

Katz v Steven M. Park Inc.

2014 NY Slip Op 31465(U)

April 10, 2014

Supreme Court, New York County

Docket Number: 651862/2011

Judge: Ellen M. Coin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ELLEN M. COIN

PART 63

HARRIETTE ROSE KATZ,

Plaintiff,

INDEX NO. 651862/2011
MOTION DATE Mar. 21, 2014
MOTION SEQ. NO. 002
E-FILED

-against-

STEVEN M. PARK INC. and STEVEN M. PARK,

Defendants

The following papers, numbered 1, were read on this motion for a default judgment:

<u>Papers</u>	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits	1
Answering Affidavits-Exhibits	
Reply Affidavits	
Cross-Motion	X No

Upon the foregoing papers, notwithstanding the lack of opposition, the motion is granted in part and denied in part.

Plaintiff established her service of the first amended summons and complaint upon defendant Steven M. Park Inc. (SMP) and SMP's default. Her amended complaint and affidavit of merit allege an agreement with SMP, plaintiff's performance thereof via her payments to the defendant corporation, the corporation's breach, and her resulting damages. (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Accordingly, she is entitled to judgment on her First Cause of Action for breach of contract as against SMP.

Plaintiff also established service of her original summons and complaint upon individual defendant Steven M. Park (Park), who served an answer *pro se*, in which he denied entering into any contract with the plaintiff. Thereafter the Court granted plaintiff's motion to amend her complaint to add the corporation SMP as a party defendant. Plaintiff has established service of the amended pleading upon Park and his default.

While defaulting defendants are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them (*Woodson v Mendon Leasing Corp.*,

[* 2]

100 NY2d 62, 70 [2003]), CPLR §3215(f) requires that the plaintiff state a viable cause of action in order to recover upon a defendant's failure to appear or answer. (*CPS Group, Inc. v Gastro Enter., Corp.*, 54 AD3d 800, 801 [2d Dept 2008]; *Beaton v Transit Facility Corp.*, 14 AD3d 637, 637 [2d Dept 2005]). For the reasons that follow, the Court finds that plaintiff's allegations fail to state any viable cause of action against Park.

Plaintiff's claims against Park allege conversion (Second Cause of Action), unjust enrichment (Third Cause of Action) and fraudulent inducement (Fourth Cause of Action).

"[A]n action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question." (*Lucker v Bayside Cemetery*, 114 AD3d 162 [1st Dept 2013][citation and internal quotation marks omitted]). "The plaintiff must have a superior right of possession to the funds, and the defendant must have exercised unauthorized dominion over the funds to the exclusion of the plaintiff's rights." (*Id.*). Here, plaintiff's claim is simply that some or all of the money she paid to SMP pursuant to their oral agreement was given to Park. (*Katz Aff.* ¶13). Plaintiff fails to allege that she entrusted a specific, identifiable fund to SMP and that SMP and Park had an obligation to return it. Instead, her claim is effectively a mere restatement of her breach of contract claim against SMP. (*Cf. Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447-448 [1st Dept 2010]). Accordingly, she has failed to establish her right to a default judgment against Park on her claim for conversion.

Unjust enrichment is classified as a "quasi-contract claim" and invokes "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties." *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 (2012) [internal quotation marks and citations omitted]. In order to successfully plead a claim for unjust enrichment, plaintiff must allege that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Id.* (internal quotation marks and citation omitted). The pleading has to indicate a relationship between the parties that could have caused reliance or inducement. (*Id.*, 19 NY3d at 517).

Here, plaintiff fails to allege a relationship between herself and Park. Instead, she alleges that she entered into a

contract with SMP, with Park communicating with her on behalf of the corporate entity. Thus, she fails to state a viable claim for unjust enrichment against Park.

Plaintiff's Fourth Cause of Action for fraudulent inducement alleges that Park was acting within the scope of his employment of SMP. Corporate officers may be held personally liable for personal torts committed in the performance of their duties for their corporation (*Westminster Constr. Co. v Sherman*, 160 AD2d 867, 868 [2d Dept 1990]). "A cause of action for fraud in inducing a contract cannot be based solely upon a failure to perform contractual promises of future acts. An alleged failure to perform such acts is a breach of contract which must be enforced by an action on the contract." (*C.B. W. Fin. Corp. v Computer Consoles*, 122 AD2d 10, 12 [2d Dept 1986][citation omitted]).

The fraudulent inducement claim alleges that Park falsely represented that SMP had the ability to perform the subject contract. The damages sought arise to of the alleged failure to perform that contract. Accordingly, the Fourth Cause of Action, sounding in fraud but based solely upon a failure to perform contractual promises of future acts, fails to state a claim against Park. (*Westminster Constr. Co. v Sherman*, 160 AD2d at 869).


In light of the foregoing, it is

ORDERED that this motion for a default judgment is granted as against defendant Steven M. Park Inc. only, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant Steven M. Park Inc. in the amount of \$20,395.00, together with interest at the statutory rate from September 28, 2012, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion is otherwise denied.

This is the decision and order of the Court.

Dated: April 10, 2014



Ellen M. Coin, A.J.S.C.

Non-final Disposition