Harris Corp. v HBC Solutions, Inc.
2015 NY Slip Op 30297(U)
March 2, 2015
Supreme Court, New York County
Docket Number: 651099/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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HARRIS CORPORATION,

Index No.: 651099/2014

Plaintiff,

DECISION & ORDER

-against-

HBC SOLUTIONS, INC.,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Harris Corporation (Harris) moves, pursuant to CPLR 3211, to dismiss the affirmative defenses and counterclaims of defendant HBC Solutions, Inc. (HBC). Plaintiff's motion is granted in part and denied in part for the reasons that follow.

I. Background & Procedural History

In this action, Harris seeks to collect approximately $5.2 million in unpaid invoices from HBC under a Manufacturing Agreement dated February 4, 2013. *See* Dkt. 15. The Manufacturing Agreement was executed in conjunction with an Asset Sale Agreement (the ASA), dated December 5, 2012, pursuant to which HBC purchased broadcasting and communications assets from Harris. *See* Dkt. 37. The Manufacturing Agreement states that the parties "would not have entered into the [ASA] without the undertakings contained in [the Manufacturing Agreement] and the execution and delivery of [the Manufacturing Agreement] is a condition to closing under the [ASA]." *See* Dkt. 15 at 3.

Harris filed its complaint on April 9, 2014, asserting causes of action for breach of contract and accounts stated. The complaint alleges Harris provided services to HBC under the Manufacturing Agreement and invoiced HBC amounts totaling $7,403,640.74. Harris claims, and HBC does not dispute, that on June 11 and 12, 2013, HBC made payments to Harris totaling $2,249,812.13, leaving an unpaid balance of $5,153,828.61. HBC filed an answer with

counterclaims on June 6, 2014. *See* Dkt. 8. Harris filed the instant motion on July 2, 2014, seeking dismissal of HBC's defenses and counterclaims.

HBC then filed an Amended Answer. *See* Dkt. 34. The Amended Answer claims that HBC did not pay the full invoiced amounts because Harris' products and services were "plagued by deficiencies in … quality, timing, and accuracy." Amended Answer ¶ 3. Specifically, HBC alleges five affirmative defenses: (1) failure to state a claim; (2) accord and satisfaction; (3) indemnification; (4) waiver, laches, and estoppel; and (5) failure to mitigate. It also asserts two counterclaims: (1) breach of contract; and (2) indemnification. By letter, Harris requested, and HBC did not oppose, that the motion to dismiss be considered as to the Amended Answer. *See* Dkt. 38. The request was granted.

The parties agree that: (1) in 2013, HBC complained to Harris about the products and services provided under the Manufacturing Agreement; (2) the Manufacturing Agreement contains a procedure for resolving disputes over products and services and the amounts invoiced;[1] and (3) the parties did not follow this procedure. Rather, HBC paid a portion of the

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[1] Section 6.1 of the Manufacturing Agreement provides:

> If [HBC] disputes in good faith any portion of the amount due on any invoice, then [HBC] shall notify Harris **in writing** of the nature and basis of the dispute **within 60 days** after [HBC's] receipt of such invoice, and in such case the parties shall use their commercially reasonable efforts to resolve the dispute as soon as reasonably possible.

Dkt. 15 at 7 (emphasis added). Section 6.5 further provides that "[HBC] is not obligated to make any payment … if Harris commits a material breach under this Agreement … until Harris has cured the material breach or [HBC] has agreed **in writing** to waive the breach." *Id.* (emphasis added). The Manufacturing Agreement sets forth robust procedures governing the parties' relationship, and such procedures consistently require written (not oral) notice. *See, e.g., id.* at 10 (section 8.1, governing "Changes to Purchase Orders and Deliverables"); *see also id.* at 18 (section 23.2, providing that all notices must be in writing). Likewise, section 14 governs when HBC is precluded from challenging products delivered to it by Harris, and, again, this section

invoiced amount, got oral assurances from Harris that things would get better, things allegedly did not improve, and this lawsuit ensued.

With respect to indemnification and consequential damages, sections 20 and 21 of the Manufacturing Agreement expressly govern. Section 20 provides that:

> Each party shall indemnify, defend and hold harmless the other ... against any and all losses including, without limitation, claims, damages, losses, liabilities, costs, expenses and reasonable attorneys' fees and legal costs which arise out of or relate to: (a) failure to comply with any applicable [law] and (b) failure to comply with the provisions of this Agreement. The indemnification procedures set forth in Section 11.3 and Section 11.4 of the [ASA][2] shall apply equally to any claims for indemnification brought pursuant to this [section].

Dkt. 15 at 17. Section 21 provides:

> **EXCEPT AS MAY BE EXPRESSLY SET FORTH IN THIS AGREEMENT, IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, OR LOSS OF REVENUE, PROFITS OR BUSINESS, OR COSTS OF ANY KIND, NO MATTER HOW SUCH DAMAGES ARE CASUSED AND WHETHER OR NOT THE POSSIBILITY OF SUCH DAMAGES, LOSSES OR COSTS WAS FORSEEABLE OR MADE KNOWN TO THE PARTY. THIS LIMITATION SHALL APPLY TO ANY CLAIM OR CAUSE OF ACTION, WHETHER IN CONTRACT, STRICT LIABILITY, TORT OR OTHERWISE, EXCEPT FOR ANY ACTION ARISING OUT OF:**
>
> **(a) any grossly negligent, willful or fraudulent act or omission, or**
> **(b) any breach of any Indemnification of Confidentiality obligations under this Agreement.**

Dkt. 15 at 17 (bold and capitalization in original).

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requires "written notice rejecting such Deliverable within two (2) weeks after receipt." *See id.* at 14. HBC had the right to terminate the Manufacturing Agreement under section 17.3 based on Harris' default. *See id.* at 15. It did not do so.

[2] While the ASA's indemnification *procedures* apply to the Manufacturing Agreement, the *scope* of the ASA's indemnification clause does not (i.e., circumstances warranting indemnification differ under the ASA and the Manufacturing Agreement, but the same procedures apply). Rather, as set forth above, section 21 of the Manufacturing Agreement is that contract's governing damages limitations clause.

Section 23.3 of the Manufacturing Agreement further provides that "[a]ny waiver granted by a party must be in writing. No failure or delay by a party in exercising any right or remedy [under] this Agreement ... and no act or omission of a party or course of dealing between the parties shall operate as a waiver or estoppel of any right ... [and a] waiver once given shall not constitute a waiver on any other future occasion for any purpose."[3] *See* Dkt. 15 at 18. Moreover, section 23.9 contains a merger clause and prohibits oral modifications of the Manufacturing Agreement. *Id.* at 19. Finally, section 23.10 is a prevailing party clause, which entitles the prevailing party in this action to costs and attorneys' fees. *See id.*

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing

[3] In other words, the parties' rights are exclusively subject to the terms of the Manufacturing Agreement, and arguments based on course of conduct and oral promises are unavailing.

Caniglia v Chicago Tribune-New York News Syndicate, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

HBC's counterclaim for indemnification is duplicative of its breach of contract counterclaim and, therefore, dismissed. As noted earlier, to the extent the Manufacturing Agreement can be read to provide HBC with the right to indemnification for costs related to this action, it has such right under section 23.10 if it prevails. Likewise, to the extent HBC's indemnification claim seeks consequential damages arising from Harris' breach of the Manufacturing Agreement, section 21 strictly limits such damages to instances of grossly negligent, willful or fraudulent acts, not properly alleged here.

Although HBC alleges that Harris' breaches were committed knowingly and were grossly negligent, these allegations are conclusorily pled and insufficient. *See SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 (1st Dept 2004) ("Even on a motion to dismiss, a court need not accept as true conclusory allegations that a defendant was grossly negligent or acted willfully"); *accord Godfrey v Spano*, 13 NY3d 358, 373 (2009) (bare legal conclusions should not be assumed to be true on motion to dismiss). HBC's only support for these allegations is a narrative claiming that Harris purportedly gave HBC oral assurances that it would improve its performance to induce HBC not to exercise its rights under the Manufacturing Agreement, thereby causing HBC consequential damages when Harris did not live up to these oral promises.

See Amended Answer ¶¶ 67-74. Even assuming these allegations are true, they are legally infirm. As discussed at length above, the Manufacturing Agreement expressly, extensively, and repeatedly sets forth a dispute resolution procedure governing Harris' performance, and strictly prohibits deviation from this procedure based on oral assurances. Therefore, if HBC relied on Harris' oral promises to cure, such reliance was legally unreasonable.

The Manufacturing Agreement expressly governs how much, if anything, HBC must pay Harris for defective products and services if not timely made, as occurred here. Consequently, HBC's claims for accord and satisfaction, setoff, wavier, estoppel, and laches are dismissed because they contravene the Manufacturing Agreement.[4] HBC's defense is limited to establishing a basis under the Manufacturing Agreement for not paying Harris the unpaid portion of the invoices, with the caveat that if HBC prevails, HBC would be entitled to its attorneys' fees in this action. Harris, of course, is entitled to the same if it prevails. Accordingly, it is

ORDERED that the motion by plaintiff Harris Corporation to dismiss the affirmative defenses and counterclaims of defendant HBC Solutions, Inc. is granted to the extent of dismissing the second (accord and satisfaction), third (indemnification), fourth (waiver, laches, and estoppel) and fifth (failure to mitigate) affirmative defenses and the second counterclaim (indemnification) and otherwise denied.

Dated March 2, 2015

ENTER:

J.S.C.

[4] Regardless, such defenses are insufficiently pleaded for the reasons explained in Harris' brief. *See* Dkt. 39 at 17-20, citing, *inter alia*, *Ashwood Capital, Inc. v OTG Mgmt., Inc.*, 99 AD3d 1, 9 (1st Dept 2012) ("the agreement contains both a no-oral-modification clause and a broad merger clause, which as a matter of law bars any claim based on an alleged intent that the parties failed to express in writing").