

Higuera v True N. Land Servs., LLC
2021 NY Slip Op 30769(U)
March 10, 2021
Supreme Court, Kings County
Docket Number: 518717/2019
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of MARCH, 2021

P R E S E N T:

HON. RICHARD VELASQUEZ, Justice.

-----X

MAGDA HIGUERA,

Plaintiff,

Index No.: 518717/2019
Decision and Order

-against-

TRUE NORTH LAND SERVICES, LLC, and
256 MENAHAN ST., LLC,

Defendants,

-----X

The following papers NYSCEF Doc #'s 1 to 19 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	23-50; 63, 51-62
Opposing Affidavits (Affirmations) _____	51-62; 79
Reply Affidavits (Affirmations) _____	81-83

After having heard Oral Argument on JANUARY 6, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff, MAGDA HIGUERA, moves for an order: (1) granting Plaintiff's pre-reply to counterclaims motion to dismiss Defendant, TRUE NOTH LAND SERVICES, LLC's (TRUE NORTH) First, Second Third and Fourth Counterclaims on the grounds that they have been rendered moot by the September 2, 2020 decision of this honorable Court; (2) granting Plaintiff's pre-reply to counterclaims motion to dismiss the Defendant, TRUE NORTH's Fourth Counterclaim, pursuant to CPLR §3211(a)(6) and (7), as well as CPLR §3212(b), on the grounds that said counterclaim of indemnification for legal fees in

unavailable because there is neither a contractual basis, nor any common law entitlement to this recovery. (MS#2) Defendant opposes the same and cross-moves for an order, pursuant to 22 NYCRR 130-1.1, granting True North's cross-motion for reimbursement of its legal fees incurred in connection with this litigation. (MS#3).

First the court shall address plaintiff's request to dismiss the defendant's 1st, 2nd, 3rd, and 4th counterclaims. Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d at 635, 389 N.Y.S.2d 314, 357 N.E.2d 970) and **“the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one”** (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d at 636, 389 N.Y.S.2d 314, 357 N.E.2d 970). Further, the court may consider any factual submissions made in opposition to a motion to dismiss a pleading in order to remedy pleading defects (see *Quinones v. Schaap*, 91 A.D.3d 739, 740, 937 N.Y.S.2d 262; *Daub v. Future Tech Enter., Inc.*, 65 A.D.3d at 1005, 885 N.Y.S.2d 115). *Minovici v. Belkin BV*, 109 A.D.3d 520, 521, 971 N.Y.S.2d 103, 106 (2013) “[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not

presumed to be true on such a motion” (*Palazzolo v. Herrick, Feinstein, LLP*, 298 A.D.2d 372, 751 N.Y.S.2d 401). **“Whether the pleadings will later survive a motion for summary judgment, or whether the party will ultimately be able to prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss”** (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38; see *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19). When a party, moves for a motion to dismiss, it is asking the court to make that determination instead. “Courts are not infallible. In undertaking such a task, a court should be mindful to prevent errors which could result in the dismissal of a worthy claim, even if it means risking an unworthy claim proceeding to trial. In other words, it must err on the side of the plaintiff. Toward this aim, many rules and standards have evolved for the court to follow.” *Poolt v. Brooks*, 38 Misc3d 1216(A), 967 NYS2d 869 (Sup. Ct. 2013).

In the present case, affording the answer and counterclaims a liberal construction, accepting the facts as alleged therein as true, and granting defendants the benefit of every possible inference, it is the opinion of this Court that the answer and counterclaims sufficiently state causes of action for defendants 1st, 2nd, 3rd, and 4th counterclaims at this pre-discovery stage of the proceedings (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, supra* at 38). Moreover, in the case at bar defendants answer with counter-claims constitutes evidence. How credible that evidence is irrelevant at this juncture. Defendant must still make out a *prima facie* case against them at trial through competent evidence, but when it comes to “he said, she said,” merely raises a question of credibility for the jury to decide (see *Communications & Entertainment Corp. v. Hibbard Brown & Co., Inc., supra*, 202 A.D.2d 191, 608

N.Y.S.2d 214). As such, the defendants have plead facts sufficient to state a cause of action and plaintiff has failed to submit any documentary evidence to the contrary. As such, it is inappropriate to dismiss such claims before any discovery has been conducted and both parties can renew their request upon the completion of discovery.

Next the court shall address defendants motion pursuant to 22 NYCRR 130-1.1, granting True North's cross-motion for reimbursement of its legal fees incurred in connection with this litigation. The court finds that the issue of the determination of reasonable attorney's fees be set down for a hearing before a Judicial Hearing Officer to hear and determine the defendants reasonable attorneys fee associated with this action.

Accordingly, plaintiff's motion to dismiss plaintiff's 1st, 2nd, 3rd, and 4th, counterclaims is hereby denied, any other reliefs not specifically addressed are hereby denied. (MS#2). Defendants' cross-motion for reasonable attorneys fee is granted to the extent that It is further ORDERED that the issue of the determination of reasonable attorney's fees be set down for a hearing before a Judicial Hearing Officer to hear and determine the defendants reasonable attorneys fee associated with this action. Pursuant to Article 22 of the Judiciary Law and in accordance with the provisions of NYCRR Part 122, the issue is assigned to the Judicial Hearing Officer in the JCP part to hear and report upon the filing of the requisite forms and the approval of the Administrative Judge. The date will be fixed by the Clerk of the Part. (MS#3)

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
March 10, 2021

ENTER FORTHWITH:


HON. RICHARD VELASQUEZ