

Access Staffing, LLC v Duff & Phelps, LLC
2011 NY Slip Op 31515(U)
May 31, 2011
Supreme Court, New York County
Docket Number: 106950/2010
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: How Joan A. V. d.d.v
Justice

PART 11

Index Number : 106950/2010
ACCESS STAFFING LLC
vs.
DUFF & PHELPS LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

This motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed Memorandum Decision & orders*

FILED

JUN 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 31, 2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
ACCESS STAFFING, LLC

Plaintiff,
-against-

Index No. 106950/10

DUFF & PHELPS, LLC
Defendant.

FILED

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-----X
Joan A. Madden, J.

Defendant moves, pursuant to CPLR 3211(a)(7), to dismiss two causes of action against them. Plaintiff opposes the motion, which is granted in part and denied in part.

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Plaintiff is in the business of locating and providing temporary and permanent personnel for hire. The verified complaint alleges that defendant entered into an agreement whereby plaintiff would search and procure a permanent employee for defendant's business. Plaintiff alleges that it did, in fact, locate and procure Ken Leissler, for employment by defendant, but defendant did not pay plaintiff for its services in the amount of 20% of Mr. Leissler's annual salary, as required by the parties' agreement, which it alleges equals \$80,000. Plaintiff further alleges that to avoid its obligation to pay, defendant claimed that Mr. Leissler "was not hired, but rather his 'company' was retained for 'project work' ...[when Mr. Leissler] was hired by defendant and retained for over six months, and was paid as an 'independent contractor,' in a bid to avoid actual liability to plaintiff, for the fees earned" (Verified Complaint ¶ 10). The complaint alternatively seeks more than \$250,000 in damages for profits realized by defendant as a result of plaintiff services in providing a suitable candidate.

The complaint contains causes of action for breach of contract, fraudulent inducement and unjust enrichment. Defendant now moves to dismiss the fraudulent inducement and unjust enrichment claims for failure to state a cause of action.

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be interpreted liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). However, “[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b).” Euryclei Partners, L.P. v. Seward & Kissel, L.P., 12 NY3d 553, 559 (2009). CPLR 3016 (b) requires that claims for fraud set forth “the circumstances constituting the wrong...in detail.” Thus, “[a]lthough there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege basic facts to establish the elements of the cause of action.” Euryclei Partners, L.P. v. Seward & Kissel, L.P., 12 NY3d at 559.

Plaintiff's second cause of action is for fraudulent inducement. To plead a viable cause of action for fraud, it must be alleged that the defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendant when made, for the purpose of inducing reliance, justifiable reliance on the alleged misrepresentation or omission by the victim of the fraud, and injury. Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996).

The complaint alleges that “the defendant in a bid to obtain the services of Ken Leissler, without payment of required fees, fraudulently induced plaintiff to forward the candidate to commence employment through a series of fraudulent misrepresentations. Said material misrepresentations included that defendant would be transitioning the candidate, Ken Leissler, to the payroll; that the fees equivalent to 20% of Ken Leissler's annualized salary would be forthcoming; and that Managing Director Erik Laykin, had the authority to negotiate contracts, and hire [personnel].” Verified Complaint ¶s19, 20.

It is further alleged that “these statements were false and known to be false when same was represented to plaintiff [and that] said statements were made with the intent to fraudulent induce plaintiff to enter into said contract; undertake to provide extensive services, and procure a candidate for hire [and that] but for these material misrepresentations, the plaintiff would not have expended said services, or procured a candidate for hire” (Id. ¶’s 20, 21). It is also alleged that “but for these material misrepresentations, the plaintiff would not have expended said services, or procured a suitable candidate for hire [and that] as a result of said fraudulent inducement, plaintiff has been damaged in the sum of \$80,000 representing the fees earned and due from defendant” (Id. ¶’s 22, 23).

“A fraud based cause of action is duplicative of a breach of contract claim ‘when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract’” Manas v. VMS Associates, LLC, 53 AD3d 451, 454 (1st Dept 2008), quoting First Bank of the Americas v. Motor Car Funding, 257 AD2d 287, 291 (1st Dept 1999). Otherwise put, “[a] cause of action for fraud does not arise when the only fraud charged relates to a breach of contract.” Id. See also, Linea Nuova, S.A. v. Slowchowsky, 62 A.D.3d 473 (1st Dept. 2009). However, a fraudulent inducement claim may be based on allegations that a defendant made “a misrepresentation of present facts [that] is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of a duty.” First Bank of the Americas v. Motor Car Funding, 257 AD2d at 291-292.

Here, the alleged misrepresentations that defendant would be transitioning Ken Leissler to the payroll and that the fees equivalent to 20% of Ken Leissler’s annualized salary would be forthcoming involve representations of future intent that arise out defendant’s contractual obligation to pay plaintiff for procuring Mr. Leissler services in exchange for 20% of his salary

and not a obligation collateral to the contract. Manas v. VMS Associates, LLC, 53 AD3d at 454; compare First Bank of the Americas v. Motor Car Funding, 257 AD2d 287 (finding that the complaint stated a cause of action for fraudulent inducement when misrepresentations related to present facts regarding the quality of the collateral and individual's credit rating that allegedly induced plaintiff to enter into agreement). Thus, these alleged misrepresentations are insufficient to state a claim for fraudulent inducement of contract.

Next, while allegations that defendant made a misrepresentation that the Managing Director Erik Laykin, had the authority to negotiate contracts, and hire [personnel], appear to involve misrepresentations related to present facts as opposed to future intentions, the complaint fails to allege with sufficient particularity how these statements induced plaintiff to enter the contract.

Furthermore, when, as here, the damages sought in connection with the purported fraud claim are the same as those sought in connection with the breach of contract claim, the fraud claim must be dismissed as duplicative of the breach of contract claim. Manas v. VMS Associates, LLC, 53 AD3d at 454 (noting that fraud claim cannot be maintained when plaintiff failed to allege that she sustained any damages that would not be recoverable under the breach of contract claim); See Orix Credit Alliance, Inc. v. R.E. Hable Co., 256 A.D.2d 114, 115 (1st Dept. 1998)(same). Accordingly, the fraudulent inducement claim must be dismissed on this ground as well.

In contrast, at this juncture, it cannot be said that the unjust enrichment claim fail to state a cause of action. The complaint alleges, *inter alia*, that "as a result of plaintiff's efforts, defendant was able to gain custody and control of the candidate Ken Leissler and his business contacts, and earned profits in excess of \$250,000.00, directly from the work provided by Ken

Leissler [and that] said sum...was earned as a direct result of plaintiff's services in providing a suitable candidate." Verified Complaint ¶25, 26. It is further alleged that "despite having reaped benefits of plaintiff's services, defendant willfully failed to pay the fees due to plaintiff." (Id., ¶ 27).

To prevail on a claim of unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered. Cruz v McAneney, 31 AD3d 54, 59 (2d Dept 2006). "[T]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what was recovered." Mandarin, 65 AD3d 448, 453 (1st Dept 2009), aff'd, 16 NY3d 173 (2011), quoting Paramount Film Distrib. Corp. v. State of New York, 30 NY2d 415, 421, rearg denied 31 NY2d 709 (1972), cert denied 414 US 829 (1973). Central to a claim for unjust enrichment is an allegation that a "benefit was bestowed...by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiff" Weiner v. Lazard Freres & Co., 241 AD2d 114, 119 (1st Dept 1998), quoting, Tarrytown House Condominiums v. Hainje, 161 AD2d 310, 313 (1st Dept 1990). See also Lake Erie Distributors, Inc. v. Martlet Importing Co., Inc., 221 AD2d 954, 956 (4th Dept 1995)(complaint adequately alleged cause of action for unjust enrichment based on allegations that "plaintiff conferred a benefit on defendant in the form of enhanced product recognition and good will through its marketing and distribution efforts....")

Under this standard, the complaint sufficiently states a cause of action for unjust enrichment based on allegations that defendant profited from the placement of Mr. Leissler, and thus conferred a benefit on defendant, and that defendant refused to pay plaintiff for its services. Moreover, contrary to defendant's position, when, as here, it is alleged that defendant obtained a

benefit through a plaintiff's efforts without compensating plaintiff, it need not be shown that the money paid was "rightfully the plaintiff's." Alko Mfg. Corp. v. Neptune Meter Co., 20 AD2d 635 (1st Dept 1964), aff'd 16 NY2d 777 (1965).

Next, although, in general, a plaintiff "cannot recover for unjust enrichment while simultaneously alleging the existence of an express contract covering the same subject matter" (MJM Advertising v Panasonic Indus. Co., 294 AD2d 265, 266 [1st Dept 2002]) when there is "a bona fide dispute as to the ... application of a contract is demonstrated, a plaintiff ... 'will not be required to elect his or her remedies.'" See Wilmoth v Sandor, 259 AD2d 252, 254 (1st Dept 1999)(citation omitted); see also, Waldman v Englishtown Sportswear, Ltd., 92 AD2d 833 (1st Dept 1983). As the defendant disputes that applicability of plaintiff's alleged contract, plaintiff may plead both breach of contract and unjust enrichment.

In view of the above, it is


ORDERED that the motion to dismiss is granted to the extent of dismissing the second cause of action for fraudulent inducement; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendant shall file and serve an answer within 30 days of the date of this decision and order, a copy of which is being mailed by my chambers to counsel for the parties; and it is further

ORDERED that a preliminary conference shall be held in Part 11, room 351, 60 Centre Street, New York, NY on July 21, 2011 at 9:30 a.m.

DATED: May 31, 2011


S.S.C.

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