Canton Realty Holdings, LLC v Citiquiet Windows, Inc.
2014 NY Slip Op 32894(U)
November 17, 2014
Supreme Court, Kings County
Docket Number: 502969/2014
Judge: Martin M. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
Commercial Part 10

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CANTON REALTY HOLDINGS, LLC;
PINE BUILDERS CORP.,

Plaintiff(s) **Index no. 502969/2014**

-against- **DECISION/ORDER**

CITIQUIET WINDOWS, INC.; NGU INC d/b/a CHAMPION ARCHITECTURAL WINDOW and DOOR,

Defendant(s)

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to dismiss pursuant to CPLR 3211(a)(1) and (7)

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	
Sur-Reply Affidavits	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

This action involves a contract dated May 3, 2013, between Pine Builders Corp., as construction manager, and Citiquiet Windows, as trade contractor, concerning the manufacture and installation of windows in new construction at 23-45 Canton Place, Brooklyn, New York. The complaint alleges that pursuant to the contract plaintiffs paid defendants a total of $390,000.00 and that defendants failed and refused to commence the work.

The complaint alleges six causes of action against both defendants. The first cause of action is for breach of contract. The second cause of action sounds in implied or quasi contract. The third cause of action seeks specific performance of the contract. The fourth cause of action is for unjust enrichment. It is difficult to classify the fifth cause of action which alleges that "Allowing Defendants to retain said funds is against good conscience and equity". The sixth cause of action is for conversion.

Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7), as to the Second through Sixth causes of action as against defendant Citiquiet Windows Inc. and in its entirety as against defendant NGU Inc, d/b/a Champion Architectural Window and Door.

At the outset it is worth noting that it is entirely well settled that,

> "[O]n a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction (see CPLR 3026). A court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970). Additionally, under CPLR 3211(a)(1), dismissal based on documentary evidence will be warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law (see Leon v. Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; Scadura v. Robillard, 256 A.D.2d 567, 683 N.Y.S.2d 108)." (Renaissance Equity Holdings, LLC v. Al–An Elevator Maintenance Corp., --- N.Y.S.2d ----, 2014 WL 4851559 N.Y. Slip Op. 06570 [2d Dept., 2014]).

The motion requires analysis of each cause of action separately as against the two corporate defendants. The two defendants stand on different footing because the contract of May 3, 2013 is between Pine Builders Corporation and defendant Citiquiet Windows, only. This is to say that defendant NGU, Inc. is not a party to the contract that is specifically designated in the First Cause of action.

In opposition to the motion, plaintiffs assert that both corporations are owned by the same individual and that they should be treated as one entity. The complaint, however, fails to state any facts whatsoever in support of piercing the corporate veils. There is no allegation that Citiquiet or its sole shareholder abused the privilege of doing business in the corporate form. (See, for example: Avila v. Distinctive Development Co., LLC, 120 A.D.3d 449, 991 N.Y.S.2d 89, 2014 N.Y. Slip Op. 05613 [2d Dept., 2014]).

The opposition does not allege sufficient facts to warrant disregarding the corporate forms. The only thread of evidence to support this claim is a check from plaintiff Caton Realty Holdings, the owner of the property, for thirty thousand dollars payable to defendant Champion. Even if this check was issued in connection with the contract and at the request of Citiquiet it is insufficient to support disregarding the separate corporate entities.

With this in mind, the court turns to each of the causes of action. It is clear that the motion to dismiss the First Cause of action, for breach of contract, as against defendant NGU, Inc. must be granted. NGU, Inc. is not a party to the express contract alleged in the First Cause of action.

As to the second cause of action for implied or quasi contract the situation is somewhat reversed. Because Citiquiet is a party to the express contract the cause of action for implied or quasi contract must be dismissed as against Citiquiet.

> "A cause of action predicated on a theory of implied contract or quasi-contract is not viable where there is an express agreement that governs the subject matter

> underlying the action (see Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388–389, 521 N.Y.S.2d 653, 516 N.E.2d 190). "A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (id. at 388, 521 N.Y.S.2d 653, 516 N.E.2d 190)." (Scott v. Fields, 92 A.D.3d 666, 938 N.Y.S.2d 575, 2012 N.Y. Slip Op. 00950 [2d Dept., 2012]).

The cause of action for implied or quasi contract is sufficiently pleaded as against NGU, Inc. As to NGU, Inc. the motion to dismiss the Second Cause of action must be denied.

The Third Cause of action purportedly seeks specific performance, but in actuality asserts a claim for damages for breach of contract. The Third Cause of action alleges that because of defendants failure to perform, plaintiffs were compelled to hire a contractor to take over the work and allegedly, under the terms of the contract, defendants are responsible for the plaintiffs costs for completing the work. Thus, the Third Cause of action is actually a claim for money damages for one item of contract damages, i.e. the cost to cover.

The Third Cause of action must be dismissed because it is merely an item of damages in the breach of contract claim. It is also worth noting that the equitable remedy of specific performance is not available to recover money damages.

The Fourth Cause of action is for unjust enrichment. Again, the motion to dismiss this claim must be granted to the extent it is asserted against Citiquiet and denied to the extent it is asserted against defendant NGU, Inc. "A cause of action alleging unjust enrichment is a quasi-contractual claim that is not viable where, as here, the parties entered into an express contract governing the subject of dispute..." . (McMorrow v. Angelopoulos, 113 A.D.3d 736, 979 N.Y.S.2d 353, 2014 N.Y. Slip Op. 00331 [2d Dept., 2014]).

As previously noted, it is difficult to classify the Fifth Cause of action. The Fifth Cause of action which alleges that defendants received $390,000.00 from plaintiffs and that "Allowing Defendants to retain said funds is against good conscience and equity". This would appear to be an amalgam of the breach of contract and unjust enrichment with, perhaps, a failed attempt to craft it as a claim for unconscionability. As the Fifth Cause of action does not make out any recognized claim and as it is subsumed in other causes of action, the Fifth Cause of action must be dismissed as against both defendants.

The Sixth Cause of action is for conversion of the $390,000.00 received by the defendants from the plaintiffs. The complaint alleges that the $390,000.00 was paid to defendants and that it was upon defendants refusal to return the funds that they allegedly converted the funds. The submissions on the motion show that there is a reasonable dispute regarding which party breached the contract and whether plaintiffs are entitled to reimbursement of the funds paid.

> "In order to establish a cause of action to recover damages for conversion, 'the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an

unauthorized dominion over the thing in question ... to the exclusion of the plaintiff's rights' " (Messiah's Covenant Community Church v. Weinbaum, 74 A.D.3d 916, 919, 905 N.Y.S.2d 209, quoting Independence Discount Corp. v. Bressner, 47 A.D.2d 756, 757, 365 N.Y.S.2d 44; see State of New York v. Seventh Regiment Fund, 98 N.Y.2d 249, 259, 746 N.Y.S.2d 637, 774 N.E.2d 702; Fitzpatrick House III, LLC v. Neighborhood Youth & Family Servs., 55 A.D.3d 664, 868 N.Y.S.2d 212). (Korsinsky v. Rose, 120 A.D.3d 1307, 993 N.Y.S.2d 92, 2014 N.Y. Slip Op. 06179 [2d Dept., 2014]).

"Where one is rightfully in possession of property, one's continued custody of the property and refusal to deliver it on demand of the owner until the owner proves his [or her] right to it does not constitute a conversion" (Trans–World Trading, Ltd. v. North Shore Univ. Hosp. at Plainview, 64 A.D.3d 698, 700, 882 N.Y.S.2d 685 [internal quotation marks omitted]). (Green Complex, Inc. v. Smith, 107 A.D.3d 846, 968 N.Y.S.2d 128, 2013 N.Y. Slip Op. 04575 [2d Dept., 2013]).

For the foregoing reasons, the Sixth Cause of action for conversion must be dismissed as against both defendants.

In sum, the Third, Fifth and Sixth Causes of action are dismissed in their entirety. The First Cause of action is dismissed as against NGU, Inc.. The Second and Fourth Causes of action are dismissed as against Citiquiet Windows, Inc..

Dated: November 17, 2014

Hon. Martin M. Solomon
J.S.C.