

American Guard Serv., Inc. v Griffin Sec. Serv., Inc.
2014 NY Slip Op 31736(U)
June 19, 2014
Sup Ct, New York County
Docket Number: 651105/13
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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AMERICAN GUARD SERVICES, INC. and
WORLDWIDE SOURCING GROUP, INC.,

Index Number: 651105/13
Submission Date: 3/14/14

Plaintiffs,

- against -

DECISION and ORDER

GRIFFIN SECURITY SERVICES, INC. and
MICHAEL E. SMITH,

Defendants.

-----X
For Plaintiffs:
Richard A. Kraslow, P.C.
425 Broad Hollow Road
New York, NY 11747

For Defendants:
Putney Twombly Hall & Hirson, L.P.
521 Fifth Avenue
New York, NY 10175

Papers considered in review of defendants' cross-motion to dismiss (motion seq. no. 001):

Notice of Motion	1
Aff in Support	2
Notice of Cross-Motion	3
Aff in Opp/Supp of Cross-Motion .	4
Aff in Opp to Cross-Motion	5
Reply Aff	6

HON. SALIANN SCARPULLA, J.:

In this action, defendants Griffin Security Services, Inc. (“Griffin”) and Michael E. Smith (“Smith”) cross-move to dismiss plaintiffs American Guard Services, Inc. (“American Guard”) and Worldwide Sourcing Group, Inc.’s (“Worldwide”) complaint pursuant to CPLR § 3211(a) (1), (7), (8), and (10) and for attorney’s fees.¹

¹ On November 20, 2013, Justice Barbara Kapnick heard oral argument on plaintiffs’ motion for a default judgment, and she denied that motion on the record. Defendants’ cross-motion to dismiss the complaint remains to be decided.

On March 27, 2013, plaintiffs Worldwide and American Guard (“Plaintiffs”) commenced this action seeking, *inter alia*, to recover an unpaid balance of two loans they allegedly made to Griffin, and for specific performance of a stock purchase agreement. Plaintiffs assert seven causes of action in the complaint sounding in breach of contract, unjust enrichment, fraud, and conversion.

According to the complaint, Worldwide and Griffin entered into a letter of intent on April 20, 2012, in which Worldwide agreed to purchase a 49% ownership interest in Griffin through a stock purchase transaction, and to extend a \$50,000 loan to Griffin. The terms of the letter of intent were purportedly incorporated into a stock purchase agreement, which provided for a June 25, 2012 closing date for the stock purchase transaction.

Worldwide alleges that its subsidiary American Guard funded the \$50,000 loan to Griffin through a wire transfer. Griffin later represented to Plaintiffs that it would need an additional \$250,000 to sustain operations until the closing date. Griffin’s chief executive officer, Smith, allegedly requested that American Guard secure a \$250,000 line of credit from its lender, TAB Bank, for the purpose of funding Griffin’s operations. To induce TAB Bank to issue the line of credit, Griffin allegedly agreed to pay its accounts receivable to American Guard in a subcontract dated April 23, 2012.

Upon Griffin’s request, American Guard submitted an application to TAB Bank for a \$250,000 line of credit. While the application was pending, American Guard

transferred \$250,000 to Griffin, upon its representation that it would fully repay this loan with the proceeds from the line of credit. According to Plaintiffs, Griffin never provided the necessary documentation to obtain the line of credit from TAB Bank, and Griffin ultimately obtained another loan by pledging its accounts receivable to a different lender. Plaintiffs allege that Griffin never fully repaid the loans funded by American Guard, and that Griffin failed to attend the closing and transfer 49% ownership to American Guard.

In the first cause of action, American Guard asserts a breach of contract claim against Griffin based on its failure to repay \$150,000 of the \$300,000 that it borrowed. American Guard also asserts an unjust enrichment claim for the unpaid \$150,000, in the second cause of action. In the third cause of action, American Guard alleges an additional breach of contract claim based on Griffin's failure to attend the closing and transfer 49% ownership interest to American Guard. American Guard also seeks specific performance of the stock purchase agreement in the fourth cause of action.

In the fifth cause of action, American Guard seeks punitive damages based on Smith's fraudulent representation that Griffin would collateralize and repay the loans. American Guard alleges that Smith's misrepresentations fraudulently induced it to make the loans, and to enter into the letter of intent and stock purchase agreement. American Guard further seeks the appointment of a temporary receiver as the sixth cause of action. Finally, in the seventh cause of action for conversion, American Guard seeks the return of

an automobile, an engagement ring, and other personalty that it transferred to Griffin on condition that Griffin would pay for these items.

In the current motion, Griffin argues that the complaint should be dismissed because it fully repaid the \$50,000 loan and it does not have an obligation to repay the \$250,000 that it received from American Guard as it never obtained the line of credit from TAB Bank. Griffin further contends that American Guard cannot state a breach of contract claim based on the letter of intent because it is an unenforceable contract.

Griffin also claims that it does not have any obligations under the stock purchase agreement because it properly terminated that agreement on July 26, 2012. Griffin argues that Plaintiffs failed to satisfy the material conditions required for the closing of the stock purchase transaction. Smith argues that the fifth and seventh causes of action against him should be dismissed because they do not state a claim.

Griffin and Smith also move to dismiss the complaint based on improper service. Smith submits an affidavit, on behalf of himself and Griffin. In his affidavit, Smith states that neither he nor Griffin were ever served with the summons and complaint. Smith contends that Plaintiffs failed to effectuate substituted service when they served the summons and complaint on a person identified as "Earl Taylor," a purported co-worker of Smith and managing agent to Griffin. Smith states that he does not have any co-worker named Earl Taylor, and that Griffin does not employ any person with that name or fitting the description contained in Plaintiffs' affidavit of service.

Discussion

1. Breach of Contract

To state a claim for breach of contract, a plaintiff must allege the existence of a contract, plaintiff's performance thereunder, defendant's breach, and damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

In the first cause of action, American Guard alleges that Griffin breached either the letter of intent or the stock purchase agreement by failing to repay \$150,000 of the \$300,000 that it borrowed. Griffin argues that this claim should be dismissed because it repaid the \$50,000 loan in full, and that it does not have any obligation to repay the \$250,000 that it received from American Guard because it never obtained a line of credit from TAB Bank.

Here, American Guard adequately alleges a breach of contract claim against Griffin with respect to the \$50,000 loan. The letter of intent provided that Worldwide, or its designee, American Guard, would extend a short-term loan to Griffin in the amount of \$50,000. American Guard alleges that it performed under the letter of intent by funding the \$50,000 loan to Griffin through a wire transfer, and that Griffin breached the letter of intent by failing to repay the loan.

Griffin argues that the letter of intent is unenforceable contract because it is merely a statement of the parties' intentions to agree at a later date. However, while paragraph 13 states that the letter of intent is a "statement of mutual intentions," that same paragraph

goes on to state that “[n]otwithstanding the foregoing, the provisions of paragraph 3 ad (sic) 5 through 14 are agreed to be fully binding upon the parties upon the execution of this letter.” As the terms and conditions of the \$50,000 loan appear in paragraph 3, it is clear that the letter of intent is a binding contract with respect to that loan, and Griffin is contractually obligated to repay it.

Griffin also contends that it paid the \$50,000 loan in full and submits a document purporting to show that it paid this loan by wire transfer on July 17, 2012. This documentary evidence, however, fails to conclusively demonstrate that Griffin repaid the \$50,000 loan because it does not contain any information whatsoever about the identity of the sender or recipient of the wire transfer, or the purpose of the wire transfer.

Although American Guard alleges a breach of contract claim for the \$50,000 loan, it does not adequately plead a breach of contract claim for the \$250,000 that it allegedly loaned to Griffin. Neither the letter of intent or the stock purchase agreement contain any contractual provisions relating to a \$250,000 loan agreement between the parties. Furthermore, American Guard does not allege the existence of an oral contract with Griffin for the \$250,000 loan.

For the reasons above, I grant Griffin’s motion to dismiss the first cause of action for breach of contract, except for American Guard’s breach of contract claim related to the \$50,000 loan provided for in the letter of intent.²

² In the complaint, Worldwide does not directly assert any causes of action against the defendants. Therefore, I dismiss Worldwide’s complaint in its entirety.

In the third cause of action, American Guard alleges that Griffin failed to attend the closing and transfer 49% ownership interest to American Guard, in breach of the stock purchase agreement. American Guard fails to state a breach of contract claim based on the stock purchase agreement because it does not allege its own performance under the contract. *Chappo & Co., Inc. v. Ion Geophysical Corp.*, 83 A.D.3d 499, 500 (1st Dep't 2011). In accordance with this decision, I further dismiss the fourth cause of action seeking specific performance of the stock purchase agreement to effectuate a transfer of 49% ownership interest to American Guard.

Accordingly, I grant Griffin's motion to dismiss the third cause of action for breach of contract and the fourth cause of action for specific performance.

2. Unjust Enrichment

A cause of action for unjust enrichment requires a showing that: (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff. *Georgia Malone & Co. Inc. v. Ralph Rieder*, 86 A.D.3d 406, 408 (1st Dep't 2011); *Clifford R. Gray, Inc. v. LeChase Const. Servs., LLC*, 31 A.D.3d 983, 987-88 (3d Dep't 2006).

American Guard sufficiently pleads an unjust enrichment claim against Griffin in the amount of \$150,000. American Guard alleges that it funded two loans to Griffin, in the amounts of \$50,000 and \$250,000, based on Griffin's promise to repay the loans. American Guard further alleges that Griffin repaid \$150,000 of the loans, but failed to

repay the remaining \$150,000. These allegations state a claim for unjust enrichment to the extent that Griffin has allegedly failed to repay \$150,000 to American Guard.

Therefore, I deny Griffin's motion to dismiss the second cause of action for unjust enrichment.

3. Fraudulent Inducement

In the fifth cause of action, American Guard alleges that Smith made false representations that Griffin collateralized and would repay the two loans of \$50,000 and \$250,000, in order to induce American Guard to make the loans and to enter into the letter of intent and the stock purchase agreement. In this cause of action, American Guard seeks punitive damages against Smith.

To state a cause of action for fraudulent inducement, a plaintiff must allege a "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury."

Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 421 (1996); *Shea v. Hambros PLC*, 244 A.D.2d 39, 46 (1st Dep't 1998).

While American Guard pleads a misrepresentation of fact – i.e., that Smith falsely represented that Griffin collateralized the loans by pledging its accounts receivable – American Guard does not adequately plead a claim for punitive damages. To sustain a claim for punitive damages, a plaintiff must allege intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act

that willfully and wantonly disregards the rights of another. *Gamiel v. Curtis & Riess-Curtis, P.C.*, 16 A.D.3d 140, 141 (1st Dep't 2005). American Guard's allegations against Smith do not rise to the level of misconduct sufficient to state a claim for punitive damages. *Leighton v. Lowenberg, D.D.S.*, 103 A.D.3d 530, 530-31 (1st Dep't 2013); *Board of Mgrs. of the Waterford Assn., Inc. v. Samii*, 68 A.D.3d 585, 586 (1st Dep't 2009).

Accordingly, I grant Smith's motion to dismiss the fifth cause of action for fraudulent inducement.

4. Temporary Receiver

CPLR § 6401(a) authorizes the appointment of a receiver where "there is danger that the property will be removed from the state, or lost, materially injured or destroyed." The appointment of a receiver is a drastic remedy only to be invoked where necessary for the protection of the parties. *In re Armienti*, 309 A.D.2d 659, 661 (1st Dep't 2003).

I grant Griffin's motion to dismiss the sixth cause of action for an appointment of a receiver. The appointment of a receiver is not a form of ultimate relief that can be awarded in a plenary action, but rather, is limited as a provisional remedy, or as an aid in post-judgment enforcement. *Old Republic Nat. Title Ins. Co. v. Cardinal Abstract Corp.*, 14 A.D.3d 678, 680-81 (2d Dep't 2005); *Lemle v. Lemle*, 92 A.D.3d 494, 498 (1st Dep't 2012).

5. Conversion

To establish a conversion claim, a plaintiff must demonstrate: (1) legal ownership or an immediate superior right of possession to a specific identifiable thing; and (2) that the defendant exercised an unauthorized dominion over that property to the exclusion of plaintiff's rights. *Lemle*, 92 A.D.3d at 497; *Meese v. Miller*, 79 A.D.2d 237, 243 (4th Dep't 1981).

I grant Smith's motion to dismiss the seventh cause of action for conversion. American Guard fails to allege that it maintained legal ownership, or an immediate superior right of possession to the automobile, diamond engagement ring, and other personalty that were allegedly converted by Smith.

II. CPLR § 3211(a)(8)

Griffin and Smith further move to dismiss the complaint based on improper service. They contend that the Plaintiffs failed to effectuate service when they served the summons and complaint on Earl Taylor because he is not Smith's co-worker or a Griffin employee.

CPLR § 308(2) provides that personal service upon an individual shall be made "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business." Under CPLR § 311(a)(1), personal service upon a

domestic corporation may be effected by delivering the summons “to an officer, director, managing or general agent.”

Based on his affidavit, I find that Smith raises an issue of fact as to whether service was properly effectuated. Although Plaintiffs’ affidavits of service constitute *prima facie* evidence of service, Smith’s sworn, non-conclusory denial is sufficient to dispute the veracity of the affidavits, and therefore a traverse hearing is required.

Finkelstein Newman Ferrara LLP v. Manning, 67 A.D.3d 538, 538 (1st Dep’t 2009); *NYCTL 1998-1 TRUST and The Bank of New York*, 7 A.D.3d 459, 460 (1st Dep’t 2004).

Smith stated that he does not have a co-worker named Earl Taylor, and that Griffin never employed any person by that name or fitting the description contained in Plaintiffs’ affidavits of service.

Accordingly, I direct American Guard and Griffin to appear for a traverse hearing to determine whether Griffin was properly served. As the causes of action against Smith are now dismissed, he is not required to appear for the traverse hearing.

III. Attorney’s Fees

Griffin and Smith argue that they are entitled to attorney’s fees pursuant to Section 12.8(d) of the stock purchase agreement. Section 12.8(d) provides that the “parties agree that . . . the prevailing party in any action brought with respect to or to enforce any right or remedy under this Agreement shall be entitled to recover from the other party or parties all reasonable costs and expenses of any nature whatsoever incurred by the prevailing

party in connection with such action, including without limitation attorneys' fees and prejudgment interest."

First, I deny Griffin's motion for attorney's fees as premature because several causes of action remain against it. Second, I deny Smith's motion for attorney's fees because the causes of action asserted against him for fraud and conversion are not within the scope of the attorney's fees provision as those claims do not relate to the enforcement of any right or remedy under the stock purchase agreement.

In accordance with the foregoing, it is

ORDERED that plaintiff Worldwide Sourcing Group, Inc.'s complaint is dismissed in its entirety; and it is further

ORDERED that a traverse hearing is directed to be conducted before a Special Referee in order to determine whether service in this action against the defendant Griffin Security Services, Inc. was properly made. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that defendants Griffin Security Services, Inc.'s motion to dismiss the complaint pursuant to CPLR § 3211(a)(8) is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR §

4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

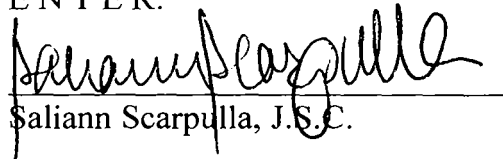
ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report, defendants Griffin Security Services, Inc. and Michael E. Smith's motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) and for attorney's fees shall be disposed of in accordance with the results of the Special Referee's report as to service and this decision.

This constitutes the decision and order of the Court.

Dated: New York, New York
 June 30, 2014

ENTER:


Saliann Scarpulla, J.S.C.