

Legum v Russo

2014 NY Slip Op 33694(U)

October 23, 2014

Supreme Court, Nassau County

Docket Number: 9204-2012

Judge: James P. McCormack

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 - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

STEVEN G. LEGUM, a/a/o LEN LOMBARDO,

Plaintiff(s),

-against-

JOE RUSSO, KEVIN MORRISON, ROBERT
CORLEY and RKJ GROUP, INC.,

Defendant(s).

_____x

TRIAL/IAS, PART 40
NASSAU COUNTY

Index No.: 9204-2012

Motion Seq. No.: 006
Motion Submitted: 9/19/14

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X

Plaintiff moves for an order: (1) pursuant to CPLR 3211(b) dismissing the Second, Third, Fourth, Fifth, Seventh, Ninth, Eleventh, Twelfth and Fourteenth Affirmative Defenses;¹ (2) pursuant to CPLR §3211 (a)(6) and (7) dismissing Defendants' counterclaim. Defendants oppose the motion.

The history of this case has been recounted in previous orders, with the most detailed being this court's January 9, 2014 order. To follow is brief recitation of the facts.

¹ There is no Fourteenth Affirmative Defense in the answer to the second amended verified complaint. The court presumes Plaintiff is referring to the Thirteenth Affirmative Defense.

[* 2]

Plaintiff brought this action to recover the sum of \$175,000.00 allegedly due under an Asset Purchase Agreement (“Agreement”) to purchase the assets of a restaurant known as Strawberry’s Grill & Bar (“Strawberry’s”). Plaintiff acquired the right to receive the remaining \$175,000.00 in payments due under the Agreement by an assignment from Len Lombardo.

Plaintiff commenced this action by the filing of a summons and motion for summary judgment in lieu of complaint on July 19, 2012. By order dated April 18, 2013, this court denied Plaintiff’s motion. Plaintiff thereafter served an amended verified complaint in which he asserted two causes of action against Defendants. By virtue of this court’s January 9, 2014 order, Plaintiff was granted leave to serve, and did serve, a second amended verified complaint dated January 31, 2014. The first cause of action of the second amended verified complaint asserts a claim for \$275,000.00 based upon a perfected a security interest in and to all of the assets of Strawberry’s. The second cause of action of the second amended verified complaint alleges that Plaintiff, as assignee of the rights of Len Lombardo, made due demand for a payment of \$175,000.00 pursuant to the terms of the Asset Purchase Agreement, and that Lombardo performed all conditions required under the agreement and Defendants took possession of the property transferred under the agreement.

In response to Plaintiff’s second amended verified complaint, Defendants have interposed a verified answer containing the following affirmative defenses:

[* 5]

(1) failure to state a cause of action; (2) failure to comply with conditions precedent; (3) unconscionability and failure to comply with, and violation of, General Obligations Law Sections 5-501, 5-701 and 5-511; (4) failure to exhaust prior remedies; (5) statute of frauds; (6) failure of consideration and breach of contract by the plaintiff; (7) unconscionability, waiver and estoppel; (8) mitigating circumstances; (9) failure to mitigate damages; (10) damages were caused in whole or in part by Plaintiff; (11) damages were caused by Plaintiff's fraudulent, negligent, intentional acts or omissions; (12) lack of a contract between the parties; and (13) failure to join indispensable parties. The answer also contains a counterclaim asserting rescission and breach of contract.

CPLR 3211(b) provides that a party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit. The standard for such a motion is whether the defendants actually have a defense, not whether they have actually stated one (*Greenblatt v Johannssen*, 80 Misc2d 436 [Sup Ct, Suffolk County 1974]). If there is any doubt as to the availability of a defense, it should not be dismissed (*Duboff v Board of Higher Educ. of City of N.Y.*, 34 AD2d 824 [2d Dept 1970]). When material issues of fact are unresolved, a court should not strike a defense (*Faulkner v City of New York*, 47 AD3d 879 [2d Dept 2008]; *Lopez v 121 St. Nicholas Ave. H.D.F.C.*, 28 AD3d 429 [2d Dept 2006]). However, affirmative defenses which merely plead conclusions of law and are unsupported by facts are insufficient (*Plemmenou v*

[* 4]
Arvanitakis, 39 AD3d 612 [2d Dept 2007]).

Defendants' Second Affirmative Defense that Plaintiff has failed to comply with conditions precedent by not having promissory notes executed and by not transferring assets to Defendants is sufficiently factual and properly pled. The Third Affirmative Defense, that the agreement contains unconscionable terms, is not supported by fact and only asserts a legal conclusions. The Fourth Affirmative Defense that Plaintiff has failed to exhaust all available remedies is sufficiently factual and properly pled. The Fifth Affirmative Defense that the action is barred by the Statute of Frauds because "defendants never signed a writing sufficient to comply with the statute of frauds" is not supported by fact and only asserts a legal conclusion. The Seventh Affirmative Defense alleging that the action should be barred by the doctrines of unconscionability waiver and estoppel because "defendants received nothing" for \$275,000.00 is not supported by facts and only asserts a legal conclusions. Incorporating the allegations of the counterclaim by reference do not change the determination. The Eighth Affirmative Defense, alleging that Defendants possess information regarding mitigating circumstances is sufficiently factual and properly pled. The Ninth Affirmative Defense alleging Plaintiff has failed to mitigate damages is not supported by fact and only asserts a legal conclusion. Incorporating the terms of the counterclaim by reference do not change the determination. The Eleventh Affirmative Defense asserts that Plaintiff's damages, if any, were caused by his own fraudulent conduct or omissions. While it does not specifically state that the counterclaim

[* 5]

is incorporated by reference, the court does so *sua sponte* and thus finds the defense is sufficiently pled. The Twelfth Affirmative Defense asserts that there is no enforceable contract between the parties. The courts finds this defense is sufficiently pled as to the individual Defendants but not as to the corporate Defendant. Plaintiff moves to dismiss the Fourteenth Affirmative Defense, but likely means the Thirteenth as there is no Fourteenth. The Thirteenth Affirmative Defense that Plaintiff has failed to join indispensable parties is sufficiently support by fact and properly pled.

Plaintiff also moves for dismissal of Defendants' counterclaim pursuant to CPLR §3211(a)(6), which provides that a party may move for judgment dismissing a counterclaim on the ground that it may not be properly interposed in the action; and §3211(a)(7) that the pleading fails to state a cause of action.

Defendants' counterclaim alleges similar facts to those in the previous counterclaim that the court dismissed in the January 9, 2014 order, to wit: that Plaintiff's assignor, Len Lombardo, made numerous fraudulent representations to Defendants and breached the parties' agreement. While the previous counterclaim was sounding in fraud, the relief sought in the current counterclaim is for rescission and breach of contract. Plaintiff's argument, therefore, that the current counterclaim is identical to the prior one and should be summarily dismissed is unsupportable. This is a contract action at heart, and Defendants move for rescission and breach of contract. They are proper counterclaims and CPLR §3211(a)(6) does not apply.

[* 6]

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must accept as true, the facts alleged in the pleading and accord the party making the allegations the "benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v. Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001] *see*, *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013]; *Simkin v. Blank*, 19 NY3d 46, 52 [2012]; *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). Moreover, the court is not to decide whether the allegations can ultimately be proven in determining a motion to dismiss. (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, [2005] *see*, *Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1 [2013]; *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, *supra*, 21 NY3d at 334). The resolution of factual issues is inappropriate on a motion pursuant to CPLR 3211 (*Endless Ocean, LLC v. Twomey, Latham, Shea, Kelley*, 113 AD3d 587; *State of New York v Grecco*, 21 AD3d 470, 478).

The counterclaim alleges that Lombardo agreed to assign a lease he was unable to assign, sold fixtures he could not sell, and that there was a certificate of occupancy that did not exist. The court finds these allegations make out a cognizable claim for breach of contract and rescission. *Vitale v. Rowland*, 88 A.D.3d 692 (2nd Dept. 2011); *Smith v. Guardian Life Ins. Co.*, 116 A.D.3d 1031 (2nd Dept. 2014).

Accordingly, it is hereby

ORDERED, that Plaintiff's motion to dismiss the Third, Fifth, Seventh and Ninth

Affirmative Defenses is GRANTED; and it is further

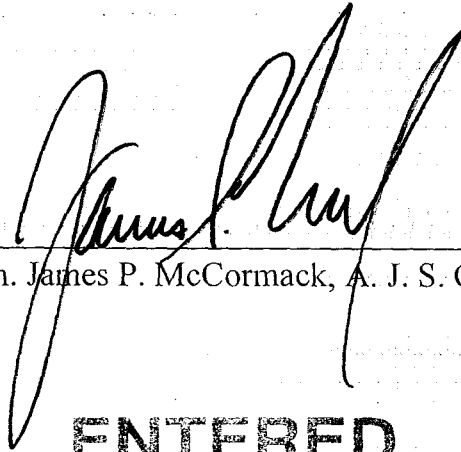
ORDERED, that Plaintiff's motion to dismiss the Twelfth Affirmative Defense is GRANTED as to the corporate defendant only. It remain intact as to the individual defendants ; and it is further

ORDERED, that Plaintiff's motion to dismiss the Second, Fourth, Eighth, Eleventh and Thirteenth Affirmative Defense is DENIED; and it is further

ORDERED, that Plaintiff's motion to dismiss the counterclaim for rescission and breach of contract is DENIED.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 23, 2014
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED

OCT 24 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE