Reynaers Inc. v A.G.M. Deco Inc.
2021 NY Slip Op 31121(U)
April 6, 2021
Supreme Court, Kings County
Docket Number: 510147/19
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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REYNAERS INC.,

Plaintiff, Decision and order

- against - Index No. 510147/19

A.G.M. DECO INC.,

Defendant,

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A.G.M. DECO INC.,

Counterclaim Plaintiff,

- against- April 6, 2021

REYNAERS INC.,

Counterclaim Defendant,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff and counterclaim defendant Raynaers Inc., has moved pursuant to CPLR §3211 seeking to dismiss counterclaims filed by the defendant A.G.M. The defendant and counterclaim plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the First Verified Complaint, from 2013 to 2019 the defendant A.G.M. agreed to buy window and door products from Reynaers at agreed upon prices. During 2017 A.G.M. began to fall behind in payments due and by the time a lawsuit was commenced they owed over two million dollars. The complaint asserts causes of action for breach of contract, goods sold and delivered and account stated. A.G.M. answered and asserted various counterclaims. The first counterclaim asserts Reynaers

violated a warranty the products were free from any defects. The second counterclaim asserts Reynaers violated an implied warranty of intended use and the implied warranty of merchantability. The third counterclaim asserts that due to the defective products of Reynaers, A.G.M. suffered lost profits. The fourth counterclaim asserts damages as a result of Reynaers' defective products. The fifth counterclaim asserts A.G.M. lost potential profits because of Reynaers' late delivery of goods. The sixth counterclaim asserts the windows and doors delivered by Reynaers were not fit for their intended purposes. The last counterclaim asserts the invoices submitted were for prices that were higher than agreed upon by the parties.

The plaintiff has now moved seeking to dismiss the counterclaims on the grounds they fail to state any cause of action. The defendant has opposed the motion arguing they have merit.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether

the counterclaim will later survive a motion for summary judgment, or whether the party will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The agreement between the parties states that the buyer, the defendant in this case, has forty eight hours from the time of delivery to object on the grounds the goods delivered were non-conforming goods (see, Reynaers Inc., General Terms and Conditions of Sale, ¶11(b)). Paragraph 67 of the Answer states that upon receiving many of the goods, namely the windows and doors from the plaintiff "many defects arose with their windows and doors including, but not limited to: locks not working, doors not opening, back of bogeys breaking off, back latch support plates bending, gaskets on interlocks stretched out, glazing beads not installed, poor quality of materials and frames, incorrect gaskets leading to issues with draughts, wrong hinges, no plate behind handles, receptors cut improperly, loose hinges, improper window positioning, air leaks in doors, failed water tests, and general fabrication issues" (see, Verified Answer to Amended Complaint with Counterclaims, ¶ 67). Indeed, the defendant asserts the plaintiff provided defective products for twenty projects (id at ¶ 68). There is no indication the defendant complied with the forty eight hour notification

requirement as a pre-requisite to the claims the products were defective. Further, the defendant did not object to any of the goods until they served the Answer following the service of the Summons and Complaint. Thus, pursuant to the agreement between the parties the failure to raise any issues regarding defective products means that "such Non-Conforming Product shall be deemed to have been accepted irrevocably as a conforming Product by Buyer" (see, Reynaers Inc., General Terms and Conditions of Sale, ¶11(b)). Therefore, there can be no claims for any warranty based upon defective or non-conforming goods since the defendant is deemed to have accepted such goods. The defendant argues that "Reynaers did not perform the limited remedy of correcting the Defects and AGM was required to expend significant sums on the repair including labor costs, additional materials, and handling costs. Thus, by limiting consequential and incidental damages, AGM would be deprived of the benefit of the bargain. Since Reynaers failed to perform the remedy by not making the "required adjustments," the consequential and incidental damage exclusion is invalid herein" (see, Memorandum of Law in Opposition, page 18). However, as explained, for any obligations on the part of Reynaers to remedy any defective products they were required to be notified of such defects. There was no such notification triggering Reynaers to take any remedial action. Additionally, the plaintiff expressly disclaimed all warranties of

merchantability and fitness. The defendant has failed to present any reason why such disclaimers do not bar the counterclaims asserted. Consequently, the motion seeking to dismiss the first two counterclaims as well as the sixth counterclaim is granted.

The agreement between the parties further states that "BUYER'S SOLE AND EXCLUSIVE REMEDY FOR CLAIMS ARISING HEREUNDER OR UNDER ANY PURCHASE ORDER, WHETHER IN CONTRACT, NEGLIGENCE, TORT, STRICT LIABILITY OR OTHERWISE, SHALL BE FOR ACTUAL DAMAGES. REYNAERS' LIABILITY FOR ANY CLAIMS SHALL IN NO EVENT EXCEED THE AMOUNT OF THE PURCHASE PRICE ACTUALLY COLLECTED BY REYNAERS FOR THE PARTICULAR PRODUCT WITH RESPECT TO WHICH LOSSES OR DAMAGES ARE CLAIMED OR, AT THE ELECTION OF REYNAERS, SHALL BE LIMITED TO THE REPAIR OR REPLACEMENT OF DEFECTIVE PARTS OF THE PRODUCTS. IN NO EVENT SHALL REYNAERS BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES SUCH AS, BUT NOT LIMITED TO, DAMAGES FOR INJURY TO PERSON, PROPERTY OR EQUIPMENT, LOSS OF PROFITS OR REVENUES, COST OF CAPITAL, COST OF PURCHASED OR REPLACEMENT PRODUCT OR CLAIMS OF BUYER'S CUSTOMERS. REYNAERS SHALL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE FOR, AND BUYER ASSUMES ALL RISK AND LIABILITY RESULTING FROM, THE TRANSPORTATION, UNLOADING, HANDLING, INTEGRATION, INSTALLATION, POSSESSION, STORAGE OR USE OF EACH PRODUCT OR ANY EXCLUDED GOODS" (see, Reynaers Inc., General Terms and Conditions of Sale, ¶15).

The third and fourth counterclaims seek lost profits and

expenses incurred modifying the alleged defective products delivered by Reynaers. The defendant asserts the lost profits and other damages sought are not barred by the above provisions because they are really direct damages designed to place the defendant in the same position as if the contract were fulfilled. That argument might be true where the contract is silent as to the damages that are available and was clearly contemplated by the parties (Kenford Company Inc., v. County of Erie, 73 NY2d 312, 540 NYS2d 1 [1989]). "To determine whether consequential damages were reasonably contemplated by the parties, courts must look to "the nature, purpose and particular circumstances of the contract known by the parties . . . as well as 'what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made'"" (see, Bi-Economy Market Inc., v. Harleysville Insurance Company of New York, 10 NY3d 187, 856 NYS2d 505 [2008]). Those principles are inapplicable where the contract expressly disclaims any damages that are consequential or incidental. Thus, since the agreement in this case expressly forecloses the possibility of any lost profits or other consequential damages they were not contemplated by the parties, cannot be considered direct damages and foreclose any relief. Therefore, the motion seeking to dismiss the third and fourth counterclaims is granted.

The terms and conditions further provides that "under no circumstances shall Reynaers have any liability to Buyer relating to any delayed delivery" (see, Reynaers Inc., General Terms and Conditions of Sale, ¶9(a)). Consequently, the motion seeking to dismiss the fifth counterclaim is granted.

The last counterclaim alleges the plaintiff overcharged the defendant for various products. The plaintiff asserts such counterclaim is vague and fails to allege any real claim. However, at this juncture the counterclaim states there were overcharges. Further, the defendant seeks $330,000 based upon such alleged overcharges. Thus, while this claim will be subject to discovery there is no basis for a summary dismissal. Therefore, the motion seeking to dismiss this counterclaim is denied.

So ordered.

ENTER:

DATED: April 6, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC