlan in an attempt to recover in the event the Court finds that there was no agreement between Quinlan, in his personal capacity, and ADI. With regard to claim for fraudulent conveyance, plaintiff states that it believes that it will prove these allegations with the benefit of discovery.

Plaintiff seeks leave to amend the complaint to include additional facts learned since the complaint was filed amounting to fraud, and to add a new cause of action sounding in fraud and/or fraudulent inducement against Quinlan. Plaintiff claims that since the complaint was filed it became aware that Quinlan knowingly misrepresented the nature of his employment with Service Select such that he may not have had the authority to bind Service Select. Additionally, plaintiff claims that it has learned that Quinlan cancelled his personal credit card, which he listed of the second credit agreement, less than one week after signing the agreement. Plaintiff also seeks leave to amend the first cause of action to add allegations that Quinlan is a co-obligor under the credit agreements, that a valid and binding contract exists between plaintiff and Quinlan, and that Quinlan breached the contract.

In opposition to plaintiff's cross-motion for leave to amend the complaint, Quinlan argues that the proposed amendments cannot withstand a motion to dismiss under CPLR 3211(a)(7) as they are insufficient and devoid of merit because (1) Quinlan is not a co-obligor because he executed the agreements in his corporate capacity and had no intention to bind himself individually, (2) the proposed fraudulent inducement claim fails as a matter of law because it based on a future intent to perform under the contract and truthful statements.

DISCUSSION

Pursuant to CPLR 3211(a)(1), dismissal of a complaint is warranted where documentary evidence is submitted conclusively establishing a defense to the asserted claims as a matter of law (*150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 AD3d 1 [1st Dept 2004]). "In particular, where a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim" (*id.*).

The second cause of action seeks to enforce the provision in the credit agreements whereby Quinlan purportedly personally guaranteed Service Select's debt to ADI. As recognized by the Appellate Division, First Department in *Brewster Transit Mix Corp. v. McLean* (169 AD2d 1036, 1037 [1st Dept 1991]):

> "A guarantee is an agreement to pay a debt owed by another which creates a secondary liability and thus is collateral to the contractual obligation" (*Shire Realty Corp v. Schorr*, 55 AD2d 356, 359-360). The

> guarantor's liability accrues only after default on the part of the principal obligor (*General Phoenix Corp. v. Cabot*, 300 NY 87, 95).

Here, as in *Brewster*, the language of the credit agreements unambiguously demonstrates that the defendant's obligation is not that of a guarantor as the writings do not make Service Select the primary obligor, with Quinlan's liability secondary to that of Service Select, accruing only after default on the part of Service Select, regardless of the self-serving allegations contained in the affidavits submitted by the plaintiff. Therefore, the second cause of action as asserted against Quinlan is dismissed pursuant to CPLR 3211(a)(1). This is not to say that Quinlan is not a co-obligor under the credit agreements who may be personally liable thereunder (*see Florence Corp. v. Penguin Constr. Corp.*, 227 AD2d 442 [2d Dept 1996]; *Yellow Book of NY, LP v. DePante*, 309 AD2d 859 [2d Dept 2003]; *Paribas Properties, Inc. v. Benson*, 146 AD2d 522, 525 [1st Dept 1989]; *Star Video Entertainment, LP v. J & I Video Distrib., Inc.*, 268 AD2d 423 [2d Dept 2000]), which is part of plaintiff's cross-motion seeking leave to amend the complaint.

Similarly, the third cause of action for unjust enrichment as asserted against Quinlan is dismissed. An action to recover for unjust enrichment sounds in restitution or quasi-contract (*Edelman v. Starwood Capital Group, LLC*, 70 AD3d 246 [1st Dept 2009]).

> Recovery under quasi-contractual theories are, generally, inappropriate if there exists a valid and enforceable contract between the parties. "It is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties" (*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 388-389; [further citations omitted]). However, "[w]here, as here, there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue, a plaintiff may proceed upon a theory of quasi-contract, as well as breach of contract and will not be required to elect his or her remedies" (*Hochman v. LaRea*, 14 AD3d 653, 654-655 [2d Dept 2005]; *see Zuccarini v. Ziff-Davis Media*, 306 AD2d 404, 405 [2d Dept 2003]).
>
> (*HAH Sales, Inc. v. Creative Bath Products, Inc.*, 58 AD3d 6, 20 [2d Dept 2008).

Here, the plaintiff alleges that a contract exists based upon the written credit agreements. No bona fide dispute as to the existence of the contract has been articulated by the parties. The credit agreements clearly cover the parties' dispute, as they relate to payment for goods/products supplied by plaintiff to Service Select. Thus, the cause of action for unjust enrichment must be dismissed because there exists a written agreement between the parties (*see Bellino Schwartz Padob Adv. v. Solaris Mktg.*

Group, 222 AD2d 313 [1st Dept 1995]).

The fourth cause of action seeking an injunction and a declaration that transfers of property are void as fraudulent is also dismissed as asserted against Quinlan for failure to state a cause of action.

> CPLR 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (citations omitted). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (citations omitted). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (citations omitted). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (citations omitted).

(*Symbol Tech., Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 193-195 [2d Dept 2009]).

A cause of action under Debtor and Creditor Law § 276 must be pled with sufficient particularity to satisfy CPLR 3016(b) (*Gateway I Group, Inc. v. Park Ave. Physicians, P.C.*, 62 AD3d 141, 150 [2d Dept 2009]). CPLR 3016(b) requires the circumstances constituting the wrong to be stated in detail in the complaint (*see Pike v. New York Life Ins, Co.*, 72 AD3d 1043, 1050 [2d Dept 2010]). Here, the plaintiff failed to allege any details of any of the allegedly fraudulent transfers in the complaint. Plaintiffs simply allege, upon information and belief, that defendants "have undertaken a practice of liquidating or otherwise transferring the property . . . at severely discounted rates or with out charge" and "engaged in a scheme whereby assets are purchaser [sic] on credit and sold and/or transferred to another (or) newly formed entity. Defendants thereafter cease operations of the entity that purchased the property in a deliberate attempt to avoid payment" (Complaint at ¶s 14 and 15). Such allegations lack specificity and do not satisfy CPLR 3016(b). Therefore, the fourth cause of action as asserted against Quinlan is dismissed.

Nevertheless, the plaintiff's cross-motion for leave to amend the complaint to amend the first cause of action and assert a claim for breach of contract against Quinlan, as a co-obligor, and to add a cause of action him for fraud, is granted. CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." "Leave to amend a pleading should be freely

granted unless the amendment sought is palpably improper as a matter of law or unless prejudice or surprise results from the delay" (*Uliano v. Entemann's, Inc.*, 148 AD2d 604, 605 [2d Dept 1989]). Whether to grant or deny leave to amend is committed to the court's discretion (*Edenwald Contracting Co., Inc. v. City of New York*, 60 NY2d 957, 959 [1983]).

Here, the defendants have failed to demonstrate that the proposed amendment is palpably improper as a matter of law or that prejudice or surprise results from the delay. As stated above, it is possible that Quinlan may found to be a co-obligor under the credit agreements and thus subject to personal liability (*see Florence Corp. v. Penguin Constr. Corp.*, 227 AD2d 442 [2d Dept 1996]; *Yellow Book of NY, LP v. DePante*, 309 AD2d 859 [2d Dept 2003]; *Paribas Properties, Inc. v. Benson*, 146 AD2d 522, 525 [1st Dept 1989]; *Star Video Entertainment, LP v. J & I Video Distrib., Inc.*, 268 AD2d 423 [2d Dept 2000]). Moreover, plaintiff's proposed fraud claim is not based upon a misrepresentation of a future intent to perform. Rather, it is based on certain allegedly false statements made by Quinlan to induce ADA to enter into the credit agreements, upon which ADA relied in entering into the agreements. "The merits of a proposed amendment will not be examined on the motion to amend unless the insufficiency is clear and free from doubt" (*Sievert v. Morlef Holding Co.*, 220 AD2d 403, 404 [2d Dept 1995]; *see, Lucido v. Mancuso*, 49 AD3d 220, 227 [2d Dept 2008]; *Noanjo Clothing, Inc. v. L & M Kids Fashion, Inc.*, 207 AD2d 436, 437 [2d Dept 1994]). Here, the insufficiency of the prosed amendments is not clear and free from doubt. Accordingly, the plaintiff's motion for leave to serve an amended complaint is granted and plaintiff is directed to serve an amended complaint in accordance with this order within 30 days.

The parties are directed to appear before the Court for a preliminary conference on August 9, 2011, at 9:30 a.m.

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

Dated: May 6, 2011
Riverhead, New York

EMILY PINES
J. S. C.

[ ] FINAL
[X] NON FINAL