Excelsia Leatherware Co. v Horowitz
2020 NY Slip Op 34048(U)
November 25, 2020
Supreme Court, New York County
Docket Number: 653291/2019
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

--X

EXCELSIA LEATHEWARE COMPANY,

Plaintiff,

- v -

KENNETH HOROWITZ and BAG STUDIO LLC,

Defendants.

--X

DECISION AND ORDER
Index No.: 653291/2019

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, these facts are taken from the complaint and are assumed true. Defendants Kenneth Horowitz ("Horowitz") and Bag Studio, LLC ("Bag Studio" and with Horowitz "Defendants") are headquartered in New York. Plaintiff Excelsia Leatherware Company ("Excelsia") is based in Hong Kong.

On December 20, 2016, Excelsia exported goods to Bag Studio valued at $42,479 which was paid (Compl. ¶ 10, NYSCEF Doc. No. 1). Excelsia continued to manufacture and ship goods to Bag Studio, and Bag Studio promptly paid within 60 days until February 2018, when it stopped paying. By November 30, 2018, Bag Studio owed Excelsia $2,761,213.55 (Compl. ¶ 14). Defendants made false statements promising to pay but never followed through (Compl. ¶¶ 20–22). Excelsia relied on the false statements and continued to manufacture and ship goods, despite not being paid for previous shipments (Compl. ¶ 24). Horowitz also falsely induced Excelsia to pay a 6% administrative fee that he demanded be 'kicked back' to an entity named "Kenneth Horowitz, Inc." as late as March 2019 (Compl. ¶¶ 29–30, 36). In at least one e-mail, Horowitz called the kickback a "comm" which Excelsia believed to mean commission (Compl. ¶ 31). Horowitz hid the kickback from other Bag Studio affiliated individuals, provided receipts for the kickback, and asked Excelsia to conceal the scheme (Compl. ¶ 33–35).

The complaint alleges (1) fraud in the inducement, (2) fraud (against Horowitz), (3) conversion, (4) account stated, (5) breach of contract, (6) unjust enrichment and (7) prima facie tort. In this motion, Defendants seek dismissal of the complaint in its entirety based on an assertion that Excelsia is not authorized to conduct business in New York and pursuant to New York

Business Corporation Law 1312 (a), the complaint must be dismissed until Excelsia registers (Br. at 3-5). They also seeks dismissal of the fraud, conversion and unjust enrichment claims on grounds they are duplicative of the breach of contract claim, the fraud claims are not pleaded with the required particularity and other various grounds (*see* Doc. 10). Plaintiff responds that it is "amenable to withdrawing Counts One, Three,. Four, Six and Seven" (Opp. Br. at 2, Doc. No. 18). Accordingly, the focus of this motion is on Excelsia's capacity to sue in a New York court and on the second cause of action only (fraud against Horowitz). The motion as to the second cause of action shall be denied for the reasons stated below. The first, third, fourth, sixth and seventh causes of action shall be dismissed as abandoned.

II. LEGAL STANDARD

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (see, *Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

III. DISCUSSION

A. Authorization of Foreign Corporations to do Business in New York

Defendants assert plaintiff is not authorized to do business in New York state and under BCL 1312(a) should be barred from maintaining an action in New York courts (Def. Br. at 3 [NYSCEF Doc. No. 10]). Defendant alleges plaintiff has done business with several New York corporations including Bag Studio, Nine West, and Mackage Soho but is not registered to do business here (Def. Br. at 5). Plaintiff was not registered with the New York State Department of State, Division of Corporations as of July 31, 2019, but has been working with defendants since 2016 (Def. Aff. Ex. B [NYSCEF Doc. No. 4]; *id.*; Ex. C [NYSCEF Doc. No. 7]). If the court does not find that plaintiff was doing systematic and regular business in New York, defendants request

plaintiff be required to post a $25,000 bond as security for costs pursuant to CPLR 8501–8503 (Def. Br. at 6).

BCL 1301 states that a foreign company must be authorized to do business in New York State (BCL § 1301). BCL 1312(a) states that an unauthorized foreign company doing business in New York state shall not "maintain any action or proceeding in this state" until they have received authorization to do business and have paid the necessary fees and charges (BCL § 1312[a]). An entity is considered to be doing business is a "permanent, continuous, and regular" activity within New York State (*see Mindy Weiss Party Consultants, Inc. v Carl*, 285 FSupp3d 560, 564 [ED NY 2018]). To determine whether a company is doing business, the court must engage in a "fact specific analysis" that determines how substantial the business's presence is (*id.*). Actions that are casual, occasional, temporary, or insubstantial "will not warrant an inference that a foreign corporation is doing business in New York" (*see Netherlands Shipmortgage Corp., Ltd. v Madias*, 717 F2d 731, 738 [2d Cir 1983]).

The burden is on the defendant to prove that the plaintiff maintained continuous and regular activity within the state (*see Highfill, Inc. v Bruce and Iris, Inc.*, 50 A.D.3d 742, 743 [2d Dept 2008]). If the defendant cannot prove this, the court will assume that plaintiff is doing business in its state of incorporation (*id.*). A foreign corporation is not considered to be doing business in New York if "activities here are limited to solicitation of business and facilitating the sale and delivery of its merchandise incidental to its business in interstate and international commerce" (*Uribe v. Merchants Bank of New York*, 266 AD 2d 21, 22 [1st Dept 1999]).

While Defendants have shown that Excelsia has maintained a systematic and continuous business relationship with them in New York since 2016, Defendants have not shown that business relationship was anything more than merely facilitating the sale and delivery of Excelsia's merchandise into New York. Excelsia is alleged to have done business with Bag Studio, Nine West Company LLC, Mackage Soho, and Camuto Group LLC, which are Delaware entities with offices in New York. Defendants also state that plaintiff only had title to the merchandise until the merchandise arrived in Shenzen, China. At that point, title would pass to Bag Studio, and Bag Studio "would thereafter be responsible for risk of loss and transportation from there to the U.S." under NY UCC 2-401 (Def. Br. at 12). Accordingly, Defendants' claim that plaintiff is unauthorized to maintain this action in New York fails.

As to the request that Excelsia be required to post a bond as security for costs in the amount of $25,000, CPLR 8501(a) provides that "upon motion . . . the court . . . shall order security for costs." However, it is required only in cases in which the risk is high that defendant may not be able to recover his costs without difficulty (*see G.C.S. Co. v Aresco, Inc.*, 111 Misc2d 45, aff'd 88 AD2d 611 [2d Dept 1981]). The amount of security as of right is modest, usually only $500 within New York City (*see* Vincent Alexander, Practice Commentaries. McKinney's Cons Laws of New York Book 7B, CPLR C 8501:1, 2019 Supp Pamp at 164). The request is denied as the court has no motion before it seeking this relief. If a motion is made and plaintiff has not registered to do business in New York as of that time, such relief may be granted in an amount not exceeding $500.

B. Fraud Claim Against Horowitz

Defendants argue that both fraud claims lack particularity as required under CPLR 3016(b), compounded by unlawful group pleading (Def. Br. at 7). They assert the fraud claim against Horowitz fails because the claim is vague, pleaded "upon information and belief" and the plaintiff lacks actual knowledge of the allegations (*see Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 A.D.3d 368, 370 [1st Dept 2007]). The complaint states that "upon information and belief…the 6% was a kickback scheme designed to enrich Horowitz and defraud Excelsia" (Compl. ¶ 30). Defendants claim the complaint does not support scienter or "wanton, willful, and malicious" actions on Horowitz's part, nor does it mention that the administrative fee was harmful (Compl. ¶ 54).

As to the fraud claim against Horowitz, Excelsia concedes the Court of Appeals has stated that tort claims brought alongside a contractual relationship must have facts of a "legal duty independent of the contract itself." (*Clark-Fitzpatrick, Inc. v. Long Island Railroad Co.*, 70 N.Y.2d 382, 389 [1987]). The court notes however, that this branch of defendant's argument is inapplicable to the second cause of action because no breach of contract is alleged against Horowitz and therefore *Clark-Fitzpatrick, Inc.*, does not apply.

Plaintiff argue that, while it is true the complaint uses the phrase "upon information and belief" in paragraphs 30 and 47, it is in relation to whether Horowitz actually sent the kickback fees to Bag Studio, which only defendants would know (Compl. ¶ 30, 47; Pl. Br. at 10). The Appellate Division has ruled that CPLR 3016(b) "is not construed so strictly so as to prevent an otherwise valid cause of action where it would be impossible for the plaintiff to state in detail all of the circumstances of the fraud because the knowledge of those details is in the exclusive possession of the defendants" (*Auguston v. Spry*, 282 A.D.2d 489, 490 [2d Dept 2001]). Paragraphs

30 and 47 notwithstanding, plaintiff argues it is able to detail every other aspect of the kickback scheme, including how Horowitz requested that plaintiff keep the kickback scheme secret from Bag Studio (Pl. Br. at 14).

The elements for fraud are "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" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 579 [2018]).

Here, plaintiff asserts the 6% kickback scheme as a misrepresentation known to be false by defendant Horowitz (Compl. ¶50). Plaintiff alleges Horowitz intentionally created the scheme to induce plaintiff to rely upon it and unnecessarily pay money to him (Compl. ¶51). Plaintiff alleges it relied on this misrepresentation and paid him money (Compl. ¶52). Defendants contend there is no scienter alleged in plaintiff's fraud claim, and that the claim is conclusory, based "upon information and belief," and is not pleaded with the particularity required by CPLR 3016(b), and should be dismissed (Compl. ¶ 47; *see Fried v Lehman Bros. Real Estate Assoc. III, L.P.*, 156 AD3d 464 [1st Dept 2017]).

The complaint plainly states "Horowitz's actions were wanton, willful, and malicious," and that there was no "legitimate or business purpose for the kickbacks" (Def. Br. at 12; Compl. ¶ 54; Pl. Br. at 7). The parts of this fraud claim that are based on information and belief are that the kickback fee did not go to Bag Studio, that it was not needed by Bag Studio, and the purposes of the scheme (Compl. ¶¶ 30, 47). These claims do not contradict plaintiff's allegations that it was defrauded out of money. The whereabouts of the kickback fee after payment can be considered information solely in defendants' possession. Consequently, this claim survives a motion to dismiss.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is GRANTED to the extent that the First, Third, Fourth, Sixth and Seventh causes of action are DISMISSED and otherwise DENIED.

This constitutes the decision and order of the court.

DATED: November 25, 2020

E N T E R,

O. PETER SHERWOOD J.S.C.