Bulent ISCI v 1080 Main St. Holrook, Inc.
2013 NY Slip Op 32413(U)
September 24, 2013
Supreme Court, Suffolk County
Docket Number: 32133/12
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 32133/12

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/14/13
ADJ. DATES 8/30/13
Mot. Seq. # 001 - MD
CDISP Y___ N X

---X

BULENT ISCI,

Plaintiff,

-against-

1080 MAIN STREET HOLROOK, INC. and
SINDY SHABBIR,

Defendants.

---X

JOHN J. ANDREWS, ESQ.
Atty. For Plaintiff
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Pt. Jefferson, NY 11777

IQBAL HYDER, LLC
Atty. For Defendants
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Jamaica, NY 11432

Upon the following papers numbered 1 to 8 read on this motion for judgment and other relief ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ___; Answering papers 5-6 ; Replying papers 7-8 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#001) by the defendants for an order extending their time to move to dismiss the complaint under CPLR 3211 is considered under CPLR 2004 and are denied; and it is further

ORDERED that those portions of this motion wherein the defendants seek to dismiss the complaint pursuant to CPLR 3211(a)(7), 3211(a)(10) and/or 3212 is considered thereunder and are denied; and it is further

ORDERED that those portions of this motion wherein the defendants seek an order "directing the plaintiff to amend pleadings" by joining certain purportedly necessary parties are denied; and it is further

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ORDERED that the remaining portions of this motion by the defendants wherein they seek leave to amend their answer is considered under CPLR 3025(b) and are denied.

In October of 2012, the plaintiff commenced this action to recover the sum of $65,000.00 due from the defendants on August 30, 2012 under the terms of an assignment of a lease of commercial premises housing a gas station and repair shop which the corporate defendant now occupies. The payment is alleged to be reflected in a writing dated July 20, 2012 executed by the plaintiff and the corporate defendant as part of the plaintiff's sale of his gas station business to the corporate defendant. Issue was joined by service of an answer by the defendants in November of 2012. That answer contained two counterclaims and the following four affirmative defenses: 1) improper service of process; 2) the plaintiff's breach which is alleged to be founded upon documentary evidence; 3) failure to state a cause of action; and 4) lack of in personam jurisdiction over defendant. A preliminary conference was thereafter held on March 18, 2013 which culminated in a stipulation of counsel setting forth a schedule for discovery exchanges and motion practice that was "so-ordered" by the court.

By the instant motion, the defendants move, pursuant to CPLR 2004 for an order granting them an extension of the time imposed upon a motion to dismiss by the provisions of CPLR 3211(e). Upon the granting of such relief, the defendants seek dismissal of the complaint pursuant to the above quoted subsections of CPLR 3211(c) or summary judgment pursuant to CPLR 3211(c) and/or 3212. In addition, the defendants seek an order compelling the plaintiff to amend his complaint to add certain allegedly necessary parties. Finally, the defendants seek leave to amend their answer to add counterclaims against the plaintiff. The plaintiff opposes the motion on various grounds. For the reasons stated below, the motion is denied.

It is well settled law that CPLR 3211(a) mandates that all motions made thereunder be made within the time period in which an answer must be served (*see* CPLR 3211[e]; ***Nowacki v Becker***, 71 AD3d 1496, 897 NYS2d 560 [2d Dept 2010]; ***Bennett v Hucke***, 64 AD3d 529, 881 NYS2d 335 [2d Dept 2009]; ***Bowes v Healy***, 40 AD3d 566, 833 NYS2d 400 [2d Dept 2007]). If not raised in a such a pre-answer motion to dismiss, all defenses recited in subparagraphs 3211(a) are waived unless set forth in an answer except those under paragraphs (a)(2) [subject matter], (a)(7) [failure to state a cause of action] and (a)(10) [failure to join necessary parties], which are never waived and may be raised at any subsequent time or pleading (*see* CPLR 3211[e]; ***Hendrickson v Philbor Motors, Inc.***, 102 AD3d 251, 955 NYS2d 3384 [2d Dept 2012]).

Here, the defendants' motion, to the extent they demand dismissal of the complaint under CPLR 3211(a)(1) and (a)(5) on the grounds of payment or otherwise, is untimely, as it was not interposed within the time required for service of the defendants' answer. While the defendants seek

leave to extend that time pursuant to CPLR 2004, the court denies such relief. To be entitled to such relief, a showing of good cause for the failure to observe the statutory or other deadline is required (*see* CPLR 2004; ***Smith v Pach***, 30 AD2d 707, 292 NYS2d 333 [2d Dept 1968]). The moving papers are devoid of any showing of an entitlement to such relief as no good cause for the extension is advanced therein by the defendants. In addition, the granting of such relief is unwarranted in light of the procedural posture of this case which includes service of an answer by the defendants nearly ten months ago and the issuance, upon the stipulation of counsel, of a preliminary conference order setting forth a schedule of discovery and a time outline for the interposition of certain motions, like the instant motion, that has long since expired. The defendants' application for relief pursuant to CPLR 2004 is thus denied.

Also denied are those portions of the defendants' motion wherein they seek dismissal of the plaintiff's complaint pursuant to CPLR 3211 and/or 3212 on the grounds that the plaintiff failed to join certain necessary parties. In his complaint, the plaintiff advances but one claim, namely, the recovery from the defendants of monies owing under an agreement between him and the defendants. The moving papers are devoid of any proof that the entities which the defendants claim are necessary parties within the purview of CPLR 1001 and 1003 and that the court should not proceed in their absence (*see* CPLR 1001; ***Rock v County of Suffolk***, 212 AD2d 587, 623 NYS2d 9 [2d Dept 1995]).

Those portions of the defendants' motion wherein they seek dismissal of the complaint upon the grounds of legal insufficiency are also denied. The legal standard to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) is whether "the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist Coll. v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], *quoting* ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). On such a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d at 314, 326, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). The test to be applied is thus "whether the complaint gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (***Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC***, 107 AD3d 788, 967 NYS2d 119 [2d Dept 2013]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc***., 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; ***Haberman v Zoning Bd. of Appeals of City of Long Beach***, 94 AD3d 997, 942 NYS2d 571 [2d Dept 2012]). If the court can determine that the plaintiff is entitled to relief on any view of the facts alleged, its inquiry is complete and the complaint must be declared legally sufficient (*see* ***Symbol Tech. v Deloitte & Touche, LLP***, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]).

A review of the complaint served herein by the plaintiff reveals that the factual allegations sufficiently state a claim of breach on the part of the defendants of the agreement to pay $65,000.00 on or before August 30, 2012 in connection with the assignment or other transfer of the plaintiff's interest in his lease of the premises housing the gas station business allegedly sold to the defendants. Whether the plaintiff will succeed on his claims is neither relevant or material.

The complaint is also legally sufficient when viewed in light of the evidentiary materials submitted by the defendant. Where evidentiary proof is offered on a motion pursuant to CPLR 3211(a)(7) and such proof is considered, but the motion has not been converted to one for summary judgment, "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1997]; *see* ***Bua v Purcell & Ingrao, P.C.,*** 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; ***Jannetti v Whelan***, 97 AD3d 797 949 NYS2d 129 [2d Dept 2012]; ***Bokhour v GTI Retail Holdings, Inc***., 94 AD3d 682, 941 NYS2d 675 [2d Dept 2012]).

A review of the defendants' submissions reveals that the same failed to establish that a material fact alleged in the complaint is not a fact at all and that there is no significant dispute with respect to it. The court thus finds that the defendants are not entitled to a dismissal of the complaint under CPLR 3211(a)(7) because the defendants failed to demonstrate that the plaintiff has no cause of action for breach of the agreement to pay the plaintiff $65,000.00. Indeed, the defendants admit the existence of the agreement in their moving papers wherein it is alleged that "the assignment of the lease was the only agreement executed by the parties" (*see* ¶ 5 of the affidavit of defendant Sindy Shabbir and ¶ 13 and of the affirmation of defense counsel attached to the moving papers as Exhibits E and D, respectively). The defendants further admit that they signed a promissory note at the closing held on July 20, 2012, in which, the corporate defendant and/or defendant Shabbir promised to pay the plaintiff the sum of $65,000.00 by August 30, 2012 (*see* ¶ 5 of the affidavit of defendant Sindy Shabbir and ¶ 15 of the affirmation of defense counsel attached to the moving papers as Exhibits E and D, respectively).

The court also denies the defendants' request to convert those portions of their motion to dismiss for legal insufficiency into one for summary judgment under CPLR 3211(c) and an award of summary judgment dismissing the complaint thereunder and/or under CLR 3212. The moving papers are devoid of any proof of the defendants' entitlement to either of these forms of drastic relief, especially in light of the admissions as to the existence of their promise to pay the plaintiff $65,000.00 for an assignment of the lease set forth by the defendants and their counsel in the moving papers outlined above. The defendants' purported defense that it paid all amounts owing to the plaintiff is not supported by documentary proof in admissible form sufficient to eliminate all

questions of fact from the case (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 487 NYS2d 316 [1985]). In sum, there has been no showing of any entitlement to a judgment as a matter of law in favor of the defendants on this motion.

Also denied are those portions of the defendants' motion wherein they seek an order in which the "court shall direct the plaintiff of Amend Pleadings by joining the NYS Department of Taxation and Finance as a necessary party plaintiff pursuant to CPLR 1001 and 1003" and the two other corporate entities. This relief is inconsistent with even the cursory readings of the express provisions of CPLR 1001 and the complaint as it is apparent therefrom that there has been no failure on the part of the plaintiff to join necessary parties to the simple, single breach of contract claim the plaintiff asserts against the defendants. Under theses circumstances, the court considers the application for an order directing the plaintiffs to amend its complaint to join certain others to be so wholly lacking in merit that it borders on the frivolous as that term is defined in 22 NYCRR Part 130-1.

Finally, the court denies those portions of the defendants' motion wherein they seek leave to serve an amended answer containing new counterclaims. The moving papers failed to include a copy the proposed new pleading as required by CPLR 3025(b).

In view of the foregoing, the instant motion (#001) by the defendants for awards of accelerated judgments and other relief is denied.

DATED: 9/24/13

THOMAS F. WHELAN, J.S.C.