Ford v Raul Carrasco NYC, LLC
2017 NY Slip Op 30431(U)
March 1, 2017
Supreme Court, New York County
Docket Number: 653936/2016
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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WILLIAM FORD

Plaintiff,

-against-

RAUL CARRASCO NYC, LLC,

Defendant.
---X
HON. CYNTHIA KERN, J.:

DECISION/ORDER
Index No. 653936/2016

Plaintiff William Ford commenced the instant action seeking damages arising out of an agreement allegedly entered into between plaintiff and defendant Raul Carrasco NYC, LLC (the "LLC"). Plaintiff now moves for an Order granting him leave to amend his complaint. Defendant LLC cross-moves for an Order granting it summary judgment dismissing the complaint. For the reasons set forth below, plaintiff's motion is granted in part and denied in part and defendant's cross-motion is denied.

The relevant facts are as follows. Defendant is in the business of purchasing and supplying retail and custom furniture for its clients. Non-party Raul Carrasco ("Carrasco") is defendant's president. Plaintiff alleges that in or around October 2015, he entered into an agreement with defendant pursuant to which plaintiff paid defendant $74,739.43 for defendant to purchase certain home furnishings on plaintiff's behalf. Plaintiff further alleges that defendant delivered some of the items that were ordered but that defendant has failed to deliver three sofas and one coffee table, totaling $42,600.00. Plaintiff alleges that he attempted to contact defendant to inquire as to the whereabouts of the items he had already paid for and never received but that defendant has yet to provide plaintiff with said items or refund plaintiff's money.

Defendant alleges that in or around October 2015, it entered into an agreement with Nicole Freezer Rubens ("Rubens") for the purchase and supply of the above furniture and that it never entered into an agreement with plaintiff. Defendant further alleges that at no time during the transaction did Rubens state that she was purchasing the furniture on plaintiff's behalf or that she was an agent of plaintiff's.

With regard to the failure to deliver the furniture at issue, Carrasco affirms as follows. The furniture order was for custom furniture so the items had to be manufactured. At the time defendant and Rubens entered into the agreement, Rubens agreed that the furniture should be kept in storage until the spring of 2016 and she wanted the furniture to be delivered in May 2016. As a result, the pieces of furniture were placed in storage in Florida where they were manufactured. However, when defendant attempted to have the furniture delivered, it became apparent that the three sofas at issue were damaged with water and the coffee table at issue was damaged during the delivery. Defendant offered to provide loaner furniture to Rubens and/or pay for the rental of furniture while the sofas and coffee table were being repaired but Rubens declined. On or about July 6, 2016, defendant informed Rubens that the sofas and coffee table were ready for delivery but Rubens informed defendant that she was refusing delivery of said items as she had already purchased replacement furniture due to the delay. Defendant alleges that the items at issue in this case are still in the warehouse in Florida awaiting delivery.

Plaintiff now moves for an Order granting him leave to amend his complaint to add allegations of a principal-agent relationship between plaintiff and Rubens; to add Carrasco as an individual defendant based on an alter-ego theory of liability; and to add causes of action against defendants for violation of Debtor and Creditor Law ("DCL") § 273, General Business Law ("GBL") § 349, fraud and fraudulent misrepresentation. Defendant cross-moves for summary judgment dismissing the complaint on the ground that there is no privity between defendant and plaintiff as the agreement was entered into between defendant and Rubens.

The court first turns to defendant's cross-motion for summary judgment dismissing the complaint. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324

(1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, defendant has failed to establish its *prima facie* right to summary judgment dismissing the complaint. Defendant asserts that the complaint must be dismissed based on lack of privity as it entered into the agreement with Rubens and not with plaintiff. However, the only written agreement provided to the court is an invoice for the purchase and delivery of the furniture at issue in this case and such invoice fails to establish that the agreement was not entered into between plaintiff and defendant. The invoice specifies that the purchase of the furniture will be billed to Rubens but that the furniture itself will be shipped to plaintiff's residence. Thus, it is not clear from the face of the invoice that the defendant was contracting with Rubens and not with plaintiff. However, even if the invoice established that defendant contracted with Rubens and not with plaintiff, which it does not, defendant has failed to establish that plaintiff is not an intended third-party beneficiary of the agreement. It is well-settled that "where the performance [of a contract] is rendered directly to a third party, that party is generally considered an intended beneficiary of the contract." *Alicea v. City of New York*, 145 A.D.2d 315, 318 (1st Dept 1988). It is undisputed in this case that the performance of the agreement, namely, the purchase and delivery of the furniture, was rendered directly to plaintiff as all furniture that was delivered was sent directly to plaintiff's residence for plaintiff's benefit. Moreover, Rubens affirms that she informed defendant at the time of purchase of the furniture that she was purchasing all furniture as an interior designer on plaintiff's behalf.

The court next turns to plaintiff's motion for leave to amend his complaint. Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the

proposed new allegations "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *Id.*

Initially, plaintiff's motion for leave to amend his complaint to add Carrasco as a defendant in the action based on an alter-ego theory of liability is granted as the court finds that such amendment is not palpably insufficient or patently devoid of merit. "In order to state a claim for alter-ego liability plaintiff is generally required to allege 'complete domination of the corporation in respect to the transaction attached' and 'that such domination was used to commit a fraud or wrong against plaintiff which resulted in plaintiff's injury.'" *Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dept 2014). With respect to alter-ego liability alleged against Carrasco, plaintiff's proposed amended complaint alleges that "Carrasco…abused the corporate form and exercised complete domination over [the LLC], in transactions with Plaintiff that ultimately resulted in Plaintiff's damages of $46,274.25 for [the LLC] and Carrasco's failure to deliver Plaintiff's orders"; that "there is no separation between [the LLC] and Carrasco, the individual, because Carrasco used [the LLC's] funds for his personal gain"; and that "[the LLC] was inadequately capitalized with insufficient funds to sustain the business." As these allegations are sufficient to state a claim for alter-ego liability against Carrasco individually, plaintiff's motion to amend his complaint to add Carrasco as a defendant on that basis is granted.

However, plaintiff's motion for leave to amend his complaint to add a claim against defendants for violation of GBL § 349 is denied as the court finds that such amendment is palpably insufficient and patently devoid of merit. GBL § 349 declares unlawful any "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." "[P]arties claiming the benefit of the section must, at the threshold, charge conduct that is consumer oriented." *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320 (1995); *see also Oswego Laborers' Local 24 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). "The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large; private contract disputes unique to the parties . . . would not fall within the ambit of the statute." *Id.* (internal quotations and citations omitted); *see also Cruz v. NYNEX Information Resources*, 263 A.D.2d 285, 290 (1st Dept 2000). Here,

plaintiff's proposed amended complaint alleges that "[the LLC] provides home furnishing to consumers" and that "[the LLC] materially mislead (sic) Plaintiff because [it] collected Plaintiff's order for home furnishing and payment of $74,739.43 with the intention to keep the payment for...Carrasco's personal gain and with no intention to completely delivery Plaintiff's order." However, the complaint fails to allege any deceptive "acts or practices" that have had "a broad impact on consumers at large" as is required when bringing a claim pursuant to GBL § 349. *See New York Univ.*, 87 N.Y.2d at 320.

Additionally, plaintiff's motion for leave to amend his complaint to add a claim against defendants for violation of DCL § 273 is denied as the court finds that such amendment is palpably insufficient and patently devoid of merit. Pursuant to DCL § 273, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." The First Department has held that in order to sufficiently plead a claim for such relief, the plaintiff must "plead with sufficient particularity any facts alleging that the conveyance at issue was made without 'fair consideration.'" *RTN Networks, LLC v. Telco Group, Inc.*, 126 A.D.3d 477, 478 (1st Dept 2015). Here, plaintiff may not add a claim for violation of DCL § 273 as the proposed amended complaint fails to specifically identify any conveyance made by defendants or whether it was made without fair consideration.

Plaintiff's motion to amend his complaint to add claims against defendants for fraud and fraudulent misrepresentation is also denied as such amendments are palpably insufficient and patently devoid of merit as they are duplicative of plaintiff's breach of contract claim. A fraud-based cause of action can only lie "where the plaintiff pleads a breach of a duty separate from a breach of the contract." *Manas v. VMS Assocs., LLC*, 53 A.D.3d 451, 453 (1st Dept 2008). *See also Krantz v. Chateau Stores of Canada, Ltd.*, 256 A.D.2d 186, 187 (1st Dept 1998), citing *Wegman v. Dairylea Coop.*, 50 A.D.2d 108, 113 (4th Dept 1975) ("To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties"). Moreover, even where a plaintiff pleads a breach of duty which is collateral to the contract, a fraud cause of action

must be dismissed if the damages alleged would also be recoverable under the breach of contract cause of action. *See Manas v. VMS Associates, LLC*, 53 A.D.3d 451 (1st Dept 2008).

Here, plaintiff's motion to amend his complaint to add claims against defendants for fraud and fraudulent misrepresentation must be denied as such claims are duplicative of plaintiff's breach of contract claim. Initially, plaintiff's proposed allegations in support of his fraud claims are identical to those alleged in support of plaintiff's breach of contract claim, specifically, that defendants represented to plaintiff that they would order and deliver the furniture at issue but that they did not follow through on that promise and never intended to do so. Moreover, the damages plaintiff seeks to recover on his fraud claims are identical to those he seeks to recover on his breach of contract claim.

To the extent plaintiff moves for leave to amend his complaint to add allegations of a principal-agent relationship between plaintiff and Rubens, such motion is denied as plaintiff's proposed amended complaint fails to make any such allegations.

Although this court has granted in part plaintiff's motion to amend his complaint, the court notes that the proposed amended complaint attached to plaintiff's motion papers has not been verified as required by CPLR § 3020(a). Thus, plaintiff is granted leave to amend his complaint on the condition that he files a verified amended complaint which comports with this decision within twenty days of the date this decision is filed.

Accordingly, plaintiff's motion to amend his complaint is granted solely to the extent set forth herein and defendant's cross-motion for summary judgment dismissing the complaint is denied. It is hereby

ORDERED that plaintiff shall file a verified amended complaint, in accordance with this decision, and such verified amended complaint shall be deemed served upon the filing of such complaint and service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and the verified amended complaint, shall be served, in accordance with the CPLR, upon the additional party in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

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

--X

WILLIAM FORD,

Plaintiff,

-against-

RAUL CARRASCO NYC, LLC and RAUL CARRASCO,

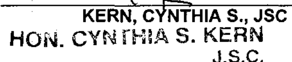
Defendants.

--X

And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk in the General Clerk's Office (Room 119), who is directed to mark the court's records to reflect the additional party. This constitutes the decision and order of the court.

DATE : 3/1/17



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