Shawmut Woodworking & Supply, Inc. v 3 BP Prop. Owner LLC
2017 NY Slip Op 32318(U)
October 24, 2017
Supreme Court, New York County
Docket Number: 653350/2015
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE
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SHAWMUT WOODWORKING AND SUPPLY, INC.
D/B/A SHAWMUT DESIGN AND CONSTRUCTION

Index No. 653350/2015

Plaintiff,

Motion Seq. No. 008

-against-

3 BP PROPERTY OWNER LLC, WINDSOR FINANCIAL GROUP, LLC, EOP 1095 RETAIL, LLC, ASICS AMERICA CORPORATION, CORD CONTRACTING CO. INC., MG CONCEPTS (DE) LLC, And REACT INDUSTRIES, LLC.

DECISION AND ORDER

Defendants.
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HON. EILEEN BRANSTEN:

Defendant Asics of America moves to dismiss the Verified Second Amended Complaint. Plaintiff opposes the motion. For the reasons that follow the motion to dismiss is hereby Granted in Part and Denied in Part.

I. PARTIES:

Plaintiff, Shawmut Woodworking and Supply, Inc. (hereinafter "Shawmut"), is a Massachusetts corporation authorized to conduct business in New York. Shawmut rendered improvements to Property located at 120 W. 42 Street and/or 1095 Avenue of the Americas in New York City (hereinafter "the Property").

Defendant 3BP Property Owner (hereinafter "3BP") is alleged to be the fee simple owner of the Property. 3BP is alleged to have bought the Property from Defendant EOP 1095 Retail (hereinafter EOP) in January of 2015.

Defendant Windsor Financial Group (hereinafter "Windsor") is a Delaware based company which is alleged to have operated interchangeably with Windsor New York. Windsor New York is an entity with which the Plaintiff contracted for certain improvements to the Property. On or about January 15, 2016, Windsor Financial filed for Bankruptcy and the action was stayed as to this Defendant.

Defendants Cord Contracting, MG Concepts, and React Industries were alleged to be holders of Mechanic's Liens against the Property. Pursuant to the January 15, 2016 Bankruptcy Court Order, the present action was also stayed as to these Defendants.

Defendant Asics America Corporation (hereinafter "Asics") is a California Corporation authorized to conduct business in the State of New York. ASICS entered into a Master Retailer Agreement (hereinafter MR Agreement) with Defendant Windsor Financial Group wherein Windsor would develop, open, and operate stores selling Asics brand shoes. *MR Agreement § 2.1.*

II. BACKGROUND:

A. The Master Retailer Agreement between Windsor and ASICS

On or about May 17, 2012, Asics entered into a Master Retailer Agreement (MR Agreement) with Windsor. That contract granted Windsor the right to develop, open, and operate Asics brand retail stores and to use the Asics trade name in connection with the marketing and sales of Asics' products in those retail stores. *MR Agreement § 2.1*. The Agreement further granted Windsor the right to grant Franchises of Asics brand stores. *Id at §2.6*. Windsor and its Franchisees were to be given a "Gold Account", which granted them the status of "preferred" Retailers. Gold Account holders were entitled to advanced delivery of certain styles of footwear, periodic special make-ups of footwear, and apparel designed exclusively for Gold Account holders.

In exchange, Windsor was required to supply Asics with detailed retail plans regarding the opening and operation of the store along with product sales forecasts for the store. Id at *§4.1*. Opening of new stores, expansion of existing stores, and closing of stores were to be approved in advance by Asics in writing and any lease agreements entered into by Windsor were to contain language permitting an assignment of the lease to Asics without the need for the landlord's consent. *Id at §4.2*. Should any event cause the termination of the MR Agreement, i.e. Windsor's bankruptcy, Asics was to be given

the option to have outstanding leases assigned to Asics, as well as the right to designate which leases, if any, will be assigned to Asics. *Id at* §17.4.5.

Asics further required Windsor and any of Windsor's store managers operating Asics brand stores to engage in Asics "initial training." *MR Agreement § 4.5.2*. Windsor was to to ensure that Asics brand stores were operated to ASICS specifications, standards, and operating procedures with regard to "(i) conduct of RETAILER's employees; (ii) appearance and standards of services and conduct of the business; (iii) supplies and suppliers; (iv) computer hardware and software systems; and (v) days and hours the business will operate" *Id at* §4.7 (emphasis in the original). Asics was to have a free and unfettered right, with or without notice, to access and retrieve Store data at any time. *Id.* At the same time, the parties agreed that Windsor was to operate as an independent contractor, and was directed to conspicuously identify itself on "all transactions with customers, patrons, suppliers, public officials, and Retailer's employees and colleagues" as the operator of the store. *Id at §9.2*

To ensure Windsor's performance under the contract, Asics was to be granted a security interest in "all goods, inventory, equipment, fixtures, furniture, and improvements now or hereafter situated on or relating to the operation of Any Store, and to all property bearing [Asics'] Trademarks and all proceeds therefrom." *Id at §4.12.1.*

B. The Lease Agreement for the Property

On February 25, 2014, Windsor signed a Lease with EOP to develop and manage an Asics brand retail store on the Property. *2nd Amen. Comp. ¶47*. This Lease Agreement for the Property provided that the landlord, EOP, was to pay an allowance of $404,700.00 for Windsor's "Initial Work" which included "soft costs" such as architectural and engineering fees associated with the Initial work. *Lease Agreement § 3.02(a)*. EOP was to hold a sum of $1,618,800.00 in escrow from which they would make distributions for Windsor's Initial Work. *Id at §3.02(d)*.

Subsequent to the performance of the Initial Work and during the course of this lease agreement, this retail store is alleged to have become known as Asics' "North American Flagship" store. *2nd Amen. Comp. ¶ 46.*

C. The Shawmut Agreement

On July 8, 2014, Shawmut and Windsor signed a proposal to design and build improvements to the Property. *Design Build pp. 1, 4*. The proposal outlined potential costs for the construction and specifically stated, "until this is superseded by our final executed agreement, you will make payments based on our actual costs incurred and time spent by personnel at our customary hourly rates, plus a fee of 5%". *Id at p. 4*.

On October 14, 2014, Shawmut completed all work on the project and invoiced a total of $3,535,760.00 to Windsor. Windsor was unable to pay the amount in full at that

time. On February 5, 2015, Windsor signed a Promissory Note, agreeing to pay Shawmut the sum of $1,916,960. *2nd Amen. Comp. ¶ 63*. Windsor subsequently defaulted on the promissory note. *See id at ¶¶ 74-77*

D. The Sale of the Property

In January of 2015, EOP sold the Property to 3 BP. *2nd Amen. Comp. ¶19*. At that time 3BP also assumed the leases at the property. *Id at ¶96*.

E. The Instant Action

The instant action was initiated by Shawmut on October 7, 2015. On November 19, 2015 Shawmut Amended its complaint, and on September 9, 2016 Shawmut Amended its complaint a second time. The Second Amended Complaint makes claims against Windsor Delaware for breach of contract (counts 1 and 2), account stated (count 3), and foreclosure on a mechanic's lien (count 4). Pursuant to 11 U.S.C. §362, the claims against Windsor are subject to an automatic stay. The stay also applies to the claim for foreclosure under a mechanics lien (count 4) against Defendants Cord, MG Concept, and React.

Shawmut further makes claims against the former property owner EOP for unjust enrichment (count 5) and breach of contract (count 6 and 7), as well as against 3BP for a

mechanic's lien foreclosure (count 4), breach of contract (count 7), and unjust enrichment (count 8).

Finally, Shawmut makes claims against Asics for a breach of contract under a theory of agency liability (count 9) and for unjust enrichment (count 10).

On March 22, 2017, oral argument was heard on a motion to dismiss filed by Asics. At that time Shawmut had entered into a settlement in principle with EOP and 3BP and the parties requested no decision be rendered at that time so as not to compromise the settlement agreement. *Tr 4:8-18 (Terry-Ann Volberg, Court Reporter) (March 22, 2018).* Since the date of oral argument Shawmut has discontinued the action against 3BP and EOP. The court now renders its decision on Defendant Asics of America's motion to dismiss.

III. DISCUSSION:

Asics moves to dismiss the Plaintiff's claims pursuant to CPLR 3211(a)(7) failure to state a claim upon which relief can be granted. This court addresses only the face of the pleading itself and decides whether Shawmut's allegations fit within any cognizable legal theory. *See Tap Holdings, LLC v. Orix Fin. Corp.*, 109 A.D.3d 167, 173-174 (2013) *citing Leon v. Martinez,* 84 N.Y.2d 83, 87–88 (1994).

A. Count 9 – Actual Authority Breach of Contract

Shawmut alleges that Asics exercised actual authority over Windsor by and through the terms of the Master Retailer agreement. Shawmut further alleges that a doctrine of actual authority exists which would impute liability upon Asics for Windsor's default. *2nd Amen. Comp. ¶¶142, 144, 145*. The root of Shawmut's claim is "through Windsor, Asics accepted all of the work on the project." *Id at 147.*

Asics asserts that the entity it contracted with, Windsor Financial (NY), is a different entity than the one Shawmut contracted with, Windsor (DE); therefore, it is alleged Shawmut cannot assert a breach of contract claim against Asics. Shawmut, however, has plead that Windsor Financial (DE) and Windsor Financial (NY) were, in fact, the same organization. *Id at ¶16.*

Asics' also asserts that Shawmut's reliance on actual authority pertaining to Shawmut's Ninth Cause of Action is irrelevant. Shawmut's Second Amended Complaint, includes claims that Asics had "actual authority" over Windsor's choices and decisions when Windsor entered into the Master Retailer Agreement with Asics. While the use of the phrase "doctrine of actual authority" is unclear, this court's duty is to accord the facts and claims of the complaint *every favorable inference*. *See Tap Holdings*, 109 A.D.3d at 173-174; *see also Leon*, 84 N.Y.2d at 87 (emphasis added). The court may rely upon factors other than the complaint to determine whether the Plaintiff has adequately, if not

artfully, pled a claim. *See Leon*, 84 N.Y.2d at 85-86 (permitting the use of the affidavits filed with motion papers to clarify the pleadings).

Here, Shawmut states with specificity that Asics directly communicated with both Shawmut and Windsor, Asics was supplied with design details by Shawmut, and specifically exercised control over the project by approving the design, layout, features, and overall look of the store. *2nd Amen. Comp. ¶¶ 37-40.* Asics was believed to have also controlled the costs of construction by increasing costs and creating change orders. *Id at ¶41.*

Shawmut's Director of Business Development, James Scarpone (hereinafter "Scarpone") further supplied an Affidavit in relation to this motion to dismiss. This affidavit stated that representatives of Asics visited the site to observe the progress of construction. *Scarpone Aff. ¶9.* Scarpone later flew to Asics headquarters in Irvine, California to discuss additional work for the New York Store with representatives of both Asics and Windsor. *Id at ¶11.* Scarpone believed "Asics controlled the decision-making process for the design, approval, and funding of the work." *Id at ¶12.*

Shawmut further alleges in its complaint that Asics exercised authority over Windsor by and through the terms of the Master Retailer Agreement. *Id at ¶142.* Exhibit A of the Second Amended Complaint includes a copy of the Master Retailer Agreement between Asics and Windsor. This court may consider the terms of the MR Agreement when deciding if Shawmut has adequately plead a claim. *See e.g. Leon,* 84 N.Y.2d at 87–

88. The MR Agreement outlines that all of the Asics' brand stores owned and operated by Windsor were to be operated to ASICS specifications, standards, and in accordance with Asics operating procedures. *See Supra II(A)*. Asics was to train Windsor and Windsor's store managers, and have access to the stores systems. *Id.* Asics was also granted the right to assume and manage any of Windsor operated Asics brand stores in the event the MR Agreement was terminated, as well as hold a security interest in all "goods, inventory, equipment, fixtures, furniture, and improvements now or hereafter situated on or relating to the operation of any store, and to all property bearing [Asics'] Trademarks and all proceeds therefrom." *See id.*

This court must accept the allegations of the complaint as true. *People ex rel. Schneiderman v. Sprint Nextel Corp.*, 26 N.Y.3d 98, 113 (2015). The essence of Plaintiff's claim against Asics is that Asics abused Windsor's corporate autonomy through the constraints of the MR Agreement and that this abuse is the basis for liability against Asics. *See Tap Holdings*, 109 A.D.3d at 175 (holding that liability exists when any abuse of the corporate form is exercised for the purpose of working an inequity on another) *citing Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993). Together, the Second Amended Complaint, the Scarpone Affidavit, and the Master Retailer Agreement state a claim that is based upon the total control Asics was able to, allegedly, assert over Windsor. *See Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dep't 2014) (stating the consideration must be given with

respect to the transaction attacked) *citing Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993); *but see Vandashield Ltd. v. Isaacson*, 146 A.D.3d 552, 555 (1st Dep't 2017) (stating plaintiffs had failed to allege facts which would show the Defendants perverted the corporate form) *see also 2nd Amen. Comp. 142-145* (noting the enigmatic "doctrine of actual authority" as the basis for Plaintiff's breach of contract claim).

Given that the standard on a 3211(a)(7) motion to dismiss is to determine whether Plaintiff has plead a legal claim, and Plaintiff has pled a claim based upon Asics' apparent control over Asics' brand stores operated by Windsor, the dismissal of this claim is not appropriate at this time. Shawmut should be given the opportunity to prove its claim that Asics' "controlled the decision-making process for design, approval, and funding" of the work. *Scarpone Aff. ¶ 12.*

B. Count 10 – Unjust Enrichment

Next, Shawmut advances a claim for unjust enrichment alleging Asics enjoys the benefit of Shawmut's labor without paying for it. *2nd Amen. Comp. ¶¶ 161-165*. In order to plead a claim for unjust enrichment the party must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party *to retain what is sought to be recovered.*" *See Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012) *citing Mandarin Trading Ltd. v. Wildenstein,*

16 N.Y.3d 173, 182 (2011) (emphasis added). A claim for unjust enrichment cannot survive, however, where there is a contract governing the right to compensation. *See e.g. Camacho v. IO Practiceware, Inc.*, 136 A.D.3d 415, 417 (1st Dep't 2016); *Allenby, LLC v. Credit Suisse, AG*, 134 A.D.3d 577, 579 (1st Dep't 2015); *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388–89 (1987).

Shawmut's unjust enrichment claims of the Verified Second Amended Complaint are based upon an alleged breach of contract between Shawmut and Windsor. *See e.g. 2nd Amen. Comp. ¶ 50*. They are further based upon a promissory note that Windsor entered into with Shawmut. *See id.* at ¶¶ 63-69. The existence of both the contract and the promissory note are sufficient to defeat the Plaintiff's claim for unjust enrichment. *Camacho.*, 136 A.D.3d at 417; *Allenby, LLC* 134 A.D.3d at 579; *Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 388–89 (1987).

Further, even if the two contracts between Shawmut and Asics did not exist, this court would find any potential benefit Asics' enjoyed too attenuated to permit a claim for unjust enrichment to go forward. *See Mandarin Trading Ltd.*, 16 N.Y.3d at 182. Even though Shawmut has shown Asics had the *right* to take over the store, Shawmut has neither plead that Asics did, in fact, take over the store nor that some other company authorized to sell Asics brand shoes subsequently started conducting business from the store. *See Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 216 (2007) (finding the relationship between the parties too attenuated to support an unjust enrichment claim), *Denenberg v.*

Rosen, 71 A.D.3d 187, 195 (1st Dep't 2010) (finding the relationship between Plaintiff and Defendant too attenuated to support an unjust enrichment claim); *cf. Mandarin Trading Ltd.*, 16 N.Y.3d at 182 (stating there was a lack of allegations sufficient to show the Defendant was even aware the Plaintiff existed). If Asics does not retain the benefit of the labor, the unjust enrichment claim cannot stand. *See Georgia Malone*, 19 N.Y.3d at 516; *see also Sperry*, 8 N.Y.3d at 216. Here, Asics had the option to take over the store and obtain the benefit of Shawmut's work; by not doing so, however, the landlord reclaims the property and obtains the benefit of any work performed therein. Thus, this court finds the link between Shawmut and Asics too attenuated to permit a claim for unjust enrichment to survive.

IV. CONCLUSION AND ORDER:

For the foregoing reasons it is hereby

ORDERED Defendant Asics' motion to dismiss is DENIED as to the claims in Plaintiff's Ninth Cause of Action for Breach of Contract;

ORDERED Defendant Asics' motion to dismiss is GRANTED as to the claims in Plaintiff's Tenth Cause of Action for Unjust Enrichment, those claims are hereby dismissed with prejudice;

ORDERED Defendant Asics shall file an Answer to Plaintiff's Ninth Cause of Action; and it is further

ORDERED the parties shall appear for a preliminary conference on December 19, 2017

at 10:00 AM.

Dated: 10/24/2017

Signed:

HON. EILEEN BRANSTEN
J.S.C.