

Trinchese Constr., Inc. v Escarza
2019 NY Slip Op 31038(U)
April 5, 2019
Supreme Court, New York County
Docket Number: 160397/2017
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----X
Trinchese Construction, Inc.,

Plaintiff,

Index Number:

-against-

160397/2017

Raul Escarza, Robert Malta,
and 202 Eighth Avenue LLC,

Motions Seq. No.: 001

Defendants.

-----X
Doris Ling-Cohan, J.:

Defendants move, pursuant to CPLR 3211 (a) (1) and(7), to dismiss plaintiff's complaint for failure to state a claim. Plaintiff cross-moves for leave to amend its complaint and, pursuant to CPLR 3212, for summary judgment.

Underlying Allegations and Background

Plaintiff alleges that it is a home improvement contracting company and that, on May 30, 2016, the property (the Property) located at 202 Eighth Avenue, New York, New York, suffered damage due to a fire (Amended Complaint, ¶¶ 1-2, 6). It states that Robert Malta (Malta) owned the Property and that Raul Escarza (Escarza) was the manager for the Property (*id.*, ¶ 3-4).

Plaintiff contends that, after the fire, its principal spoke with Malta, for the purpose of discussing reconstruction of the Property, that "Malta referred [him] to [] Escarza, as Malta's agent, for that purpose" (*id.*, ¶ 7; Trinchese Affidavit, ¶¶ 2-3).

Plaintiff states that, on June 8, 2016, Escarza, "as authorized agent for [] Malta", executed an agreement (the Contract) for reconstruction work on the Property and that, under the Contract, the insurance proceeds for the fire damage were to be assigned to plaintiff (Amended Complaint, ¶¶ 8-9; Trinchese Affidavit, ¶¶ 3-4). It further provides that the Contract contained a provision that stated Escarza had the authority to bind the Property's owner and that if he lacked such authority, he would be personally liable (*id.*, ¶ 7).

Plaintiff alleges that it performed the work, that it rendered bills, that defendants did not dispute the bills, and that it was not paid (Amended Complaint, ¶¶ 9-12; Trinchese Affidavit, ¶¶ 8-10, 16). Plaintiff also states that, on September 12, 2016, after the execution of the subject contract, Malta transferred the Property to the LLC and that Malta is a managing member of the LLC (Amended Complaint, ¶ 4; Trinchese Affidavit, ¶ 11).

Before this Court is defendants' motion to dismiss plaintiff's complaint and plaintiff's cross-motion for leave to amend its complaint and for summary judgment.

The amended complaint has four causes of action: (i) breach of contract against Escarza and Malta; (ii) unjust enrichment against Malta and the LLC; (iii) account stated against Escarza and Malta; and (iv) quantum meruit against all defendants.

Escarza states that he has "difficulty reading the English language", that plaintiff's principal told him that the reconstruction work done to repair the Property would be done without having to pay anything and that plaintiff would look solely to the insurance company for payment and that he "was tricked and deceived" into signing the Contract (Escarza Affidavit, ¶¶ 2, 5-8). Escarza further states that the work plaintiff performed was of poor quality and that he disputed the invoices that plaintiff sent (*id.*, ¶¶ 12-17).

The Contract includes a provision that states that "[y]ou agree to assign to us all your rights and title to the [proceeds] of the Insurance Policy" (¶ 7) and a provision that states that, "[y]ou are representing to us that you are the record owner of the [P]roperty and that you have the authority to sign this agreement and to bind all the owners of the [P]roperty [and] [i]f you are not the owner or do not have the authority to sign this [C]ontract for all owners you will be personally responsible to pay us" (¶ 8).

Defendants seek dismissal of plaintiff's amended complaint, contending that there was no meeting of the minds on the essential terms, that the unjust enrichment and quantum meruit causes of action are barred by the existence of the Contract, that there was no account stated and that the claims against Escarza should be dismissed, since he was an agent for a

disclosed principal.

Procedural Issues

CPLR 3212 (a) provides that a party may move for summary judgment "after issue has been joined." Generally, "courts are statutorily required to . . . notify the parties . . . that it was treating [plaintiff's] cross motion as a cross motion for summary judgment [pursuant to CPLR 3211 (c)]" (*Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 256 [2d Dept 2012]). Similarly, the Court may not consider a request for summary judgment under CPLR 3211 (c) unless the defendants "'unequivocally' chart[ed] a course for summary judgment" (*Primedia Inc., v SBI USA LLC*, 43 AD3d 685, 686 [1st Dept 2007], quoting *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]; see also *Island Intellectual Prop. LLC v Reich & Tang Deposit Solutions, LLC*, 155 AD3d 542, 542 [1st Dept 2017]).

Amendment of Pleadings

CPLR 3025 (a) permits a party to amend a pleading as of right once, prior to the time for responding to the pleading expires. Thereafter, leave is freely granted in the absence of prejudice (see *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; *A.N. Frieda Diamonds, Inc. v Kaminski*, 122 AD3d 517, 517 [1st Dept 2014]).

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] the benefit of every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotation marks and citation omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Contract Claim

"[A] party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all

essential terms . . . [, there must be] sufficiently definite terms and the parties must express their assent to those terms” (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 [1st Dept 2012]).

Contract Interpretation

Generally, “when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing” (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties’ agreement and the best evidence of the parties’ agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569-70 [2002]). Put another way, “[c]ourts will give effect to the contract’s language and the parties must live with the consequences of their agreement [and] [i]f they are dissatisfied . . . , the time to say so [is] at the bargaining table” (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [2013] [internal quotation marks and citation omitted]; see also *McFarland v Opera Owners, Inc.*, 92 AD3d 428, 428-429 [1st Dept 2012]; *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

“To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation . . . by

examining the entire contract . . . as a whole [and] in deciding the motion, [t]he evidence will be construed in the light most favorable to the one moved against" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] [internal quotation marks and citations omitted]).

Unjust Enrichment

"[U]njust enrichment is not a catchall cause of action to be used when others fail [but] [i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). "The essence of unjust enrichment is that one party has received money or a benefit at the expense of another which, in good conscience, ought to be returned" (*Carriafiello-Diehl & Assoc., Inc. v D & M Elec. Contr., Inc.*, 12 AD3d 478, 479 [2d Dept 2004]) However, "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello*, 18 NY3d at 790; see also *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]). Also "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*id.* at 388; see also *L.E.K. Consulting LLC v Menlo Capital Group*,

LLC, 148 AD3d 527, 528 [1st Dept 2017]).

Agent For A Disclosed Principal

"An agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his or her personal liability for, or to, that of the principal" (*Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 673 [1st Dept 2010]; see also *News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 147 [1st Dept 2005]). The same rule applies for representatives of both corporations and limited liability companies (see *Delagrang v Payard*, 110 AD3d 491, 491 [1st Dept 2013; *Matias v Mondo Props. LLC*, 43 AD3d 367, 367-368 [1st Dept 2007]).

Individual Liability of A Corporate Officer

The general rule is that a person who signs a contract as an officer on behalf of a corporation is not personally liable, unless there is clear and explicit evidence of his intention to bind himself personally (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]; *Weinreb v Stinchfield*, 19 AD3d 482, 483 [2d Dept 2005]). This is so because in a modern commercial context "[t]here is great danger in allowing a single sentence in a long contract to bind individually a person who signs only as a corporate officer [and, consequently, there must be] ... some direct and explicit

evidence of actual intent" (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]). The inclusion of a single sentence purporting to bind an agent personally is insufficient to establish such intent (*id. at 67; Herman v Ness Apparel Co.*, 305 AD2d 217, 218 [1st Dept 2003]).

Account Stated

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and [the] balance due" (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007] quoting *Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [3d Dept], *lv denied* 82 NY2d 660 [1993]). However, "a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012][internal quotation marks and citation omitted])

Discussion

Initially, the court notes that summary judgment may only be sought "after issue has been joined" (CPLR 3212 [a]). Additionally, the defendants have not "'unequivocally' chart[ed] a course for summary judgement" (*Primedia*, 43 AD3d at 686). Since defendants' motion is a pre-answer motion, summary judgment is unavailable at this time, and the portion of plaintiff's motion that seeks summary judgment must be denied. The portion

of plaintiff's cross motion that seeks leave to amend its complaint is granted, since defendants have not shown any prejudice and the court will determine defendants' motion to dismiss, as addressed to the amended complaint.

Plaintiff's amended complaint is based essentially upon the Contract and its provisions (§§ 8-10; Trinchese Affidavit, §§ 3-4). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter" (*Clark-Fitpatrick*, 70 NY2d at 388; see also *Corsello*, 18 NY3d at 790). However, "where the contract does not cover the dispute in issue [,]...a plaintiff [may] proceed upon a quasi-contract theory of unjust enrichment" (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD 3d 1, 10 [1st Dept 2012]). Thus, here, the portion of defendants' motion that seeks dismissal of plaintiff's causes of action for unjust enrichment and quantum meruit is, therefore, granted as to defendants Escarza and Malta, but denied as to the LLC. The LLC was not a party to the Contract since it was not in existence at the time the Contract was executed, but, nevertheless, plaintiff may be entitled to recover from the LLC on its causes of action for unjust enrichment and/or quantum meruit, if it is determined that, *inter alia*, the LLC received a benefit, at plaintiff's expense (see *Bauman Assoc., Inc. v H & M Intl. Transp., Inc.*, 171 AD 2d 479,

483-84 [1st Dept 1991]).

The portion of defendants' motion that seeks dismissal of plaintiff's cause of action for breach of contract based upon a purportedly inadequate meeting of the minds is denied. As indicated above, the court must accept plaintiff's allegations as true, for the purpose of deciding defendants' pre-answer motion (see *Goldman*, 5 NY3d at 570-571). Viewed from this perspective, plaintiff has adequately alleged a breach of the Contract against Malta, and defendants' contention that plaintiff's performance of the work was of poor quality is not properly raised in a motion directed at the face of the pleadings. Similarly, the portion of defendants' motion that seeks dismissal of the account stated cause of action must be denied, since accepting plaintiff's allegations and all favorable inferences, it has sufficiently alleged the elements of an account stated claim and defendants' contentions that the invoices were disputed do not "conclusively establish" a defense (*Leon*, 84 NY2d at 88). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I*, 5 NY3d at 19).

However, plaintiff's amended complaint explicitly asserts that plaintiff was aware that Escarza was acting as the agent of Malta, the Property's owner (¶ 7-9; see also Trinchese Affidavit, ¶¶ 3-4). The general rule is that "[a]n agent for a disclosed

principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his or her personal liability for, or to, that of the principal" (*Performance Comercial*, 79 AD3d at 673; see also *Delagrance*, 110 AD3d at 491). Plaintiff contends that the provision in the Contract that states that, if Escarza did not have the authority to bind the Property's owner, he would be personally liable, is sufficient to constitute a personal guarantee. This, however, runs contrary to the rule that the inclusion of a single sentence purporting to bind an agent personally is insufficient to establish clear and explicit evidence of the agent's intention to bind himself personally (*Salzman*, 10 NY2d at 67; see also *Georgia Malone*, 86 AD3d at 408; *Herman*, 305 AD2d at 218). Accordingly, the portion of defendants' motion that seeks to dismiss plaintiff's amended complaint against Escarza is granted.

Order

It is, therefore,

ORDERED that the motion of defendants to dismiss plaintiff's complaint against them is granted to the extent of dismissing the causes of action for unjust enrichment and quantum meruit as against defendant Robert Malta, and to dismiss the complaint against Raul Escarza, in its entirety, with costs and disbursements, as taxed by the Clerk of the Court upon submission

of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants Robert Malta and 202 Eighth Avenue LLC; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption, which shall read as follows: Trinchese Construction, Inc. v Robert Malta and 202 Eighth Avenue LLC; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the portion of plaintiff's cross motion that seeks summary judgment is denied; and it is further

ORDERED that the portion of plaintiff's cross motion that seeks leave to amend its complaint is granted and the amended complaint in the proposed form annexed to the cross moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendants Robert Malta and 202 Eighth Avenue

LLC shall serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that within 30 days of entry of this order, defendant Raul Escarza shall serve a copy upon all parties, with notice of entry.

Dated: April 5, 2019



Hon. Doris Ling-Cohan, J.S.C.

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