

Rowe v Carefree Alarms, Inc
2019 NY Slip Op 31924(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 154212/2015
Judge: Anthony Cannataro
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

INDEX NO. 154212/2015

ROGER ROWE,

MOTION DATE 03/27/2019

Plaintiff,

- v -

MOTION SEQ. NO. 001

CAREFREE ALARMS, INC, N.Y.C DEPARTMENT OF FINANCE, JORGE RAMIREZ,

DECISION AND ORDER

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 56, 57, 58, 59

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Plaintiff Roger Rowe commenced this action for breach of contract, and other related causes of action, against defendants Carefree Alarms, Inc., Jorge Ramirez, in his personal capacity and in his capacity as president of Carefree, and the N.Y.C. Department of Finance. Defendant N.Y.C. Department of Finance has not appeared in the case. Plaintiff's claims arise out of an alleged contract between the parties, pursuant to which plaintiff was to provide certain work and materials on projects to be performed by Carefree for the N.Y.C. Department of Finance, in exchange for 50% of the revenue generated from the projects. Defendants Carefree and Ramirez now move for summary judgment dismissing the complaint, pursuant to CPLR 3212, and plaintiff cross-moves for partial summary judgment.

On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to “show facts sufficient to require a trial of any issue of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn (*Benjamin v City of New York*, 55 Misc3d 1217[A], 2017 NYSlipOp 50619[U] [Sup Ct, NY County 2017]). Summary judgment “is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues” (*Andre v Pomeroy*, 35 NY2d 361, 363 [1974]).

Plaintiff, representing himself, asserts five causes of action in his complaint. The first two causes of action sound in article 3 of the Lien Law. Trust claimants may only enforce Lien Law article 3 claims “in a representative action brought for the benefit of all beneficiaries of the trust” and any relief that may be granted “shall be deemed to be for the benefit of the entire class of trust beneficiaries” (Lien Law § 77, subds. 1 and 3[b]). Here, plaintiff’s claims are in improper form as he is seeking recovery only on behalf of himself. As such, the first and second causes of action in the complaint must be dismissed without prejudice (*see Dittmar Explosives v A. E. Ottaviano, Inc.*, 20 NY2d 498 [1967] [the defect in the form of plaintiffs’ action should not be cause for a dismissal thereof on the merits, as same can be cured by a proper pleading]; *see also Glazer v Alison Homes Corp.*, 62 Misc 2d 1017 [Sup Ct, Kings County 1970], *aff’d*, 36 AD2d 720 [1971]).

Defendants’ also seek to dismiss all claims against defendant Ramirez, in his individual capacity. Generally, to pierce the corporate veil a plaintiff must show that: (1) the defendant 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. (*see Matter of Guptill Holding Corp. v State of New York*, 33 AD2d 362, 364-365, *affd* 31 NY2d 897 [1972]).

Plaintiff has failed to set forth any evidence to satisfy his burden in this regard.

Additionally, in his affidavit defendant Ramirez attests that when he met with plaintiff, he did so as the legal representative of Carefree. As such, the complaint is dismissed as against defendant Ramirez.

Plaintiff's fourth cause of action sounds in fraudulent inducement, and his fifth cause of action sounds in deceptive act and practice violations. In the First Department, a cause of action for fraud does not arise where the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligation (*Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 [1994]; *see* 14 N.Y.Prac., New York Law of Torts § 1:72). Furthermore, pursuant to CPLR § 3016(b), causes of action alleging fraud must be pleaded with specificity (*see Louis Sforza v Health Insurance Plan of Greater New York, Inc. et al.*, 210 AD2d 214 [1994]; *Eastman Kodak v Roopak Enterprises, Ltd.*, 202 AD2d 220 [1994]). Here, plaintiff has not pleaded a valid claim for fraud with sufficient specificity. As such the fourth and fifth causes of action are both dismissed.

Plaintiff's third cause of action is for breach of contract. While no proof has been submitted of a written contract between the parties, in his pleadings and in his deposition testimony, plaintiff has asserted that there was at least an oral contract between himself and defendant Carefree. Although defendants have presented considerable evidence to contradict that claim, the issue nevertheless remains an issue of fact for a jury to decide. As such, plaintiff's motion for summary judgment is denied.

Furthermore, contrary to defendants' contention, the alleged oral contract, if it existed, would not necessarily run afoul of the Statute of Frauds. The Statute of Frauds is generally inapplicable to joint venture agreements or partnerships, since absent any

definite term of duration, an oral agreement to form a partnership or joint venture for an indefinite period creates a partnership or a joint venture at will (*see Foster v Kovner*, 44 AD3d 23 [2007]; *Massey v Byrne*, 112 AD3d 532 [2013]). In this case, although the projects between the parties took place over a four-year period, the original alleged joint venture oral agreement would not necessarily have anticipated a completion date, and so, it cannot be determined at this time that the alleged agreement would be barred (*see W.L. Christopher, Inc. v Seamen's Bank for Sav.*, 144 AD2d 809 [1988] [a defendant was not entitled to summary judgment in an action in which the plaintiff alleged that the parties had entered into an oral joint venture agreement whereby the plaintiff would renovate and manage the defendant's shopping center in exchange for, among other things, a 50% share of net profit upon the sale of the shopping center, notwithstanding the defendant's contention that the action was precluded by the Statute of Frauds requirement of writing for contracts not performable in one year, since the terms of the alleged oral agreement merely called for the distribution of profits upon the sale without regulating the time of the sale, and therefore, the Statute of Frauds did not come into play]). As such, the branch of defendants' motion which seeks to dismiss plaintiff's cause of action for breach of contract is denied.

Defendants' also seek dismissal of plaintiff's claims for punitive damages. It is a well-founded rule that, "[p]unitive damages are not recoverable for ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights" (*Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 [1994]; *Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.*, 65 AD3d 865 [2009]). Plaintiff's action is one which mainly seeks to recover for a private wrong. As such, plaintiff's claim for punitive damages is dismissed.

Accordingly, it is

ORDERED that the branch of defendants' motion which seeks dismissal of the complaint against defendant Jorge Ramirez is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; 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; and it is further

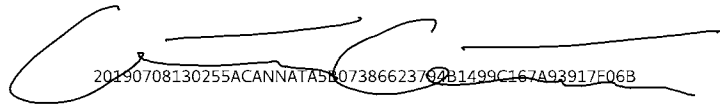
ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the branches of defendants' motion which seek dismissal of the first and second causes of action in the complaint are granted, and those causes of action are dismissed without prejudice; and it is further

ORDERED that the branches of defendants' motion which seek dismissal of the fourth and fifth causes of action and the claim for punitive damages are granted; and it is further

ORDERED that defendants motion is otherwise denied, and the action shall continue as to the remaining cause of action for breach of contract; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied in its entirety, and counsel are directed to appear for a status conference in Room 490, 111 Centre Street on July 31, 2019 at 2:15PM.



20190708130255ACANNATASB07386623702B1499C167A93917F06B

7/8/2019
DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE