

Parsons Constr., Inc. v Wifi Constr. LLC
2020 NY Slip Op 32490(U)
June 22, 2020
Supreme Court, Queens County
Docket Number: 700855/2019
Judge: Joseph Risi
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Short Form Order

FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

**6/23/2020
01:02 PM**

Present: HONORABLE JOSEPH RISI
A. J. S. C.

IA Part 3

**COUNTY CLERK
QUEENS COUNTY**

-----X
PARSONS CONSTRUCTION, INC.,

Index Number 700855/2019

Plaintiff,

DECISION/ORDER

--against--

WIFI CONSTRUCTION LLC, TRISTATE
FENCING CORP. and ELKANOH KRAUSZ,

Motion Sequence No. 1

Defendants,

-----X

The following papers numbered 1 to 5 read on defendants' motion, for an order, pursuant to CPLR §3211(a)(1),(7) and (8), dismissing the complaint against them.

	<u>Papers Numbered</u>
Notice of Motion - Affidavit - Exhibits - Service.....	EF 4-14
Memorandum of Law in Support.....	EF 15

Upon the foregoing papers, this unopposed motion is determined as follows:

This action was commenced by the filing of a summons and complaint on January 15, 2019, seeking to recover damages for the alleged breach of contract and fraudulent inducement. Defendants Wifi Construction LLC ("Wifi"), Tristate Fencing Corp. ("Tristate") and Elkanoh Krausz ("Krausz") submit this pre-answer motion to dismiss seeking dismissal of the complaint pursuant to CPLR §3211(a)(1),(7) and (8).

On a motion to dismiss a complaint pursuant to CPLR §3211(a)(1), the documentary evidence must utterly refute the plaintiff's allegations (*See Phillips v Taco Bell Corp.*, 152 AD3d

806 [2d Dept. 2017]). Such evidence must be unambiguous, authentic and undeniable such as judicial records and documents such as a contract, the contents of which are essentially undeniable. (*Id.*).

The arguments presented by defendants are not resolved by the documents submitted. Contrary to plaintiff's allegations in the complaint, defendants allege that the monies paid to defendants were commissions due to defendants for contracts, work and payments plaintiff obtained as a result of Defendant Krausz' efforts. The affidavits attached to the motion are insufficient to establish what the parties assented to in their agreement, oral or otherwise, or lack thereof.

With respect to the branch of defendants' motion to dismiss pursuant to CPLR §3211(a)(7), plaintiff sufficiently alleged a cause of action to recover damages for breach of contract against defendants. "When a party moves to dismiss a complaint pursuant to CPLR §3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action." (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 682 [2d Dept 2012]; quoting *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2010]). "[T]he complaint must be construed liberally, the factual allegations in the complaint must be deemed to be true, and the nonmoving party must be given the benefit of all favorable inferences." (*Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1158-59 [2d Dept 2019]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*Cortlandt St. Recovery Corp. v*

Bonderman, 31 NY3d 30, 38 [2018], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Zurich Am. Ins. Co. v City of N.Y.*, 176 AD3d 1145 [2d Dept 2019].) “The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach.” (*Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965 [2d Dept 2019] [internal quotation marks omitted]). Here, plaintiff alleges, *inter alia*, it loaned money to defendants which were not repaid. Assuming the facts alleged to be true and according plaintiff the benefit of every favorable inference (*see Goshen v Mutual. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]), the complaint sufficiently alleges the elements of a breach of contract cause of action against defendants necessary to survive a motion to dismiss pursuant to CPLR §3211(a)(7). (*See Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019]).

With respect to the cause of action for fraud, plaintiff alleges that “Defendants fraudulently induced the Plaintiff to lend said sum, with the promise of returning same within 90 days, upon the completion of a real estate transaction” and that “Defendants misrepresented the facts, which they knew to be false, to induce the Plaintiff to rely on those statements to issue said loan.”

Defendants contend that plaintiff has failed to allege the aforementioned causes of action with particularity. Defendants also argue that plaintiff failed to disclose their source of information to form their allegations, what action(s) they were induced into undertaking, and the

damages stemming from such reliance.

In order to state a cause of action for fraud, the plaintiff is required to allege: (1) that the defendants made material representations that were false or concealed a material existing fact, (2) that the defendants knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff was deceived, (4) that the plaintiff justifiably relied on the defendants' misrepresentations and (5) that the plaintiff was injured as a result of the representations (*Watson v. Pascal*, 27 AD3d 459 [2d Dept 2006]). An action based in fraud or misrepresentation must be stated in detail (CPLR §3016(b)). Here, plaintiff has failed to allege the claim of fraud and misrepresentation with any particularity. Plaintiff makes general allegations in its complaint without specifics. There were no specifically alleged instances of false representations that induced plaintiff's reliance or damages.

Furthermore, the allegations with regard to the fraud causes of action also fail to state a cause of action. A claim involving multiple defendants must make specific and separate allegations against each defendant (*see Ramos v Ramirez*, 31 AD3d 294 [1st Dept 2006]; *Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736 [1st Dept 1981]). Here, the plaintiff made the fraud allegations collectively, which is impermissible. Accordingly, the causes of action for fraud are dismissed.

Defendants Wifi and Krausz move to dismiss the complaint for lack of personal jurisdiction. Pursuant to CPLR §3211(e), "an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon

the ground of undue hardship.”

Defendant Wifi was served on February 1, 2019 via Secretary of State in accordance with Limited Liability Law §303. Defendant Wifi’s contention that it was not served based on the fact that plaintiff had not filed an Affidavit of Service is unavailing. Plaintiff did file an affidavit of service on July 18, 2019 albeit after the filing of this motion. Moreover, pursuant to Limited Liability Law §303, “Service of process on such limited liability company shall be complete when the secretary of state is so served.” The statute makes no mention of a filing requirement to complete service.

Defendant Krausz’ contends that service upon him was improper, as he was served at his business upon Moshe Monheit, “in [sic] individual who is not an employee, agent or representative of Defendant Krausz, or otherwise authorized to accept service on his behalf”. Although defendant Krausz mistakenly argues that plaintiff failed to show that Mr. Monheit was “authorized” by defendant to accept process, no such showing is required. The issue under the statute is simply whether the person served was of “suitable age and discretion.” (*see City of New York v VJHC Development Corp.*, 125 AD3d 425 [1st Dept. 2015]; *Charnin v Cogan*, 250 AD2d 513 [1st Dept. 1998]). Furthermore, although Mr. Krausz submits an affidavit in support of the motion, he fails to allege that the address where he was served was not his place of business.

Accordingly, the branch of the motion to dismiss the cause of action for fraud is granted and the remaining branches to dismiss are denied in accordance with the foregoing decision.

This is the decision and order of the Court.

Dated: June 22, 2020



Hon. Joseph Risi, A.J.S.C.

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-5-

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