

Archstone Dev. LLC v Renval Constr. LLC
2017 NY Slip Op 32665(U)
December 14, 2017
Supreme Court, New York County
Docket Number: 651857/2017
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

ARCHSTONE DEVELOPMENT LLC,

Plaintiff,

-against-

Index No: 651857/2017

DECISION/ORDER

Motion Seq. No. 001

RENVAL CONSTRUCTION LLC and RENATO BUSLJETA,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion to dismiss plaintiff's complaint under CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

Papers

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Novack Burnbaum, LLP, New York (Howard C. Crystal of counsel), for plaintiff.

Kushnick Pallaci, PLLC, New York (Adam S. Cohen of counsel), for defendants.

Gerald Lebovits, J.

Defendants Renval Construction LLC (Renval) and Renato Busljeta move pre-answer under CPLR 3211 (a) (1) and (7) to dismiss all causes of action in the complaint based on documentary evidence — plaintiff's alleged failure to comply with a condition precedent as set forth in the parties' contract — and for failure to state a cause of action.

According to the complaint, plaintiff, Archstone Development, and defendant, Renval, entered into an agreement on May 24, 2016. Defendant Renato Busljeta is Renval's principal. The agreement mainly consists of two IAI A102 (2007), "General Conditions of the Contract for Construction" and IAI A201 (2007), "Standard Form of Agreement Between Owner and Contractor" (hereinafter, the agreement). Under the agreement, plaintiff agreed to pay the maximum guaranteed price of \$2,347,086.00 for the work performed by defendant on a monthly basis after defendant submits required documentations including "payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that cash disbursement already made" (NYSEF Document 10, § 12.1.4.) On or about July 8, 2016, defendant requested a 10% down payment — not part of the written agreement. Plaintiff agreed to pay the down payment. On or about August 1, 2016, defendants submitted an application for payment (bill) to plaintiff in the amount of

\$510,229.57 claiming that the total work completed was \$899,408.60. One day later, Renval amended its bill and sought \$433,564.57 and claimed \$844,938.17 for the work completed. Renval failed to provide the required documentation for the costs associated with the project. On August 3, 2016, plaintiff sent the following email to defendant: "I don't think this is going to work. . . . At this point I think it may be best if you stop the work at the site and refund the deposit minus all legitimate and documented expenses." On or about August 3, 2016, defendant replied by email: "I will have my team stop with the work at the site as per your request today August 3, 2016. We will work on returning deposit minus all legitimate fees and work that is furnished." Defendant's Deposit Report accounted for \$144,936.00 of the down payment, leaving \$188,772.60 as a credit due to be paid back to plaintiff. According to the complaint, Renval then stopped working on the project.

On or about August 24, 2016, plaintiff commenced an action by filing a complaint in the Supreme Court under the Index number 654491/2016 (the first action). The first action was dismissed without prejudice.

Plaintiff brought this action on April 6, 2017, against defendants asserting six causes of action: (1) declaratory judgment/specific performance; (2) common law accounting; (3) breach of contract; (4) breach of fiduciary duty; (5) constructive fraud; and (6) conversion. Plaintiff asserts the first and third cause of action against defendant Renval and the second, fourth, fifth, and sixth cause of action against both defendants.

Defendants move to dismiss plaintiff's complaint on the basis that plaintiff failed to comply with the agreement's condition precedent before bringing this action. Defendants argue that plaintiff failed to submit its claim with the Initial Decision Maker (IDM) and to serve defendants with the notice of the claim within the time specified in the agreement. Defendants argue that plaintiff filed its claim with the IDM on August 23, 2016, one day after the 21-day period, and failed to serve defendants with any notice of claim. Defendants also argue that plaintiff failed to satisfy the condition precedent as set forth in § 14.2.2 of the agreement: that the owner may terminate the contract for cause "upon certification by the Initial Decision Maker that sufficient cause exist . . . may . . . [after] seven day's written notice, terminate employment of the contractor." Defendants note that plaintiff terminated defendants on August 3, 2016, in an email and then defendants submitted their claim to the IDM.

Defendants also move to dismiss plaintiff's fourth cause of action for breach of fiduciary duty on the basis that the agreement provides that the agreement should not "create any fiduciary liability."

Defendants also move to dismiss plaintiff's fifth cause of action on the basis that plaintiff fails to state a cause of action for constructive fraud. Defendants argue that plaintiff does not allege in its complaint that defendants' statements regarding the terms of the agreement were false and that defendants knew those statements were false; therefore, the plaintiff fails to meet the required standard of pleading for the cause of action for fraud. Defendants also argue that the fraud claim is duplicative of the breach-of-contract claim and that the causes of action for fraud are based on "the allegations that defendants made false representations under the agreement." (NYSEF Document No. 5, ¶ 34.)

Defendants also move to dismiss plaintiff's sixth cause of action for conversion on the basis that defendants were terminated for convenience rather than for cause and were terminated based on the agreement's definition of termination for convenience in § 14.4; therefore

defendants argue that plaintiff is not entitled to the reimbursement of the down payment. Defendants also assert that plaintiff failed to receive a certification of termination from IDM before terminating defendants; therefore, that plaintiff failed to satisfy the condition precedent for terminating defendants for cause.

In opposition, plaintiff argues that the parties deleted from their agreement the IDM requirement and that they also mutually waived the obligation to mediate before plaintiff may bring an action. Plaintiff argues that even if the parties did not delete the IDM requirement and waive the mediation obligation, Renval's repudiation of its contractual obligations excused plaintiff from fulfilling the condition precedent. Plaintiff makes multiple alternative arguments, namely, that even if the requirements for the IDM and mediation were still effective, plaintiff complied with them; or that the requirements are not applicable; or that if plaintiff failed to comply with any of the requirements, their failure to comply was de minimis.

Plaintiff argues that the fifth cause of action for constructive fraud is adequately pleaded and non-duplicative. Plaintiff also states that it alleged in the complaint that defendants conceded that the down-payment funds were allegedly used to pay sub-contractors and to pay defendant Busljeta an undisclosed sum, and further that defendants overcharged plaintiff \$188,772.60. Plaintiff also argues that the fraud claim is not duplicative of the breach of contract claim; the fraud claim is based on allegations that are separate and distinct from the breach of contract cause of action.

Plaintiff further argues that the sixth cause of action, for conversion, should not be dismissed. Plaintiff argues that the agreement was not terminated for convenience and that plaintiff never alleged or referred to termination in its complaint. Plaintiff further asserts that plaintiff requested in its August 6, 2016, email that defendants stop working on the project; it did not terminate defendants. Furthermore, plaintiff alleges that the termination occurred only when on September 27, 2016, the IDM's decision found that plaintiff had terminated the contract.

Also, plaintiff argues that the fourth cause of action for breach of fiduciary duty is well pleaded. Plaintiff asserts that § 9.6.7 of the agreement is limited to Renval's obligation regarding "Progress Payments" and that defendants breached their duty of good faith and fair dealing implied in every contract; and that defendants breached their duty of good faith and fair dealing when they falsely claimed that claimed they performed a considerable amount of the project within 10 days of a 347 work-day project.

Plaintiff argues, moreover, that defendants fail to explain their argument about dismissing plaintiff's first, second, and sixth causes of action for failure to state a cause of action.

I. CPLR 3211 (a) (1)

Defendants' motion under CPLR 3211 (a) (1) is denied.

When a court considers a motion to dismiss under CPLR 3211, "it must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff's the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012].)

Courts will grant dismissal under CPLR 3211 (a) (1) "only if the documentary evidence submitted utterly refutes plaintiff's factual allegations and conclusively establishes a defense to

the asserted claims as a matter of law.” (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014]; accord *Leon v Martinez*, 84 NY2d 83, 88 [1994].)

Defendants rely on the language of the agreement, specifically on § 14.2.2, § 15.1.2, and § 15.2.1 that refer to the procedure involving the IDM. As the plaintiff points out in its reply in opposition, the parties modified § 1.1.8 and agreed that “[t]here shall be no Initial Decision Maker.” Moreover, the parties modified this section as follows: “All disputes between Owner and Contractor shall be determined pursuant to ~~render initial decision on Claims in accordance with Section 15-§13.2 and certify termination of the agreement under section 14.2.2.~~” (Cite plaintiff’s Memorandum of Law in Opposition, ¶ 6 [deletions in the original].) Defendants assert that the parties did not delete the IDM’s role in Section 14 and 15; they modified these sections.¹

Defendants’ proof — the agreement — does not utterly refute plaintiff’s factual allegations; defendants’ proof does not conclusively establish a defense to the asserted claims as a matter of law. The court cannot ascertain at this preliminary stage the parties’ intention about what role, if any, an IDM would have in resolving the parties’ disputes.

In response to defendants’ argument that plaintiff’s failure to mediate and mediate violated a condition precedent for bringing an action, plaintiff attaches a stipulation between the parties alleging that the parties waived the mediation requirement. The court considers the stipulation between parties and concludes that upon favorable inference of the facts in the complaint, the complaint is not dismissed for plaintiff’s failure to mediate as a condition precedent to bringing this action.

Defendants also argue that plaintiff failed to serve the required notice under the contract. In its opposition papers, plaintiff provides the court with an email that allegedly would satisfy the notice requirement. Defendants fail to “conclusively establish[] a defense to the asserted claims as a matter of law.” Defendants’ motion to dismiss the complaint on the basis that plaintiff failed to comply with a condition precedent is denied.

II. CPLR 3211 (a) (7)

On a motion to dismiss under CPLR 3211 (a) (7) for failure to state a cause of action, a court must “determine whether, accepting as true the factual statements of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.” (*Aristy-Farer v State of NY*, 29 NY3d 501, 509 [2017], quoting *People v NY City Tr. Auth.*, 59 NY2d 343 [1983] [citations and internal quotation omitted].) Plaintiff is entitled to all favorable inferences from its pleadings and, hence, “[i]f we determine that plaintiffs are entitled to relief on any reasonable view of the facts stated, our inquiry is complete and we must declare the complaint legally sufficient.” (*Aristy-Farer v State of NY*, 29 NY3d 501, 509 [2017], quoting *NY City Tr. Auth.*, 59 NY2d at 343 [internal quotation marks omitted].)

¹ The court notes that in § 1.1.8 of A201 Agreement, the parties agreed that “[a]ll disputes between Owner and Contractor shall be determined pursuant to § 13.2.” However, section §13.2 of A201 Agreement is titled “Successors and Assigns” and has no term regarding dispute resolution. Notwithstanding this fact, section § 13.2 of A102 Agreement is titled “Binding Dispute Resolution.” According to this section, if claims are “not resolved by mediation pursuant to Section 15.3 of . . . A201 . . . Document,” the parties agree to litigation in a court of competent jurisdiction as a dispute-resolution method.

i. Fourth cause of action

Defendants' motion to dismiss the fourth cause of action for breach of fiduciary duty is granted.

For a cause of action for breach of fiduciary duty, "plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011].)

Under § 9.6.7 of the agreement, "[n]othing contained herein . . . shall create any fiduciary liability or tort liability on the part of the Contractor [defendants] for breach of trust . . ." The contract's language is clear that no fiduciary duty exists between parties. Plaintiff fails to establish that defendants owed it a fiduciary duty. The parties agreed that no fiduciary relationship exists between them.

In its opposition papers, plaintiff discusses defendants' breach of the covenant of good faith and fair dealing. But in its complaint, plaintiff does not assert that defendants breached the covenant of good faith and fair dealing. The court disregards this aspect of plaintiff's argument.

ii. Fifth cause of action

Defendants' motion to dismiss the fifth cause of action for constructive fraud is granted.

It is well-established that "a fraud claim that arises from the same facts as an accompanying contract claim, seeks identical damages and does not allege a breach of any duty collateral to or independent of the parties' agreements is subject to dismissal as redundant of the contract claim." (*Cronos Group Ltd. v XComIP, LLC*, 2017 NY Slip Op 06515, at *6, 2017 WL 4125643, at *6 [1st Dept 2017] [citations and internal quotation omitted].)

Plaintiff's cause of action for constructive fraud arises from the same facts as plaintiff's breach-of-contract claim. In its breach-of-contract claim, plaintiff asserts the same facts and duties that defendants owed plaintiff that plaintiff asserts in its constructive-fraud claim, including failing to substantiate its payment applications (bills) and disbursements of the Down Payment; paying non-compensable costs from the Owner's payment; failing to account for the Down Payment; and using the Down Payment for unauthorized or improper purposes; and failing to return such funds to plaintiff. In plaintiff's cause of action for fraud, it asserts that defendants failed to keep their promises under the contract. According to plaintiff, defendants had to keep records of their spending and return any money they did not spend once defendant was terminated.

Defendants' motion to dismiss the fifth cause of action is granted. Plaintiff's constructive fraud claim is duplicative of its breach of contract claim.

No need exists for the court to consider defendants' remaining argument that plaintiff failed to plead the required elements of a constructive fraud.

iii. Sixth cause of action

Defendants' motion to dismiss the sixth cause of action for conversion is denied.

Defendants' argument is that they were terminated for convenience rather than for cause and therefore that plaintiff is entitled only to "payment for work executed, and costs incurred by reason of such termination, along with Contractor's fee on the Work not executed." (Defendants'

Affirmation in Support ¶ 39.) Plaintiff argues that the email in question was merely a request to end work; plaintiff asserts that a termination letter was sent to defendants on September 27, 2016. The court must give plaintiff's complaint every liberal and favorable inference. (*Aristy-Farer v State of NY*, 29 NY3d 501, 509 [2017].) The court cannot tell when defendants were terminated; therefore, the court cannot determine at what point, if at all, defendants converted funds. The court cannot tell what, if any, effect the August 6 email has on plaintiff's cause of action.

Defendants' motion to dismiss the sixth cause of action is denied.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint is granted in part and denied in part: the fourth and fifth causes of action are dismissed and the remaining causes of action survive; and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and order with notice of entry on defendants; and it is further

ORDERED that defendants must serve and file its answer within 20 days of service of this decision and order with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference on February 28, 2018, at 11:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: December 14, 2017



HON. GERALD LEBOVITS
J.S.C.