

Lightstone RE LLC v Zinntex LLC
2021 NY Slip Op 32710(U)
December 13, 2021
Supreme Court, Kings County
Docket Number: Index No. 516443/21
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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LIGHTSTONE RE LLC,

Plaintiff,

Decision and order

- against -

Index No. 516443/21

ZINNTEX LLC, BARRY ZINN & RICKY ZINN,

Defendants,

December 13, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss certain causes of action. The plaintiff has cross-moved seeking to amend the complaint pursuant to CPLR §3025. The motions have been opposed respectively. Papers were submitted by the parties and after review of all the arguments this court now makes the following determination.

According to the complaint, on April 13, 2020 the parties entered into an agreement whereby the plaintiff agreed to purchase personal protective equipment from the defendants. The next day they entered into another agreement whereby, again, the plaintiff would purchase personal protective equipment from the defendants. The plaintiff wired \$2,085,000 pursuant to the agreements, however, the complaint alleges the defendants failed to deliver the masks as outlined in the agreements. Indeed, on May 6, 2020 the plaintiff notified the defendants they were cancelling the contract and sought a refund. On June 24, 2020 the parties entered into an agreement whereby defendants agreed to return \$1,475,000 of the funds to the plaintiff. Defendant

Ricky Zinn executed a guaranty concerning these obligations. The complaint alleges the defendants have failed to repay the funds pursuant to the agreement. The complaint alleges causes of action for breach of contract against Zinntex and Ricky Zinn, fraud against Zinntex and Barry Zinn, conversion against Zinntex and unjust enrichment against Zinntex. The defendants have now moved seeking to dismiss the breach of contract claim against Ricky Zinn and the fraud and conversion claims altogether. The plaintiff seeks to amend the complaint to assert personal claims against Ricky Zinn as an officer of Zinntex and to amend the fraud claim against Zinntex and Ricky Zinn.

Conclusions of Law

It is well settled that a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). Therefore, a review of the allegations contained in the amendments must be examined.

The plaintiff has apparently abandoned any claims that Ricky Zinn entered into a written guaranty. Rather, the amended complaint alleges the contract was made "for" Zinntex and Ricky Zinn (see, Verified Amended Complaint, ¶ 39).

It is well settled that to succeed on a request to pierce the corporate veil and hold an individual responsible for the liabilities of the corporation the plaintiff must demonstrate that "(1) the owners exercised complete dominion of the corporation in respect to the transaction attacked; and (2) that such dominion was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (Conason v. Megan Holding LLC, 25 NY3d 1, 6 NYS3d 206 [2015]). As the Court of Appeals observed, at the pleading stage "a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in 'bad faith' while representing the corporation" (East Hampton Union Free School District v. Sandpebble Builders Inc., 16 NY3d 775, 919 NYS2d 496 [2011]). Rather, the plaintiff must allege facts demonstrating such dominion over the corporation and that "through such domination, abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against the plaintiff such that a court in equity will intervene" (Oliveri Construction Corp., v. WN weaver Street LLC, 144 AD3d 765, 41 NYS3d 59 [2d Dept., 2016]). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to [corporate or] LLC formalities, inadequate capitalization, commingling of assets, and the personal use of [corporate or] LLC funds" (see, Grammas v. Lockwood Associates

LLC, 95 AD3d 1073, 944 NYS2d 623 [2d Dept., 2012])). Thus, mere conclusory statements that the individual dominated the corporation are insufficient to defeat a motion to dismiss (AHA Sales Inc., v. Creative Bath Products Inc., 58 AD3d 6, 867 NYS2d 169 [2d Dept., 2008])).

In this case the complaint does not state in any manner at all that Ricky Zinn abused the corporate form, and such abuse was used to commit a fraud, wrong or injustice against the Plaintiff. There are no facts whatsoever supporting the allegation that any individual claims devolve upon Ricky Zinn. In Albstein v. Elany Contracting Corp., 30 AD3d 210, 818 NYS2d 8 [1st Dept., 2006] the court granted the motion seeking to dismiss the piercing of the corporate veil on the grounds the plaintiff alleged "nothing more than that the corporation was 'undercapitalized' and functioned as" the individual's "alter ego" (id). The court further noted the plaintiff failed to "plead any facts to substantiate such conclusory claims" and did not "sufficiently allege that the corporate form was used to commit a fraud against her" (id).

Therefore, the cross-motion seeking to amend the complaint to assert individual claims against Ricky Zinn is denied and the motion seeking to dismiss any claims against Ricky Zinn is granted.

Turning to the claim of fraud, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a

material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & McLaughlin, Esqs., 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]).

However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie" (McKernin v. Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]). Zinntex seeks to dismiss the fraud claim on the grounds the fraud is the same as the breach of contract claim. The plaintiff opposes that contention arguing the breach of contract claim is not duplicative of the fraud claim since the fraud alleges misrepresented facts that took place after the contract was entered into and are thus clearly collateral. The breach of contract essentially alleges that Zinntex contracted to deliver goods and failed to do so. Thus, if true, the failure to deliver goods constituted a breach of contract. The fraud claim alleges essentially two

misrepresentations, the first that Zinntex had access to such personal protective equipment and could deliver them (see, Verified Amended Complaint, ¶ 44) and that after the contracts were signed Zinntex misrepresented their imminent arrival from overseas (see, Verified Amended Complaint, ¶ 45). The plaintiff argues the fraud claim is distinct from the breach of contract claim because the "these representations were not as to provisions within the April 2020 Contracts" (Plaintiff's Memorandum of Law, page 6). It is true that a misrepresentation of a material fact that is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain an action of fraud and is distinct from the breach of contract claim (Selinger Enterprises Inc., v. Cassuto, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only to the intent or ability to perform under the contract then such misrepresentation is duplicative of the breach of contract claim (see, Gorman v. Fowkes, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). Generally, for a fraud claim to be collateral to a breach of contract claim the misrepresentation must consist of a present fact that is unrelated to the precise terms of the contract itself. Thus, in American Media Inc., v. Bainbridge & Knight Laboratories LLC, 135 AD3d 477, 22 NYS3d 437 [1st Dept., 2016] the plaintiff sued defendant for advertisements it placed in various periodicals without receiving payment

pursuant to the contract. The court held misrepresentations made by the defendant were not duplicative of the breach of contract claim. Specifically, the principal of the defendant made statements that he loaned the defendant sufficient funds to cover the advertising expenses thereby inducing the plaintiff to enter into the contract. The court noted those misrepresentations were collateral since they were misrepresentations of present facts, namely that the defendant had sufficient funds. Further, these misrepresentations were collateral to the actual terms of the contract which involved placing advertising in plaintiff's periodicals (see, also, Deerfield Communications Corp., v. Chesebrough Ponds Inc., 68 NY2d 954, 510 NYS2d 88 [1986]). Thus, the critical distinction whether a fraud claim is distinct from a breach of contract claim rests upon the following criteria. The first is whether the misrepresentation concerns a future intent to perform or whether the statement misrepresents present facts (see, Wylie Inc., v. ITT Corp., 130 AD3d 438, 13 NYS3d 375 [1st Dept., 2015]). If the misrepresentation concerns present facts it will generally be considered collateral. If the misrepresentation concerns a future intent to perform then it is generally duplicative of a breach of contract claim. This does not mean to imply a fraud claim regarding future conduct can never be distinct from a breach of contract claim. It surely can where the promise is collateral to the contract (see, Fairway

Prime Estate Management LLC v. First American International Bank, 99 AD3d 554, 952 NYS2d 524 [1st Dept., 2012]). Moreover, even if the misrepresentation concerns a present statement of facts, those facts must touch a matter that is not the subject of the contract. Therefore, if the promise or misrepresentations "concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (HSH Nordbank AG v. UBS AG, 95 AD3d 185, 941 NYS2d 59 [1st Dept., 2012]).

In this case, the claim alleges that Zinntex through "Barry Zinn misrepresented to Plaintiff that Zinntex had access to PPE supplies and, the ability to bring said PPE into the United States despite the ongoing COVID-19 Pandemic, because of his direct relationships with suppliers in China" (see, Verified Amended Complaint, ¶ 44). While that may allege a present statement of fact, such allegation does not include a matter not already subject to the contract, namely selling personal protection equipment. Thus, any misrepresentations of Zinntex upon which the plaintiff relied in this case were all related to the agreement between the parties which forms the basis of the breach of contract claim.


Further, concerning misrepresentations as to the delivery of the goods, mere promissory statements as to what will be done in the future are not actionable" (Adams v. Clark, 239 NY 403

[1925]). Nevertheless, a promise made "with a preconceived and undisclosed intention of not performing it...constitutes a misrepresentation of 'a material existing fact' upon which an action for rescission may be predicated" (Sabo v. Delman, 3 NY2d 155, 164 NYS2d 714 [1957]). However, that is only true if the promise was made at the time of the contract and contributed to its inducement (Deerfield Communications, supra). According to the complaint, misrepresentations about the delivery of the goods occurred a week after the agreements were signed (see, Verified Amended Complaint, ¶¶ 19-22). Thus, there was no allegation of contemporaneous inducement concerning the knowing inability to perform. Therefore, there can be no fraud claim. Consequently, the motion seeking to amend the complaint to assert that claim is denied and the motion seeking to dismiss the fraud claim is granted.

So ordered.

ENTER:

DATED: December 13, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC