Pielet Bros. Contr. v All City Glass'n Mirro-1964UA, LLC
2015 NY Slip Op 31045(U)
June 18, 2015
Supreme Court, New York County
Docket Number: 161294/2014
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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PIELET BROTHERS CONTRACTING,

Plaintiff,

- v -

ALL CITY GLASS'N MIRRO – 1964UA, LLC, and SOLOMON BERKOVITCH,

Defendants.

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Index No. 161294/2014

DECISION and ORDER

Mot. Seq. #002

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

Plaintiff, Pielet Brothers Contracting ("Plaintiff"), brings this action for breach of contract, violation of N.Y. UCC Article 2, unjust enrichment and violation of New York Debtor and Creditor Law, Article 10 based on, inter alia, an alleged agreement to retain defendant, All City Glass'n Mirro – 1964UA, LLC ("All City"), to provide and install windows as part of Plaintiff's construction and development of certain real property located at 145 W. 123rd Street, New York, New York (the "Harlem Property"). Plaintiff claims that individual defendant Solomon Berkovitch ("Berkovitch") (and together with All City, collectively, "Defendants") is All City's sole member, owner, and operator.

Plaintiff commenced this action on November 13, 2014, by summons with Notice. Plaintiff filed a complaint on February 25, 2015. Defendants interposed an answer to Plaintiff's complaint on March 16, 2015. Defendants filed an amended answer to Plaintiff's complaint on March 25, 2015, asserting counterclaims for anticipatory repudiation of contract, wrongful termination of contract, and breach of contract against Plaintiff.

Plaintiff now moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the counterclaims asserted in Defendants' amended answer on the basis of failure to state a cause of action.

Defendants oppose.

CPLR § 3211 provides, in relevant part:

> (a) Motion to dismiss cause of action. 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; or

(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]).

As for Defendants' first counterclaim, under the doctrine of anticipatory breach, "where there has been an anticipatory breach of a contract by one party, the other party may treat the entire contract as broken and may sue immediately for the breach". (*Rachmani Corp. v. 9 E. 96th St. Apt. Corp.*, 211 A.D.2d 262, 266 [1st Dep't 1995] quoting 22 NY Jur 2d, Contracts, §§ 387-393, at 295). In order to give rise to a cause of action for anticipatory breach, "there must be a definite and final communication of the intention to forego performance." (*Rachmani Corp.*, 211 A.D.2d at 267). By contrast, a "[m]ere expression of difficulty in tendering the required performance, for example, is not tantamount to a renunciation of the contract." (*Id.*).

Defendants' amended answer asserts, "Plaintiff and [All City] entered a contract for the installation of custom windows". (Am. Ans. ¶ 20) Defendants' amended answer alleges that, "[p]ursuant to the contract, Plaintiff was obligated to pay the Defendant LLC the sum of $120,000.00." (Am. Ans. ¶ 21). Defendants' amended answer further alleges that All City, "purchased materials and incurred other expenses toward its performance of the parties' contract", and, "was ready, willing, and able to perform its obligations under the parties' contract." (*Id.* ¶¶ 22-23). Defendants' amended answer asserts that, "Plaintiff anticipatorily repudiated the parties' contract without cause", and that, "[a]s a result of the Plaintiffs anticipatory repudiation, the Defendant LLC is rendered unable to receive the benefits of the parties' contract". (*Id.* ¶¶ 25-26).

Here, even accepting Defendants' allegations as true, Defendants' amended answer fails to allege that Plaintiff made a "definite and final communication" of Plaintiff's intention to forgo performance under the purported contract for the

installation of custom windows. Accordingly, even accepting Defendants' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Defendants' amended answer fail to state a counterclaim for anticipatory breach. (*Jacobs Private Equity, LLC v. 450 Park, LLC*, 22 A.D.3d 347, 347 [1st Dep't 2005]).

As for Plaintiff's counterclaim for breach of contract, "[t]he elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dep't 2009]). Additionally, "[a]lthough on a motion to dismiss [the non-moving party's] allegations are presumed to be true and accorded every favorable inference, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss." (*Godfrey v. Spano*, 13 N.Y.3d 358, 373 [2009]).

Defendants' counterclaim for breach of contract pleads factual allegations which are identical to the factual allegations asserted in Defendants' counterclaim for anticipatory breach. Defendants' amended answer further asserts, "Plaintiff breached its obligations under the parties' contract without cause", that, "[a]s a result of the Plaintiff's breach of the parties' contract, the Defendant LLC suffered damages", and that, "[a]s a result of the Plaintiffs breach of the parties' contract, the Defendant LLC is rendered unable to receive the benefits of the parties' contract." (Am. Ans. ¶¶ 44-46).

Here, even accepting Defendants' allegations as true, Defendants' amended answer does not contain any factual allegations of Plaintiff's failure to perform under the purported contract for the installation of custom windows. Nor does Defendants' amended answer plead any specific provision of the subject contract that Plaintiff allegedly breached. (*Chambers Assoc. LLC v. 105 Acquisition LLC*, 37 A.D.3d 365, 366 [1st Dep't 2007]). Accordingly, even accepting Defendants' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Defendants' amended answer are insufficient to support Defendants' counterclaim for breach of contract.

Finally, with respect to Defendants' counterclaim for wrongful termination of contract, this counterclaim pleads factual allegations which are identical to the factual allegations asserted in Defendants' counterclaims for anticipatory breach and breach of contract. Even accepting Defendants' factual allegations as true and drawing all inferences in favor of the non-moving party, Defendants' counterclaim

for wrongful termination of contract lacks sufficient factual specificity to survive a motion to dismiss. Moreover, Defendants' counterclaim for wrongful termination of contract is duplicative of Defendants' insufficient counterclaim for breach of contract. Accordingly, even accepting Defendants' allegations as true and drawing all inferences in favor of the non-moving party, Defendants' counterclaim for "wrongful termination of contract" fails.

Wherefore, it is hereby

ORDERED that Plaintiff's motion to dismiss counterclaims is granted; and it is further

ORDERED that Defendants' first, second, and third counterclaims, for anticipatory breach, wrongful termination of contract, and breach of contract, respectively, are dismissed and the Clerk is directed to enter judgment accordingly.

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

DATED: June 18 2015

EILEEN A. RAKOWER, J.S.C.