Cross Is. Wrecker Serv., Inc. v Horton Dredge & Dock, Inc.
2014 NY Slip Op 33947(U)
September 18, 2014
Supreme Court, Nassau County
Docket Number: 602321/14
Judge: Anthony L. Parga
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X PART 6

CROSS ISLAND WRECKER SERVICE, INC.,

INDEX NO. 602321/14

Plaintiff,

-against-

MOTION DATE: 08/22/14
SEQUENCE NO. 001

HORTON DREDGE & DOCK, INC., HERTZ EQUIPMENT RENTAL CORP. and HERTZ GLOBAL HOLDINGS,

Defendants.

----------X

Notice of Motion, Affs, Exs & Memo of Law 1
Affirmation & Affidavit in Opposition 2
Reply Affirmation & Exs 3

Upon the foregoing papers, it is ordered that this motion by defendants Hertz Equipment Rental Corp and Hertz Global Holdings ("Hertz") to dismiss all of plaintiff's causes of action asserted against them, pursuant to CPLR §3211(a)(7), is denied in part, and granted in part, as directed below.

As alleged in the complaint, this is an action to recover the cost of services rendered by plaintiff in removing and recovering a piece of heavy machinery (the "excavatuor") which had become submerged and stuck in a canal. The excavator is owned by Hertz but had been rented to and was in use by defendant Horton Dredge & Dock, Inc. ("Horton") when it became stuck. On or about October 7, 2013 Horton entered into the contract with plaintiff for the recovery of the excavator.

In its complaint plaintiff denominates five causes of action, as follows: first - breach of contract; second - benefit of the bargain; third - unjust enrichment; fourth - quantum meruit; and fifth - breach of contract for recovery of service charges

The sole criterion on a motion to dismiss pursuant to CPLR § 3211(a)(7) is whether the pleading states a cause of action. If, from its four corners there are factual allegations which,

taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 796 -97 [2d Dept 2011] citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Hense v Baxter*, 79 AD3d 814 [2d Dept 2010]). The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference (*Id.* citing *Leon v Martinez*, supra at 87; S*okol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

While bare legal conclusions devoid of factual predicate are neither presumed true nor accorded every favorable inference (*Morris v Morris*, 306 AD2d 449 [2d Dept 2003]; *Doria v Masucci*, 230 AD2d 764, 765 [2d Dept 1996]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704 [2d Dept 2008]), a court may freely consider affidavits submitted by the Plaintiffs to remedy any defects in the complaint itself (*Leon v Martinez*, supra at 88; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). The court's role is to determine whether the facts as alleged support any cognizable legal theory (*Dye v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 273 AD2d 193 [2nd Dept 2000]), not whether Plaintiffs have properly identified it *(Rovello v Orofino Realty Co.*, supra at 636) or whether the plaintiff can ultimately establish its allegations at trial (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11 (2005); *see also, Sokol v. Leader*, supra).

Breach of Contract - First and Fifth Causes of Action

Plaintiff does not oppose dismissal of these causes of action as against the Hertz defendants. Nor could it successfully do so. "Generally, a party alleging a breach of contract must 'demonstrate the existence of a . . . contract reflecting the terms conditions of their . . . purported agreement' (American-European Art Assoc. v Trend Galleries, Inc., 227 AD2d 170, 171, 641 NYS2d 835 [1st Dept 1996])"(Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 181-182 [2011]). Where a defendant is not a party to the contract alleged to have been breached, no recovery may be had as against that defendant for breach of contract as that defendant is not bound by the contact's terms (see *Pacific Carlton Dev. Corp. v. 752 Pac., LLC*, 62 AD3d 677, 678 [2nd Dept 2009]. As plaintiff does not allege the existence of a contract with Hertz the first and fifth causes of action are dismissed.

Benefit of the Bargain - Second Cause of Action

Nor does plaintiff oppose dismissal of the second cause of action as against the Hertz defendants. Any recovery for loss of the benefit of the bargain stems from the existence of an underlying contractual relationship (see *Board of Education v. Sargent, Webster, Crenshaw &*

Folley, 125 AD2d 27, at 29 [2nd Dept 1987], aff'd 71 NY2d 21). Again, as no contract exists with Hertz there can be no loss of the benefit of the bargain plaintiff had with Hertz.

Unjust Enrichment - Third Cause of Action

> The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be. A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit the other party to retain what is sought to be recovered.
>
> * * * Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated.

(*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

Unfairness alone is insufficient to establish a cause of action for unjust enrichment, there must be allegations of a relationship sufficient to justify the imposition of liability (*Georgia Malone & Co., Inc. v Rieder*, supra, at 519 ["Although [plaintiff's] alleged loss . . . certainly appears unfair, its unjust enrichment claim against [defendant] falls short of stating facts establishing a sufficient relationship to impose potential liability against that party"]).

A sufficient relationship between the non-contracting parties exists where it could have caused reliance by or inducement of plaintiff to go forward in the absence of an agreement with the party being enriched (*Mandarin Trading Ltd. v Wildenstein*, supra, at 182 ["under the facts alleged, there are no indicia of an enrichment that was unjust where the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement"]; *Philips Intl. Invs., LLC v. Pektor,* 117 AD3d 1[1st Dept 2014]).

The Court has reviewed the plaintiff's complaint and all of the submissions of the parties hereto including the affidavit in opposition by plaintiff's President and sole shareholder, George Lindeman, in which he states that Hertz openly participated in the salvage effort by, *inter alia*, expressing its desire to recover and/or salvage the Excavator and by assisting in the post-recovery dismantling of the machinery's drive to allow salt removal. At this early stage in the litigation, considering the pleadings in a light most favorable to plaintiff and allowing plaintiff the benefit of every possible inference, the complaint sufficiently sets forth causes of action relating to its claims of unjust enrichment as against the Hertz defendants.

Quantum Meruit - Fourth Cause of Action

" '[I]n order to make out a claim in quantum meruit, a claimant must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services' (*Moors v. Hall*, 143 AD2d 336, 337-338; see also *Umscheid v. Simnacher*, 106 AD2d 380)" *Martin H. Bauman Assoc., Inc. v. H & M Int'l Transport, Inc.*, 171 AD2d 479, 484 [1st Dept 1991]).

Here too, plaintiff's complaint, liberally considered and as supplemented by the affidavit of its president is sufficient to withstand dismissal.

In sum plaintiff's first, second and fifth causes of action are dismissed as against the Hertz defendants but its third and fourth causes of action stand.

Having denied defendant's motion with regard to the third and fourth causes of action **the Hertz defendants shall serve an answer to the complaint within ten (10) days of service of a copy of this Order with notice of entry (CPLR § 3211(f)).**

Further, **plaintiff is directed** to serve a copy of this order upon the Differentiated Case Management Part ("DCM") Case Coordinator of the Nassau County Supreme Court within thirty (30) days of the date of this Order. The parties shall appear for a Preliminary Conference on **November 12, 2014, at 9:30 A.M.** in the DCM Part, Nassau County Supreme Court, to schedule all discovery proceedings.

This constitutes the decision and Order of this Court.

Dated: September 18, 2014

Anthony L. Parga, J.S.C.

Cc: Solomon & Solomon P.C.
Columbia Circle, Box 15019
Albany, NY 12212-5019

Frank M. Scalera
300 Genova Court
Farmingdale, NY 11735