

Meshman v Benjaminov
2017 NY Slip Op 30556(U)
March 22, 2017
Supreme Court, New York County
Docket Number: 652343/2015
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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SCHANDEL MESHMAN

Plaintiff,

DECISION/ORDER
Index No. 652343/2015

-against-

ARKADIY BENYAMINOV,

Defendant.

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

Plaintiff Schandel Meshman commenced the instant action arising out of a contract she entered into with defendant Arkadiy Benyaminov. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting her summary judgment on her claims for breach of contract, unjust enrichment and quantum meruit and dismissing defendant’s counterclaims for breach of contract, fraud and breach of the implied covenant of good faith and fair dealing. Defendant separately moves for an Order pursuant to CPLR § 3212 granting him partial summary judgment on his counterclaims and dismissing plaintiff’s complaint. The motions are consolidated for disposition and are resolved as follows.

The relevant facts are as follows. Plaintiff owned and operated Amicable World, LLC (the “Amicable”), a special education teaching business, from February 2008 when it was formed until September 2014, and employed defendant as a special education teacher at Amicable. In early 2010, Amicable entered into a Requirements Agreement with the Board of Education of the City School District of the City of New York (the “City”) to provide services for preschool students with disabilities through a Special Education Itinerant Teacher (“SEIT”) program, which is regulated by the City.

In or around January 2014, plaintiff was notified by her accountant that Amicable has “a potential liability of \$223,240” due to recoupment of funds under the contract with the City and that plaintiff should

“consider all of [her] options, including consulting a lawyer about closedown/transfer of” Amicable. In a second e-mail, plaintiff’s accountant informed her that Amicable does “not have the funds that should have been left over for mandated services that [Amicable] did not provide for.” Thereafter, plaintiff unsuccessfully attempted to sell Amicable to two different purchasers.

In or around March 2014, plaintiff, as seller, and defendant, as purchaser, entered into a Purchase of Business Agreement (the “Agreement”). Pursuant to the Agreement, plaintiff would sell and transfer to defendant her interest in Amicable and the business it operated for the purchase price of \$425,000.00. The Agreement provided that after an initial deposit, defendant would pay the balance of the purchase price in installments. Additionally, the Agreement provided a representation by plaintiff that Amicable’s assets are “free and clear of any liens, charges, encumbrances, or rights of others,” that “there is no pending or anticipated claim against the Assets [of Amicable]” and that “[n]o third party contract is outstanding that could result in a claim against or affecting the Assets [of Amicable] in whole or in part either now or in the future.”

Plaintiff continued to manage Amicable after the Agreement was signed during a transition period while plaintiff was acquiring the approval of certain state agencies for the transfer of the business. On or about September 5, 2014, plaintiff transferred the business to defendant pursuant to the Agreement. Defendant made the first few installment payments to plaintiff pursuant to the Agreement but stopped making payments beginning in February 2015 when he alleges he became aware that Amicable was an insolvent business and that at the time the parties entered into the Agreement, plaintiff did not accurately reflect Amicable’s liabilities on the audited financial statements provided by plaintiff to defendant during due diligence. Specifically, defendant asserts that the SEIT rate calculation sheets filed by the plaintiff in 2014 prior to the transfer of Amicable showed a liability of \$0 for fiscal year 2014 and showed a recoupment liability that had accrued prior to fiscal year 2013 which was in the process of being paid back to the City of New York via an installment agreement. However, defendant asserts that Amicable had accrued liabilities to the City of New York of approximately \$409,304.00 based on the SEIT rate calculation

sheets defendant received in February 2015 for fiscal years 2013 and 2014, although no mention of such liabilities was made in the Agreement.

Plaintiff commenced the instant action asserting claims for breach of contract, unjust enrichment and quantum meruit based on defendant's failure to make all of the required payments under the Agreement. Defendant interposed an answer in which he asserts counterclaims for breach of contract, breach of the covenant of good faith and fair dealing and fraud based on plaintiff's failure to transfer Amicable to defendant free of liabilities and encumbrances and seeks to recover damages and rescission of the Agreement.

As an initial matter, the court finds that defendant is entitled to summary judgment dismissing plaintiff's claims for unjust enrichment and quantum meruit and that plaintiff is not entitled to summary judgment on those claims. It is well-settled that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987). Here, plaintiff's claims for unjust enrichment and quantum meruit must be dismissed as it is undisputed that the Agreement governs the subject matter of this action.

Further, the court finds that defendant is entitled to summary judgment on his breach of contract counterclaim and that plaintiff is not entitled to summary judgment dismissing such counterclaim. Pursuant to the Agreement, plaintiff represented that Amicable was free and clear of all liabilities, encumbrances and rights of others as well as any claims, both current and future and that there was no contract with a third-party that could result in a claim affecting Amicable "either now or in the future." However, the court finds that plaintiff breached the Agreement because at the time plaintiff sold and transferred Amicable to defendant, Amicable was not free and clear of all liabilities, encumbrances, rights of others or future claims and indeed, there was a third-party contract with the City that could result in a claim affecting Amicable in the future. This finding is based on the broad language of the Agreement and the undisputed fact that Amicable owed over \$400,000 to the City for the fiscal years 2013 and 2014. Although plaintiff asserts that such funds are not actually "liabilities" as contemplated in the Agreement as such funds merely get

recouped by the City by lowering Amicable's operating budget for the following year, such assertion is without merit. Such recoupment by the City certainly fits into one of the broad categories listed in the Agreement, including, *inter alia*, liabilities, encumbrances, rights of others and current or future claims. Thus, as the court has determined that plaintiff has breached the Agreement based on the material misrepresentations therein, defendant is entitled to rescission of the Agreement.

To the extent plaintiff asserts that defendant is not entitled to summary judgment on the ground that defendant had actual knowledge of the potential for recoupment of the funds by the City, such assertion is without merit. The only evidence plaintiff provides in support of such assertion are excerpts of the deposition transcripts of the defendant and of non-party Svetlana Katanov, defendant's sister. However, neither deposition transcript establishes that defendant had actual knowledge of any of Amicable's liabilities prior to entering into the Agreement.

To the extent plaintiff asserts that defendant's motion for summary judgment must be denied on the ground that defendant cannot establish justifiable reliance on the alleged misrepresentations as he did not do his own proper due diligence prior to entering into the Agreement, such assertion is without merit as defendant need not establish justifiable reliance on a claim for breach of contract.

To the extent plaintiff asserts that defendant is not entitled to summary judgment on his counterclaim for breach of contract on the ground that defendant failed to attach to his motion copies of all of the pleadings in this case as required by CPLR § 3212(b), such assertion is without merit. "Although CPLR 3212(b) requires that a motion for summary judgment be supported by copies of the pleadings, the court has discretion to overlook the procedural defect of missing pleadings when the record is 'sufficiently complete.'" *Washington Realty Owners, LLC v. 260 Washington Street, LLC*, 105 A.D.3d 675 (1st Dept 2013). "The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted." *Id.* The pleadings will be considered available for the court's consideration if they are filed electronically. *See Studio A Showroom, LLC v. Yoon*, 99 A.D.3d 632 (1st Dept 2012). As this case is an e-filed case, the record is sufficiently complete as copies of all the pleadings are available for the court to review online.

As the court has determined that defendant is entitled to rescission of the Agreement, plaintiff's motion for summary judgment on her breach of contract claim must be denied.

However, plaintiff is entitled to summary judgment dismissing defendant's counterclaims for fraud and breach of the implied covenant of good faith and fair dealing on the ground that such claims are duplicative of defendant's counterclaim for breach of contract. 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"). However, 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). Additionally, it is well settled that New York Law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim based on the same facts is also pled. See *Kaminsky v. FSP Inc.*, 5 A.D.3d 251, 252 (1st Dept 2004). In order to maintain such a claim, plaintiff must allege a "breach of a duty other than, and independent of, that contractually established between the parties." *Id.* Further, a claim for breach of the implied covenant of good faith and fair dealing will be dismissed where the damages alleged by such a breach are "intrinsically tied to the damages resulting from the breach of a contract." *Canstar v. J.A. Jones Construction*, 212 A.D.2d 452, 453 (1st Dept 1995).

Here, plaintiff is entitled to summary judgment dismissing defendant's counterclaims for fraud and breach of the implied covenant of good faith and fair dealing on the ground that such claims are duplicative of defendant's breach of contract claim. Defendant's allegations in support of his counterclaims for fraud and breach of the implied covenant of good faith and fair dealing are identical to those alleged in support of his breach of contract claim, specifically, that plaintiff misrepresented to defendant in the Agreement that

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Amicable's assets were free and clear of all claims, potential claims, encumbrances and liabilities when in actuality, at the time the parties entered into the Agreement, Amicable owed funds to the City.

Accordingly, the parties shall settle order and judgment as follows. The complaint is dismissed in its entirety; defendant's counterclaims for fraud and breach of the implied covenant of good faith and fair dealing are dismissed; summary judgment is granted in favor of defendant on his counterclaim for breach of contract; and based on the granting of summary judgment in favor of the defendant on his breach of contract counterclaim, the Agreement is rescinded and defendant is entitled to recover the amounts he has already paid to plaintiff for the purchase of Amicable and plaintiff is entitled to recover ownership of Amicable.

DATE: 3/22/17

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