

Total Maintenance Solution, LLC v St. John's Univ.

2016 NY Slip Op 33102(U)

June 28, 2016

Supreme Court, Queens County

Docket Number: 700681-2015

Judge: Leslie J. Purificacion

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maintenance) to STJ at two of its college campuses. At certain points over the course of the years, TMS paid “legal fees and deductibles to defend against various claims brought by maintenance engineers, supervisors and the Union (and the Union’s associated benefit funds) that represented them.” TMS commenced this action to recover the same after STJ refused to reimburse TMS. STJ moves to dismiss the complaint on various grounds, as discussed below. The motion is opposed by the plaintiff.

Facts

TMS is a limited liability company engaged in the business of providing janitorial and maintenance services to the owners and operators of commercial buildings, educational institutions and healthcare establishments. On or about August 7, 2007, TMS and STJ entered into a Service Agreement (“Agreement”), whereby TMS would employ “Maintenance Engineers and Supervisors” to provide janitorial, maintenance, repairs and general services (“Basic Services”) at St. John’s properties located in Queens, Staten Island and Manhattan. Pursuant to its terms, the Agreement was renewed automatically for six successive month terms.

On or about August 29, 2012, TMS and STJ entered into an Addendum to the Service Agreement that extended the term of the Agreement for an additional eighteen (18) months, subject to the termination provisions contained in the Agreement. As consideration for the services provided to STJ by TMS, TMS was to receive, inter alia, reimbursement for costs incurred in providing the services and a management fee.

TMS and STJ conducted business starting on or about August 1, 2007, and concluding on or about May 1, 2014. During the time that TMS and STJ conducted business, TMS was compelled to pay labor costs for the payment of the Maintenance Engineers and Supervisors in the form of legal fees and deductibles to defend against various claims brought by maintenance engineers, supervisors and the Union that represented them. In 2011, the Building Service 32BJ Benefit Funds (“Funds”) conducted an audit of benefit fund contributions made pursuant to the collective bargaining agreement between TMS and Service Employees International Union Local 32BJ (“Union”), covering Maintenance Engineers at STJ’s that STJ had required TMS to enter into as a condition of TMS being retained to perform the janitorial, maintenance, repair and general service work at STJ’s.

TMS incurred \$28,789.91 in attorneys’ fees associated with the Union’s 2011 audit of benefit fund contributions, \$34,134.56 in attorneys’ fees associated with a lawsuit commenced by a TMS employee in 2011, \$15,036.40 in attorneys’ fees associated with a lawsuit commenced by a second TMS employee in 2012, \$10,000 in settlement funds concerning an EEOC claim filed by a third TMS employee in 2010, and \$25,000 in attorneys’ fees associated with the Fund’s ongoing assessment of Withdrawal Liability, for a total of

\$112,960.87. In this action, TMS is attempting to recover those legal fees as “costs related to the payment of Maintenance Engineers and Supervisors” under the Contract, as well as under the various related quasi-contractual theories of Account Stated, Unjust Enrichment, Quantum Meruit, Breach of Implied Covenant of Good Faith and Fair Dealing and Promissory Estoppel. Defendant STJ moves to dismiss these causes of action, pursuant to CPLR 3211. Plaintiff opposes the motion.

Discussion

The branch of the motion which is to dismiss the breach of contract cause of action is denied.

The legal standards to be applied in evaluating a motion to dismiss are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Prop. Assoc.*, 242 AD2d 359 [2d Dept 1997], citing *Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper, supra*, 242 A.D.2d at 360). The court's function is to “accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts” (*Cooper*, 242 AD2d at 360, quoting *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp., supra*).

Here, section 2.1(a) of the Agreement provides, in relevant part that,

“[STJ] shall pay [TMS] a management fee equal to 3% of the gross total cost of the Basic Services (“Gross Total Cost”). The Gross Total Cost shall be the sum of (I) all costs related to the payment of Maintenance Engineers and Supervisors . . .”

Section 4.2, on the other hand, requires TMS to indemnify STJ for, what appears to be, the very same fees. Specifically, section 4.2 provides that

“TMS shall to the fullest extent permitted by law, indemnify, defend and hold STJ . . . harmless from and against all claims, suits, damages, liabilities, losses, demands, costs and expenses, including reasonable attorneys' fees and disbursement, and punitive damages of every kind and nature, by or on behalf of any person, firm, association or corporation, in connection with [TMS'] performance under this

Agreement, including any and all claims by the Maintenance Employees and Supervisors concerning their hiring, employment, or separation therefrom, and claims by the Union or its various benefits funds in any form (including without limitation in court, arbitration or before a government agency.”

In determining the obligations of parties to a contract, the threshold determination as to whether an ambiguity exists is a question of law to be resolved by the court (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *Williams v Village of Endicott*, 91 AD3d 1160, 1162 [2012]; *Hudock v Village of Endicott*, 28 AD3d 923, 924 [2006]). “A contract is ambiguous if the language used lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion” (*Pozament Corp. v Aes Westover, LLC*, 27 AD3d 1000, 1001[2006] [citation omitted]; *accord Vectron Intl., Inc. v Corning Oak Holding, Inc.*, 106 AD3d 1164, 1165 [2013]; *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162–163 [1990]). “If [as here] the court concludes that a contract is ambiguous, it cannot be construed as a matter of law, and dismissal under CPLR 3211(a)(7) is not appropriate” (*Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 402 [2010] [citation omitted]; *see Vectron Intl., Inc. v Corning Oak Holding, Inc.*, 106 AD3d at 1165). Accordingly, the branch of the motion which is to dismiss the breach of contract action for failure to state a cause of action, is denied.

Defendant further argues that the court must dismiss the remaining causes of action which sound in quasi-contract since plaintiff has fully performed on a valid written agreement. However, since plaintiff is entitled to plead inconsistent causes of action in the alternative, the quasi-contractual claims are not necessarily precluded by the pleading of a cause of action for breach of the Agreement (*see Winick Realty Grp. LLC v Austin & Associates*, 51 AD3d 408 [2008]). Thus the court will address the remaining causes of action, in seriatim.

The branch of the motion which is to dismiss plaintiff’s second cause of action, to wit, for an account stated is granted. To state a cause of action of account stated, plaintiff must allege defendant’s receipt and retention of the subject statement of account without proper objection within a reasonable time (*see, e.g., Loheac v Children’s Corner Learning Center*, 51 AD3d 476 [1st Dept 2008]; *Ruskin, Moscou, Evans & Faltischek v FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1st Dept 1996]). This is predicated on the view that where an account is prepared and rendered, a person who receives it is bound to examine it; if the recipient fails to object within a reasonable time, the recipient becomes bound by the account, absent fraud, mistake or other equitable consideration (*see, e.g., Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 [1st Dept 1983]). Thus, “[a]n account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat a statement of debt as an account stated” (*Ross v Sherman*, 57 AD3d 758, 759 [2008],

citing *Simplex Grinnell v Ultimate Realty, LLC*, 38 AD3d 600, 600, 832 NYS2d 244). “A cause of action alleging an account stated, however, cannot be utilized simply as another means to attempt to collect under a disputed contract” (*id.*).

The branch of the motion which is to dismiss the causes of action sounding in unjust enrichment is granted since it is duplicative of the cause of action to recover damages for breach of contract (*Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644, 645 [2005]; see *Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 470; *Walter H. Poppe Gen. Contr. v Town of Ramapo*, 280 AD2d 667, 668).

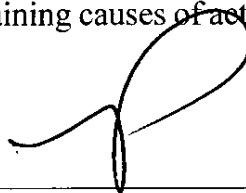
Plaintiff's fourth cause of action sounding in quantum meruit is dismissed, on the ground that there was a valid and enforceable contract governing the very subject matter for which the plaintiff seeks to recover (*Mucerino v Firetector, Inc.*, 306 AD2d 330, 332 [2003]; see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]; *Moore v Microsoft Corp.*, 293 AD2d 587, 588 [2002]).

Finally, the branch of the motion which is to dismiss plaintiff's promissory estoppel claims is granted as it too is duplicative of the breach of contract claim, since plaintiff alleges no duty owed it by defendant independent of the contract (see *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614, 615 [2009]; *Brown v Brown*, 12 AD3d 176, 176–177 [2004]).

Conclusion

The branch of the motion which is to dismiss the breach of contract claim is denied. The branches of the motion which are to dismiss the remaining causes of action are granted.

Dated: June 28, 2016



Hon. Leslie J. Purificacion, J.S.C.

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