J.N. Savasta Corp. v Voluntary Benefits Agency, LLC
2015 NY Slip Op 30491(U)
April 2, 2015
Sup Ct, New York County
Docket Number: 155303/2014
Judge: Eileen A. Rakower
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15
---X
J.N. SAVASTA CORP.,

Plaintiff,

- v -

VOLUNTARY BENEFITS AGENCY, LLC
and LANCE V. SHNIDER,

Defendants.
---X

Index No.
155303/2014

**DECISION
and ORDER**

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract, *quantum meruit*, and unjust enrichment based on, *inter alia*, an insurance agency's alleged failure to pay certain commission fees to an insurance consulting company, as allegedly required under an agreement for the same. Plaintiff, J.N. Savasta Corp. ("Savasta"), claims to have entered into an agreement (the "Agreement") with defendants, Voluntary Benefits Agency, LLC ("VBA") and Lance V. Shnider ("Shnider") (collectively, "Defendants"), whereby Defendants allegedly agreed to pay Plaintiff a ten percent commission on certain insurance premiums. Plaintiff claims to have performed its obligations under the Agreement, and that Defendants failed to make commission payments as required under the Agreement for the months of July 2012 through December 2012.

Plaintiff commenced this action on May 29, 2014, by summons and complaint (the "Complaint"). On September 17, 2014, Plaintiff and Defendants entered into a stipulation extending Defendants' time to move or plead until October 15, 2014. On October 15, 2014, Defendants filed a verified answer (the "Answer"), asserting various affirmative defenses and raising counterclaims.

Plaintiff now moves for an Order, pursuant to CPLR § 3211(b), dismissing Defendants' second, third, fifth, ninth, eleventh, and twelfth affirmative defenses; and, pursuant to CPLR § 3211(a)(7), dismissing Defendants' second counterclaim on the basis of failure to state a cause of action.

Defendants oppose.

Pursuant to CPLR § 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." (CPLR § 3211[b]). The proper inquiry on a motion to strike defenses is whether the party actually has a defense, not whether it is properly stated or artfully pleaded. (*Becker v. Elm Air Conditioning Corp.*, 143 A.D.2d 965, 966 [2d Dep't 1988]). The pleader is entitled to the benefit of every reasonable intendment of the defenses and, if there is any doubt as to the availability of a defense, it should not be dismissed. (*Duboff v. Board of Higher Educ.*, 34 A.D.2d 824, 824 [2d Dep't 1970]). Statements of legal conclusion, even if inconsistent, are permissible. (*River House Realty Co. v Lico Contr.*, 172 A.D.2d 426, 426 [1st Dep't 1991]; *Klapper v. Shapiro*, 154 Misc. 2d 459, 461-62 [Sup. Ct. N.Y. Cnty. 1992]).

Defendants' second affirmative defense asserts: "The allegations contained in the Complaint are barred for lack of standing." Plaintiff's complaint alleges that Defendants agreed to pay a ten percent commission fee to Plaintiff and failed to make payments as required. Accordingly, Plaintiff's complaint adequately alleges standing and Defendants second affirmative defense, for lack of standing, has no merit.

Defendants' third affirmative defense asserts: "The allegations contained in the Complaint are barred by the doctrine of laches and or [sic] Statutes of Limitations." Here, Plaintiff's complaint is timely brought. In addition, although Defendants argue that the facts would be fresher and the witnesses more readily available had Plaintiff filed the instant suit at the time of the alleged injury, the mere lapse of time is insufficient, without more, to sustain a defense of laches. (*Macon v. Arnlie Realty Co.*, 207 A.D.2d 268, 271 [1st Dep't 1994]). Accordingly, Defendants' third affirmative defense has no merit and does not state a defense to Plaintiff's complaint.

Defendants' fifth affirmative defense asserts: "Plaintiff has failed to join indispensable parties as required under Fed. R. Civ. Pro. 19(a)(1)(A) and 19(1)(B)(ii)." As the Federal Rules of Civil Procedure do not apply to the instant case, which is subject to the New York Civil Practice Law and Rules ("CPLR"), Defendants fifth affirmative defense has no merit.[1]

[1] Furthermore, Defendants' fifth affirmative defense lacks merit under New York law governing the joinder of necessary party. CPLR § 1001 provides that persons "should" be joined if their presence in the action is necessary to accord "complete relief" between those who already are parties; or, "who might be inequitably affected by a

Defendants' ninth affirmative defense asserts: "Plaintiff has failed to obtain proper service upon Defendants." Plaintiff argues that Defendants' ninth affirmative defense lacks merit because, pursuant to the Stipulation, Defendants agreed to waive the issue of personal jurisdiction. To this end, the Stipulation expressly provides: "Defendants also hereby agree not to raise personal jurisdiction as a defense to this matter." Plaintiff argues that service of process is a component of personal jurisdiction, and that Defendants have therefore waived the defense of improper service pursuant to the Stipulation. Accordingly, in light of the Stipulation's express waiver, Defendants' ninth affirmative defense has no merit.

Defendants' eleventh affirmative defense asserts: "The current venue is improper." Improper venue is a procedural defect that does not provide grounds for dismissing a complaint. Additionally, improper venue does not constitute an affirmative defense. (*See Graham v. Sylvan Lawrence Co.*, 82 A.D.2d 980, 981 [3d Dep't 1981] ["Improper venue being neither an affirmative defense nor a ground for dismissing the complaint, the so-called ". . . affirmative defense" was properly dismissed."]). Accordingly, Defendants' eleventh affirmative defense fails to state an affirmative defense and dismissal is warranted.

Defendants' twelfth affirmative defense asserts: "Defendants reserve the right to assert additional defenses and claims, as information becomes available to Defendants, through formal and/or informal discovery." As this assertion fails to state an affirmative defense, dismissal of Defendants' twelfth affirmative defense is warranted.

As for Plaintiff's motion to dismiss Defendants' second counterclaim, for "frivolous litigation", CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (7) the pleading fails to state a cause of action.

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judgment in the action". (CPLR § 1001[a]). Here, Plaintiff's complaint asserts claims arising from an alleged Agreement between Plaintiff and Defendants. Pursuant to the claimed Agreement, Defendants allegedly agreed to pay Plaintiff a ten percent commission on certain insurance premiums, which non-party Agri Star Meat & Poultry ("Agri Star") paid to Defendants. Although Defendants argue that Agri Star should be joined in this action, neither Plaintiff's complaint nor Defendants' Answer alleges that Agri Star is a party to the Agreement. The pleadings do not contain factual allegations from which to infer that a judgment in this action would affect a right or interest belonging to Agri Star. Accordingly, even under CPLR § 1001, Defendants' fifth affirmative defense has no merit.

(CPLR § 3211[a][7]). In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]).

Defendants' second counterclaim, for "frivolous litigation" essentially seeks costs and sanctions pursuant to 22 NYCRR 130-1.1. 22 NYCRR § 130-1.1 authorizes the Court, in its discretion, to award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from "frivolous conduct". This statute further provides that, "[i]n addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part." (22 NYCRR § 130-1.1[a]). Conduct is "frivolous" within the meaning of § 130-1.1 if, "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;" if "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another;" or, if "it asserts material factual statements that are false." (22 NYCRR § 130-1.1[c][1]-[3]).

Here, Defendants' second counterclaim alleges that "Plaintiff has initiated this litigation, without a reasonable basis, in an attempt to cause Defendants to defend the same and hire local counsel." Accordingly, accepting Defendants allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Defendants' Answer are sufficient to support Defendants' second counterclaim, for purposes of surviving a motion to dismiss at this early stage of litigation.

Wherefore, it is hereby

ORDERED that Plaintiff's motion is granted only to the extent that Defendants' second, third, fifth, ninth, eleventh and twelfth affirmative defenses are dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: April 2 2014

EILEEN A. RAKOWER, J.S.C.