Active World Solutions, Inc. v Means
2021 NY Slip Op 31729(U)
May 17, 2021
Supreme Court, Kings County
Docket Number: 520301/16
Judge: Lawrence S. Knipel

At a Term, Part NJTRP 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 17th day of May, 2021.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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ACTIVE WORLD SOLUTIONS, INC. and ALVARO VAZQUEZ,

Plaintiffs,

- against - Index No. 520301/16

MALIK MEANS and ACTIVE WORLD SCHOLASTIC, LLC,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.[1]
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	28-37, 39-52, 67-68, 71-76
Opposing Affidavits (Affirmations)	53-66, 68-70, 81-84
Reply Affidavits (Affirmations)	85-88, 90-91, 89

Upon the foregoing papers in this action for breach of a commercial contract, plaintiffs Active World Solutions, Inc. (Solutions) and Alvarado Vazquez (Vazquez) (collectively, plaintiffs) move, in motion sequence (mot. seq.) two, pursuant to CPLR 3212, for an order granting them partial summary judgment on the first and second causes of action in their complaint against defendants, Malik Means (Means) and Active World Scholastic, LLC (Scholastic) (collectively, defendants). Each of those causes

[1] New York State Courts Electronic Filing Document Numbers

of action claim breach of contract, with the first one seeking $30,572.00 in unpaid monthly payments to Means and the second one seeking $12,704 for unpaid goods sold and delivered to Scholastic.

Defendants cross-move, in mot. seq. three, seeking an order granting leave to move for partial summary judgment on "good cause" shown and then granting partial summary judgment, pursuant to CPLR 3212, dismissing plaintiffs' second and third causes of action in their entirety as a matter of law.

Plaintiffs cross-move, in mot. seq. four, for an order pursuant to CPLR 3025 (b) for leave to file and serve an amended complaint on defendants to change Solutions' ad damnum clause in its third cause of action from one for specific performance of an exclusive supply contract to one for monetary damages for breach of the same contract because the term for the exclusive supply contract has expired.

Background and Procedural History

In this commercial dispute, plaintiffs seek damages allegedly sustained as a result of the breach of a company buyout agreement and nonpayment for goods. In 2015, the parties formed Scholastic as a joint venture. Plaintiff Vazquez and his wife Maria owned 50% of Scholastic and defendant Means owned the other half. In 2016, the parties dissolved their relationship and entered into a buyout agreement, signed on August 15, 2016, wherein Means bought plaintiff Vazquez and his wife's joint 50% interest in Scholastic for $30,000 (*see* NYSCEF Doc No. 11). Means made that payment upon signing the agreement. However, the agreement also required Means to reimburse Vazquez $30,572.00, for the startup costs he and his wife had incurred forming

Scholastic. Such payments were to be made in $2,000.00 monthly installments beginning October 1, 2016 with the last payment of $2,572.00 due in January 2018. The agreement also includes an exclusive arrangement requiring Scholastic to purchase all its custom-decorated apparel from Solutions for three years after the agreement's signing. Plaintiffs claim that defendants have not paid the monthly installments; did not purchase all its custom-decorated apparel from Solutions during the three-year period provided by the agreement; and have not paid for a custom order (i.e. the Barringer order) that was delivered to defendants.

On or about November 10, 2016, plaintiffs commenced this action by summons and complaint, discovery ensued, and plaintiffs filed a note of issue and a certificate of readiness for trial on January 27, 2020. Thereafter, the instant motions were filed.

Plaintiffs' Motion

Plaintiffs contend that Vazquez is entitled to summary judgment on the first cause of action because Means admitted in his deposition that none of the payments required under paragraph three of the agreement were made. They also assert that summary judgment is warranted where, as here, a defendant admits to acts constituting the elements of a cause of action. Defendant Means in this regard testified that his attorney, Jill Pilgrim, advised him not to make the payments to Vazquez and advised him, instead, to make the payments to her to hold in her escrow account (*see* NYSCEF Doc No. 32, Means tr at 209, line 3 through 211, line 25, annexed as exhibit 2 to plaintiffs' moving papers). Neither Means, nor his attorney, it is argued, provide a valid factual or legal justification for making payments to an attorney escrow account. Therefore, plaintiffs

contend that they are entitled to summary judgment on their first cause of action for breach of contract based on defendant Means' admission that the installment payments totaling $30,572.00 are outstanding.

Additionally, plaintiffs argue they are entitled to recover the contract balance from defendants for the specially made or unique items that remain unpaid. Relying on the New York Uniform Commercial Code, plaintiffs state it is undisputed that Solutions produced clothing items pursuant to a purchase order approved by Means, on behalf of Scholastic; that the clothing items were a custom order for a specific and unique purpose; that the items had no resale value to another customer; and that Scholastic never paid for those items. Solutions asserts that it has demonstrated by documentary evidence its entitlement to judgment on its second cause of action for breach of contract for goods sold and delivered, and that there is no material factual issue to be determined at trial. Solutions thus claims entitlement to summary judgment on its second cause of action for breach of contract in the amount of $12,704.00 for goods sold and delivered.

Defendants' Cross Motion

In moving for leave to file a partial summary judgment motion, defendants recognize that the filing time provided by CPLR 3212 (a) is shortened by Rule 13 of the Kings County Uniform Civil Term Rules, which provides that "[n]o motion for summary judgment may be made more than 60 days after filing a Note of Issue . . . except with leave of the Court on good cause shown." Defendants submit that good cause for the delay exists because the Covid-19 pandemic halted nonessential proceedings on March

19, 2020, around the time the motion was originally due, i.e. March 27, 2020.[2] The March deadline was not met because the COVID-19 pandemic closed the court and counsel's office for months.

Further, defendants reference Governor Andrew Cuomo's prior Executive Order No. 202.28 and its progeny, which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules . . . or by any other . . . rule, or regulation . . ." Defendants calculate the tolling provisions as having run for 108 days from March 20, 2020 through July 6, 2020. Their counsel adds that he still lacks full access to his downtown Manhattan office and only recently gained full access to the file materials for this matter.

Defense counsel acknowledges that this cross motion is beyond the 60-day time frame in Rule 13, but notes in applying the tolling provision of the Governor's prior orders that the time to move for summary judgment remains well within the CPLR's 120-day post-note of issue time limit. Hence, defendants urge in considering the overall circumstances herein that "good cause" exists for the delay in making this cross motion and that leave should be granted.

Next, defendants argue that they have met their burden for summary judgment dismissing plaintiffs' second and third causes of action as a matter of law. They contend they are entitled to summary judgment dismissal as plaintiffs breached the same terms of

[2] Filing of the note of issue herein occurred on January 27, 2020, a day ahead of the January 28, 2020 deadline for such filing, which made March 27, 2020 the due date for filing defendants' cross motion.

the same buyout agreement they are alleged to have breached. They claim that the record herein shows that plaintiffs unilaterally changed the terms and conditions of the Barringer order, without defendant Means' prior consent or mutual agreement. More specifically, defendants allege that plaintiff Vazquez withheld items from the Barringer order, changed payment terms from "upon receipt" to "pre-payment" and failed to physically deliver the order to Means and Scholastic. Defendants contend that Vazquez's own unilateral breaches of the Barringer order guidelines, markups and payment terms and conditions justified defendant Means' refusal to pay the disputed $12,704 for that order. Vazquez's breach, defendants allege, is not in dispute, and, in turn, also constitutes a breach of the August 2016 buyout agreement. Consequently, defendants concludes that Means and Scholastic were no longer obligated to honor or pay for the order and that plaintiff's second cause of action should be dismissed.

Lastly, defendants argue that plaintiffs fail to sufficiently plead damages relating to the third cause of action as part of their breach of contract claims. Defendants contend there are insufficient facts to show how the breach caused plaintiffs' injury or to support a damages claim and that the third cause of action does not specify an amount of alleged damages. Hence, defendants view the pleading as speculative and fatally deficient.

They further claim that Vazquez repeatedly violated the August 2016 buyout agreement and unilaterally changed payment and delivery terms and markups for no reason. Defendants regard these violations as deliberate, as breaching the buyout agreement and voiding the agreement's exclusivity provision. These multiple and repeated breaches in defendants' view no longer obligated them to honor the exclusivity

provision and legally permitted them to use other vendors to fulfill their apparel needs.

Defendants' Opposition and Reply

Defendants state that it has always been defendant Mean's intention to reimburse the startup costs to Alvaro and Maria Vazquez and that he has made several good faith offers to pay back these costs during this litigation to resolve that dispute. Additionally, defendants acknowledge that the startup costs may be ordered by the court. Nonetheless, in opposition to plaintiffs' partial summary judgment motion, defendants assert that plaintiffs have not named a necessary party to this action, i.e. Maria Vazquez. It is argued that plaintiffs' failure to name her as a necessary party should be considered and applied to any startup costs award. Defendants argue that any award to Alvaro Vazquez personally should be reduced by 50% due to plaintiffs' failure to add Maria Vazquez as a necessary party considering that the record shows that she initially owned a 25% share of Scholastic and was a signatory to the buyout agreement.

Additionally, defendants note that the initial $30,000 check paid by Means for the full interest purchase of Scholastic was made payable to both Alvaro and Maria Vazquez and that the answer pleads failure to name all necessary parties as an affirmative defense. Defendants posit that any award for startup cost alleged in the first cause of action should be reduced by half given the omission of not naming Maria Vazquez herein.

As to the second cause of action, defendants contend that plaintiffs have failed to meet their burden of proof and reiterate the argument in their cross motion that plaintiffs breached the agreement, making it unenforceable, and thereby both relieving defendants of an obligation to perform under the contract and precluding plaintiffs' recovery.

Consequently, defendants conclude that plaintiffs' partial summary judgment motion as to the second cause of action should be denied in its entirety as a matter of law.

In reply and further support of their cross motion, defendants claim the record shows that Means paid all the invoices, except the Barringer order, in accordance with the mutually agreed terms. Means attributes his veering from the agreement to place orders with plaintiff Solutions when Vazquez unilaterally changed the payment terms and markups. Defendants claim it is undisputed that Vazquez deviated from the original "mutually agreed upon" terms and conditions without Means' express input and mutual agreement. Such unilateral changes, defendants submit, justified Means canceling certain orders, ending his relationship with Vazquez and Solutions and placing orders with other apparel vendors.

In addition, defendants argue that plaintiffs' third cause of action for specific performance of an exclusivity provision in the subject agreement is moot and should be dismissed because the three-year exclusivity provision expired on August 15, 2019. Further, defendants argue that plaintiffs filed their opposition papers late, have no justifiable excuse for the late filing and denying plaintiffs' partial summary judgment motion is warranted on this basis. In any event, defendants urge disregarding the allegedly self-serving affidavits plaintiffs attached to their opposition papers to create material factual issues as they view them as meritless and contradicted by the record.

Plaintiff's Cross Motion and Reply

Plaintiffs contend in seeking amendment of their third cause of action that initially the damages suffered were unknown and that it was not possible to predict the damages

that would be suffered over the exclusivity period's three-year term. Originally, plaintiffs sought only specific performance of the agreement's exclusivity provision, but now with discovery complete, they claim they are now able to calculate and prove the monetary damages suffered. Defendants, they argue, will not be prejudiced by the amendment of plaintiffs' third cause of action and ad damnum clause as the amendment would only change equitable relief to monetary damages. Plaintiffs assert that the amendment is not palpably insufficient or patently devoid of merit, is merely a demand for monetary damages to be proven at trial and is supported by documents defendants produced. They further highlight that leave to amend a pleading should be freely given in the court's discretion and the amendment essentially seeks to conform the pleadings to the documents produced in discovery. On these bases, plaintiff seeks amendment of its complaint.

In opposition to defendants' cross motion, plaintiffs assert that the damages sought in the third cause of action, though originally unknown, were not "speculative," and are knowable. Plaintiffs also argue that their own separate cross motion to amend only concerns the third cause of action, and summary judgment in any event can still be granted on their first and second causes of action.

In further opposition to defendants' cross motion, plaintiffs maintain their entitlement to recover the full contract price because defendant Scholastic failed to pay for unique, custom-made items. Plaintiffs explain that the Barringer purchase order predated the subject agreement and is governed by its own terms. Consequently, the branch of defendants' cross motion for summary judgment dismissing the second cause of

action should be denied. Plaintiffs additionally claim that even if the Barringer purchase order occurred after the date of the buyout agreement, they did not violate the "mutually agreed order processing guidelines and mark-up fees" provision of the buyout agreement (*see* NYSCEF Doc No. 49, ¶ 2, annexed as exhibit I to defendants' cross motion). The Barringer purchase order's payment term, plaintiffs maintain, was always "due on receipt." Plaintiff Solutions asserts it performed its part of the Barringer purchase order by producing the custom-decorated apparel without requiring prepayment by defendant Scholastic and was prepared to release the finished goods upon payment by Scholastic at the time of pickup.

Relying also on the New York Uniform Commercial Code and case law, plaintiffs contend they are entitled to the full $12,704.00 contract price of the Barringer purchase order. Plaintiffs argue that Scholastic breached the Barringer purchase order as that order sought custom-decorated apparel, unique to Scholastic's specific customer, which was specially produced for that order, and Scholastic failed to make payment upon delivery. Plaintiffs also counter that the clothing items had no resale value to another customer. Additionally, plaintiffs argue that an adequate defense to their first cause of action is not provided because defendants' advice from his counsel to deposit the payments to an escrow account does not justify the breach. An attempt to gain a tactical advantage, plaintiffs assert, is not a legal justification for breaching a contract and in their view warrants denying defendants' motion.

Plaintiffs submit in their reply that Vazquez' wife, Maria, is not a necessary party to this action because she assigned her interest in the agreement and claims against

defendants to her husband, plaintiff Alvaro Vazquez. Plaintiffs assert that Maria did not want to be part of this litigation, and she and her husband, as a married couple, are one economic unit. Therefore, plaintiffs assert that Maria Vazquez is not a necessary party to this action.

Plaintiffs also argue in reply that the deteriorating relationship between the parties does not excuse defendants' breach and relieve them of meeting the terms of their agreement. Plaintiff Vazquez argues that the toxicity of the parties' relationship is irrelevant since defendants signed the agreement and thus were obligated to meet its terms. Plaintiffs also argue that there was no "double dipping" on certain jobs; that deposition testimony confirms that Mr. Vazquez had made an error in calculating the amounts to be credited to Scholastic; and that he corrected the calculation immediately when brought to his attention. Plaintiffs additionally note that the buyout agreement contained no provision for a lump sum payment. In summary, plaintiffs affirm they did not breach the agreement and that defendants have not reimbursed any amount for the startup costs and not paid for delivered custom goods.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of

fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010]). If it is determined that the movant has made such showing, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Gensuale Campanelli & Assoc., P.C.*, 126 AD3d 936, 937 [2d Dept 2015] quoting *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]).

"[I]ssue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

Initially, defendants' cross motion for leave to move for summary judgment is granted as good cause is shown for the delay given the health crisis of the Covid-19 pandemic and executive orders extending the deadlines to file motions. Specifically,

> "[o]n March 7, 2020, Governor Andrew M. Cuomo issued Executive Order 202, which declared a disaster emergency in New York State due to the COVID-19 pandemic and temporarily suspended and/or modified certain laws of the State of New York. This included suspending the filing of all motions except those deemed essential until April 19, 2020. Further Executive Orders were issued that continued to extend the suspension, including on July 6, 2020, an Executive Order extending the filing of motions to August 5, 2020" (*Milea v Shorefront Operating LLC*, 2021 NY Slip Op 30645[U], *5 [Sup Ct, Kings County 2021]).

"Under the circumstances of the Covid-19 pandemic and the Executive tolling orders that followed[,] the motion will be deemed timely and will be considered on the merits" (*Campos v Unique Devs. Holdings Corp.*, 2021 NY Slip Op 30113[U], *3 [Sup Ct, Kings County 2021]). Further, no arguments are offered in opposition to defendants' motion for leave to move for summary judgment.

Here, there are considerable facts in dispute that bar summary judgment as to the second and third causes of action. Each party argues that there are no facts in dispute, but the filings establish the opposite. As to the second cause of action concerning payment for uniquely-made items, plaintiffs state that the goods were delivered and accepted by defendant and there has been no payment. To the contrary, defendants state that the order was not delivered, and they did not take possession. Next, plaintiffs state that defendants approved the terms of the order that was to be paid on delivery and that the Barringer order predated the subject agreement. However, defendants state that plaintiffs changed the terms of the order relying on plaintiff Vazquez's deposition testimony. Vazquez' deposition testimony relied upon by defendants references an email that provides that Vazquez changed the payment terms from due on receipt to prepaid and that this was not a mutually agreed upon change.

Defendants assert that plaintiffs breached the terms of their buyout agreement by unilaterally changing the terms of the Barringer order without prior consent or mutual agreement. Whether the Barringer order predated the subject agreement, as contended by plaintiffs, is also an issue for trial, as that question is not conclusively established by the evidence presented. There are also questions as to "double dipping" on certain jobs with Vazquez's admission that he made errors that were corrected. Defendants aver that

plaintiffs withheld the product, changed payment terms from "upon receipt" to "pre-payment" and failed to deliver the order to defendants. The facts concerning whether the parties breached the subject agreement are thus disputed.

As to the third cause of action, defendant Means contends that plaintiff Solutions was charging defendant Scholastic a higher price than should be charged as contentions between the parties increased. Defendants also allege that there were unjustified markups and packages being held that fermented further toxicity between the parties. Defendants claim that Vazquez repeatedly violated the terms of the August 2016 buyout agreement with Means; that these violations were deliberate; in breach of the buyout agreement; and voided the exclusivity provision of the agreement. Whether the exclusivity agreement was voided by the parties' actions presents an issue for the trier of facts to decide. Factual questions concerning the exclusivity provision and whether it was breached are outstanding and are not resolved by these motions.

Further, defendants submit that there are insufficient facts to establish how plaintiff was injured concerning the exclusivity clause. It is for the trier of facts to decide whether there were unilateral changes, whether the parties deviated from the "mutually agreed upon" terms and conditions, and whether defendants were justified in canceling certain orders and in their relationship with plaintiffs.

However, plaintiffs' partial summary judgment motion as to its first cause of action is granted as defendants do not dispute the total sum claimed for the startup cost and acknowledge that the court may grant recovery of the startup cost agreed to between the parties. The only defense to this claim is that a necessary party was not named in this

action. However, that argument is adequately rebutted by Maria Vazquez's affidavit where she attests that she was not reimbursed for the startup cost as required under the agreement and has assigned all her legal claims against defendants to plaintiffs in writing (*see* NYSCEF Doc Nos. 86-87). The evidence demonstrates that plaintiff Vazquez has legal authority to claim his wife's interest in this action. Consequently, plaintiffs have demonstrated, as to its first cause of action, that there are no material facts in dispute and established each element, thereby entitling them to summary judgment in their favor.

Concomitantly, plaintiffs' motion to amend its complaint is granted as no prejudice against defendants is shown and amendments to pleadings should be freely granted absent prejudice or surprise. "A motion for leave to amend a pleading may be made at any time, and leave shall be freely given upon such terms as may be just" (*R&G Brenner Income Tax Consultants v Gilmartin*, 166 AD3d 685, 687 [2d Dept 2018] citing CPLR 3025 [b] [internal quotation marks omitted]). Further, plaintiff is not seeking to add a cause of action, but, instead, to change the relief sought from equitable to monetary. Contrary to defendants' contention, delay alone is not sufficient to deny leave to amend the pleading, as the delay must be coupled with significant prejudice to defendant and mere exposure to more liability will also not suffice to deny amendment (*id.*). Consequently, plaintiffs are granted leave to file and serve an amended complaint on defendants to change plaintiff Active World Solutions, Inc.'s ad damnum clause in its third cause of action from one for specific performance of an exclusive supply contract to one for monetary damages for breach of the same contract. Furthermore, defendants' cross motion to dismiss plaintiffs' third cause of action is denied as the issue has not been rendered moot.

The court has considered the parties' remaining contentions and finds them unavailing. All relief not expressly granted herein is denied. Accordingly, it is

ORDERED that the branch of plaintiffs' partial summary judgment motion, mot. seq. two, for an order granting them partial summary judgment on their first cause of action against defendants for breach of contract in the amount of $30,572.00, is granted; and it is further

ORDERED that the branch of plaintiffs' partial summary judgment motion, mot. seq. two, for an order granting them partial summary judgment on their second cause of action against defendants for breach of contract in the amount of $12,704.00, is denied; and it is further

ORDERED that the branch of defendants' cross motion, mot. seq. three, for leave to move for partial summary judgment on "good cause" shown is granted; and it is further

ORDERED that the branch of defendants' cross motion, mot. seq. three, for an order granting partial summary judgment and dismissing plaintiffs' second and third causes of action in their entirety as a matter of law is denied; and it is further

ORDERED that plaintiffs' cross motion, in mot. seq. four, for an order for leave to file and serve an amended complaint on defendants to change plaintiff Active World Solutions, Inc.'s ad damnum clause in its third cause of action from one for specific performance of an exclusive supply contract to one for monetary damages for breach of the same contract is granted.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE