

Hartree Partners, LP v Camin Cargo Control, Inc.

2016 NY Slip Op 30731(U)

April 18, 2016

Supreme Court, New York County

Docket Number: 159848/2015

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 45

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Hartree Partners, LP,

Plaintiff,

Index
Number:

-against-

159848/2015

Camin Cargo Control, Inc.,

Defendant.

-----X

Anil C. Singh, J.:

Defendant moves, pursuant to CPLR 3211 (a) (7), to dismiss plaintiff's complaint for failure to state a claim. Plaintiff cross-moves, pursuant to CPLR 3025 (b), for leave to amend its complaint in the form annexed to its cross motion.

Underlying Allegations and Procedural Background

Plaintiff alleges that it is a commodities company specializing in trading energy products and that, on December 13, 2013, defendant agreed to inspect and test 50,000 to 53,000 barrels of Naphtha (the Naphtha) that plaintiff owned (complaint, ¶¶ 1-3). Plaintiff asserts that, after performing the test, defendant issued on December 31, 2013, a certificate of analysis (the Certificate) for the Naphtha that specified certain facts regarding the Naphtha's chemical composition (*id.*, ¶ 5).

Plaintiff states that, on January 23, 2014, it then sought to sell the Naphtha to Glencore Ltd. (Glencore), but that on

January 27, 2014, Glencore rejected the Naphtha, claiming that the Naphtha did not meet the specifications set forth in the Certificate (*id.*, ¶¶ 6-8). Plaintiff further states that, on January 28, 2014, defendant admitted that its technician had "recklessly" included incorrect data in the Certificate and that Glencore subsequently sued plaintiff (the Glencore Action) for breach of contract for the purported non-conformity of the Naphtha with the Certificate (*id.*, ¶¶ 9-10).

Plaintiff further states that, on or about August 17, 2015, it settled the Glencore Action by agreeing to pay Glencore \$345,000 and that it incurred legal fees and expenses of approximately \$155,000 in defending the Glencore Action (*id.*, ¶ 11). On September 25, 2015, plaintiff commenced this action seeking \$500,000 in damages against defendant for gross negligence and fraud, based upon defendant's conduct in issuing the Certificate.

Defendant interposed its answer with affirmative defenses on October 23, 2015 and, on December 7, 2015, it made the instant motion to dismiss plaintiff's complaint. On December 30, 2015, plaintiff cross-moved to amend its complaint. The proposed amended complaint seeks to add additional specificity regarding the Certificate (proposed amended complaint, ¶¶ 3, 6, 7, 16-20). It also proposes to drop the causes of action for gross negligence and for fraud, and to substitute a cause of action for

breach of contract. The proposed amended complaint states that "[o]n or about December 23, 2013, [defendant] expressly agreed that it would pull a sample from the shore side storage tank and analyze [it]" (§ 4). No other terms of the purported agreement are set forth in plaintiff's proposed amended complaint.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] the benefit of every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotation marks and citation omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a

motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Leave to Amend

"Motions for leave to amend pleadings should be freely granted (CPLR 3025 [b]), absent prejudice or surprise" (*MBIA Ins. Corp. v Greystone & Co., Inc.* 74 AD3d 499, 499 [1st Dept 2010]; see also *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). However, amendment is not proper if "the proposed amendment is palpably insufficient or patently devoid of merit" (*MBIA Ins.*, 74 AD3d at 499; see also *Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 209 [1st Dept 1991]).

Fraud

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]).

Economic Loss Doctrine

"[C]ogent policy considerations militate against allowing tort recovery for contractually based economic losses . . . [since] [a] purchaser enjoys the contractual control and choice to protect itself with insurance and UCC warranties" (*Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.)*,

84 NY2d 685, 688 [1995]). The doctrine bars recovery for "damages for purely economic loss related to the failure or malfunction of a product, such as the cost of replacing or retrofitting the product, or for damage to the product itself [on a basis] in tort [and the plaintiff] is limited to a recovery sounding in breach of contract or breach of warranty" (*126 Newton St., LLC v Allbrand Commercial Windows & Doors, Inc.*, 121 AD3d 651, 652 [2d Dept 2014]; see also *Archstone v Tocci Bldg. Corp. of N.J., Inc.*, 101 AD3d 1059, 1061 [2d Dept 2012], lv dismissed 21 NY3d 1035 [2013]). While the economic loss doctrine applies to "a downstream purchaser" in a products liability action (*126 Newton*, 121 AD3d at 652), it is a subset of the broader principle that where a party's underlying claim is based on contract, "tort claims . . . fail [where a] plaintiff merely alleges economic loss, not personal injury or property damages" (*Cedar & Wash. Assoc., LLC v Bovis Lend Lease LMB, Inc.*, 95 AD3d 448, 449 [1st Dept 2012]; see also *Roundabout Theater Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272, 272-273 [1st Dept 2003]; *Rockefeller Univ. v Tishman Const. Corp. of N.Y.*, 232 AD2d 155, 155-156 [1st Dept 1996], lv denied 89 NY2d 811 [1997]).

Discussion

Initially, the court notes that plaintiff has not challenged defendant's showing that plaintiff has not set forth a viable cause of action for fraud (*Eurycleia*, 12 NY3d at 559) or upon

negligence (*Cedar & Wash.*, 95 AD3d at 449). While plaintiff notes that the economic loss doctrine is limited to products liability actions, the broader principle is that where a plaintiff is pursuing a claim based upon a contract, "tort claims . . . fail [where, as in this case, a] plaintiff merely alleges economic loss" (*id.*) Accordingly, defendant's motion to dismiss plaintiff's complaint for failure state a cognizable cause of action must be granted.

Plaintiff's cross motion seeks to rectify these failings in its complaint by substituting a cause of action based upon breach of contract. The court notes that the plaintiff has not annexed an affidavit of merits and "'a motion for leave to amend a pleading must be supported by an affidavit of merit and evidentiary proof that could be considered on a motion for summary judgment'" (*Bag Bag v Alcoobi*, 129 AD3d 649, 649 [1st Dept 2015] quoting *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998]). Moreover, even giving plaintiff's proposed amended complaint the appropriate favorable inferences, it is deficient. While it does allege that on December 23, 2013, defendant "expressly agreed" to inspect and test the Naphtha (proposed amended complaint, ¶ 8), no additional details as to the terms of the agreement are set forth. Whether the agreement was written or oral, the time by which the testing and inspection had to be completed, the price for the testing and inspection,

and any limitations on damages are among the terms that are absent from the proposed amended complaint.

"[A] party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to *all essential terms* . . . [and] [a]n agreement must have sufficiently definite terms and the parties must express their assent to those terms" (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 [1st Dept 2012] [italics added]; see also *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]; *Metropolitan Enters. NY v Khan Enter. Constr., Inc.*, 124 AD3d 609, 609 [2d Dept 2015]). Since plaintiff's proposed amended complaint is barren of allegations regarding the "essential terms" of the agreement (*Silber*, 92 AD3d at 439), it is "palpably insufficient" and, consequently, its cross motion for leave to amend its complaint must be denied (*MBIA*, 74 AD3d at 499).

Order

It is, therefore,

ORDERED that defendant's motion to dismiss the complaint is granted, with costs and disbursements to the defendant as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross motion for leave to serve an amended complaint is denied.

Dated: *April 18* , 2016

ENTER:



J.S.C.
ANIL C. SINGH