Ean Aviation v Ascent Aviation Group Inc.
2018 NY Slip Op 31788(U)
April 5, 2018
Supreme Court, New York County
Docket Number: 650493/2017
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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EAN AVIATION,

Plaintiff,

- v -

ASCENT AVIATION GROUP INC., WORLD FUEL SERVICES INC., DOES 1-10

Defendant.

INDEX NO. 650493/2017

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this application to/for Summary Judgment

HON. BARRY R. OSTRAGER:

Defendants move for summary judgment dismissing plaintiff's complaint and plaintiff cross-moves for a determination as to liability in its favor on its claims. On March 22, 2018, oral argument on the motion was heard. The Court granted dismissal of most of plaintiff's claims on the record and reserved decision on plaintiff's claims for breach of contract, fraudulent inducement, conversion, and constructive trust. For the reasons stated herein, defendants' motion is granted in part and plaintiff's cross-motion is denied in its entirety.

Background

Plaintiff EAN Aviation ("EAN") provides services for private charter jets and helicopters. Defendants Ascent Aviation Group Inc. ("Ascent") and World Fuel Services Inc.

("WFS") are in the business of marketing and distributing aviation fuels. Ascent is a fully owned subsidiary of WFS and handles those WFS equipment sales that are related to fuel sales. In 2012, the parties entered into negotiations regarding a fuel solution for EAN in Nigeria. The negotiations between the parties concerned both the supply of aviation fuel and the sale of a refueler truck to EAN. The parties entered into a written agreement regarding the refueler truck with the alleged understanding that an agreement governing the supply of aviation fuel would be executed after further negotiations. By October 2016, the parties' relationship had broken down and negotiations regarding fuel services had ceased.

Plaintiff's ten-count complaint alleges, *inter alia*, that defendants fraudulently induced plaintiff to sign the refueler truck agreement with the promise that the parties would separately execute an agreement governing the supply of aviation fuel. Plaintiff also alleges that defendants breached their agreement to provide a refueler truck and aviation fuel services. Defendants move for summary judgment dismissing plaintiff's claims and plaintiff cross moves for summary judgment as to liability on its claims.

Breach of Contract

CPLR 3212 provides that "[a]ny party may move for summary judgment in any action" to resolve claims that do not pose genuine issues of material fact necessitating a trial. The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes

summary judgment and requires a trial." *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep't 2012).

Plaintiff alleges that defendants breached an agreement to provide fueling services and a refueler truck. It is undisputed that the parties' entered into a Bill of Sale ("Refueler Agreement") whereby defendants would sell a refueler truck to plaintiff in exchange for $105,000, and that said truck was ultimately delivered to plaintiff in Nigeria. (*See* Reed Aff. Exh. H [NYSCEF Doc. 31]). Plaintiff's claim that defendants breached the Refueler Agreement is based primarily on defendants' alleged failure to provide various training services that were contemplated in a term sheet, but which were never included in the ultimate Refueler Agreement, and that the refueler truck is useless without training services or a fuel supply.

The Court rejects that claim. The Refueler Agreement does not contain any language regarding the provision of training services or fuel supplies. The unambiguous language of the Refueler Agreement provides only for the sale of a refueler truck in exchange for a $105,000 promissory note. *Id.*

It is well settled under New York law that "when the parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *Id.* (citations omitted). Here, the intention of the parties is clearly and unambiguously set forth in the Refueler Agreement, which, notably, does not contain any writing even alluding to the provision of training services or fuel supplies. It is undisputed that defendants performed under the Refueler Agreement by providing plaintiff with a fully operational refueler truck. The defendants are obligated to provide nothing more to

plaintiff under the Refueler Agreement other than a fully operational refueler truck. Accordingly, defendants did not breach the Refueler Agreement and plaintiff's claim for breach of such agreement must be dismissed.

Plaintiff also asserts that defendants breached an alleged separate agreement to provide plaintiff with a fuel supply (the "Fuel Supply Agreement"). No formal written contract governs this alleged Agreement. Rather, plaintiff relies on a series of email exchanges extending from September 2013 to October 2016 in asserting that the communications established a meeting of the minds sufficient to form a contract. (*See* Eze Aff. Exh. B [NYSCEF Doc. 74]). However, these email communications show nothing more than three years of ongoing negotiations regarding pricing terms, and, at most, an agreement to agree in the future.

"A writing is not a sufficient memorandum unless the full intention of the parties can be ascertained from it alone, without recourse to parol evidence." *Dahan v. Weiss*, 120 A.D.3d 540, 542 (2d Dep't 2014) (internal quotations omitted). Here, there was no meeting of the minds regarding key elements of the proposed agreement, such as pricing terms. Instead, the communications merely demonstrate an intent to negotiate the essential terms of the agreement. However, "an agreement to agree, which leaves material terms of a proposed contract for future negotiation, is unenforceable." *Danton Constr. Corp. v. Bonner*, 173 A.D.2d 759, 760 (2d Dep't 1991).

Further, to the extent plaintiff alleges the existence of a purely oral agreement, such an agreement would be barred by the Statute of Frauds. Under New York law,

> [e]very agreement, promise or undertaking is void, unless it or some note or memorandum therefor be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: (1) By its terms is not to be performed within one year from the making thereof or the performance of which is not to be contemplated before the end of a lifetime. (N.Y. Gen. Oblig. Law § 5-701(a)(1)).

Additionally, under the Uniform Commercial Code,

> [e]xcept as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. (U.C.C. § 2-201(1)).

Here, plaintiff alleges that the sale of fuel—a good—would have substantially exceeded $500 and would have continued for a five-year period. (*See* Reed Aff. Exh. C [NYSCEF Doc. 26] ("Demuren Dep."); Reed Aff. Exh. D [NYSCEF Doc. 27] ("Olawuyi Dep.")). Thus, to the extent plaintiff may claim the existence of an oral contract, such a contract is barred by the Statute of Frauds. Having already found that no written Fuel Supply Agreement was formed, plaintiff's claim for breach of contract must be dismissed in its entirety.

Fraudulent Inducement

Plaintiff's claim for fraudulent inducement cannot be determined on a summary judgment motion. "To state a legally cognizable claim of fraudulent inducement based on a misrepresentation or omission, the complaint must allege that the defendant intentionally made a material misrepresentation of fact in order to defraud or mislead the plaintiff, and that the plaintiff reasonably relied on the misrepresentation and suffered damages as a result." *Connaughton v. Chipotle Mexican Grill, Inc.*, 135 A.D.3d 535, 537 (1st Dep't 2016). A claim for fraudulent inducement requires plaintiff to allege "a material representation of a fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance on the misrepresentation, and damages." *1810 E & J Restaurant Corp. v. Red and Blue Parrot, Inc.*, 150 A.D.3d 648, 648 (2d Dep't 2017).

The gravamen of plaintiff's claim is that the defendants induced plaintiff into purchasing a refueler truck with the promise that the parties would thereafter finalize the Fuel Supply

Agreement and provide training services. Essentially, plaintiff claims that defendants represented that they would enter into a Fuel Supply Agreement and provide training services when defendants had no intention to do so, in order to induce plaintiff to purchase a refueler truck for $105,000. While it appears unlikely that, in such a case, defendants would then continue to negotiate a Fuel Supply Agreement with plaintiff for years following execution of the Refueler Agreement, plaintiff has arguably presented a disputed issue of fact as to the intent of the defendants at the time they allegedly induced plaintiff into signing the Refueler Agreement. Therefore, defendants motion for summary judgment dismissing plaintiff's claim for fraudulent inducement is denied.

Conversion & Constructive Trust

Plaintiff's claim for conversion alleges that defendants wrongfully called an amount on the letter of credit plaintiff used to purchase the refueler truck. It is undisputed that plaintiff called on the letter of credit used to purchase the refueler truck by demanding a payment of $91,488.15 from CitiBank. (Eze Aff. Exh. D [NYSCEF Doc. 76]). Plaintiff alleges that this amount "far exceeded" the $88,388.24 then outstanding. Defendants argue that when they called on the letter of credit in October 2016, the balance on the loan was $91,488.15, and that shortly after the call on the letter of credit, plaintiff made a payment to defendants equal to the value of two monthly payments, totaling $4,158.26, which defendants subsequently returned to plaintiff. At a minimum, there appears to be a factual dispute as to the timing of the $4,158.26 payment plaintiff made to defendants and whether that payment was made and/or received before or after defendants called on the letter of credit. Therefore, defendants' motion for summary judgment dismissing plaintiff's conversion claim is denied.

Finally, plaintiff seeks a constructive trust as a remedy for its conversion claim. To grant a constructive trust, plaintiff must establish: "(1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment." *Panetta v. Kelly*, 17 A.D.3d 163, 165 (1st Dep't 2005). Here, plaintiff cannot allege a confidential or fiduciary relationship with the defendants. The parties simply had an arms-length contractual relationship. Therefore, plaintiff's claim for a constructive trust is dismissed.

All other claims having been dismissed for the reasons stated on the record during oral argument on this motion, it is hereby

ORDERED that defendants motion for summary judgment dismissing plaintiff's first and second causes of action is denied; and it is further

ORDERED that defendants motion for summary judgment dismissing plaintiff's third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth causes of action is granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment as to liability on all claims is denied in its entirety.

The Clerk is directed to enter judgment accordingly and to sever the first and second causes of action so they may proceed to trial as scheduled on April 16, 2018.

4/5/2018
DATE

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:		CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
		GRANTED		DENIED	[X]	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE