

**Omar v Moore**

2018 NY Slip Op 33889(U)

March 5, 2018

Supreme Court, Erie County

Docket Number: 2017-813776

Judge: Emilio Colaiacovo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF ERIE

---

NASIR MUZAID OMAR,  
  
Plaintiff,

MEMORANDUM DECISION

-vs-

Index No: 2017-813776

MICHAEL MOORE II,  
NU-ERA HOME IMPROVEMENT,  
and SADEQ AHMED  
a/k./a SADEQ AHMED ALSHAMARI,  
  
Defendants.

---

Defendants, Nu-Era Home Improvement (hereinafter "Nu-Era") and Sadeq Ahmed (hereinafter "Ahmed"), have moved this Court to dismiss the Plaintiff's Amended Complaint that asserts several causes of action against the Defendants including, but not limited to, breach of contract, unjust enrichment, fraud, negligence, and breach of fiduciary duty. The Defendants move to dismiss maintaining they are not parties to the contract for the work performed which is in dispute. Plaintiff insists he has adequately alleged the elements for each cause of action pled and that questions of fact abound that require this Court to deny the motion. The Court's opinion is as follows.

Statement of Facts

The underlying action arises from a dispute wherein Plaintiff alleges that Defendants were to provide construction services for his residence. Plaintiff further alleges that he contracted with Defendants Nu-Era, Ahmed and Michael Moore

(hereinafter "Moore") to perform construction and home improvement work on his residence in the Town of Concord, New York.<sup>1</sup> Plaintiff states that he gave Ahmed the sum of \$40,000 for work that was to be performed, which was memorialized in a written contract. The total cost for the work totaled \$62,800. Plaintiff contends Ahmed was to hold the funds in escrow pending completion of the work.

Plaintiff, Nu-Era, and Ahmed agree that there was a written agreement memorializing the understanding of the parties. However, there is sharp disagreement on the nature of that contract. Plaintiff alleges that he met with Ahmed who wrote down on a sheet of legal paper the work to be completed and the cost. (See Affirmation in Opposition to Defense Motion to Dismiss, p. 2). The Defendants, on the other hand, allege that the Plaintiff and Moore entered into a written contract, which was dated November 29, 2016. This contract lists the location where the work was to be performed, the estimated completion date, that \$30,000 was to be held in escrow, and that "all work being done has been discussed by both parties." (See Affirmation in Support of Motion to Dismiss Plaintiff's Amended Complaint, Exhibit "A"). Plaintiff maintains that the purported contract is a forgery, suggesting that the signature on the contract does not match his signature. (See Affirmation in Opposition to Defense Motion to Dismiss, Exhibit "B").

Plaintiff alleges that Defendants Ahmed, Nu-Era, and Moore performed shoddy work such as incomplete siding repair as well as negligent installation of gutters,

---

<sup>1</sup> Defendant Moore has not appeared personally or by counsel and has not moved nor joined in the relief requested by Defendants Nu-Era and Ahmed.

windows, and a second story to a garage. Plaintiff alleges that he asked the Defendants to repair the work and fix the damage caused on several occasions. However, that work was never completed.

Plaintiff maintains he made repeated requests for his money to be refunded. However, neither Defendant remitted the deposited funds to the Plaintiff. Thereafter, the Plaintiff commenced this action.

### Discussion

It is well settled that all favorable inferences must be awarded to a Plaintiff when Defendants seek to dismiss their complaint. Leon v. Martinez, 82 N.Y.2d 83 (1994). When considering the relief requested in a motion to dismiss, the Court is "limited to examining the pleading to determine whether it states a cause of action." Meyer v. Stout, 45 A.D.3d 1445 (4<sup>th</sup> Dep't. 2007). The Court must accept the facts as alleged as true and interpret them in the light most favorable to the Plaintiff. Matter of Board of Education, Lakeland Cent. School District of Shrub Oak v. State Educ. Dept., 116 A.D.2d 939 (3<sup>rd</sup> Dep't. 1986).

However, this does not necessarily mean that a verified complaint may avoid CPLR 3211 scrutiny. Bare legal conclusions and factual claims are insufficient. That said, on a motion to dismiss made pursuant to CPLR 3211(a)(1), a defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that a plaintiff's claims fail as a matter of law. A court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions

that are “unsupportable based upon the undisputed facts.” Robinson v. Robinson, 308 A.D.2d 234 (1<sup>st</sup> Dep’t. 2003).

#### *Breach of Contract*

The elements of a claim for breach of contract are (1) the existence of a contract, (2) due performance of the contract by plaintiff, (3) breach of the contract by defendant, and (4) damages resulting from the breach. JP Morgan Chase v. J.H. Elec. of NY, Inc., 69 A.D.3d 802 (2d Dep’t. 2010). Here, the Plaintiff has pled the necessary elements of a standard breach of contract cause of action. Plaintiff alleges that he discussed the terms of the work to be performed with the Defendants and that he performed his obligation by remitting the deposit as requested by Defendants. Plaintiff maintains that the Defendants failed to properly complete the work that was agreed to and, as a result, he sustained money damages.

Defendants Ahmed and Nu-Era argue that they are not a party to that contract. However, Plaintiff insists that the purported contract signed was in fact not the contract they signed, but that there was an oral agreement between himself and the applicable defendants, and that he was damaged since the money he paid is now gone and the work was never performed. Oral contracts can be valid and enforceable so long as they do not fall within the Statute of Frauds. Ovsyannikov v. Monkey Broker, LLC, 2011 N.Y. Misc. LEXIS 6941 (Supreme Court, New York County, 2011); Ferrer v. Samuel, 192 Misc.2d 533 (Supreme Court, Nassau County, 2002). Here, the statute of frauds is not applicable. It is this Court’s position that the Plaintiff states a cause of action for breach of contract.

The complaint recites all the necessary elements to allege a claim for breach of contract. Until discovery is complete, this Court declines to exercise the drastic remedy of dismissing the action. As such, this Court shall DENY the Defendant's motion to dismiss the breach of contract claim.

### *Negligence*

To state a cause of action for negligence, a Plaintiff must allege "... the existence of a legal duty, a breach of that duty, proximate causation, and damages." Luina v. Katharine Gibbs School New York, Inc., 37 A.D.3d (2d Dep't. 2007). A mere breach of a contract does not give rise to a tort cause of action unless a legal duty independent of the contract has been violated." Feinman v. Parker, 252 A.D.2d 869 (3d Dep't. 1998). Defendants Ahmed and Nu-Era insist that the breach of contract and the negligence causes of action are duplicative and cannot both be maintained. Burlew v. Am. Mut. Ins. Co., 99 A.D.2d 11 (4th Dep't. 1984). In the complaint, Plaintiff alleges that Defendants negligently installed siding, insulation, gutters, windows, and agreed to perform other construction work that was included in the contract. Plaintiff also alleges that trucks labeled "Nu-Era Home Improvement" were at the job site when the work was negligently performed. These allegations deal with the negligence of the Defendants in performing their work. While Defendants suggest that, as a matter of law, a Plaintiff cannot maintain both breach of contract and negligence. However, it is well settled that a Plaintiff may plead alternative causes of action in a complaint. See CPLR 3014, 3017(a); Cohn v. Lionel Corp., 21 N.Y.2d 559 (1968).

As previously noted, on a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded liberal construction. This Court accepts the facts as alleged in the complaint as true, accords the Plaintiff the benefit of every possible favorable inference, and finds that the alleged facts fit within a cognizable legal theory. It is the opinion of this Court that the Plaintiff has alleged sufficient allegations to meet the bare threshold necessary to proceed.

As such, the Defendant's motion as to the negligence cause of action is DENIED.

#### *Fraud*

To state a cause of action for fraud, a party must allege (1) a representation of a material fact; (2) the falsity of that representation; (3) knowledge that it was false when made; (4) justifiable reliance by the plaintiff; and (5) resulting injury. Pope v. Saget, 29 A.D.3d 437 (1<sup>st</sup> Dep't 2006). It is equally understood that fraud must be pled with particularity. See CPLR 3016. However, the Plaintiff has not sufficiently pled this cause of action in his complaint. The Plaintiff has failed to allege any misrepresentation purportedly made by Defendants, much less with the requisite particularity required by CPLR 3016. As such, this cause of action must be struck and the Defendant's motion should be GRANTED.

#### *Unjust Enrichment*

"The theory of unjust enrichment lies as a quasi-contract claim." IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 192 (2009); Goldman v. Metropolitan

Life Ins. Co., 5 N.Y.3d 561 (2005). It is an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties concerned. IDT Corp., 12 N.Y.3d at 142. Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded. Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382 (1987). At this stage of the litigation it is premature to opine as to whether Plaintiff's breach of contract claim will ultimately be established. However, Plaintiff has alleged that he gave a \$40,000 deposit personally to Defendant Ahmed. Defendants insist, instead, that Plaintiff gave the money to Defendant Moore. Taking the allegations in the complaint as true, as this Court is constrained to do in a motion to dismiss, Plaintiff gave a substantial sum of money to one of the Defendant's without receiving a benefit. This is sufficient to sustain a claim for unjust enrichment. Further, the Court finds based on the vastly contradictory positions of the parties that there are questions of fact that require this litigation to proceed. As such, Defendants' motion to dismiss this cause of action is DENIED.

#### *Breach of Fiduciary Duty*

In order to state a cause of action for a breach of fiduciary duty, a plaintiff must allege "the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." Kurtzman v. Bergstol, 40 A.D.3d 588 (2d Dep't. 2007).

"A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 (2005); Roni LLC v. Arfa, 18 N.Y.3d 846 (2011). Such a relationship "may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but an arms-length business relationship does not give rise to a fiduciary obligation." WIT Holding Corp. v. Klein, 282 A.D.2d 527 (2<sup>nd</sup> Dep't. 2001); EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d at 19; Carbon Capital Mgt., LLC v. American Express Co., 88 A.D.3d 933 (2<sup>nd</sup> Dep't. 2011). The core of a fiduciary relationship is "a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d at 19. "A breach of fiduciary duty cause of action must be pleaded with the requisite particularity under CPLR 3016 (b)." Parekh v. Cain, 96 A.D.3d 812 (2<sup>nd</sup> Dep't. 2012); Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 A.D.3d 804 (2<sup>nd</sup> Dep't. 2011).

Other than alleging that he gave the sum of \$40,000 to the Defendant Ahmed, the Plaintiff does not establish a fiduciary duty. He fails to allege a "higher level of trust" between himself and the Defendants. Further, in his complaint, he fails to plead with particularity how the arrangement created an escrow arrangement. As such, this cause of action fails.

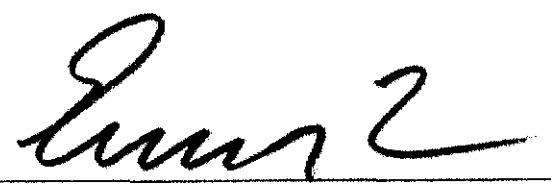
As such, the Defendant's motion to dismiss the breach of fiduciary cause of action is GRANTED.

*Attorney's Fees*

The general rule is that each party to a litigation bears their own costs of attorneys' fees for the action, except for a few narrow exceptions. Mighty Midgets, Inc. v. Centennial Ins., Co., 47 N.Y.2d 12 (1979); Hooper Assocs., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487 (1989); Buffalo v. J. W. Clement Co., 28 N.Y.2d 241 (1971); Stark v. Matchett, 2016 N.Y. Misc. LEXIS 2858 (Supreme Court, New York County, 2016). Defendants have failed to demonstrate the existence of any applicable exceptions. To that end, Defendants' motion for attorney's fees is DENIED.

This shall constitute the decision of the Court. Defendants shall submit an Order on notice.

Dated: March 5, 2018



Hon. Emilio Colaiacovo, J.S.C.