

Start El., Inc. v Fountainhead Constr. LLC
2011 NY Slip Op 34028(U)
June 24, 2011
Supreme Court, New York County
Docket Number: 101712/2011
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMOND

PART 35

Justice

Index Number : 101712/2011
START ELEVATOR, INC.
VS.
FOUNTAINHEAD CONSTRUCTION LLC
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE 6/21/11
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

In accordance with the accompanying memorandum decision, it is hereby

ORDERED that defendant's motion pursuant to CPLR 3211 (a)(5) and (a)(7) dismissing plaintiff's complaint as against it is granted solely to the extent that the first cause of action for breach of contract, the second cause of action for goods sold and delivered, and the third cause of action for account stated are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the parties shall appear for an in-court conference at Part 35, Room 438, 60 Centre Street, New York, NY, on July 19, 2011, at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: 6/24/11

[Signature]
HON. CAROL EDMOND 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: PART 35

-----X
START ELEVATOR, INC.,

Plaintiff,

Index No.101712/2011

-against-

FOUNTAINHEAD CONSTRUCTION LLC,
and 277 MOTT ST., LLC,

Defendants.

----- X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In the instant action, plaintiff Start Elevator, Inc. (“Start”) seeks to recover damages against defendants 277 Mott St., LLC, (“277 Mott”) and Fountainhead Construction, LLC, (“Fountainhead”), for goods sold and delivered upon theories of breach of contract, account stated and unjust enrichment. Defendant 277 Mott St., LLC, (“277 Mott”) moves pursuant to CPLR 3211 (a)(5) and (a)(7) dismissing Start’s complaint against it.

Background Facts

277 Mott is the owner of real property located at 277 Mott Street in New York (the “premises”). Fountainhead was the general contractor for a renovation project of the premises pursuant to the contract between 277 Mott and Fountainhead. On or about March 31, 2008, Fountainhead entered into an agreement with Start for the installation of an elevator at the premises. In July 2008, after receiving 277 Mott’s pre-contract deposit, Fountainhead ceased operations and closed its doors.¹

¹In a related action, *277 Mott v Fountainhead Construction, et al.*, Index # 603168/2008, Justice Judith J. Gisch, granted 277 Mott’s summary judgment motion on its claims against Fountainhead for diversion of funds and breach of contract.

The facts are disputed as to what work, if any, has been performed by Start at the premises. Start alleges that it commenced actual work on April 14, 2008 and delivered materials for the project starting May 23, 2008, pursuant to the contract with Fountainhead. 277 Mott denies that any work was done on the premises and now moves to dismiss Start's claims against it.

As a threshold matter, the court refuses to treat this motion as a motion for summary judgment, as Start urges the court. While “where the parties, [through extensive evidence,] have deliberately chart[ed] a summary judgment course, a motion to dismiss pursuant to CPLR 3211 may be converted to a summary judgment motion by the court after giving the parties adequate notice” (see CPLR 3211[c]; *CPC Intern., Inc. v McKesson Corp.*, 120 AD2d 221, 507 NYS2d 984 [1st Dept 1986]; *Backer v Bouza Falco Co.*, 28 AD3d 503, 504 [2d Dept 2006], *lv denied* 7 NY3d 707 [2006]), no such extensive evidence has been submitted by the parties on this motion. Therefore, the court applies the standard of a motion to dismiss (CPLR 3211).

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and 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 into any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

Here, it is undisputed that no contract exists between Start and 277 Mott. Therefore, the

first cause of action for breach of contract is dismissed.

Plaintiff's second cause of action for goods sold and delivered must likewise be dismissed. Although on a motion to dismiss under CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted]), the complaint must not consist of only a "conclusory assertion" of the wrong; it must contain factual allegations (*Goldin v Engineers Country Club*, 54 AD3d 658, 659–60 [2d Dept 2008]), *app denied*, 13 NY3d 763 [2009]; *see also Chappo & Co., Inc. v Ion Geophysical Corp.*, 2011 NY Slip Op 02942 m, — AD3d — [1st Dept 2011]).

Here, the second cause of action is unsupported by any factual allegations. The complaint alleges in a conclusory manner that plaintiff "delivered goods materials and labor to defendants [and] provided invoices for the amounts due (\$82,500)," but fails to allege any facts demonstrating that it sold and delivered any goods to 277 Mott, warranting dismissal of the second cause of action.

Plaintiff similarly fails to state a cause of action for an account stated because "[a]n account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat a statement of debt as an account stated (*see Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, 996, 420 NYS2d 212 [1979]). Moreover, "[a]n account stated cannot be made an instrument to create liability when none otherwise exists. [. . .] A cause of action alleging an account stated cannot be utilized simply as another means to attempt to collect under a disputed contract" (*Erdman Anthony & Assoc. v Barkstrom*, 298 AD2d 981, 747 NYS2d 670 [4th Dept 2002]). Here, the complaint fails to allege that 277 Mott received and retained any of plaintiff's invoices for any of the alleged goods or services, which it "retained

without objection within a reasonable time” (*cf. Loheac v Children's Corner Learning Center*, 51 AD3d 476 [1st Dept 2008]; *Ruskin, Moscou, Evans & Faltischek v FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1st Dept 1996]). Therefore, the third cause of action for account stated is also dismissed.

Finally, the fourth cause of action alleges that “defendant” has been unjustly enriched in the amount of \$82,500.

“A cause of action for unjust enrichment arises when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another” (*Mandarin Trading Ltd. v Wildenstein, supra*; *Sperry v Crompton Corp., supra*). To establish a claim for unjust enrichment, a plaintiff must establish that he/she performed services for the defendant, which resulted in the defendant being unjustly enriched (*Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Organization, Inc.*, 12 Misc 3d 1182 [2006], *citing Clark v Daby*, 300 AD2d 732, 751 NYS2d 622 [3d Dept.2002] and *Kagan v K-Tel Entertainment, Inc.*, 172 AD2d 375, 568 NYS2d 756 [1st Dept.1991]). Plaintiff must also allege that he or she “conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor” (*Nakamura v Fuji*, 253 AD2d 387, 390 [1st Dept 1998]).

While the complaint does not allege that Start performed any services directly for 277 Mott at its request, for which Start anticipated being compensated, in its affidavit in opposition to this motion, Start avers that 277 Mott “benefitted and has been enriched by the materials, work, labor and services of the plaintiff for the elevator modernization.” Since on a motion to dismiss, “[a]ffidavits submitted by a plaintiff may be considered for the limited purpose of remedying

defects in the complaint” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]), and because “the court is not authorized to assess the relative merits of the complaint’s allegations against the defendant’s contrary assertions “ (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]), the court finds that plaintiff barely stated its cause of action for unjust enrichment.

It should be noted that, contrary to 277 Mott’s contention, this claim is barred by *res judicata* by virtue of the decision in *277 Mott v Fountainhead Construction*, Index # 603168/2008 (Gisch, J.), which granted 277 Mott’s summary judgment motion on its claims against Fountainhead for diversion of funds and breach of contract.

The doctrine of *res judicata*, or claim preclusion, bars parties from relitigating *causes of action* between them that were actually litigated or could have been litigated in the earlier action (*DaimlerChrysler Corp. v Spitzer*, 782 NYS2d 610, *affd* 7 NY3d 653 [2006]; *see Hyman v Hillelson*, 79 AD2d 725, 726 [1980], *affd* 55 NY2d 624 [1981]).

The instant action is not a relitigation of a claim decided in a prior action. The decision in *277 Mott v Fountainhead Construction*, Index # 603168/2008, merely states in *dicta* that “[no] work was ever done by defendant on the property.” Thus, even assuming Start as a subcontractor is in privity with Fountainhead, a general contractor, the claim for unjust enrichment against Fountainhead has not been litigated in the prior action. And, since, as stated above, no contract existed between Start and 277 Mott, the court’s grant of summary judgment to 277 Mott on the breach of contract claim against Fountainhead has no preclusive effect on Start’s unjust enrichment claim. Therefore, the dismissal of this claim is unwarranted.

Accordingly, 277 Mott’s motion is granted solely to the extent that the first, the second

and the third causes of action are dismissed, and the motion is otherwise denied.

Conclusion

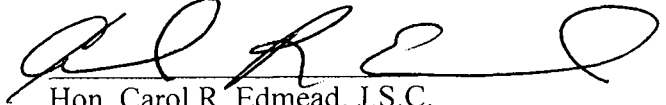
Based on the foregoing, it is hereby

ORDERED that defendant's motion pursuant to CPLR 3211 (a)(5) and (a)(7) dismissing plaintiff's complaint as against it is granted solely to the extent that the first cause of action for breach of contract, the second cause of action for goods sold and delivered and the third cause of action for account stated are dismissed, and the motion is otherwise denied; and it is further

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Dated: June 24, 2011


Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD