

Canon Fin. Servs., Inc. v Meyers Assoc., LP
2014 NY Slip Op 32519(U)
September 26, 2014
Supreme Court, New York County
Docket Number: 650613/2013
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

CANON FINANCIAL SERVICES, INC.,
Plaintiff,

Index No.: 650613/13

Motion Date: 12/20/13

- v -

Motion Seq. No.: 01

MEYERS ASSOCIATES, LP. d/b/a MEYER ASSOCIATES and CANON USA, INC.,
Defendants.

The following papers, numbered 1 to 3 were read on this motion to dismiss.

Table with 2 columns: Document Name and No(s). Rows include Notice of Motion/Order to Show Cause -Affidavits -Exhibits (1), Answering Affidavits - Exhibits (2), and Replying Affidavits - Exhibits (3).

Cross-Motion: [X] Yes [] No

Upon the foregoing papers,

Motion sequences 001 and 002 are hereby consolidated for disposition.

In motion sequence 001, the defendant Canon USA (Canon) moves pursuant to CPLR 3211 to dismiss the co-defendant Meyer Associates LP d/b/a Meyers Associate's (Meyers) counterclaims asserted in its answer.

In motion sequence 002, Meyers moves to amend the third counterclaim for tortious interference with contract and to assert a new counterclaim based on General Business Law § 349

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

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

(GBL § 349). In that same motion sequence, the plaintiff Canon Financial Services (CFS) cross-moves pursuant to CPLR 3212 for summary judgment on the two causes of action in its complaint.

This action arises out of a service agreement between Meyers and non-party EZ Docs, Inc. d/b/a Office Automation Systems (OAS), whereby OAS agreed to service and maintain Canon photocopiers leased by Meyers (the Service Agreement).

Canon is the exclusive United States distributor of Canon-brand products, including Canon-brand equipment, such as printers, scanners, and photocopiers. Generally, Canon does not sell its equipment directly to end users. Instead, it maintains a network of authorized retail dealers that purchase the equipment from Canon and market the equipment and accessories to the end users. Furthermore, Canon does not generally provide maintenance and repair services to the end users and requires its authorized dealers to retain Canon trained personnel that maintain and repair the equipment for the end user.

CFS is a subsidiary of Canon and provides financing for end users that want to lease Canon equipment instead of purchasing it outright. If the equipment is being leased, the authorized retail dealer conveys title of the equipment to CFS, which in turn leases the equipment to the end user pursuant to a financing agreement. However, the authorized retail dealer remains obligated to maintain and service the equipment.

In 2008, Office Automation Systems, Inc. (OAS Inc.), a small

authorized retail dealer in Manhattan, contacted Canon about a possible sale of OAS Inc. to CMB Leasing, LLC d/b/a Empire Technology (Empire).¹ Pursuant to the terms of the dealer agreement with Canon (the Dealer Agreement), any proposed sale of an authorized Canon retail dealership requires the approval of Canon.

In conducting its due diligence, Canon discovered that the two principals of Empire, Anthony Grimaldi and Steve Hernandez, were previously charged with a criminal scheme to defraud related to business equipment leases. As a result, Canon rejected the sale of OAS Inc. to Empire.

Less than two months later, OAS Inc. contacted Canon again about a possible acquisition, this time by, EZ Docs, Inc. (EZ Docs). Unbeknownst to Canon, the principal of EZ Docs, Catherine Mattiuci, was actually the sister of Grimaldi. However, this fact was not disclosed during the due diligence process. Thereafter, on November 20, 2008, Canon approved the sale of OAS Inc. to EZ Docs.

In January 2010, Canon received a request for the approval of EZ Docs' acquisition of another Canon authorized retail dealer, Vista Digital Solutions, Inc. (Vista). During Canon's due diligence, Mattiuci provided a business plan for EZ Docs that did not reveal that Grimaldi and Hernandez were employees of EZ

¹ OAS Inc. refers to Office Automation Systems, Inc. prior to its acquisition by EZ Docs, Inc (EZ Docs).

Docs. Canon was aware of a rumor that Grimaldi and Hernandez were connected to EZ Docs, but could not confirm the relationship. Ultimately, Canon approved the acquisition of Vista by EZ Docs.

Meyers alleges in its counterclaims that, on November 6, 2009, Meyers entered into a service agreement with OAS, now owned by EZ Docs, whereby OAS agreed to service and maintain Canon photocopiers leased by Meyers (the Service Agreement).

The photocopiers were leased and financed pursuant to a financing agreement between Meyers and CFS (the Financing Agreement). The Financing Agreement provided that Meyers was to pay CFS \$2,317 per month for 60 consecutive months.

Almost immediately after executing the Service Agreement, Meyers began experiencing numerous problems with the photocopiers. Despite repeated requests, OAS failed to respond or fulfill its service obligations under the Servicing Agreement. Meyers alleges that it has been unable to use the photocopiers as a result of OAS' failure to properly maintain and service them.

Upon receiving numerous complaints about OAS from Meyers and other customers, Canon commenced an investigation and discovered that OAS was employing Anthony Grimaldi and Steve Hernandez.

Consequently, in light of the complaints and the criminal histories of Grimaldi and Hernandez, Canon terminated OAS as an authorized reseller in October 2011. As a result, OAS was also no longer authorized to service the Canon photocopiers leased by

Meyers.

On May 8, 2012, CFS commenced this action seeking the unpaid balance of the Financing Agreement. CFS alleges that Meyers is in default as of July 1, 2012.

Thereafter, Meyers answered and asserted affirmative defenses and counterclaims. Meyers counterclaims allege, inter alia, that Canon and CFS' failure to discover the criminal backgrounds of Grimaldi and Hernandez resulted in damages to Meyers.

As a threshold matter, this Court will first address Meyers motion to amend. In motion sequence 002, Meyers moves to amend the third counterclaim for tortious interference with contract and assert a new counterclaim pursuant to GBL § 349.

"Leave to amend a pleading is freely given . . . absent prejudice or surprise resulting directly from the delay" (Eighth Ave. Garage Corp. v H.K.L. Realty Corp., 60 AD3d 404, 405 [1st Dept 2009] [internal citations omitted]). Where a court concludes that an application to amend a pleading "clearly lacks merit," leave is properly denied (id.).

Meyers' first proposed amendment is to replead its previously dismissed third counterclaim for tortious interference. The original third counterclaim alleged that Canon tortiously interfered with the Service Agreement between Meyers and OAS, by terminating the Dealer Agreement with OAS. Meyers' proposed amended third counterclaim alleges that Canon

intentionally, maliciously, and without justification interfered with the Service Agreement between OAS and Meyers by terminating the Dealer Agreement with OAS. As a result, OAS allegedly went out of business and was unable to service Meyers' photocopiers.

Canon argues in opposition that leave to amend should not be granted because the allegations of the proposed amendment to the third counterclaim for tortious interference only assert additional conclusory allegations that are insufficient to sustain a cause of action.

This Court agrees that Meyers' amendment does nothing more than add conclusory allegations that restate the elements of a cause of action for tortious interference with contract without any supporting facts. As a result, leave to amend the previously dismissed third cause of action is denied.

Meyers' second proposed amendment seeks to assert a counterclaim pursuant to GBL § 349, alleging that Canon and CFS have engaged in deceptive acts and practices by permitting OAS to misidentify itself as Canon to the detriment of end users. Meyers alleges that Canon's failure to discover the fraud and take corrective action resulted in damage not only to, Meyers, but to the public at large.

Meyers' counterclaim must establish "three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act"

(Stutman v Chem. Bank, 95 NY2d 24, 29 [2000]).

"[T]he deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances" (id. at 29 [internal quotation marks and citations omitted]). "A deceptive practice, however, need not reach the level of common-law fraud to be actionable under section 349" (id.). "In addition, a plaintiff must prove 'actual' injury to recover under the statute, though not necessarily pecuniary harm" (id.).

The record clearly establishes that Canon terminated OAS as an authorized retail dealer upon confirmation that certain employees of OAS had a criminal history of defrauding consumers. Furthermore, Meyers allegations that Canon permitted or allowed OAS to masquerade as Canon are demonstrably untrue. The mere fact that Canon waited until its suspicions were confirmed cannot be construed as consent or approval of OAS' misconduct. Meyers fails to allege any facts that would support this cause of action, relying solely on the statements in its counsel's affirmation.

Consequently, leave to amend to assert a cause of action pursuant to GBL § 349 is denied, and Meyer's motion to amend is denied in its entirety.

In motion sequence 001, Canon argues that the counterclaims must be dismissed as against it because OAS is not an agent of Canon.

"On a motion to dismiss pursuant to CPLR 3211, the pleading

is to be afforded a liberal construction" (Leon v Martinez, 84 NY2d 83, 87 [1994]). "We 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 within any cognizable legal theory" (id.).

Meyers is not in privity with Canon, but seeks a determination that Canon, as the alleged principal of OAS, is liable for OAS' misconduct. Meyers asserts counterclaims for negligent retention, negligent omission, tortious interference with contract, breach of contract, breach of the implied warranty of fitness, and breach of implied warranty of merchantability.

However, Meyers fails to establish the existence of a principal-agent relationship between Canon and OAS. Meyers alleges that OAS had apparent authority to act on behalf of Canon, but fails to identify any conduct or representations by Canon that would result in a manifestation of apparent authority.

In order to demonstrate that OAS had apparent authority Meyers would need to establish reliance on a misrepresentation by OAS because of some misleading conduct by Canon (Hallock v State, 64 NY2d 224, 231 [1984]).

Furthermore, the Dealer Agreement between OAS and Canon specifically provides that "nothing contained in this Agreement shall be construed to make [OAS] the agent of [Canon] for any purpose . . .". Moreover, it is well established that merely retaining supervisory control over an independent contractor does

not form a basis to impose liability against the principal (Fernandez v 707, Inc., 85 AD3d 539, 540 [1st Dept 2011]).

The first counterclaim for negligent retention and second counterclaim for negligent misrepresentation must be dismissed because Meyers has failed to establish that Canon or CFS owed it a duty of care. "The threshold question in any negligence action is whether the alleged tortfeasor owes a duty of care to the injured party...and the existence and scope of that duty is a legal question for the courts to determine" (Sheila C. v Povich, 11 AD3d 120, 125 [1st Dept 2004] [internal citations omitted]). This Court cannot impose liability for the first and second counterclaims without the breach of an existing duty owed to Meyers (id.).

The third cause of action for tortious interference is dismissed against Canon because ample evidence has been submitted that establishes that Canon terminated the Dealer Agreement with OAS because of the deficiencies in its performance and the criminal backgrounds of its employees, but not with the intention of rendering performance under the Service Agreement impossible. Intentional interference is an essential element of pleading tortious interference with contract (Hoag v Chancellor, Inc., 246 AD2d 224, 228 [1st Dept 1998]). This cause of action is dismissed against CFS because Meyers fails to allege any interference by CFS.

The fourth counterclaim for breach of contract, the fifth

counterclaim for breach of the implied warranty of fitness, and the sixth counterclaim for breach of the implied warranty of merchantability are dismissed against Canon because Meyers lacks privity with Canon. Furthermore, those counterclaims are dismissed as against CFS because Meyers fails to identify a breach of the Financing Agreement by CFS, and CFS expressly disclaimed any warranties related to the photocopiers pursuant to the Financing Agreement.

Paragraph 6 of the Financing Agreement provides that:

"[Meyers] acknowledges that CFS is not a manufacturer, dealer, or supplier of the equipment...CFS has made no representation or warranty with respect to the sustainability or durability of the equipment...or any other representation of warranty, express or implied with respect to the equipment, including without limitation, the implied warranties of merchantability and fitness for a particular purpose. Any warranty with respect to the Equipment made by the supplier, dealer or manufacturer is separate from, and is not part of, this Agreement" (Mandel-Gates Opp., Ex. A).

Therefore, Canon's motion to dismiss Meyers' counterclaims is granted in its entirety thereby dismissing Canon from the action.² Meyers has failed to establish that Canon and OAS have a principal-agent relationship that would provide a basis to impose liability against Canon, given the lack of privity between Meyers and Canon.

In motion sequence 002, CFS cross-moves for summary judgment

² CFS has no direct claims against Canon.

on the causes of action in its complaint.

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citations omitted]).

Summary judgment is a drastic remedy and should only be granted where the moving party has demonstrated the absence of any triable issue of fact through sufficient evidence (id.). "The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers [internal quotation marks, citations, and emphasis omitted]" (id.).

"Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (Kershaw v Hospital for Special Surgery, 114 AD3d 75, 82 [1st Dept 2013]). "When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination" (id.).

CFS alleges in its first cause of action for breach of contract that pursuant to the Financing Agreement, Meyers agreed to make certain payments in exchange for the photocopiers. According to CFS, as of July 1, 2012, Meyers is in default of the Financing Agreement and the amount of \$125,869.55 is allegedly due and owing.

CFS second cause of action for account stated alleges that

CFS provided statements on a regular basis that Meyers accepted without objection, but failed to pay. The total amount due and owing is \$125,869.55.

Meyers opposes the granting of summary judgment arguing that the Financing Agreement and Service Agreement were integrated agreements, part of a single transaction. Thus, Meyers argues that OAS' breach of the Service Agreement is a defense to Meyers breach of the Financing Agreement.

Despite Meyers contentions, the Financing Agreement expressly provides that "[a]ny warranty with respect to the Equipment made by the supplier, dealer or manufacturer is separate from, and is not part of, this Agreement" (Mandel-Gates Opp., Ex. A). This clearly establishes that the parties intended the Financing Agreement and the Service Agreement to be separate and distinct transactions by CFS' express disclaimer against any warranties that were provided by OAS or Canon. Furthermore, the Financing Agreement provides that:

"This agreement is a net lease. If the Equipment is not properly installed, does not operate as represented or warranted, or is unsatisfactory for any reason, [Meyers] shall make such claim solely against the supplier, dealer, or manufacturer. Customer waives any and all existing and future claims and offsets against any Payments or other charges due under this Agreement, and unconditionally agrees to pay such Payments and other charges, regardless of any offset or claim which may be asserted by [Meyers] or on its behalf" (*id.*).

Meyers does not dispute that it was party to the Financing

Agreement, that it has not fulfilled its obligations under the Financing Agreement, or that it accepted statements of its account from CFS without objections. Furthermore, the Financing Agreement has established that it is separate and apart from the Service Agreement and that Meyers has waived any claims of an offset. Meyers otherwise fails to raise a triable issue that would preclude the granting of summary judgment.

Therefore, CFS is entitled to summary judgment on the first and second causes of action in its complaint.

Accordingly it is,

ORDERED that the co-defendant Canon USA, Inc.'s motion for summary judgment dismissing the counterclaims is granted in its entirety thereby dismissing Canon from the action with costs and disbursements to the party as taxed by the Clerk of the Court upon presentation of a bill of appropriate costs, and it is further

ORDERED that the defendant Meyers Associates, LP d/b/a Meyer's Associates's motion to amend is denied in its entirety, and it is further

ORDERED that the plaintiff Canon Financial Services, Inc.'s cross motion for summary judgment is granted as to liability on the first cause of action for breach of contract; and it is further

ORDERED that the plaintiff Canon Financial Services, Inc.'s motion for summary judgment is granted as to the second cause of

action for account stated against the defendant Meyers Associates, LP d/b/a Meyers Associates thereunder in the amount of \$125,869.55; and it is further

ORDERED that the assessment of attorneys fees on the first cause of action is referred to a Special Referee to hear and determine pursuant to CPLR 4317(b) and that within 30 days from the date of service of this order with notice entry, plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) to arrange a date for a reference to hear and determine pursuant to CPLR 4317(b) and for placement at the earliest convenient date upon the calendar of the Special Referees Part; and it is further

ORDERED that upon such determination the Clerk is directed to enter judgment in favor of plaintiff Canon Financial Services, Inc. and against the defendant Meyers Associates, LP on the complaint in the sum of \$125,869.55, with interest thereon at the statutory rate from July 1, 2012 to be calculated by the Clerk, plus attorneys fees, and costs and disbursements upon submission of the appropriate bill of costs.

This is the decision and order of the court.

Dated: September 26, 2014

ENTER:


DEBRA A. JAMES J.S.C.