Toth v Taouil
2019 NY Slip Op 30513(U)
February 27, 2019
Supreme Court, New York County
Docket Number: 655325/2017
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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JAMES TOTH,

Plaintiff,

- v -

FREDERICK TAOUIL, MITER CAP LLC

Defendants.

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INDEX NO. 655325/2017

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 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, 56

were read on this motion to/for DISMISSAL.

In this contract dispute over the disposition of an aircraft, plaintiff James Toth moves in motion sequence 001 to: (1) dismiss defendants' Frederick Taouil and Miter Cap, LLC's counterclaims pursuant to CPLR 3211[a][1] and [7]; (2) direct an immediate sale of the airplane, which is the subject of this litigation; (3) appoint plaintiff as receiver pursuant to CPLR 6401 for the sale of the airplane; (5) permit the proceeds from the sale of the airplane to be deposited with the Clerk of the Court pending the outcome of this action; and (6) enjoin the defendants from going near the airplane during the pendency of the action.

Defendants' counterclaims are for the following: (1) breach of contract; (2) a declaration that Toth is in breach of contract and has "waived his right to any of the relief demanded in the Complaint"; (3) a declaration that the aircraft may be moved to any airport that defendants deem logistically feasible and in the best interest of the aircraft; (4) a declaration that defendants may sell the aircraft in their sole discretion; (5) a declaration that defendant Miter Cap, LLC is a distinct and separate legal entity and not the alter-ego of co-defendant Taouil; and (6) breach of good faith and fair dealing, as alternative to breach of contract (NYSCEF #23 – Verified Answer with Counterclaims at 12-15, ¶¶23-43).

Defendants' Counterclaim Allegations

The parties in this action entered into a written agreement entitled the "Aircraft Purchase/Sales Agreement" (SPA) on or about May 19, 2017 to facilitate the sale by defendants and purchase by plaintiff of a 50% interest in a 1989 Mooney PFM in the amount of $75,000.00, with a market value of the airplane at

$125,000.00 (*id.* at 9, ¶¶6-8). Defendants claim that the parties opened an escrow account as required by the SPA and Toth made a payment of $10,000 to the account, which is deemed "non-refundable" pursuant to Section 4 of the SPA (*id.* at 10, ¶9). As per SPA Section 5, Toth was given the option to perform a pre-purchase inspection and submit to defendants a list of any discrepancies (NYSCEF #21 – SPA at §5). Defendants would then have the option to: (a) pay to have the discrepancies affecting the airworthiness of the aircraft repaired at seller's expense and to complete the sale; or (b) decline to do the repairs and refund Toth's deposit and cancel the sale (*id.*).

Thus, on or about June 17, 2017, Toth sent Taouil a list of alleged defects from an organization called AIR MODS, a Federal Aviation Administration (FAA) certified aircraft inspector (Counterclaims at 10, ¶10). Defendants claim that the list did not "indicate which items, if any, constituted airworthiness items" and "[r]ather, this list seemed to enumerate all alleged issues with the aircraft, none of which required any repairs" (*id.*). The parties agreed to move the closing date from June 30, 2017 to July 18, 2017 (*id.* at 10, ¶11). Defendants claim that on June 28, 2017, Toth traveled to Ellenville Airport in Ellenville, New York to inspect the repairs being performed on the aircraft, which were done at the sole cost of Taouil (*id.* at 10, ¶12). Defendants claim AIR MODS sent them a letter acknowledging that the list Toth provided defendants was not a list of only airworthiness items (*id.* at ¶13; NYSCEF #42 – AIR MODS' letter to Defendants). Defendants claim that between June 24, 2017 and July 18, 2017, they continued to ask Toth to provide a list of airworthiness issues (NYSCEF #23 at 12, ¶15). On July 14, 2017, Toth made another payment in the amount of $48,688.33 toward his share of interest in the aircraft. The payment was deposited into the escrow account to pay off a lien on the aircraft with the amount (*id.* at 10, ¶14).

Defendants claim that even though Toth never provided them a list containing solely airworthiness items, Taouil, "in good faith and in justifiable reliance", had substantial and material repairs performed on the aircraft for Toth's benefit to facilitate the closing on the aircraft (*id.* at 11, ¶16). Defendants claim that on July 15, 2017, despite the lack of the list of airworthiness items, Taouil flew the plane to Linden Airport, New Jersey in accordance with the delivery terms of the SPA to facilitate the closing on July 18 (*id.* at 11, ¶17).

On the closing date, defendants allege that Toth demanded that Taouil furnish results of an engine oil analysis, which defendants claim was not required by the SPA (*id.* at 11, ¶18). Defendants further state that Toth's allegation regarding Taouil's failure to deliver the log books associated with the aircraft was unjustified because the log books were to remain in the aircraft as per federal regulations (*id.*). The parties were unable to complete the sale, and Toth failed to pay the remaining balance of $16,850.26 (*id.* at 11, ¶19). Defendants claim that the deal fell through because plaintiff failed to provide a valid list of airworthiness

issues and then demanded additional deliverables, such as the oil report, on the date of closing and failed to complete the transaction (*id.* at 12, ¶22).

Standard on Motion to Dismiss

Plaintiff moves pursuant to CPLR 3211(a)(1) and (7) to dismiss defendants six counterclaims. In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). "The court must determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 88). In particular, 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*, 84 NY2d at 88). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

Defendants' First Counterclaim – Breach of Contract Claims

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by one party; (3) failure to perform by the other party; and (4) resulting damage (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). A counterclaim for breach of contract must be dismissed where the defendant fails "to allege, in nonconclusory language, as required, the essential terms of the parties' purported...contract, including those specific provisions of the contract upon which liability is predicated..." (*Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 223, 234 [1st Dept 1994]). Vague and conclusory allegations will not suffice (*see Gordon v Dino De Laurentis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]).

Defendants assert three forms of breach of contract in their first counterclaim: (1) that plaintiff did not provide an "accurate list" of airworthiness defects under Section 5 of the SPA; (2) that plaintiff "demanded" repairs not required under the SPA; and (3) that plaintiff did not close on the agreed upon date.

Plaintiff's motion is granted on the "airworthiness" branch of defendants' breach of contract counterclaim. Section 5 of the SPA provided plaintiff with the option to complete a pre-purchase inspection. If plaintiff took the opportunity, he was to present defendants "any list of discrepancies compiled" (SPA at §5). The list, therefore, did not need to be limited to just "airworthiness defects" as claimed by defendants. The SPA only required that the list have addressable airworthiness defects to permit the defendants to perform their obligation to either (a) pay to have

the airworthiness issues addressed or (b) decline to perform the repairs and refund the plaintiff (*id.*). The list plaintiff submitted to defendant included airworthiness defects that defendants recognized as such – indeed, defendants retained Joseph Bennis, an FAA licensed mechanic, who evaluated plaintiff's list and determined that the need for tires constituted an airworthiness issue (NYSCEF #24 – Defects List; NYSCEF #37 – Taouil Affidavit at ¶8). Accordingly, plaintiff is not in breach of SPA Section 5.

Additionally, the supposed inaccuracy of the list does nothing for the breach of contract claim; so long as plaintiff provided "any list" to defendant that contained an airworthiness issue, plaintiff complied with Section 5 of the SPA. Indeed, defendants' airworthiness argument presents as a defense to plaintiff's claim for breach of contract, but it cannot stand as an independent counterclaim.

Plaintiff's motion is also granted on the second component of defendants' first counterclaim regarding plaintiff's "demands" for repairs not required under the SPA. A breach of contract occurs when a party fails to adhere to a material promise that is part of the contract. The SPA does not prohibit plaintiff from requesting actions by defendants outside the scope of the SPA. The extraneous requests by plaintiff, such as for the oil analysis report, are outside of the scope of the contract, and therefore, there is no breach.

Turning to the third component of defendant's first counterclaim regarding the failure to close, plaintiff's motion is denied. The documentary evidence does not establish conclusively which party was in breach and at what time. Even though plaintiff swears he was ready to pay the unpaid portion of the purchase price, it is clear that the parties did not close on the aircraft. Taking the defendants' allegations as true, defendants have made a valid claim for breach of contract due to the failure of plaintiff to close on the deal at the appointed time. Accordingly, at this time, this portion of defendants' counterclaim is unamenable to resolution on a motion to dismiss. Accordingly, plaintiff's motion is denied as to this portion of the first counterclaim.

The court notes that plaintiff makes a new argument in his Reply Memorandum that the breach of contract claims should be dismissed because of an alleged liquidated damages provision in the SPA. This new argument appearing in plaintiff's reply is rejected. The new argument also does not resolve the dispute as to who breached the contract first, which is a predicate to determining if liquidated damages should be awarded at all. Accordingly, the liquidated damages argument fails to alter the calculus here and defendants' third branch of its counterclaim for breach of contract survives the motion.

Defendants' Second to Fourth Counterclaims for Declaratory Relief

Plaintiff next moves to dismiss defendants' second through fourth counterclaims. Defendants' counterclaims seek: a declaration that Toth is in breach of contract and has "waived his right to any of the relief demanded in the Complaint"; a declaration that the aircraft may be moved to any airport that defendants deem logistically feasible and in the best interest of the aircraft; and, a declaration that defendants may sell the aircraft in their sole discretion (Counterclaims at 13-14, ¶28-36).

Defendants' second through fourth counterclaims are dismissed. "A declaratory judgment action is generally appropriate only where a conventional form of remedy is not available. Where alternative conventional forms of remedy are available, resort to a formal action for declaratory relief is generally unnecessary and should not be encouraged" (*Bartley v Walentas*, 78 AD2d 310, 312 [1st Dept 1980]). Defendants' three requests for declaratory relief are all better addressed through their breach of contract claim.

Defendants' second counterclaim explicitly requests the court to declare that plaintiff breached the SPA. This is clearly duplicative of defendants' first counterclaim for breach of contract (*see Wildenstein v 5H & Co, Inc.*, 97 AD3d 488, 491 [1st Dept 2012] [declaratory relief to have contract deemed void and unenforceable duplicative of breach of contract claim]). If defendants win their breach of contract claim, plaintiff will not have any rights in the plane and defendants' damages are better addressed through the breach of contract claim.

Next, defendants' third and fourth counterclaims are similarly dismissed as duplicative of the first counterclaim for breach of contract. Defendants attempt to distinguish the declaratory relief sought from the breach of contract claim by asserting that they seek to settle "the title to, and right over, the Aircraft, precisely because and as a result of Plaintiff's misconduct through the course of his dealings" (NYSCEF #50 – Defts' Opp Memo, ¶34). However, the "misconduct" in question is simply plaintiff's alleged breach. In other words, the relief sought by counterclaims three and four is better resolved through resolution of the breach of contract claim because if plaintiff breached the SPA, there would be no sale, the airplane must remain with defendants, and there would be no restrictions on the alienability of the aircraft. The declaratory relief would simply be duplicative of the conventional breach of contract claim. Accordingly, plaintiff's motion is granted with respect to counterclaims two through four.

Defendants' Fifth Counterclaim – Declaratory Relief Regarding Defendants' Corporate Form

Plaintiff's motion to dismiss defendants' fifth counterclaim is denied. Defendants' fifth counterclaim seeks a declaration finding that defendant Miter Cap, LLC is a distinct and separate operating legal entity and not the alter ego of defendant Taouil (Counterclaims at 14, ¶39). Plaintiff claims that the fifth counterclaim should be dismissed because the documentary evidence establishes that Miter Cap, LLC is an alter ego of Taouil.

"[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]). Factors to be considered when determining that a corporation was dominated and controlled to commit a fraud or wrong include: inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors; and common office space or telephone numbers (*see Fantazia Intern. Corp. v CPL Furs New York, Inc.,* 67 AD3d 511, 512 [1st Dept 2009]). "The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Matter of Morris*, 82 NY2d at 142).

It is premature at this stage of the litigation to dismiss defendants' fifth counterclaim. The documentary evidence does not clearly establish that Taouil exercised such complete domination over the corporation and that domination was used to commit a fraud or wrong against the plaintiff. The Partnership Agreement between Taouil and Toth that was to take effect after completion of the SPA does not establish that defendants were abusing the corporate form. The Partnership Agreement was not signed by Miter Cap, LLC (the owner of the plane), but allowed Taouil and Toth to utilize the plane for personal use. Toth argues that this constitutes co-mingling of corporate assets for personal use. However, this neglects the fact that the Partnership Agreement is not in effect due to the lack of completion of the SPA's terms. And, even if the Partnership Agreement were in effect, all that establishes is that Toth and Taouil were authorized to operate the aircraft. The Partnership Agreement does not, for purposes of CPLR 3211(a)(1), clearly establish that defendants have abused the corporate form. Therefore, it is inappropriate to dismiss defendants' fifth counterclaim at this time.

Defendants' Sixth Counterclaim – Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiff's motion to dismiss defendants' sixth counterclaim for breach of the implied covenant of good faith and fair dealing is granted. Defendants claim that the covenant of good faith was violated in two ways: (1) that Toth failed to fulfill his contractual obligations under the SPA, including not providing "a valid list containing solely those items... to be addressed that constitute airworthiness items"; and (2) that Toth demanded additional deliverables from Taouil, including the oil analysis report, on the closing date (Counterclaims at 15, ¶42).

Defendants' two basis in this claim are identical to their claims in the breach of contract counterclaim. As the "claims arise from the same facts and seek the identical damages" for the alleged breaches, the covenant of good faith claims must be dismissed as duplicative (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]). Additionally, as discussed above, the two claims here must be dismissed because they were unsustainable as breach of contract claims and thus they cannot survive as breach of covenant of good faith claims (*see Skillgames, LLC v Brody*, 1 AD3d 247, 252 [1st Dept 2003]; *Triton Partners LLC v Prudential Securities Inc.*, 301 AD2d 411 [1st Dept 2003]).

Plaintiff's Request for Declaratory and Injunctive Relief

Plaintiff's second through sixth requests in its motion to dismiss seeks declaratory and injunctive relief on a variety of grounds, namely: (2) an order that the airplane in question in this dispute be placed for immediate sale; (3) to appoint a receiver to sell the airplane, pursuant to CPLR 6401; (4) to make plaintiff the receiver of the airplane for the purpose of selling the plane; (5) to order that the proceeds of the sale be deposited with the clerk of the court pending the outcome of the action; and (6) to enjoin the defendants from going near the airplane during the pendency of the action. Plaintiff's second through sixth requests are denied.

It is readily apparent that plaintiff is asking this court for summary judgment within his motion to dismiss and acknowledge as such (*see* NYSCEF #51 – Pltf's Reply, ¶3). While courts may convert a motion to dismiss into a motion for summary judgment per CPLR 3211(c), this court will not do so here. There has not been "adequate notice to the parties" of the court's intent to view this motion as one for summary judgment, and the parties did not submit facts or arguments clearly indicating that they were "deliberately charting a summary judgment course" (*Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]). Accordingly, resolving plaintiff's requests for declaratory and injunctive relief is inappropriate at this time.

Accordingly, it is hereby ORDERED that plaintiff's motion to dismiss defendants' first counterclaim as it relates to the first and second sub-claims (§ 5 of SPA and additional repairs issues, respectively) is granted; it is further

ORDERED that plaintiff's motion to dismiss defendants' first counterclaim as it relates to the third sub-claim (closing date issue) denied; it is further

ORDERED that plaintiff's motion to dismiss defendants' second through fourth counterclaims is granted; it is further

ORDERED that plaintiff's motion to dismiss defendants' fifth counterclaim is denied; it is further

ORDERED that plaintiff's motion to dismiss defendants' sixth counterclaim is granted; and it is further

ORDERED that the remainder of plaintiff's motion requesting injunctive and declaratory relief is denied without prejudice.

The parties are directed to appear at a preliminary conference on March 20, 2019 at 10:15 a.m. in Part 33, 71 Thomas Street, room 101, New York, NY, 10013.

This constitutes the Decision and Order of the court.

2/27/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE