

Island Ordinance Sys., LLC v Amerimex, Inc.

2021 NY Slip Op 32898(U)

September 29, 2021

Supreme Court, Nassau County

Docket Number: Index No. 604583/2020

Judge: Sharon M.J. Gianelli

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 11
Present: Hon. Sharon M.J. Gianelli

ISLAND ORDINANCE SYSTEMS, LLC

Plaintiff,

-against-

AMERIMEX, INC.,

Defendant.

X

Index No: 604583/2020

Motion Seq. 002

Decision and Order

X

Papers submitted on this motion:
Plaintiff's Notice of Motion, Affirmation, Exhibits
and Memorandum of Law in Support _____X
Defendant's Affirmation, Affidavit, and
Memorandum of Law in Opposition _____X
Plaintiff's Memorandum of Law in Reply _____X

This action was commenced by the filing of a Summons and Complaint on May 26, 2020. An Answer with Counter-Claims was filed on August 17, 2020. This action arises out of an alleged breach of contract between Island Ordinance Systems, LLC and Amerimex, Inc.

Plaintiff now moves for an Order pursuant to CPLR 3211(a)(1) and (7), dismissing the Second Counterclaim in the Verified Answer with Counterclaims for alleged lost future profits based upon documentary evidence and for failure to state a cause of action.

Factual History

It is uncontested that on or about May 28, 2018, Plaintiff and Defendant, on behalf of the Mexican Navy, entered into a written contract for 450 target practice rounds for a total contact price of \$477,900.00. Plaintiff, as per the agreement was to ship the goods

directly to the Mexican Navy from their place of manufacturing located in Brazil.

Defendant states that the deadline for the shipment of goods to the Mexican Navy was on or about August 28, 2019, and claims that Plaintiff was aware of this deadline.

Defendant claims that approximately one month before delivery was due, Plaintiff advised the Defendant that it would not be able to meet the deadline required by the Mexican Navy.

Defendant states that on or about August 9, 2019, Plaintiff directly advised the Mexican Navy that it could not deliver the goods by the original deadline and requested that the deadline be extended to December 25, 2019. According to Defendant, the Mexican Navy denied Plaintiff's request for an extension of time and declared the contract cancelled.

According to Plaintiff, on or about November 6, 2019, the Empresa Gerencial de Projetos Navais, a Brazilian state-owned company, inspected the target practice rounds for quality and issued a "Conformity Certificate", approving the goods for shipment.

Plaintiff further states that on or about November 18, 2019, Plaintiff sent Defendant Invoice No. 6581 for \$477,900, the contract price. Plaintiff also states that the Invoice contained a provision that a 2% per month late fee will be applied to all overdue invoices.

Plaintiff also claims that on or about December 5, 2019, the target practice rounds were delivered to and accepted by the Mexican Navy without rejection at the Port of Veracruz, Mexico. Plaintiff claims that Defendant has since refused to pay any amount owed under the Contract.

Defendant, on the other hand, claims that the Mexican Navy made no attempts to receive the shipment sent by Plaintiff because they had declared the contract cancelled. Defendant further states that they never received payment by the Mexican Navy for the goods, and further argues that the delayed shipment severed their relationship with the Mexican Navy resulting in future losses.

Plaintiff brings this motion to dismiss Defendant's Second Counterclaim, which seeks to hold Plaintiff liable for \$5 million of alleged lost profits.

Plaintiff argues that Defendant does not have a viable cause of action because under New York law, a party cannot state a viable cause of action for lost future profits resulting from an alleged breach of contract unless it explicitly pleads (i) that the damages were caused by the breach, (ii) that the alleged loss is capable of proof with reasonable certainty, and (iii) that the particular damages were within the contemplation of the parties to the contract at the time it was made.

Plaintiff argues that Defendant fails to plead that the alleged loss is capable of proof with reasonable certainty and further fails to prove that the damages were within the contemplation of the parties at the time the contract was made.

Additionally, Plaintiff argues that Defendant's alleged damages are too speculative to sustain a cause of action because Defendant failed to provide any method to calculate its lost profits with reasonable certainty. Plaintiff argues that Defendant identifies its lost profits-based Defendant's 40-year business relationship with the Mexican Navy and the annual revenue generated during that 40-year period.

Plaintiff further claims that Defendant failed to plead and cannot prove that Plaintiff contemplated that a delay in delivery could potentially result in Plaintiff being required to indemnify Defendant. Moreover, Plaintiff argues that documentary evidence – the Purchase Order and Invoice – demonstrate as a matter of law that the parties did not contemplate Plaintiff assuming unlimited potential liability for future profits. Plaintiff also argues that such a consequence for an alleged breach of contract would have required an express agreement among the parties at the time of contracting.

In Opposition, Defendant argues that Plaintiff was aware of the consequences of its failure to deliver the goods by the specified date to the Mexican Navy would result in the termination of any future relationship between Defendant and the Mexican Navy. Defendant also argues that Defendant's damages were foreseeable by the Parties and are reasonably capable of being determined.

Defendant states that the UCC 2-715(2)(a) expressly gives the buyer a right to consequential damages resulting from a seller's breach. Defendant claims that under the UCC, "when a written contract is silent with respect to damages, a court applies a 'commonsense rule' to determine what the parties would have concluded had they considered the subject."

Defendant further argues that the UCC follows the common-law rule that the seller is liable for consequential damages of which the seller had a reason to know. Additionally, Defendant argues that the rule that damages must be within the contemplation of the parties is a rule of foreseeability. Defendant claims that the party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made.

Additionally, Defendant argues that in the instant case, termination of a future relationship with the Mexican Navy due to Plaintiff's alleged breach of contract was reasonable and foreseeable by the Plaintiff, due to the parties' 30-year relationship. Defendant argues that due to this relationship the parties were both familiar with the consequences of failing to honor government contracts. Defendant further argues that damages were contemplated because Plaintiff was aware and knew that the Goods had been purchased expressly to fill the Defendant's contract with the Mexican Navy. Specifically, they were aware that failing to meet the terms of the Navy Contract would result in Defendant's disqualification from any future business with the Mexican Navy.

Furthermore, Defendant argues that the requirement that damages be reasonably certain, does not require absolute certainty. Defendant states that damages resulting from the loss of future profits are often an approximation which does not require a determination with “mathematical precision”, only that they be “capable of measurement based upon known reliable factors without undue speculation”. Defendant argues that it may use, “and the Court should accept”, any reliable method offered based on evidence offered by Defendant demonstrating Defendant’s longstanding business relationship with the Mexican Navy.

In Reply, Plaintiff argues that under UCC. 2-715, a party must explicitly plead and prove that “the potential for consequential damages” on collateral business transactions was within the opposing party’s contemplation at the time of entering into the agreement.

Plaintiff argues that Defendant failed to satisfy this standard as Plaintiff’s general awareness of Defendant’s relationship with the Mexican Navy is insufficient to prove that Plaintiff contemplated “assuming the role of insurer or guarantor” of Defendant’s contracts with the Mexican Navy. Plaintiff also argues that Defendant’s claim for lost profits do not flow from any provision set forth in the Contract between the parties, instead the alleged lost profits arise from “collateral business arrangements” with non-parties to the Contract.

Plaintiff claims that although Defendant argues that “when a written contract is silent with respect to damages, a court applies a ‘commonsense rule’ to determine what the

parties would have concluded had they considered the subject”, Defendant cannot show that in the context of the contract Plaintiff agreed to assume liability for lost profits damages ten times greater than the contract price. Plaintiff further argues that knowing that a delay in shipment could hurt Defendant’s relationship with the Mexican Navy does not imply that Plaintiff agreed to assume total liability for the Mexican Navy cancelling potential future contracts with Defendant.

Further, Plaintiff argues that Defendant’s claim stating that both parties were aware of the sensitivity and rigidity of the contracts in the industry “weighs heavily against” Defendant. Plaintiff argues that in this case Defendant would have specified the risk in the contract if they intended Plaintiff to agree to pay lost profits in the event of a breach.

Additionally, Plaintiff argues that Defendant’s proposed damages is rooted in speculation and fails to satisfy the threshold “reasonable certainty” standard necessary to get past the pleadings stage. Plaintiff further argues that Defendant’s claims of future collateral business arrangements require the Court to speculate about (1) which products Defendant would have been approved to ship; (2) the market demand for those products; (3) the costs to produce the products; (5) the wholesale price for those products; and (6) the profitability of the business. Plaintiff argues that this quantifiable loss is far from the “reasonable certainly” standard, requiring dismissal.

Analysis/Law

When deciding a motion for summary judgment, the court must determine if triable issues of fact exist. *Matter of Suffolk County Dept. of Social Services v. James*, 83 N. 2d 178 [1994]. In doing so, the court must view the evidence in a light most favorable to the non-moving party and afford the non-moving party all reasonable inferences which can be drawn from the evidence. *Negri v. Stop & Shop, Inc.*, 65 N. 2d 625 [1985]; and *Louniakov v. M. R.O. D. Realty Corp.*, 282 A.D.2d 657 [2d Dept. 2001].

Once the movant has established a prima-facie showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in admissible form establishing the existence of triable issues of fact or demonstrate an acceptable excuse for its failure to do so. *Zuckerman v. City of New York*, 49 N.Y. 2d 557 [1980]. See also *Davenport v. County of Nassau*, 279 A.D. 2d 497 [2d Dept. 2001]; and *Bras v. Atlas Construction Corp.*, 166 A.D. 2d 401 [2d Dept. 1990]. Summary judgment cannot be avoided on the basis of mere conclusions, unsubstantiated allegations or expressions of hope. *Zuckerman v. City of New York*, supra.

When a motion is based on a failure to state a cause of action, such as in the instant case, the petition's legal sufficiency is judged solely on the face of the allegations and no consideration of the facts alleged in support of the motion will be permitted. Said another way, the Court's scope of review is narrow, and it is limited to ascertaining whether the pleading states any cognizable cause of action. See *Hogan v NY State Off of Mental Health*, 115 A.D.2d 638 [2d Dept. 1985].

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." See *Heffez v L & G Gen. Const., Inc.*, 56 A.D.3d 526 [2d Dept. 2008].

Further, on a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true. See *Holly v Pennysaver Corp.*, 98 A.D.2d 570 [2d Dept. 1984], *S. v. County of Nassau, Dept. of Social Servs.*, 83 A.D.2d 628[2d Dept. 1981]).

Loss of future profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law." *Kenford Co. v County of Erie*, 67 N.Y.2d 257 [1986], citing *Wakeman v Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205 [1886].

"A party may not recover damages for lost profits unless they were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty." *Ashland Mgt. v Janien*, 82 N.Y.2d 395 [1993].

The requirement that damages be reasonably certain does not require absolute certainty (see *id.* at 403). "Damages resulting from the loss of future profits are often an approximation. The law does not require that they be determined with mathematical precision. It requires only that damages be capable of measurement based upon known reliable factors without undue speculation." *Id.*; see *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of NY*, 10 N.Y.3d 187 [2008]. "It is fundamental to the law of

damages that one complaining of injury has the burden of proving the extent of the harm suffered. *G & A Moving & Stor. Co. v Computer Assoc. Intl.*, 233 A.D.2d 479 [2d Dept 1996].

Plaintiff has failed to establish its *prima-facie* burden that no issues of fact exist with respect to Defendant's Second Counterclaim.

Accordingly,

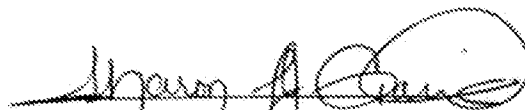
It is

ORDERED, Plaintiff's motion for an Order dismissing the Second Counterclaim in the Verified Answer with Counterclaims for alleged lost future profits based upon documentary evidence and for failure to state a cause of action; is Denied.

All applications not specifically addressed herein are denied.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
September 29, 2021



HON. SHARON M.J. GIANELLI,
Justice of the Supreme Court

The conformed signature on this Order and copies thereof shall be deemed original.

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ENTERED
Oct 04 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE