

Cuevas v Castillo

2015 NY Slip Op 30432(U)

March 10, 2015

Supreme Court, Suffolk County

Docket Number: 004335-2014

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 04335-2014

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
 J. S. C.

Original Motion Date: 10-20-2014; 12-16-2014
 Motion Submit Date: 01-20-2015
 Motion Sequence No.: 001 MD
 002 MD

Final
 Non Final

_____ X
JUAN ALMONTE CUEVAS,

Plaintiff,

- against -

**JOSE CASTILLO and HAMPTON
 MECHANICAL INC.,**

Defendants.

_____ X

Attorney for Plaintiff
 Law Office of Edward Horn
 82 Pine Street, Suite 206
 Freeport, New York 11520

Attorney for Defendant
 Tierney & Tierney, Esqs.
 Thomas E. Scott, Esq.
 409 Route 112
 Port Jefferson Station, New York 11776

Factual Background

Plaintiff Juan Almonte Cuevas (“Cuevas”) alleges that he was the sole shareholder, owning 200 shares of stock, and President of Our Flavor Deli Gourmet Inc. (“Corporation”).¹ Plaintiff further asserts that the aforesaid Corporation was incorporated on or about October 9, 2012, and that the Corporation subsequently opened a deli D/B/A Our Flavor Deli Gourmet (“Deli”) located at 1761

¹ The Court would like to acknowledge the valuable aid of Andrew Schnissel, Legal Intern.

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Route 112, Medford, NY 11763. In addition, Plaintiff Cuevas alleges that Defendant Jose Castillo (“Castillo”) was an employee working for the Corporation and that, in October 2013, Defendant Castillo agreed to enter into a Stock Sale and Purchase Agreement (“SSPA”), whereby Defendant agreed to purchase a 100% interest in the Corporation from the Plaintiff for a purchase price of \$35,000. Plaintiff contends the terms of the parties’ agreement were memorialized in writing and both parties signed the SSPA on October 6, 2013. Plaintiff sets forth a signed Promissory Note to secure the SSPA. Plaintiff states that after Defendant Castillo signed the SSPA, the Defendant immediately took control over both the Corporation and Deli, and has since continuously operated the Corporation for his sole benefit. Plaintiff alleges that despite making repeated demands for payment, Defendant Castillo never paid the \$35,000 due to the Plaintiff pursuant to the SSPA.

In opposition to Plaintiff’s historic description of the parties’ relationship, Defendant Castillo asserts that Plaintiff leased the aforesaid premises on about May 2012. Defendant states that at that time, the subject property was improved by a vacant shell, described as a building with a gutted interior. Defendant sets forth that between approximately May 2012 and October 2013, Defendant’s company, Hampton Mechanical Inc. provided services to Plaintiff enabling Plaintiff to open the Deli in August 2013. Specifically, Defendant alleges that the work performed on the subject premises included the following: installing a gas hot water heater, gas lines to a stove, two fryers, a grill, an oven, hot plate, a steam table, seven sinks, a three-component sink, a sink and toilet in a half bathroom, a kitchen hood, kitchen floor drains and a commercial grease trap.

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In addition, Defendant contends that in order to fully renovate the subject premises, Defendant hired and paid other contractors to provide architectural services, engineering services, installation and spackling of sheetrock, installation electric wiring, switches and outlets, a ceiling, counters, countertops, shelving, shelving doors in refrigerated areas, a large walk-in freezer, a music system and painting the Premises. Defendant also argues that Defendant purchased fixtures and equipment for use in the Deli, including a stove, hot plate grill, steam table, espresso coffee maker, refrigeration units, a commercial kitchen hood, a computerized cash register, scales, a meat case and a salad bar.

Furthermore, Defendant sets forth that Defendant advanced Plaintiff funds to pay the security deposit for the subject premises as required pursuant to the lease. In addition, Defendant claims that Defendant advanced rent and insurance to Plaintiff. Defendant also claims that Defendant advanced funds to Plaintiff to purchase “groceries, soda, cold cuts and other items” to be sold at the deli.

Defendant argues that all of the aforementioned services were provided to Plaintiff pursuant to an oral agreement. Under such agreement, the Defendant was to do whatever was necessary so that Plaintiff could open and operate the Deli and the Plaintiff was either to pay the Defendant back in full or pay the Defendant half of the value of the aforementioned services and give the Defendant a half-interest in the Deli.

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In her affidavit, The Defendant's bookkeeper, Theresa Alliegro, claims that the Defendant sent invoices for the Defendant's aforesaid services to Plaintiff in or about December 2012 and July 2013. The first invoice was in the amount of \$125,000 and the second invoice in the amount of \$165,000. The two aforesaid invoices total to \$290,000, which the Defendant claims to be the fair and reasonable value of the services provided to Plaintiff.

Defendant Castillo claims that on October 6, 2014, Defendant entered into a SSPA with Plaintiff to purchase the entire Deli for \$35,000. Defendant Castillo further claims that at the time of entering into the SSPA, Plaintiff had not paid Defendant any of the \$290,000 owed for the aforesaid services provided by Defendant.

Thus, as per Defendant, on or about October 7, 2013, Defendant sent the Plaintiff a third invoice setting forth: the \$290,000 that the Plaintiff owed Defendant for the aforesaid services, a \$35,000 deduction from the aforementioned amount, which represents the purchase price of the Deli, and an unpaid balance of \$255,000. Plaintiff has denied both any oral agreement and that he received any of the three aforementioned invoices. He also argues that the only benefit received from the work performed inured to the benefit of Defendant and his new business.

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Procedural Background

On February 28, 2014, Plaintiff filed a Summons and Verified Complaint to enforce the SSPA and Promissory Note. In response, Defendant Castillo served a Verified Answer on April 2014, which asserted various denials, affirmative defenses and counterclaims. The Answer contains counterclaims for breach of contract, unjust enrichment and an account stated seeking to recover \$255,000 based on Plaintiff's failure to pay Defendant for "installing equipment, fixtures, trade fixtures and improvement and betterments" at the Deli.

Legal Standard

Summary Judgment is being sought on both Plaintiff's breach of contract claim and on Defendant's counter-claims for breach of contract, unjust enrichment and account stated.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidence in admissible form to prove a prima facie case what would entitle such party to judgment in its favor without the need for a trial, CPLR § 3212; *Winegrad v NYU Medical Center*, 64 NY 2d 851 (1985); *Alvarez v Prospect Hospital*, 68 NY 2d 320 (1986); *Gitlin v Chrinkin*, 98 AD 3d 561 (2d Dep't 2012); *Winter v Black*, 95 AD 3d 1208 (2d Dep't 2010). If the burden is met, it then shifts to the party opposing the summary judgment motion to establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of the action,

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Zuckerman v City of New York, *supra*. Since the granting of a motion for summary judgment is the functional equivalent of a trial, it is considered a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact, *Rotuba Extruders v Ceppos*, 46 NY 2d 223 (1977).

The elements of a cause of action for breach of contract include the following: 1) formation of a contract between parties; 2) performance by the claimant; 3) failure to perform by the answering party; and 4) resulting damage, *Palmetto Partners, LP v AJW Qualified Partners, LLC*, 83 AD 3d 804 (2d Dep't 2011); *JP Morgan Chase v J H Electric of New York*, 69 AD 3d 802 (2d Dep't 2010); *Furia v Furia*, 116 Ad 2d 694 (2d Dep't 1986).

An account stated is an agreement between the parties to an account based upon prior transactions with respect to the correctness of the account items and the balance due and owing, *Fleetwood Agency Inc v Verde Electric Corp*, 85 AD3d 850 (Dep't 2011). A cause of action alleging an account stated assumes the existence of some indebtedness between the parties or an express agreement between the same to treat a statement of debt as an account stated, *Ross v Sherman*, 57 AD 3d 758 (2d Dep't 2008); *Grinnell v Ultimate Realty LLC*, 38 Ad 3d 600 (2d Dep't 2007). “[A]n agreement may be implied where a party retains bills without objecting to them within a reasonable period of time. . . .”, *American Centurion Bank v Cutler*, 81 AD 3d at 762 (2d Dep't 2011).

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Unjust enrichment is based upon a quasi contractual claim that is imposed by equity to prevent injustice where there is an absence of an actual agreement between the parties , *IDT Corp v Morgan Stanley Dean Witter & Co*, 12 NY 3d 132 (2009). In order to maintain such an action, the proponent must prove that: 1) the other party was enriched; 2) at the claiming party's expense; and 3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered, *Mandarin Trading Ltd v Wildenstein*, 16 NY 3d 173 (2011).

Legal Analysis

Here, Plaintiff has met the initial burden of proving prima facie that Defendant has breached the SSPA contract. Plaintiff has demonstrated the existence of a contract, between himself and the Defendant, in which Plaintiff agreed to sell his 100% interest in the Corporation and all of its property to the Defendant for a purchase price of \$35,000. Plaintiff has demonstrated his performance under the contract, specifically selling his interest in the Corporation to Defendant. Plaintiff has also demonstrated that Defendant did not pay the amount owed to Plaintiff. Lastly, Plaintiff has demonstrated the resulting damages in the amount of \$35,000.

Since Plaintiff has met the initial burden by setting forth sufficient evidence to prove a prima facie breach of contract claim, the burden then shifts to Defendant to raise a triable issue of fact. Defendant has raised a triable issue of fact by alleging that an additional contract existed between

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Plaintiff and Defendant, an oral agreement, which was accompanied by three invoices sent to Plaintiff and that Plaintiff subsequently failed to respond to any of those invoices. In one of these invoices Defendant specifically deducted the amount owed on the promissory note from the monies assertedly due Defendant. Since Defendant has raised a genuine triable issue of fact, Plaintiff's motion for Summary Judgment must be denied.

The Court next addresses whether Defendant has met the initial burden of setting forth sufficient evidence to prove a prima facie case entitling Defendant to judgment on the counterclaims for breach of contract, unjust enrichment and account stated.

Here, Defendant has met the initial burden of proving prima facie both his breach of contract and account stated claims, by alleging that there was an oral agreement between Plaintiff and Defendant; setting forth three invoices demonstrating the existence of that oral agreement; asserting that the Plaintiff never responded to the aforesaid invoices and by unopposed assertions that Plaintiff was never compensated Defendant for his work.

Upon the shifting of the burden, Plaintiff has also raised triable issues of fact by asserting that no oral agreement existed, that he never received the subject invoices and that any benefit conferred by the work performed inured solely to the Defendant/counterclaimant.

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With regard to the Defendant's unjust enrichment claim, it is the Court's view that Defendant's assertion that work was performed by Plaintiff is insufficient, without more, to make out a prima facie case. However, even if the Court were to so hold, here, upon the shifting of the burden, Plaintiff raises triable issues of fact as in the prior counterclaims, based on the assertion that only Defendant/Counterclaimant benefitted therefrom. Accordingly, neither Plaintiff nor Defendant/Counterclaimant is entitled to Summary Judgment on any of the aforementioned claims.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: March 10, 2015
Riverhead, New York



EMILY PINES
J. S. C.