

Safariland, LLC v H.B.A. Agencies, Ltd.
2021 NY Slip Op 30423(U)
February 9, 2021
Supreme Court, New York County
Docket Number: 657434/2019
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. LAURENCE L. LOVE</u>	PART	IAS MOTION 63M
	<i>Justice</i>		
-----X		INDEX NO.	<u>657434/2019</u>
SAFARILAND, LLC		MOTION DATE	<u>07/16/2020</u>
Plaintiff,		MOTION SEQ. NO.	<u>002</u>
- v -			
H.B.A. AGENCIES, LTD.,		DECISION + ORDER ON	
Defendant.		MOTION	
-----X			

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion is decided as follows:

Plaintiff moves to dismiss, pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) defendant’s counterclaims seeking to recover for i) breach of contract, ii) breach of covenant of good faith and fair dealing under Florida and Israeli Law, iii) reformation of contract under Florida and New York Law; iv) promissory estoppel under Florida Law, v) unjust enrichment under Florida and Israeli Law, vi) quantum meruit under Florida Law, vii) fraudulent misrepresentation under Florida and Israeli Law, and viii) compensation under Israel Agency Contract Law. Defendant’s counterclaims seek damages of approximately \$234,611.45.

Plaintiff Safariland, LLC (“Safariland”) is a Delaware Limited Liability Company, based in Jacksonville, FL, specializing in the distribution of law enforcement, military, and security products. Defendant H.B.A. Agencies, Ltd. (“HBA”) is an Israeli Limited Liability Company specializing in security equipment for anti-terrorism.

A summons and complaint were filed on December 13, 2019, and defendant filed an answer with counterclaims on June 12, 2020.

Plaintiff’s complaint alleges that, “[o]n September 1, 2015, the parties entered the Agreement, which lasted for a period of one year, terminating on August 31, 2016. HBA agreed

to provide the following consulting services: solicit orders from the Israeli MOD [Ministry of Defense], make introductions and arrange for meetings with members of the Israeli MOD, investigate inquiries or leads received by Safariland, assist Safariland in preparing and submitting presentations, bids and quotations, and participating in contract negotiations, and providing other assistance as requested by Safariland.”

Plaintiff’s complaint continues with, “[i]n return for HBA’s services, Safariland agreed to pay HBA a total of \$90,000, in twelve monthly installments of \$7,500, and shall not exceed the amount of US \$90,000. The agreement provided that: ‘in no event shall this Agreement require Safariland to pay or continue to pay any compensation to Consultant if such compensation is or becomes prohibited by any law, regulation or administrative action.’ The Agreement neither references nor requires Safariland to pay HBA any commission for sale procured by HBA.”

Plaintiff’s complaint continues, “[a] few months after entering into the Agreement (between Safariland and HBA), the Israeli MOD, located at 800 Second Avenue, 11th Fl., New York, NY 10017, purchase order no. 4440717442, to plaintiff for \$2,346,114.48.” It appears the Israeli MOD entered into an agreement with Safariland. HBA seeks ten percent of the commission from this contract, \$234,611.45.

HBA’s affirmation in opposition states, “In June 2015 HBA facilitated a \$902,000 sale of Safariland’s products to the government of Israel. Before Safariland would pay HBA its commission, however, Safariland required that HBA sign a written contract. The contract prepared by Safariland provided for payment of \$90,000 to HBA, which is 10% of the \$902,000 sale, as agreed. However, because Safariland’s attorneys did not want to refer to this payment as a commission, Safariland required that HBA sign a ‘Consulting Services Agreement.’ HBA, without counsel, and despite that English is not its first language, signed the document in order to receive

its 10% commission, which had not yet been released. The CSA [Consulting Services Agreement] was not an arm's length agreement.”

HBA's affirmation in opposition continues with, “[i]n December 2015, HBA facilitated a second sale of Safariland's products to the government of Israel totaling \$2.3 million. The first delivery milestone on the December 2015 order was not until December 2019, and HBA continued to work with Safariland on the December order after the CSA expired. HBA sought its 10% commission from Safariland for the December order pursuant to the Commission Agreement. Safariland's attorneys, however, refused to pay HBA.”

On a motion to dismiss based upon documentary evidence, defendant must present evidence which “utterly refutes” plaintiff's allegations and establishes a defense as a matter of law (see *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]). When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges. LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

In deciding a motion to dismiss under CPLR 3211(a), the pleading at issue must be given a liberal construction, and a court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Leon v. Martinez*, 84 N.Y.2d 83, 87-88[1994]).

HBA contends that the parties agreed, orally and via email, before the CSA was signed, that HBA would be paid a 10% commission on sales generated for Safariland. HBA further asserts that the CSA was drafted only to compensate HBA for the June 2015 \$902,000 order, which

Safariland would not pay without the signing of the CSA. While the CSA appears to utterly refute HBA's allegations, a review of the e-mails between parties raises issues of fact as to whether said CSA wholly reflects the parties' agreement or if the additional sale of approximately \$2,300,000.00 was contemplated by the CSA.

As it relates to defendant's first and second causes of action, a party asserting a breach of contract claim must establish four elements: 1) an agreement; 2) plaintiff's adequate performance of that agreement; 3) breach by defendant; and 4) damages resulting from the breach (see *Meyer v. North Shore-Long Island Jewish Health System, Inc.*, 137 A.D.3d 878 [2d Dept. 2016]; N.Y. Prac. Cont. Sec. 19:13). The elements of a claim for breach of the implied covenant are similar to those for breach of a duty in that there must be: a duty; breach of that duty; causation; and damages (see *Benihana of Tokyo, LLC v. Angelo, Gordon & Co., L.P.*, 259 F. Supp3d 16 [S.D.N.Y. 2017]; N.Y. Prac. Cont. Sec. 19:13).

H.B.A. has sufficiently pleaded the elements of breach of contract, pleading that: (1) an offer was made by Safariland to pay H.B.A. a 10% commission on sales that H.B.A. generated to the Israeli Ministry of Defense, and H.B.A. accepted, (2) H.B.A. performed under this agreement, beginning work as early as February 2015 and continuing beyond August 31, 2016, and secured over \$3.2 million in sales of Safariland's products to the Israeli Ministry of Defense, (3) Safariland failed to perform under this agreement by refusing to pay H.B.A. a 10% commission on all sales that H.B.A. generated, and (4) H.B.A. has been damaged by this breach.

The three elements for a claim of promissory estoppel include; "1) a representation as to a material fact that is contrary to a later-asserted position; 2) a reasonable reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon (see *Romo v. Amedex Ins. Co.*, 930 So.2d 643 [D.C. App.

FL. 4th Dist. 2006]). Here, HBA has pled all three elements: (1) Safariland, before and after the CSA was signed, represented to H.B.A. that it would be paid a 10% commission on sales to the Israeli Ministry of Defense including the December Order, (2) that HBA reasonably relied on these representations, beginning work in February 2015 and continuing to work and provide services to Safariland after the CSA expired, and (3) Safariland changed its position by refusing to compensate HBA for the December Order which is detrimental to HBA.

A party is entitled to recovery in quasi-contract, quantum meruit, and/or unjust enrichment to recover the value of the benefits conferred by said party upon defendants (see *Dialcom, LLC v. AT&T Corp.*, 20 Misc.3d 1111(A) [Sup. Ct. Kings Cty 2008]). While the existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter, where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies (see *IIG Capital LLC v. Archipelago, LLC*, 36 A.D.3d 401, 405 [1st Dept 2007]).

Defendant's counterclaims states a cause of action under Israeli law of fraudulent misrepresentation and compensation. Plaintiff's reply states, "[m]oreover, when HBA executed the agreement, it represented that HBA 'is an independent contractor and not an...agent...' Israeli Agency Law by its terms applies only to agents and not to independent contractors." Since defendant contends the agreements was not an arms-length agreement, the distinction between independent contractor and agent cannot be definitively defined.

As there are issues as to whether the CSA accurately reflects the intentions of the parties and as defendant has sufficiently pled their counterclaims, it is hereby ORDERED that

Plaintiff's motion to dismiss defendant's counterclaims is DENIED in its entirety.

2/9/2021

DATE



LAURENCE L. LOVE, 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