Highlands Ctr. LLC v Home Depot U.S.A., Inc.
2014 NY Slip Op 33383(U)
December 18, 2014
Supreme Court, Putnam County
Docket Number: 2258/13
Judge: Lewis J. Lubell

SC 2/4/15 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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HIGHLANDS CENTER LLC,

Plaintiff,

-against -

HOME DEPOT U.S.A., Inc.,

Defendant.

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DECISION & ORDER

Index No. 2258/13

Sequence No. 2
Motion Date: 9/2/14

LUBELL, J.

The following papers were considered in connection with this motion by plaintiff for an Order (i) dismissing the counterclaims filed by defendant and counterclaimant, Home Depot U.S.A, Inc. ("Home Depot") in their entirety pursuant to CPLR 3211(a)(1, (5) and (7); (ii) awarding attorney's fees to Highlands as the successful party in the event the counterclaims are dismissed pursuant to the terms of the agreements between the parties that are the subject of the counterclaims; and (iii) awarding Highlands such other and further relief as the Court deems just and proper:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION/EXHIBITS 1-33	1
MEMORANDUM OF LAW	2
AFFIRMATION IN OPPOSITION/EXHIBITS A-DD	3
MEMORANDUM OF LAW IN OPPOSITION	4
MEMORANDUM OF LAW IN REPLY	5

Plaintiff, Highlands Center, LLC ("Highlands"), brings this action for breach of contract, declaratory relief, quantum meruit and unjust enrichment against defendant, Home Depot, U.S.A., Inc. ("Home Depot"), to recover Home Depot's alleged 36.73% share of Highlands's cost to monitor the quality of storm water runoff from the Highlands Shopping Center, and Home Depot's share of the maintenance costs of the storm water collection system used in connection therewith.

By Decision & Order of March 31, 2014, the Court denied Home Depot's pre-answer motion to dismiss except as to otherwise time-barred claims. Thereupon, the Court directed Home Depot to serve its answer to the complaint. It did, along with counterclaims. This motion by Highlands follows wherein it seeks to dismiss Home Depot's counterclaims.

As to all counterclaims, the Court finds no merit to plaintiff's reliance on the "filed rate doctrine." The "filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable" (Wegoland Ltd. v. NYNEX Corp., 27 F3d 17, 18 [2d Cir 1994]). Defendant is neither directly nor indirectly challenging utility rates within the meaning of the doctrine.

Defendant argues, and its counterclaims are deemed so circumscribed, as

> . . . seek[ing] to implement the prior decisions by the [Public Service Commission]. They seek compensation or recoupment based upon the prior decisions by the PSC, and the Court and a prior admission by ISW and the pending sewer rate appeal. The damages demanded are based upon the rates set in these prior proceedings and, with the exception of the Town's decision that is being appealed under Article 78 [not now before this Court], do not in any way seek to change the decisions as issued.

(Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss Counterclaims, dated July 23, 2014). As so delineated, the counterclaims are neither barred by the doctrines of res judicata (see Koether v. Generalow, 213 AD2d 379, 380 [2d Dept 1995]) nor collateral estoppel (Capital Tel. Co., Inc. v. Pattersonville Tel. Co., Inc., 56 NY2d 11 [1982]).

Plaintiff's further argument that the second breach of contract counterclaim should be dismissed is also rejected.

At the very least, the Court finds that there is ambiguity as to whether defendant's obligation to pay for the "use of all utilities consumed" means actual usage and, in any event, something other than payment for utilities based upon percentage of square footage occupancy. As such, plaintiff's motion to dismiss must be denied.

> On a motion to dismiss for failure to state a cause of action, courts afford the complaint a liberal construction, accept the facts alleged therein as true and give the plaintiffs the benefit of all favorable inferences to determine whether those facts support any cognizable legal theory (see Nelson v. Capital Cardiology Assoc., P.C., 97 AD3d 1072, 1073 [2012]; Schmidt & Schmidt, Inc. v. Town of Charlton, 68 AD3d 1314, 1315 [2009]). In a breach of contract action, "[w]hether a contract is ambiguous is a question of law to be resolved by the court" (Williams v. Village of Endicott, 91 AD3d 1160, 1162 [2012]; see Greenfield v. Philles Records, 98 NY2d 562, 569 [2002]; CV Holdings, LLC v. Artisan Advisors, LLC, 9 AD3d 654, 656 [2004]). Ambiguity exists if the "language used lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion" (Pozament Corp. v. AES Westover, LLC, 27 AD3d 1000, 1001 [2006]; accord Williams v. Village of Endicott, 91 AD3d at 1162; see Greenfield v. Philles Records, 98 NY2d at 569). In the context of a motion to dismiss, if the contract's language is ambiguous, then the motion must be denied to permit the parties to discover and present extrinsic evidence of the parties' intent.

(Vectron Intern., Inc. v. Corning Oak Holding, Inc., 106 AD3d 1164, 1165 [3d Dept 2013]).

If, in the end, the contract is fairly construed as requiring payment for utilities based upon use or consumption, then the second cause of action will be sustained. Therein, defendant seeks from plaintiff the difference between the costs of utilities actually charged based upon square footage and the contractually provided "fees and charges for the use of all utilities consumed on the Premises" (Agreement, §7.1).

The fact that the PSC and Town Board have determined that their respective utility rates must be based primarily on square footage is not a bar to defendant's counterclaims which, on their face, seek to enforce the alleged benefit of a contractual bargain.

Highland's statute of limitations defense that "there is no basis for asserting that refunds should be granted with respect to payments for sewer service made prior to the adjustments in July 2010" (Memorandum of Law in Support of Plaintiff's Motion to Dismiss Counterclaims, dated May 28, 2014, pp, 34-35) is not opposed. Home Depot concedes that the "counterclaims are based upon a breach . . . determined at the earliest when the PSC determination was made in 2010" (Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss Counterclaims, dated July 23, 2014, pp 4-5). Thus, the first, second and fifth counterclaims are timely, having been commenced within six years of 2010.

Even upon "affording plaintiff every favorable inference . . . when reviewing the pleadings and factual allegations of [the] complaint" (Ovitz v. Bloomberg L.P., 18 NY3d 753, 758 [2012]), the Court finds that defendant's failure to have "plead facts demonstrating the existence of a special, confidential, or fiduciary relationship (Baer v. Complete Off. Supply Warehouse Corp., 89 AD3d 877, 878 [2d Dept 2011] citing Schenkman v. New York Coll. of Health Professionals, 29 A.D.3d 671, 672; Vitale v. Steinberg, 307 A.D.2d 107, 108-110) warrants the dismissal of the third counterclaim for negligent misrepresentation. This is especially so given the fact that the parties are "sophisticated commercial entities, which entered into an arms-length transaction . . . (Hong Leong Fin. Ltd. (Singapore) v. Morgan Stanley, 44 Misc 3d 1231(A) [Sup Ct 2014] citing Greentech Research LLC v. Wissman, 104 AD3d 540, 540-541 [1st Dep't 2013][no special relationship where arm's length business relationship between sophisticated financial entities, and no unique knowledge or expertise alleged]; MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 87 AD3d 287, 297 [1st Dep't 2011][no special relationship where sophisticated commercial entities entered into arm's length business transaction]).

Where, as here, "a cause of action alleging breach of the implied covenant of good faith and fair dealing . . . is merely duplicative of a breach of contract claim", it must be dismissed (Refreshment Mgt. Services, Corp. v. Complete Off. Supply Warehouse Corp., 89 AD3d 913, 915 [2d Dept 2011] citing New York Univ. v. Continental Ins. Co., 87 NY2d 308, 319-320 [1995]).

Plaintiff's motion to dismiss the fifth cause of action for unjust enrichment is denied. "[C]auses of action alleging breach of contract and unjust enrichment may be pleaded alternatively" (Auguston v. Spry, 282 AD2d 489, 491 [2d Dept 2001]). Defendant need not now elect its remedy.

Plaintiff's application for counsel fees is denied, without prejudice to re-application when and if appropriate.

Based upon the forgoing, and there being no merit to other arguments raised, it is hereby

ORDERED, that plaintiff's motion to dismiss is granted to the extent that the third and fourth counterclaims are hereby dismissed, and is otherwise denied; and it is further,

ORDERED, that, plaintiff is directed to respond to the surviving counterclaims within twenty days hereof; and it is further,

ORDERED, that the parties are directed to appear before the Court for a Status Conference at 9:30 AM on February 4, 2015.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
December 18, 2014

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

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