

CC Pay Operations Ltd. v Alokush
2019 NY Slip Op 30048(U)
January 2, 2019
Supreme Court, New York County
Docket Number: 653002/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45

Justice

INDEX NO. 653002/2018

CC PAY OPERATIONS LTD.,

Plaintiff,

MOTION DATE 10/09/2018, 10/09/2018

- v -

MOTION SEQ. NO. 001 002

AHMAD ALOKUSH, AHMADEUS.LLC

Defendants.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 19, 25, 27

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 26

were read on this motion to DISMISS

Upon the foregoing documents:

Plaintiff CC Pay Operations LTD ("CC Pay") commenced this action against Defendants Ahmad Alokush ("Alokush") and Ahmadeus LLC ("Ahmadeus") alleging breach of contract, fraudulent inducement, conversion and unjust enrichment.

Defendants seek dismissal of Plaintiff's second cause of action for fraudulent inducement (motion sequence 001) and CC Pay seeks dismissal of Defendants' counterclaims for breach of contract and unjust enrichment (motion sequence 002). For the following reasons, Defendants' motion is Granted and CC Pay's motion is Denied.

Background

CC Pay and Ahmadeus entered a Software Development and Maintenance Agreement dated February 28, 2018 ("the Agreement") (Complaint ¶2). Under the Agreement, Ahmadeus

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was to develop a web platform for CC Pay that would permit individuals to purchase “CafeCoin,” a cryptocurrency. *Id.* ¶¶29-30. According to the Complaint, Defendants represented they were “skilled and competent and capable of designing a professional website.” *Id.* ¶82. CC Pay alleges that, contrary to those representations, Defendants “had no proficiency in website design.” It alleges that had it “known that Ahmadeus could not design a website, it would not have retained Ahmadeus.” *Id.* ¶8.

Moreover, according to CC Pay, Ahmadeus “manufactured a dispute over money with CC Pay, and used that dispute as a pretext for breaching the Agreement.” *Id.* ¶6. CC Pay alleges that Ahmadeus “quit” without delivering any of the requested software and kept \$68,250 that it had already received.

For its part, Ahmadeus asserts that it performed or substantially performed all of its obligations under the Agreement but CC Pay has refused to pay all amounts due thereunder. It also asserts a claim for unjust enrichment.

Motion to Dismiss CC Pay’s Claim for Fraudulent Inducement

In assessing a motion to dismiss, a court must accept the allegations pled in the Complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994); *Morone v. Morone*, 50 N.Y.2d 481, 484 (1980).

In order to state a legally cognizable claim of fraudulent inducement, 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,

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537 (1st Dep't 2016), *aff'd*, 29 N.Y.3d 137 (2017); *Oxbow Calcining USA Inc. v. American Indus. Partners*, 96 A.D.3d 646, 650 (1st Dept 2012).

Generally, an individual's opinion about the caliber of work to be performed or her or his ability to perform a task is not an actionable fraud. *See, e.g., Renaissance Equity Holdings v. Al-An Elevator Maint. Corp.*, 121 A.D.3d 661, 664 (2nd Dep't 2014) (an alleged misrepresentation regarding intent or ability to perform under a contract does not give rise to a cause of action for fraud). Such statements of opinion as to a party's qualifications cannot form the basis for a fraudulent inducement claim. *Id.*; *see also Yablon v. Stern*, 161 A.D.3d 594, 594-95 (1st Dep't 2018) (plaintiff's cause of action alleging fraud in the inducement was properly dismissed, as it was founded upon "non-actionable promises of future conduct or events, rather than present fact, and non-actionable opinion of defendant as to his entity's resources and capability of undertaking the luxury renovation sought by plaintiffs."); *Lax v. Design Quest, N.Y., Ltd.*, 101 A.D.3d 431, 431 (1st Dep't 2012) ("Plaintiffs' fraud in the inducement claim was based on the alleged misrepresentation by defendants of their expertise and licensing. This claim was properly dismissed as duplicative of the breach of contract claims that alleged defective and deficient work.").

CC Pay's generalized allegations regarding Defendants' representations as to their skill and ability to perform under the Agreement are not sufficient to state a cause of action for fraudulent inducement. The statements attributed to the Defendants are not misrepresentations of verifiable *objective* facts but rather statements concerning their ability or intent to perform, which are not sufficient support a fraud claim. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 292 (1st Dep't 2011). Notably, CC Pay references specific factual representations contained on the Ahmadeus website indicating that it performed work for other

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specified “prestigious” companies such as Goldman Sachs (Compl. ¶20), but does not allege that those factual representations are false.

If CC Pay can establish that Ahmadeus failed to satisfy its obligations under the Agreement, its claim sounds in contract, not in fraud. *See, e.g., Cronos Grp. Ltd. v. XComIP, LLC*, 156 A.D.3d 54, 56 (1st Dep’t 2017) (“We hold that the cause of action for fraud, to the extent it is based on allegations that the defendants gave false assurances that they would perform a contractual obligation, should have been dismissed on the ground that it is duplicative of the contract claim and is not supported by allegations of specific facts giving rise to an inference that defendants did not intend to honor their assurances when they were made.”).

Accordingly, Defendants motion to dismiss CC Pay’s cause of action for fraudulent inducement is Granted. Because that is the only claim asserted against Defendant Alokush individually, he is dismissed from the action.

Motion to Dismiss Counterclaims for Breach of Contract and Unjust Enrichment

CC Pay seeks dismissal of Ahmadeus’ counterclaims for breach of contract and unjust enrichment. CC Pay asserts that the claim for breach of contract is refuted by documentary evidence (specifically, the Agreement) and that the claim for unjust enrichment is duplicative of the contract claim.

Under CPLR §3211(a)(1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d at 87-88. In order to warrant dismissal, the documentary evidence must “utterly refute” the claimant’s allegations. *Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

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CC Pay argues that the terms of the Agreement conclusively establish a defense to Ahmadeus' claim that it was not compensated for certain work it performed under the Agreement. CC Pay notes that the Agreement accounts for and contemplates the need for Ahmadeus to perform additional work that was reasonably necessary to fulfill the primary purpose of the software. CC Pay contends the additional work performed by Defendants was reasonably necessary to fulfill the primary purpose of the software, which Defendants dispute. Some examples of the alleged "additional work" include: Speaking to and training attendees for upcoming cryptocurrency conferences and providing technical advice and consulting to CC Pay about the nature and limits of blockchain technology, initial coin offerings and the economic and technical potential of these technologies. *Alokush Affidavit*, ¶6-7. The contract called for the design of software to permit purchase and use of a cryptocurrency.

The language of the Agreement does not conclusively establish a defense to Ahmadeus' claim for breach of contract. There is a factual dispute as to whether the work performed was *reasonably necessary* to fulfill the primary purpose of the software. There also remains a dispute as to whether Defendant Ahmadeus performed all the work it was hired to do, warranting payment of the remaining balance due under the Agreement. As such, CC Pay's motion to dismiss the breach of contract claim is denied. *Shaw Creations Inc. v Galleria Enterprises, Inc.*, 29 Misc 3d 1213(A) (N.Y. Cty. Sup. Ct. 2010) (motion to dismiss must be denied because there are material issues of fact).

CC Pay's motion to dismiss the counterclaim for unjust enrichment is also denied. Although such claims may be dismissed where they are duplicative of a claim for breach of contract, in this case there is a dispute as to whether some of the work performed by Ahmadeus was covered by the Agreement. "[W]here there is a bona fide dispute as to the existence of a

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contract or the application of a contract in a dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract and will not be required to elect his or her remedies.” *Kramer v. Greene*, 142 A.D.3d 438, 441-42 (1st Dep’t 2016).

Therefore, upon due consideration, it is:

ORDERED that Defendants’ motion to dismiss Plaintiff’s second cause of action (Fraud) is Granted; it is further

ORDERED that Defendant Alokush is hereby dismissed from the action, the only cause of action pled against him having been dismissed; it is further

ORDERED that Plaintiff’s motion to dismiss Defendants’ counterclaims is Denied; it is further

ORDERED that all parties are to file Answers for all remaining claims within 20 days after this Order is filed with Notice of Entry; and it is further

ORDERED that all parties are to appear for a Preliminary Conference on February 5, 2019 at 9:30 am.

1/2/2019
DATE


HON. JOEL M. COHEN

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE