

Aero, Inc. v Aero Metal Prods., Inc.

2014 NY Slip Op 33909(U)

February 24, 2014

Supreme Court, Erie County

Docket Number: 2013-801148

Judge: Timothy J. Walker

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

AERO, INC.,

Plaintiff,

- against

**COMMERCIAL DIVISION
DECISION AND ORDER
INDEX NO. 2013-801148**

AERO METAL PRODUCTS, INC. and
SERVOTRONICS, INC.,

Defendants.

BEFORE: HON. TIMOTHY J. WALKER, Presiding Justice

**APPEARANCES: Nixon Peabody LLP
Laurie Styka Bloom, Esq., Of Counsel
Attorneys for Plaintiff**

**Cosgrove Law Firm
J. Michael Lennon, Esq., Of Counsel
Attorneys for Defendants**

WALKER, J.

Plaintiff has moved to dismiss Defendants' affirmative defense and counterclaims, and to strike Defendants' discovery demands.

FACTS

The transactions giving rise to this action pertain to the lease (by Defendant, Aero Metal Products, Inc. ("AMP")), of real and personal property which, at all times relevant to these proceedings were owned by Plaintiff in the state of Arkansas (the "Arkansas Facility", and the "Leases", respectively), Defendant, Servotronics, Inc. ("Servotronics") guaranteed the Leases.

Plaintiff commenced this action against Defendants, seeking damages for Defendants' alleged breaches of the Leases. Defendants asserted an affirmative defense and first counterclaim sounding in negligent/fraudulent inducement, and/or fraud, pertaining to the Leases, as well as a second counterclaim pertaining to the costs associated with "a complete cleanup of the [Arkansas Facility], including "the past obligations of [Plaintiff] and its predecessors".

The parties agree that the activities at issue took place between January 1, 2009, and November 3, 2009.

Defendants allege that AMP entered into (and Servotronics guaranteed) the Leases "based upon and in reliance upon the false representations and presentations made by [non-party Nicholas Trbovich ("Trbovich")] to representatives of [Servotronics and AMP], and upon certain actions taken by [Trbovich] in furtherance of said representations and presentations" (*see, e.g.,* Answer at ¶ 22).

Specifically, Defendants allege that, prior to July 30, 2009, Trbovich owned, then transferred his ownership interest in Plaintiff to his Wife; despite that transfer, Trbovich remained "intimately involved in the direction and management of [Plaintiff] and [the Arkansas Facility]"; and that, during the time the Leases were being negotiated, Trbovich acted on behalf of Plaintiff, **and** as an officer and/or director of Servotronics (Answer at ¶¶ 34-37).

Pared to its essentials, Defendants claim that Trbovich (while "wearing dual hats") convinced Servotronics to form AMP in order to lease and operate the Arkansas Facility. During lease negotiations, Trbovich allegedly provided false and misleading information to Servotronics regarding Plaintiff's financial stability, and failed to disclose that Plaintiff and/or the Arkansas Facility:

- Ceased doing business in 2009;
- Had limited customer orders;
- Was delinquent in payments to vendors; and
- Was approaching insolvency (Answer at ¶¶ 47-48)

In addition, Trbovich allegedly represented to Servotronics that certain equipment, including a CNC Grinder and Plaintiff's Water Filtration and Processing System, were active or otherwise operational - such claims being false at the time they were made (Answer at ¶¶ 48-52).

LEGAL ANALYSIS

It is well settled that, in considering a motion to dismiss, the pleading shall be liberally construed [*see* CPLR 3026]; and the court shall accept the facts, as alleged in the pleading, as true, and afford the non-moving party the benefit of every favorable inference [*Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503]. Moreover, the court shall avoid assessing the merits of the pleading or any of its factual allegations and instead determine only whether the facts as alleged fit within any cognizable legal theory [*Id.*] Equally well settled, allegations lacking factual support need not be accepted as true [*Dominski v. Frank Williams and Son, LLC*, 46 AD3d 1443 (4th Dept. 2007)], and where claims are based on misrepresentation or fraud, "the circumstances constituting the wrong shall be stated in detail" [*Mandarin Trading, Ltd. v. Wildenstein*, 16 NY3d 173, 178 (2011); *see also* CPLR 3016(b)].

Fraudulent misrepresentation results from (i) a misrepresentation or material omission of fact; (ii) made by defendant with knowledge of its falsity; (iii) made for the purpose of inducing plaintiff to rely on it; (iv) plaintiff's justifiable reliance on the misrepresentation or material omission; and (v) plaintiff's resultant injury [*Mandarin*, 16 NY3d at 178]. Justifiable reliance is

an issue of fact rarely appropriate for determination on a motion to dismiss [*DDJ Mgmt., LLC v. Rhone Grp, LLC*, 15 NY3d 147 (2010)].

Here, Defendants sufficiently set forth a cause of action sounding in fraud (the First Counterclaim and Affirmative Defense) [CPLR §3013; *see also, Dischiavi v. Calli*, 111 A.D.3d 1258 (4th Dep't 2013)]. As such, the applicable statute of limitations is six (6) years, such that these claims are timely [CPLR §213 (1) and (8)].

However, claims sounding in negligent misrepresentation or negligent failure to disclose information pertaining to the Leases are time-barred, because they were not commenced within three (3) years of the alleged acts or omissions giving rise to such claims [CPLR §214; *see also, Santiago v. 1370 Broadway Assoc.*, 97 N.Y.2d 765 (2001); and *IFD Constr. Corp. v. Corddry Carpenter Dietz & Zack*, 253 A.D.2d 89 (1st Dep't 1999)].

Finally, while somewhat inarticulate, the Second Counterclaim is not itself time-barred.

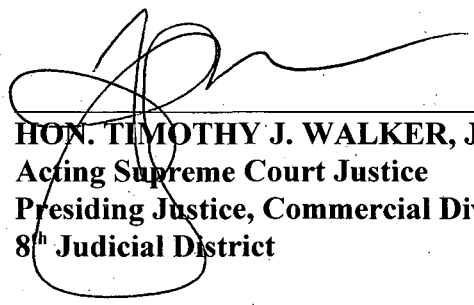
Accordingly, it is hereby

ORDERED, that, consistent with the determinations set forth herein, Plaintiff's motion to dismiss the Answer is granted in part and denied in part; and it is further

ORDERED, that Plaintiff's motion to strike Defendants' discovery demands is denied in its entirety.

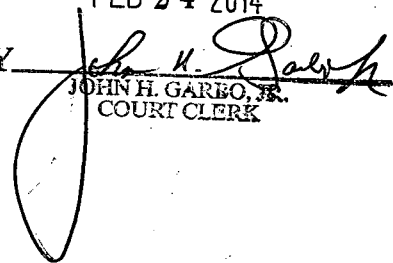
This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: February 24, 2014
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District

GRANTED

FEB 24 2014
BY 
JOHN H. GARBO, JR.
COURT CLERK