

Esh Mgt. LLC v Canet
2017 NY Slip Op 33219(U)
September 27, 2017
Supreme Court, Nassau County
Docket Number: 603087/17
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X
ESH MANAGEMENT LLC,

Plaintiff,

-against-

**SHERRILL CANET, KATHY SIEGEL and MELISSA
URWIN, SHERRILL CANET INTERIORS LTD.,**

Defendants.
-----X

TRIAL/IAS PART 13

INDEX # 603087/17

Mot. Seq. 1, 2
Mot. Date 7.13/8.31.17
Submit Date 9.11.17

The following papers were read on this motion:	E File Docs Numbered	
	MS 1	MS 2
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	10	17
Answering Affidavits (Affirmations).....	17	
Reply Affidavit.....		21

Defendants moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the first, second, third and fourth causes of action. Plaintiff cross-moves for leave to file an amended complaint.

Before this court is an action sounding in breach of contract (first cause of action) and fraudulent misrepresentation (second cause of action). Plaintiff also asserts claims for counsel fees (third cause of action) and punitive damages (fourth cause of action). According to plaintiff's complaint, defendant Sherrill Canet Interiors, Ltd. (SCI) is an interior design firm and individual defendant Sherrill Canet is the principal designer thereof. The complaint alleges that plaintiff entered into a written, signed contract with defendant SCI on or about February 11, 2013 whereby SCI was to provide design services for the creation of a large residential unit, combined from five smaller units at plaintiff's residence in Manhattan. The contract provided for a flat design fee of \$150,000.00 to be paid with an initial deposit of \$15,000.00 and the balance to be billed monthly at the rate of \$10,000.00 for eleven (11) months and a final balance of \$25,000.00 at the completion of the project but no later than eighteen (18) months after the signing of the contract.

According to the complaint, plaintiff inquired about the status of the project multiple times between April 2013 and September 2013. Defendant Canet allegedly represented to the plaintiff that she had been “making progress” by gathering samples, tiles, plumbing fixtures and floor plans but never sent designs, plans, or samples to the plaintiff. Plaintiff alleges that its principal complained about the lack of progress to the defendants but received unsatisfactory responses. Plaintiff further alleges that other officers of SCI, defendants Urwin and Siegel, assured plaintiff that progress was being made and that ESH should continue to make payments under the contract. Plaintiff asserts that defendants knew their representations were false, as they were aware that SCI had taken minimal steps to progress on the project at the time the representations were made.

In support of this motion, defendants argue that plaintiff’s complaint fails to allege facts demonstrating its own performance as required by the contract. According to the defendant, only the first three payments totaling \$35,000 were made. However, the contract does not provide milestone dates for any of SCI’s services. Nor does it contain a “schedule of values” or any other provision that would make plaintiff’s monthly payments dependent or contingent on the value of the services provided by defendants. Rather the contract provides for a “flat fee design.” Accordingly, defendants contend that the plaintiff failed to sufficiently allege its own performance under the contract. Defendants further argue that the complaint fails to state a cause of action against the individual defendants because they are not parties to the contract.

As to plaintiff’s fraud claims, defendants assert the payments made by the plaintiff to SCI were required as part of a pre-existing contractual obligation and cannot support a fraud claim. Moreover, it is undisputed that plaintiff did not make any payments in reliance upon the alleged representations. Finally, defendants have no duty to disclose its custom line of products. Defendants contend that a misrepresentation claim cannot stand because that cause of action is not entirely independent of the contractual relationship but rather directly relates to the breach of contract.

Although plaintiff attaches an amended complaint, plaintiff argues that the original complaint states a cause of action for breach of contract and fraudulent misrepresentation. Nonetheless, plaintiff argues that the cross-motion should be granted, and as a result, the majority of defendants’ motion should be denied as moot.

As stated in *STS Management Development, Inc. v NYS Department of Taxation and Finance*, 254 AD2d 409 [2d Dept. 1998]. “[t]he defendants’ motion to dismiss the complaint pursuant to CPLR 3211(a)(7) extended the defendants’ time to answer (see, CPLR 3211[f]) and thus extended the time in which the plaintiffs could amend their complaint as of right (see, CPLR 3025[a]; *Sholom & Zuckerbrot Realty Corp. v. Coldwell Banker Commercial Group*, 138 Misc.2d 799).” (*STS Management Development*, 254 AD2d 409 [2d Dept. 1998]). “‘Leave to amend a pleading should be freely granted unless the proposed amendment is palpably improper as a matter of law or prejudices or surprises the opposing party’ (*Nassau County v. Incorporated Vil. of Roslyn*, 182 AD2d 678, 679 [1992]; see *Ricca v. Valenti*, 24 AD3d 647, 648 [2005]).”

(*Melendez v Bernstein*, 29 AD3d 872 [2d Dept. 2006]). The court has examined both the original complaint and the amended complaint and finds the first, third and fourth causes of action to be the same in both pleadings and based on the same set of facts. Therefore, the court will consider defendant's motion to dismiss with respect to those causes of action. (*Sim v. Farley Equipment Co. LLC*, 138 AD3d 1228 [3d Dept 2016]; *see also Anthony J. Demarco, Jr., PC v. Bay Ridge Car World, Ltd.*, 169 AD2d 808 [2d Dept 1991]). The plaintiff has added a number of factual allegations to its second cause of action, which would under some circumstances vitiate defendant's motion. However, defendants address the new allegations in their reply papers. Accordingly, in the interest of judicial economy, the court will consider the second cause of action as well. (*See Aikens Const. of Rome, Inc. v. Simons*, 284 AD2d 946 [4th Dept 2001])

A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *see Rodolico v. Rubin & Licatesi, P.C.*, 114 AD3d 923, 924-925). "The evidence submitted in support of such motion must be 'documentary' or the motion must be denied" (*Cives Corp. v. George A. Fuller Co., Inc.*, 97 AD3d 713, 714, quoting *Fontanetta v. John Doe I*, 73 AD3d 78, 84 [internal quotation marks omitted]; *see Attias v. Costiera*, 120 AD3d 1281, 1282).

In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v. Palomino*, 78 AD3d at 996-997; *see Attias v. Costiera*, 120 AD3d at 1282-1283; *Cives Corp. v. George A. Fuller Co., Inc.*, 97 AD3d at 714).

(*Eisner v. Cusumano Const., Inc.*, 132 AD3d 940, 941 [2d Dept 2015]).

Here, the attached documentary evidence and e-mails do not conclusively establish a defense as a matter of law nor are they unambiguous or undeniable within the intendment of CPLR 3211(a)(1). (*See gen. Granada Condominium III Assn. v. Palomino*, 78 AD3d at 997 [2d Dept. 2010]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307, 318; *see also Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409, 414; *Leon v.*

Martinez, 84 NY2d 83, 87–88). The role of the court is to “determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v. Martinez*, 84 NY2d at 87–88). Therefore, a complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated (*see Campaign for Fiscal Equity v. State of New York*, 86 NY2d at 318). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19).

The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach (*see Elisa Dreier Reporting Corp. v. Global Naps Networks, Inc.*, 84 AD3d 122, 127; *Brualdi v. IBERIA Lineas Aeraes de España, S.A.*, 79 AD3d 959, 960; *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803; *Furia v. Furia*, 116 AD2d 694, 695).

(*Dee v. Rakower*, 112 AD3d 204, 208 (2nd Dept. 2013))

Applying these principles, the court finds that within the four corners of the complaint the pleading sufficiently alleges the elements of a breach of contract cause of action to survive a motion to dismiss pursuant to CPLR 3211(a)(7) as to the corporate defendant. Plaintiff’s allegations that defendants were in material breach by a total lack of performance is sufficient to support an allegation that the plaintiff’s own performance of its contractual payment obligations was excused. (*See Viacom Outdoor Inc. v. Wixon Jewelers, Inc.*, 82 AD3d 604 [1st Dept 2011]).

Plaintiff’s complaint also alleges that the individual defendants were aware that the corporate defendant had taken only minimal steps with respect to progress under the contract while providing assurances in order to induce plaintiff to make payments under the contract. As noted above, a motion to dismiss will fail if from the four corners of the complaint, factual allegations are discerned which taken together manifests any cognizable cause of action sounding in breach of contract. (*Vitale v Rowland*, 88 AD3d 692 [2d Dept. 2011]). Individual defendants can be held personally liable for a breach of contract if the officers of the corporation took action on behalf of the corporation that manifests bad faith. (*Ledy v Wilson*, 38 AD3d 214 [2d Dept. 2005]). In this case, plaintiff outlines a series of allegedly false representations and assurances, which, if true, would support a finding of bad faith.

“Whether the complaint will later survive a motion for summary judgment or whether the plaintiff will ultimately be able to prove its claim plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss’ (*Shaya B. Pac., LLC v Wilson Elser Moskowitz Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]).” (*McCarthy v Young*, 57 AD3d 955 [2d Dept. 2008]). Accordingly, at this pre-discovery stage, the motion to dismiss the first cause of action insofar as asserted against the individual defendants is denied.

With respect to the third cause of action, fees are not recoverable in an action unless specifically provided for by statute or contract which is not the case here. Thus, there is no basis for plaintiff’s claim for counsel fees and the third cause of action is dismissed. (*Wright v Selle*, 27 AD3d 1065 [4th Dept. 2006]).

With respect to the fourth cause of action, there is no basis here for defendants’ claim for punitive damages inasmuch as there is no “allegation of egregious tort directed at the public at large” (*Id.*; *Steinhardt Group v. Citicorp*, 272 AD2d 255, 257; see *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613; *Westinghouse Elec. Supply Co. v. Pyramid Champlain Co.*, 193 AD2d 928, 932).

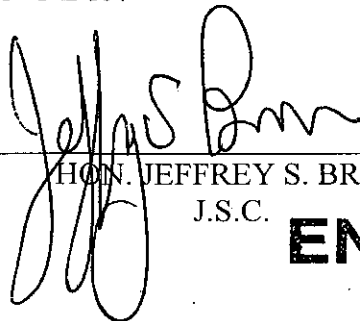
Turning then to the second cause of action, plaintiff’s amended complaint has added numerous factual allegations. In order to plead a cause of action for fraudulent misrepresentation or fraudulent inducement, the plaintiff must state the specific nature or content of the purported misrepresentation, its justifiable reliance thereon and/or the existence of such a relationship between the parties as would create a duty to disclose purportedly concealed facts, the falsity of the representation, knowledge by the representing party of its falsity, and resulting injury. (See *Centro Empresarial Cempresa, S.A. v. American Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]; *JGK Industries, LLC v. Hayes NY Business LLC*, 145 AD3d 979 [2d Dept 2016]; *Jacobs v Hasber*, 232 AD2d 372 [2d Dept. 1996]; CPLR 3016). Here, the plaintiff alleges in connection with the second cause of action that defendant Canet told plaintiff’s principal that his apartment was going to be “spectacular,” that she and his chosen architect make “an extraordinary team,” that her services would be “worth” waiting for. Plaintiff states that Canet knew these statements to be false when she made them. Moreover, the plaintiff alleges that defendant Canet “regularly represented that she had fully staffed offices in both New York City and Long island, making SCI appear to be an elaborate design company. When [ESH’s principal] ultimately visited the New York office, it was revealed that the office was no more than a one-bedroom apartment, where Canet and her husband were living.” The remainder of plaintiff’s allegations concern statements made after the contract was signed and cannot form the basis of a fraudulent inducement claim. As to the relevant misrepresentations, to the extent that they could even be considered statements of fact rather than mere hyperbole, the plaintiff has not made sufficient allegations of its justifiable reliance thereon. (*JGK Industries*, 145 AD3d 979). The second cause of action is, therefore, dismissed.

Therefore, the motion is **granted in part and denied in part**. The second, third, and fourth causes of action are **dismissed**. The attached proposed amended complaint is deemed served upon service of a copy of this order upon all counsel who have appeared in this action.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 27, 2017

ENTER:



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ENTERED

OCT 03 2017

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