

Cohen Bros. Realty Corp. v Mapes
2018 NY Slip Op 32047(U)
August 13, 2018
Supreme Court, New York County
Docket Number: 655115/2017
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

COHEN BROTHERS REALTY CORPORATION, 3 EAST 54TH NEW YORK, LLC, INTERNATIONAL PLAZA ASSOCIATES, LP, 135 EAST 57ST STREET, LLC, 475 BUILDING COMPANY, LLC, FIFTH AVENUE BUILDING COMPANY, LLC, 622 THIRD AVENUE COMPANY, LLC, THREE PARK AVENUE BUILDING, CO., LP., D&D BUILDING COMPANY LLC, D&D 59ST STREET BUILDING COMPANY LLC, 805 THIRD NEW YORK LLC, COHEN RITZ RETAIL COMPANY, LLC, COHEN QUAD CINEMA, LLC, AND WESTCHESTER BUILDING COMPANY LLC,

Plaintiffs,

Index No.: 655115/2017

-against-

DECISION/ORDER

Motion Seq. No. 003

RYAN JOHN MAPES, D&K GENERAL CONTRACTOR CORP. a/k/a D&K GENERAL CONTRACTING CORP. a/k/a DK CONSTRUCTION ONE COPR., CITY MAINTENANCE INC. a/k/a CITY MAINTENANCE CORP., ITALCO DATA & ELECTRIC INC. a/k/a ITALCO DATA& ELECTRIC CO., MILLENIUM STAR ELECTRIC, INC., R&A PAINTING, LTD., and JOHN DOE No. 1,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants DK Construction One Corp., D&K General Constructor Corp., City Maintenance Inc., and Millenium Star Electric, Inc.'s (collectively, the moving defendants) motion to dismiss the case against them and for summary judgment on their counterclaims, and in reviewing plaintiffs' cross-motion to compel the moving defendants to comply with discovery demands.

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Harwood Reiff LLC, New York (Donald A. Harwood and Simon W. Reiff of counsel), for plaintiffs.
Regosin, Edwards, Stone & Feder, New York (Saul E. Feder of counsel), for moving defendants.

Gerald Lebovits, J.

Defendants DK Construction One Corp., D&K General Constructor Corp., City Maintenance Inc., and Millenium Star Electric, Inc.’s (collectively, the moving defendants), move to dismiss the case against them for failure to state a cause of action under CPLR 3211 (a) (7), and for summary judgment on their counterclaims. Plaintiffs cross-move to compel the moving defendants to comply with discovery demands under CPLR 3126.

The moving defendants’ motion is granted in part and denied in part. Plaintiffs’ cross-motion is granted to the extend provided in the Part IV (Plaintiffs’ Cross-Motion to Compel Discovery).

I. Background

Eleven companies, two limited partnerships, and one corporation, Cohen Brothers Realty Co. (Cohen Brothers), as the managing agent for these plaintiffs, filed this case against Cohen Brothers’ former Vice President, Ryan J Mapes, and some contractors/subcontractors. Plaintiffs claim that Mapes made fraudulent representations and conspired with these contractors/subcontractors to create false or inflated invoices, thus causing plaintiffs to make unnecessary payments to these contractors/subcontractors.

Plaintiffs state four causes of action against the moving defendants: (1) common-law fraud; (2) civil conspiracy to commit common-law fraud; (3) unjust enrichment; and (4) conversion and accounting. The moving defendants filed four counterclaims against plaintiffs (1) breach of contract, based on the performing of labor and services under CPLR 3016 (f); (2) *quantum meruit*; (3) violation of prompt payment law under GBL § 756-a; and (4) account stated. The moving defendants filed two counterclaims against plaintiffs except Cohen Brothers: (1) unjust enrichment and (2) conversion. The moving defendants filed one counterclaim against Cohen Brothers: aiding, abetting, and inducing breach of contract.

After oral argument on July 18, 2018, plaintiffs submitted a supplemental affirmation in opposition to the moving defendants’ motion and in support of plaintiffs’ cross-motion. This court accepted it. Because after plaintiffs’ submission of papers related to the moving defendants’ motion, plaintiffs accepted several discovery responses from the moving defendants.

On August 7, 2018, the moving defendants filed reply papers to plaintiffs' supplemental affirmation.

II. The Moving Defendants' Motion to Dismiss

The moving defendants' motion to dismiss is granted in part and denied in part.

The moving defendants' motion to dismiss the fraud claim and the claim of civil conspiracy to commit a fraud is denied. A cause of action alleging fraud must be pleaded with the requisite particularity under CPLR 3016 (b). The particularity under CPLR 3016 (b) is satisfied "when the facts suffice to permit a reasonable inference of the alleged misconduct." (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].) Plaintiffs claim that the moving defendants (1) were repeatedly billing for the same project (Plaintiffs' Affidavit of Steven M. Cherniak in Support of Cross-Motion, ¶ 47); (2) were paid through a purchase order on which Mapes forged the signature of Cohen Brothers' CEO (*Id.* ¶ 42); (3) paid attorney fee for Mapes in a case unrelated to this action. (Plaintiffs' Affirmation in Support of Cross-Motion, ¶ 24 [c].) The complaint adequately pleads the fraud claim and the claim of civil conspiracy to commit a fraud.

The moving defendants' motion to dismiss the unjust-enrichment claim is denied. To state an unjust-enrichment claim, a plaintiff must prove that (1) the other party was enriched, (2) at plaintiff's expense, and (3) it is against equity and good conscience to permit the other party to retain the benefit. (*Malone & Co. Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011].) Accepting plaintiffs' allegations as true, plaintiffs adequately plead the unjust-enrichment claim.

The moving defendants argue that the claimed repeat-billing was an inadvertent error. (Defendants' Affidavit of Denis Xhari in Opposition to Cross-Motion, ¶ 43-44.) Mapes denied forging the signature of Cohen Brothers' CEO at any time. (Defendants' Affidavit of Ryan Mapes in Opposition to Cross-Motion, ¶ 11.) The moving defendants argue that Mapes borrowed the alleged attorney fee from Denis Xhari, an officer of each one of the moving defendants. (Defendants' Reply Affidavit to Plaintiffs' Proposed Supplemental Submission, ¶ 39-40.) For a motion to dismiss, a court must determine only whether the facts, as a plaintiff alleges, fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) Accepting plaintiffs' allegations as true, as this court must at this early stage of the litigation, the complaint survives the motion to dismiss the fraud claim, the claim of civil conspiracy to commit a fraud, and the unjust-enrichment claim.

The moving defendants' motion to dismiss the conversion claim is granted. To state a cause of action for conversion, a plaintiff must show "(1) plaintiff had legal ownership or an immediate superior right of possession to specific identifiable personal property, and (2) defendant exercised unauthorized dominion over the property to the exclusion of the plaintiff's rights." (*Aetna Cas. & Sur. Co. v Glass*, 75 AD2d 786, 786 [1st Dept 1980].) Plaintiffs failed to allege specifically an identifiable personal property that the moving defendant had exercised unauthorized dominion over it to the exclusion of plaintiffs' rights.

The moving defendants' motion to dismiss the claim for accounting is granted. A party seeking an accounting must make a prior demand for one before seeking judicial relief. (*See Kaufman v Cohen*, 307 AD2d 113, 123-124 [1st Dept 2003].) Plaintiffs' claim for accounting is dismissed because they failed to demand one prior to commencing this action.

III. The Moving Defendants' Motion for Summary Judgment

The moving defendants' motion for summary judgment on their counterclaims is denied.

A summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law and showing absence of any material issue of fact. (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985].) Once the movant makes this showing, the burden shifts to the party opposing the motion to prove the existence of material issues of fact requiring a trial. (*Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003].)

The moving defendants have made a prima facie showing of entitlement to judgment as a matter of law on the breach-of-contract claim against plaintiffs. The moving defendants presented the unpaid sum and the list of specific services. (Defendants' Affidavit in Support of Motion, ¶ 55-58.) Plaintiffs raised an issue of fact by showing a claimed repeat-billing on a same project (Plaintiffs' Affidavit of Steven M. Cherniak in Support of Cross-Motion, ¶ 47.) At the oral arguments on July 18, 2018, the moving defendants withdrew their request to be paid the alleged double-billing of \$2000. (Defendants' Reply Affirmation to Plaintiffs' Proposed Supplemental Submission, ¶ 23.) Plaintiffs argue that there are other irregularities in billing. (*Id.* ¶ 21-22.) Plaintiffs have proved the existence of material issues of fact.

The moving defendants failed to make a prima facie showing of entitlement to judgment as a matter of law on account stated against plaintiffs. There can be no account stated "where any dispute about the account is shown to have existed." (*Abbott, Duncan & Weiner v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995].) Plaintiffs claimed repeat-billing on a same project. (Plaintiffs' Affidavit of Steven M. Cherniak in Support of Cross-Motion, ¶ 47.) Plaintiffs also argue that there are other irregularities in billing. (Defendants' Reply Affirmation to Plaintiffs' Proposed Supplemental Submission, ¶ 21-22.)

The moving defendants failed to make a prima facie showing of entitlement to judgment as a matter of law on other counterclaims.

IV. Plaintiffs' Cross-Motion to Compel Discovery

On November 27, 2017, plaintiffs served the moving defendants the first request for production of documents. On December 14, 2017, the moving defendants filed a response to plaintiffs' first request for production of documents and produced several documents. On February 1, 2018, the moving defendants filed this motion to dismiss this case and for summary judgment on their counterclaims. At the preliminary conference on March 21, 2018, the parties set a discovery schedule to provide for the production of documents on or before May 30, 2018. On March 22, 2018, plaintiffs filed this cross-motion to compel discovery.

Plaintiffs' notice of cross-motion seeks to compel discovery from another defendant, Italco, not from the moving defendants. (Plaintiffs' Notice of Cross-Motion to Compel Discovery.) The moving defendants argue that plaintiffs' cross-motion failed to seek compel discovery from the moving defendants. Plaintiffs' seeking discovery from Italco is a typo, because plaintiffs' affirmation and affidavit refer to the moving defendants. (Plaintiffs' Affidavit of Steven M. Cherniak in Support of Cross-Motion, ¶ 5.)

Plaintiffs' discovery demands should not include the moving defendants' bidding process. Losing a bargain is undeterminable and speculative, thus, a loss of an alternative contractual bargain cannot serve as a basis for fraud or misrepresentation damages. (*Rather v. CBS Corp.*, 68 AD3d 49, 58 [1st Dept 2009].) Furthermore, the doctrine of estoppel prevents plaintiffs to argue the moving defendants' mishandling the bidding process. Plaintiffs knew and acquiesced in Mapes's bidding method for the moving defendants. (Plaintiffs' Affidavit of Steven M. Cherniak in Support of Cross-Motion, ¶ 20, 25-26; Defendants' Affidavit of Ryan Mapes in Opposition to Cross-Motion, ¶ 8.)

Plaintiffs' discovery demands should focus on whether the moving defendants submitted false or inflated invoices, whether Mapes civilly conspired to commit fraud, and whether the moving defendants were unjustly enriched from this fraud. Except for the bidding process in each request, plaintiffs' document requests numbered 1-15 are materially related to this case. Plaintiffs' document requests numbered 16 is about another defendant, Italco, thus is unrelated to this case.

Plaintiffs' cross-motion to compel discovery under CPLR 3126 is granted to the extent that the moving defendants should comply with plaintiffs' document requests numbered 1-15 except for the bidding process in each request.

Accordingly, it is hereby

ORDERED that defendants DK Construction One Corp., D&K General Constructor Corp., City Maintenance Inc., and Millenium Star Electric, Inc.'s (collectively, the moving defendants) motion to dismiss is granted in part and denied in part: plaintiffs' cause of action for conversion and accounting is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the moving defendants' motion for summary judgment on their counterclaims is denied; and it is further

ORDERED that plaintiffs' cross-motion to compel discovery under CPLR 3126 is granted to the following extent: the moving defendants should supplement their response, within 30 days upon notice of entry on this motion, to plaintiffs' document demands numbered 1-15 except for the bidding process in each request; and it is further

ORDERED that plaintiffs are directed to serve a copy of this decision and order with notice of entry on the moving defendants and on the County Clerk's Office, which is directed to amend its records accordingly; and it is further

NYSCEF DOC. NO. 210

RECEIVED NYSCEF: 08/21/2018

ORDERED that the parties appear for a conference on November 21, 2018, at 11:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: August 13, 2018

J.S.C. 

HON. GERALD LEOVITŠ
J.S.C.