

Nurzia Constr. Corp. v Kaplan
2015 NY Slip Op 32825(U)
November 13, 2015
Supreme Court, Dutchess County
Docket Number: 51465/2015
Judge: James D. Pagonis
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
NURZIA CONSTRUCTION CORP.,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 51465/2015

NANCY KAPLAN,

Defendant.

-----X

PAGONES, J D., A.J.S.C.

Defendant moves for an order, pursuant to CPLR 3211(a)(7), CPLR 3211(a)(8) and CPLR 327(a), dismissing plaintiff's complaint.

The following papers were read:

Notice of Motion-Affirmation-Exhibits A-D	1-6
Affirmation-Affidavits(3)-Exhibits 1-9	7-19
Reply Affirmation-Affidavit	20-21

Upon the foregoing papers, the motion is decided as follows:

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether

the facts as alleged fit within any cognizable legal theory (see *Nonnon v. City of New York*, 9 NY3d 825 [2007]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus (see *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11 [2005]).

Plaintiff's complaint alleges four causes of action sounding in breach of contract and quantum meruit. Defendant alleges that the contract upon which the plaintiff seeks to recover is unenforceable. The Court would emphasize that a motion made pursuant to CPLR 3211(a)(7) requires the Court to examine whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (see *Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). Accordingly, plaintiff's first and third causes of action adequately allege all of the essential elements of causes of action to recover damages for breach of contract, to wit: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (see generally *JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 AD3d 802 [2nd Dept 2010]). The Court will next turn to plaintiff's second and fourth causes of action sounding in quantum meruit. To state a cause of action based on quantum meruit, a plaintiff must allege (1) the performance of 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 (see *Goldstein v. Derecktor Holdings, Inc.*, 85 AD3d 728 [2nd Dept 2011]). Here, plaintiff alleges that it provided labor, materials and services at defendant's request with expectation of compensation and that only a portion of the balance was received. Accordingly, plaintiff sufficiently alleges the essential elements of two causes of action based upon quantum meruit.

Therefore, the branch of the defendant's motion seeking dismissal pursuant to CPLR 3211(a)(7) is denied.

Defendant next seeks dismissal pursuant to CPLR 3211(a)(8), lack of personal jurisdiction. Defendant alleges that "there is no personal jurisdiction over the defendant since she is a resident of the State of Connecticut, all work was performed in the State of Connecticut and the majority of the negotiations and discussions were held in the State of Connecticut."

A New York court may exercise personal jurisdiction over a non-domiciliary who, either in person or through his or her agent, transacts any business within the state or contracts anywhere to supply goods or services in the state (see CPLR §302[a][1]; *Urfirer v. SB Builders, LLC*, 95 AD3d 1616 [3rd Dept 2012]). As the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue (see *Marist Coll. v Brady*, 84 AD3d 1322 [2nd Dept 2011]). Such

burden, however, does not entail making a prima facie showing of personal jurisdiction; rather, plaintiff need only demonstrate that it made a "sufficient start" to warrant further discovery (see *Peterson v. Spartan Industries, Inc.*, 33 NY2d 463 [1974]).

Under the particular circumstances of this case, the plaintiff established that facts may exist to exercise personal jurisdiction over the defendant and has made a "sufficient start" to warrant disclosure on the issue of personal jurisdiction (see *Doe v. McCormack*, 100 AD3d 684 [2nd Dept 2012]).

Accordingly, the second branch of defendant's motion seeking dismissal pursuant to CPLR 3211(a)(8) is denied.

Lastly the defendant seeks dismissal pursuant to CPLR 327(a). The doctrine of *forum non conveniens* permits a court, on the motion of any party, to stay or dismiss an action when, although it may have jurisdiction over a claim, the court determines that in the interest of substantial justice the action should be heard in another forum (CPLR 327[a]; see *Koskar v. Ford Motor Co.*, 84 AD3d 1317 [2nd Dept 2011]). On such a motion, the Supreme Court is to weigh the parties' residencies, the location of the witnesses and any hardship caused by the choice of forum, the availability of an alternative forum, the situs of the action, and the burden on the New York court system (*Tiger Sourcing [HK] Ltd. v. GMAC Commercial Fin. Corporation-Can.*, 66 AD3d 1002 [2nd Dept 2009]). No one factor is dispositive (*id.*).

The Supreme Court's determination should not be disturbed unless the court improvidently exercised its discretion or failed to consider the relevant factors (see *Koskar v. Ford Motor Co.*, 84 AD3d 1317 [2nd Dept 2011]).

Here, the moving papers fail to establish, as a matter of law, that the Dutchess County Supreme Court would be an inconvenient forum for the trial of this matter. Thus, the third branch of defendant's motion seeking dismissal pursuant to CPLR 327(a) is denied.

Based upon the foregoing, the motion is denied in its entirety.

This constitutes the decision and order of the Court. This decision and order has been filed electronically.

Dated: November 13, 2015
Poughkeepsie, New York

ENTER


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