

AVO Constr. LLC v OCNYC Elec. Contr. Inc.
2020 NY Slip Op 34015(U)
December 3, 2020
Supreme Court, New York County
Docket Number: 651315/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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INDEX NO. 651315/2020

AVO CONSTRUCTION LLC,

Plaintiff,

MOTION DATE 12/02/2020

MOTION SEQ. NO. 001

- v -

OCNYC ELECTRICAL CONTRACTING INC., PHILIP
O'CONNELL, JOHN DWYER

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 12, 13

were read on this motion to/for DISMISSAL.

The motion by defendants O'Connell and OCNYC Electrical Contracting Inc. ("Movants") to dismiss the second through fifth causes of action is granted in part.

Background

Plaintiff is a contractor and claims it hired defendant OCNYC as a subcontractor for a job in Brooklyn. Defendant O'Connell is the president of OCNYC. Plaintiff insists that it paid a total of \$117,000 to OCNYC pursuant to a contract as a deposit but OCNYC did not perform pursuant to the terms of the contract and it wants the deposit back.

Movants seek to dismiss certain causes of action on the ground that the second through fifth causes of action represent an effort to drag OCNYC's principal into this case when it really is about a purported breach of contract. Movants also claim that the work was actually performed.

In opposition, plaintiff claims that its third cause of action for fraud is not duplicative of its breach of contract claim, its conversion claim is properly pled and its unjust enrichment claim states a cause of action at this stage of the proceeding. Plaintiff also insists that its civil conspiracy cause of action is not duplicative of its breach of contract claim.

Discussion

“On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

Movants seek to dismiss plaintiff’s claims for unjust enrichment (second claim), fraud (third claim), conversion (fourth claim), and civil conspiracy (fifth claim).

Unjust Enrichment

The Court denies this branch of the motion. “A ‘quasi contract’ only applies in the absence of an express agreement ... in order to prevent a party's unjust enrichment” (*Beach v Touradji Capital Mgt. L.P.*, 85 AD3d 674, 927 NYS2d 41 [1st Dept 2011]). A plaintiff is permitted to plead a quasi-contract theory, such as unjust enrichment, in the alternative to a breach of contract claim (*id.*). At this motion to dismiss stage, the Court finds that plaintiff is permitted to pursue this cause of action in the alternative.

Fraud

“The elements of a fraud cause of action consist of a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose

of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 827, 37 NYS2d 350 [2016] [internal quotations and citations omitted]). “A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b). . . the purpose underlying the statute is to inform a defendant of the complained-of incidents” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Here, the Court finds that the fraud cause of action was not pled with the requisite particularity required under CPLR 3016(b). Plaintiff only offers conclusory assertions that defendants “fraudulently induced Plaintiff into entering into the Contract” (NYSCEF Doc. No. 1, ¶ 29). Plaintiff merely argues that defendants never intended to perform under the contract—that states a breach of contract claim not a claim for fraud.

Plaintiff also asserts that defendant Dwyer conspired with defendant O’Connell to take money from plaintiff. But the complaint does not explain who Mr. Dwyer is or who he works for. From Movants’ papers, it seems that Dwyer is a principal of plaintiff and is engaged in litigation with the other principal of plaintiff. Nevertheless, the Court finds that this cause of action is simply a breach of contract claim that plaintiff has tried to plead as a fraud claim. It does not state a cause of action.

Conversion

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it,

in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50, 827 NYS2d 96 [2006]).

Similar to the fraud claim, the Court dismisses this cause of action. The allegations asserted are conclusory and fail to establish that defendants exercised improper control over personal property belonging to plaintiff. Rather, the complaint contends that defendants refused to give back a deposit after signing a contract and failing to perform its obligations. That is a breach of contract claim, not a conversion cause of action.

Civil Conspiracy

"Although New York does not recognize an independent cause of action for civil conspiracy, allegations of civil conspiracy are permitted to connect the actions of separate defendants with an otherwise actionable tort. To establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury" (*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404, 119 NYS3d 478 [1st Dept 2020] [internal quotations and citations omitted])

The Court also dismisses this claim. As an initial matter, plaintiff did not sufficiently explain the nature of the purpose or plan. It merely claims that defendant Dwyer (who's role remains unclear) and defendant O'Connell conspired to entered into a contract for work that was never performed. Again, that it is a breach of contract claim. And to the extent that plaintiff asserts a civil conspiracy to commit the tort of conversion, that theory is also rejected. There is no basis to find that plaintiff has stated a cause of action for conversion against Movants.

Summary

The allegations in this case are straightforward. Plaintiff claims it paid a deposit to defendant OCNYC for work that was never performed and it wants that deposit back. While plaintiff is permitted to plead a claim for unjust enrichment in the alternative, it does not adequately state the remaining causes of action against Movants. Plaintiff's effort to allege these torts is without merit and cannot survive this motion to dismiss.

Accordingly, it is hereby

ORDERED that the motion by defendants OCNYC Electrical Contracting Inc. and Philip O'Connell is granted only to the extent that the third through fifth causes of action are severed and dismissed and denied to the extent it sought dismissal of the second cause of action.

Conference: March 8, 2021 at 2:00 PM.

12/3/2020
DATE

ARLENE P. BLUTH, J.S.C. (with signature)

Form with checkboxes for case disposition: CHECK ONE: CASE DISPOSED, GRANTED, DENIED, SETTLE ORDER, INCLUDES TRANSFER/REASSIGN, NON-FINAL DISPOSITION, GRANTED IN PART, SUBMIT ORDER, FIDUCIARY APPOINTMENT, OTHER, REFERENCE.