

Practice Bldrs. Holdings, LLC v Jack E.N.T. Corp.

2016 NY Slip Op 30359(U)

February 29, 2016

Supreme Court, New York County

Docket Number: 651721/2015

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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PRACTICE BUILDERS HOLDINGS, LLC,

Plaintiff,

Index No. 651721/2015

-against-

DECISION/ORDER

JACK E.N.T. CORP. and JACOB STRULOVICH,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action seeking recovery of a \$150,000.00 deposit it paid to defendants, asserting causes of action for fraudulent misrepresentation against defendant Jacob Strulovich ("Strulovich"), negligent misrepresentation against Strulovich, unjust enrichment against defendant Jack E.N.T. Corp., breach of an implied agreement against Jack E.N.T. Corp and piercing the corporate veil against Strulovich. Defendants now move for an Order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the complaint in its entirety as against Strulovich and dismissing plaintiff's causes of action for fraudulent misrepresentation, negligent misrepresentation, unjust enrichment and piercing the corporate veil as against Jack E.N.T. Corp. Defendants' motion is resolved as set forth below.

The complaint alleges as follows. Plaintiff owns and manages office space located at 131 West 35th Street, New York, New York and used by Gramercy Cardiac Diagnostic Services

("Gramercy") (the "office space"). When plaintiff purchased the office space for Gramercy's use, it had to demolish and remodel the office space to suit Gramercy's needs. Plaintiff hired Strulovich and, "through him," his company Jack E.N.T. Corp. to perform the demolition work. Strulovich sent plaintiff a written proposal for the demolition work but the proposal was not signed by any of the parties. In February 2015, plaintiff corresponded with Strulovich about its requirements for the reconstruction of the office space and how Strulovich should bid for the work. On or about March 10, 2015, Strulovich sent plaintiff an initial bid for the construction work with a proposed price of \$985,000.00, requiring a 20% deposit upon signing of the agreement. The proposed agreement was not signed by any of the parties. Plaintiff informed Strulovich that the bid was inadequate. However, it was important to plaintiff that the project proceed quickly. On or about March 12, 2015, Strulovich told plaintiff that if it gave him a "check," Strulovich would be able to start work at the office space regardless of whether plaintiff had the necessary work permits. Plaintiff handed Strulovich a check for \$150,000.00 made payable to Jack E.N.T. Corp. on or about March 13, 2015. Plaintiff believed that this check was a deposit contingent upon the execution of a satisfactory bid agreement and the immediate commencement and performance of the work. However, Strulovich failed to submit an adequate bid proposal, no agreement was entered and the work was not commenced. On March 26, 2015, plaintiff told Strulovich that the bid was inadequate and needed corrections and Strulovich replied, "I'll see what I can do but if you have to replace me, replace me." Thereafter, plaintiff hired a different contractor to do the work. Defendants have failed to return the \$150,000.00 "deposit." Thus, plaintiff commenced the instant action.

The court first considers the portion of defendants' motion for an Order pursuant to CPLR §§ 3211(a)(1) dismissing the complaint in its entirety as against Strulovich. In order to

prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claims. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the present case, the portion of defendants' motion for an Order pursuant to CPLR §§ 3211(a)(1) dismissing the complaint as against Strulovich is denied on the ground that the documentary evidence relied on by defendants, the proposed agreement for the construction work and the \$150,000.00 check made payable to Jack E.N.T. Corp., do not definitively dispose of plaintiff's claims. Although defendants contend that the proposed agreement, which is on Jack E.N.T. Corp. stationery, states that "[t]his agreement is made and entered into...by and between Jack E.N.T. Corp...and Practice Builders Medical Management LLC" and has a signature block for Strulovich to sign as "Contractor," shows that Strulovich did not intend to be personally bound by the proposed agreement, this contention is not relevant as it is undisputed that the proposed agreement was never executed. Plaintiff is not asserting any cause of action for breach of contract. The unexecuted proposed agreement does not definitely dispose of plaintiff's pleaded claims against Strulovich for fraudulent and negligent misrepresentation, which are based on misrepresentations allegedly made by Strulovich, in his individual capacity as well as in his capacity as the principal of Jack E.N.T. Corp., regarding the deposit for the construction work.

Further, defendants' contention that the \$150,000.00 check made payable to Jack E.N.T. Corp. shows that plaintiff was only dealing with Strulovich in his capacity as the principal of Jack E.N.T. Corp. and not in his individual capacity is without merit. This check does not

definitely dispose of plaintiff's pleaded claims against Strulovich for fraudulent and negligent misrepresentation, which are based on plaintiff's allegations that Strulovich made certain misrepresentations about his ability to start work immediately, in his individual capacity as well as in his capacity as the principal of Jack E.N.T. Corp., if he received a check made payable to Jack E.N.T. Corp. Therefore, the portion of defendants' motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the complaint as against Strulovich is denied on the ground that the proposed agreement for the construction work and the \$150,000.00 check made payable to Jack E.N.T. Corp. do not definitively dispose of plaintiff's claims against Strulovich.

The court now turns to the portion of defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's complaint as against Strulovich. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, "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).

The portion of defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's cause of action for fraudulent misrepresentation against Strulovich is denied. To plead a cause of action for fraud, a plaintiff must allege misrepresentation of a

material fact, falsity, scienter, reliance and injury. See *Barclay v. Barclay Arms Associates*, 74 N.Y.2d 644 (1989). The alleged misrepresentations “must be misstatements of material fact or promises made with a present, but undisclosed, intent not to perform them.” *Schulman v. Greenwich Associates, LLC*, 52 A.d.3d 234 (1st Dept 2008).

In the present case, plaintiff has sufficiently pleaded a cause of action for fraudulent misrepresentation against Strulovich. Plaintiff has alleged that Strulovich assured it that he would be able to commence and perform the construction work immediately if he received a deposit, even without work permits, that this statement was false, that Strulovich knew it was false and that plaintiff relied on the statement and was injured in the amount of \$150,000.00.

Defendants’ contention that plaintiff’s cause of action for fraudulent misrepresentation should be dismissed because plaintiff’s allegation regarding scienter is conclusory is without merit. Although “the circumstances constituting” fraud must be pleaded in detail pursuant to CPLR § 3016, a defendant’s actual intent to defraud “is ordinarily a question of fact which cannot be resolved on...a motion to dismiss.” *Shisgal v. Brown*, 21 A.D.3d 845, 846 (1st Dept 2005). Thus, a complaint that alleges that the representations “were known...to be false” is pleaded with the required specificity. *Id.*

Further, defendants’ contention that plaintiff’s cause of action for fraudulent misrepresentation against Strulovich should be dismissed as duplicative of plaintiff’s cause of action for breach of contract is without merit as plaintiff is not asserting a cause of action for breach of contract, merely a cause of action for breach of an implied agreement. Although the court cannot ascertain the gravamen of plaintiff’s cause of action for breach of an implied agreement, it is undisputed that no contract between the parties was executed. Thus, the portion of defendants’ motion for an Order pursuant to CPLR §§ 3211(a)(7) dismissing plaintiff’s cause

of action for fraudulent misrepresentation against Strulovich is denied.

The portion of defendants' motion for an Order pursuant to CPLR §§ 3211(a)(7) dismissing plaintiff's cause of action for negligent misrepresentation against Strulovich is also denied. To plead a cause of action for negligent misrepresentation, a plaintiff must allege that "there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false and there was reasonable reliance upon the information given." *Hudson River Club v. Consolidated Edison Co. of New York, Inc.*, 275 A.D.2d 218, 220 (1st Dept 2000). A special relationship of trust or confidence may exist where a plaintiff relies on "persons who possess unique or specialized expertise." *Fresh Direct, LLC v. Blue Martini Software, Inc.*, 7 A.D.3d 487, 489 (2nd Dept 2004) (holding that the plaintiff's purchase of computer software and related services and reliance on the defendant's software expertise were sufficient to plead the existence of a special relationship).

In the present case, plaintiff has sufficiently pleaded a cause of action for negligent misrepresentation against Strulovich. Plaintiff has alleged that it relied on Strulovich's specialized expertise in commercial construction, creating a special relationship of trust between Strulovich and plaintiff. Further, plaintiff has alleged that Strulovich assured it that he would be able to commence and perform the construction work immediately if he received a deposit, even without the necessary work permits, that this statement was false and that plaintiff reasonably relied on the statement. Although defendants contend that Strulovich and plaintiff did not have a special relationship of trust, defendants have failed to cite any case law holding that reliance on specialized expertise in commercial construction cannot create a special relationship of trust. Thus, the portion of defendants' motion for an Order pursuant to CPLR §§ 3211(a)(7) dismissing plaintiff's cause of action for negligent misrepresentation against Strulovich is denied.

However, the portion of defendants' motion for an Order pursuant to CPLR §§ 3211(a)(7) dismissing plaintiff's cause of action for piercing the corporate veil against Strulovich is granted. Plaintiff may not assert a stand-alone cause of action for alter ego liability against Strulovich as it is well-settled that "an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather, it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." *Morris v. New York State Dep't. of Taxation & Fin.*, 82 N.Y.2d 135 (1993). If plaintiff wishes to replead its allegations in support of the purported cause of action for piercing the corporate veil, plaintiff may make a motion to amend the complaint to assert that Strulovich should be held liable for plaintiff's causes of action for unjust enrichment or breach of an implied agreement against Jack E.N.T. Corp.

The court now turns to the portion of defendant's motion for an Order dismissing plaintiff's cause of action for unjust enrichment against Jack E.N.T. Corp. Defendants' only argument in support of dismissing plaintiff's cause of action for unjust enrichment, that plaintiff's cause of action for breach of contract precludes plaintiff from seeking recovery for unjust enrichment, is without merit as plaintiff has not asserted a cause of action for breach of contract, but rather for breach of an implied agreement. As discussed above, although the court cannot ascertain the gravamen of plaintiff's cause of action for breach of an implied agreement, it is undisputed that no contract between the parties was executed. Therefore, the portion of defendants' motion for an Order pursuant to CPLR §§ 3211(a)(7) dismissing plaintiff's cause of action for unjust enrichment against Jack E.N.T. Corp. is denied.

The court need not consider the portion of defendants' motion for an Order pursuant to CPLR §§ 3211(a)(7) dismissing plaintiff's causes of action for fraudulent misrepresentation,

