

Helguson v AlphaPerformance USA, LLC
2021 NY Slip Op 33681(U)
August 4, 2021
Supreme Court, New York County
Docket Number: Index No. 654581/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 42EFM

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GRIMUR HELGUSON,	INDEX NO.	<u>654581/2020</u>
Plaintiff,		
- v -	MOTION DATE	<u>05/26/2021, 05/26/2021</u>
ALPHAPERFORMANCE USA, LLC and GEORGE VILLAR	MOTION SEQ. NO.	<u>001 002</u>
Defendant.		

**DECISION + ORDER ON
MOTION**

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HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 26, 28, 29, 32, 34, 36

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 27, 30, 31, 33, 35

were read on this motion to/for DISMISS.

I. INTRODUCTION

In this action seeking damages for breach of a contract for sale of a customized racing motorcycle, the defendants, AlphaPerformance USA, LLC (Alpha), and George Villar (Villar) each move, pre-answer, pursuant to CPLR 3211(a)(1), (a)(5), and/or (a)(7) to dismiss the complaint (SEQ 001, SEQ 002). The plaintiff opposes the motions. Alpha’s motion is granted in part. Villar’s motion is granted.

II. BACKGROUND

The plaintiff is a resident of Iceland who builds and races high-performance racing motorcycles and runs a successful drag racing team in Iceland. The complaint asserts that in mid

to late 2014, the plaintiff contacted Alpha, a company run by Villar, for the purpose of having Alpha manufacture a new racing motorcycle that the plaintiff and his team could use to race in the United States. Pursuant to a Motor Vehicle Bill of Sale (the 2014 contract) dated December 21, 2014, the parties agreed that, in exchange for the plaintiff's payment of \$59,988.00, Alpha would provide to the plaintiff a BMW HP4 motorcycle customized to include, *inter alia*, upgraded wheels, brakes, bodywork, electronics, and power upgrades.

On December 29, 2014, the plaintiff paid \$20,000 to Alpha. On February 9, 2015, Villar emailed the plaintiff on behalf of Alpha to update him that the motorcycle would be ready for shipping in two weeks. On April 9, 2015, and April 10, 2015, the plaintiff transferred additional monies totaling \$38,980 to Alpha. Around that time, the plaintiff was advised that the motorcycle was not ready and that assembly had not even started. The plaintiff then visited New York and met with Villar, who promised the plaintiff that the motorcycle would be completed within a week and ready to ship in late April or early May 2015. On April 27, 2015, the plaintiff made an additional payment of \$9,057.51 to Alpha. In the following weeks, however, the plaintiff's attempts to contact Villar went unanswered. On May 13, 2015, Villar emailed the plaintiff and advised that the motorcycle would be in a crate and ready for delivery on May 15, 2015. Villar also emailed pictures purporting to show the plaintiff's motorcycle partially assembled. Nonetheless, the defendants failed to deliver a motorcycle to the plaintiff on May 15, 2015. On May 16, 2015, the plaintiff personally visited the BMW of Manhattan where Villar represented Alpha had its motorcycle shop. There, the plaintiff was informed that Alpha had not obtained the base motorcycle from BMW until April 16, 2015, and that no progress had been made towards completion of the motorcycle he requested.

On September 9, 2015, the plaintiff, who had retained an attorney, again visited New York and met with the defendants to discuss a settlement of the matter. On November 4, 2015, the parties executed a letter agreement (the 2015 letter agreement) wherein Alpha promised to provide the plaintiff with additional parts at dealer cost for other motorcycles the plaintiff owned. Alpha further represented that it anticipated it would take 60-75 days to complete work on the upgraded BMW motorcycle and send it out for controlled break-in and tuning. In late 2015 or early 2016, the plaintiff was advised by Villar that the BMW motorcycle was close to completion. The plaintiff traveled to New York on April 4, 2016, to inspect the motorcycle. Upon inspection, the plaintiff discovered it was missing many parts and that there were no spare parts, as had been agreed upon. Further, on April 6, 2016, the plaintiff put the motorcycle through a dynamometer test at a motorcycle shop in Manhattan and discovered that it was unable to produce the agreed upon horsepower. On April 25, 2016, the plaintiff wrote to the defendants and demanded the 2014 contract be terminated and that he be refunded, or that the defendants provide an alternative custom-built motorcycle meeting the specifications outlined in the Bill of Sale. The parties attempted to resolve the matter thereafter but were unsuccessful.

Finally, on September 21, 2020, the plaintiff commenced this action. The complaint states causes of action sounding in breach of the 2014 contract (first cause of action), breach of the 2015 letter agreement (second cause of action), fraudulent inducement (third cause of action), piercing the corporate veil against Villar (fourth cause of action), and unjust enrichment (fifth cause of action). The instant motions to dismiss ensued.

III. LEGAL STANDARD

A. CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable.” See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) quoting Fontanetta v John Doe 1, *supra*.

B. CPLR 3211(a)(5)

“On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired.” Benn v Benn, 82 AD3d 548, 548 (1st Dept. 2011) (quoting Island ADC, Inc. v Baldassano Architectural Group, P.C., 49 AD3d 815, 816 [2nd Dept. 2008]); see also Gravel v Cicola, 297 AD2d 620 (2nd Dept. 2002). “The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled or was otherwise inapplicable, or whether the action was actually commenced within the period propounded by the defendant.” QK Healthcare, Inc. v InSource, Inc., 108 AD3d 56, 65 (2nd Dept. 2013); see MTGLQ Investor, LP v Wozencraft, 172 AD3d 644 (1st Dept. 2019); Epiphany Community Nursery School v Levey, 171 AD3d 1 (1st Dept. 2019); J.A. Lee Elec., Inc. v City of New York, 119 AD3d 652 (2nd Dept. 2014). The plaintiff’s submissions in

response to the motion “must be given their most favorable intendment.” Benn v Benn, *supra* at 548 (quoting Arrington v New York Times Co., 55 NY2d 433, 442 [1982]).

C. CPLR 3211(a)(7)

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

IV. DISCUSSION

A. First and Second Causes of Action

The defendants claim that the first and second causes of action, which sound in breach of contract, must be dismissed as time-barred pursuant to CPLR 3211(a)(5). They characterize both the 2014 contract and the 2015 letter agreement as contracts for the sale of goods for the price of \$500 or more, governed by Section 2-725 of the Uniform Commercial Code (UCC) and subject to a four-year statute of limitations period. Conversely, the plaintiff avers that the subject contracts were for services, not goods, and that they are therefore subject to the six-year statute of limitations for non-UCC breach of contract claims set forth in CPLR 213(2).

This matter involves a mixed transaction contract where both goods and services have been promised. For statute of limitations purposes, the distinction between goods contracts and services contracts under New York law turns on whether the transaction, viewed as a whole, is one in which services predominate over any sale of goods aspect, such that the transfer of personal property is but an incidental feature of the transaction. See Milau Associates v North

Ave. Development Corp., 42 NY2d 482 (1977); Hagman v Swenson, 149 AD3d 1 (1st Dept. 2017).

Here, the 2014 contract is labeled a “Motor Vehicle Bill of Sale” and provides that “for full payment in the sum of \$59,988.00,” Alpha “sells and transfers” to the plaintiff a 2013 BMW Motorrad series HP4 racebike in black. The 2014 contract then includes a list of “Specifications” applicable to the subject motorcycle. The 2015 letter agreement specifies the steps that remained to complete building the motorcycle, including installation of parts, fueling, break-in, and tuning. The 2015 letter agreement also promises to provide several additional items at dealer cost, not to be installed. The court concludes that both the 2014 contract and the 2015 letter agreement, viewed as a whole, contemplate a transaction predominantly for the sale of goods. While manufacture and customization services are incidental to the contemplated transaction, the primary purpose of the agreements is plainly the transfer of personal property to the plaintiff. See UCC § 2-105 (defining “goods” as “including specially manufactured goods”). Accordingly, the UCC’s four-year statute of limitations period is applicable to the plaintiff’s breach of contract claims.

A cause of action for breach of any contract for sale “accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach.” UCC § 2-275(2). The defendants aver that the plaintiff’s claims accrued “by the spring/summer of 2015,” presumably since after the plaintiff had paid all monies owed under the 2014 contract and still had not received his motorcycle. Alternatively, to the extent the 2015 letter agreement extended the time to perform under the 2014 contract, the defendants contend that the plaintiff’s claims accrued on January 18, 2016, at the latest. Conversely, the plaintiff states that his claims did not accrue until

April 2016, when Alpha delivered a motorcycle that failed to conform to the 2014 contract specifications.

The court agrees with the plaintiff. The defendants' arguments that the breach of contract claims accrued sooner than the date of delivery of the motorcycle are not based on a reasonable interpretation of the subject contracts, neither of which provided any specific deadline for performance. Alpha's representation in the 2015 letter agreement that it "anticipate[d]" it would take "60-75 days to complete the work" on the upgraded motorcycle and send it out for controlled break-in and tuning does not equate to a January 18, 2016, deadline for delivery of the bike. Moreover, the defendants misstate the gravamen of the plaintiff's claims, which is not merely that the defendants failed to "timely" provide the agreed upon motorcycle, but that the defendants failed "to provide Plaintiff with a highly specialized, custom built, racing motorcycle as set forth in the parties' [agreement]." The latter took place when Alpha delivered the purportedly defective product to the plaintiff. Finally, the plaintiff has alleged that the defendants affirmatively and repeatedly represented that they intended to perform under the subject contracts until as late as "early 2016," and even offered consideration for the plaintiff's agreement to extend their time to perform after the plaintiff had fully paid the sales price. The defendants did, in fact, supply the motorcycle to the plaintiff on April 4, 2016. In the face of these facts, the defendants' argument that any breach of the contracts occurred prior to their tendering performance fails.

Accordingly, the court finds that the plaintiffs' breach of contract claims accrued on April 4, 2016. The four-year statute of limitations applicable to those claims expired on April 3, 2020. However, Governor Andrew Cuomo's Executive Order 202.8, issued on March 20, 2020, directed, *inter alia*, that "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,” be tolled until April 19, 2020. Subsequently, Governor Cuomo issued a series of executive orders approximately every 30 days extending tolling through November 3, 2020. The plaintiff’s time to commence this action therefore had not expired when he filed the complaint on September 21, 2020.

For the foregoing reasons, the plaintiff’s first and second causes of action, sounding in breach of contract, survive the motion.

B. Third Cause of Action

The defendants next assert that the third cause of action, sounding in fraudulent inducement, is inadequately pleaded because it is duplicative of the plaintiff’s first and second causes of action, which seek to recover for breach of contract. “It is a well established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.” Dormitory Authority v Samson Construction Co., 30 NY3d 704 (2018) (citation omitted). However, the Court of Appeals has also recognized that “a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract.” North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171 (1968); see also Sommer v Federal Signal Corp., 79 NY2d 540 (1992).

The plaintiff’s allegations in support of his third cause of action, alleging fraud in the inducement, fail to assert the breach of any duty distinct from, or in addition to, the defendants’ duties under the subject contracts. The plaintiff’s claim is premised on the plaintiff’s assertion that “Defendants were incapable of constructing the specialty motorcycle [the plaintiff] had requested” and nonetheless represented that they could construct the motorcycle “for the purpose of inducing [the plaintiff] to enter a contract with them, which they knew they would never

produce under.” The defendants’ underlying statement here is a promissory statement of future performance and does not amount to a misrepresentation of a present fact extraneous to the contract, as required to sustain a separate cause of action based on a fraud in the inducement. See The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 (1st Dept. 2004); First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287 (1st Dept. 1999). Furthermore, the only fraud claimed in relation to this misstatement and Villar’s alleged misstatement that the motorcycles was “nearing competition” is based exclusively on the same facts, i.e., nonperformance, as underlie the breach of contract claims. See Gordon v Dino De Laurentiis Corp., 141 AD2d 435 (1st Dept. 1988); MP Innovations, Inc. v Atlantic Horizon International, Inc., 72 AD3d 571 (1st Dept. 2010). In addition, the plaintiff does not allege that he was induced by the defendants’ misstatements to do anything outside of the written agreement, i.e., paying the amount agreed to.

For the foregoing reasons, the third cause of action is dismissed as against both defendants.

C. Fourth Cause of Action

The complaint’s fourth cause of action does not state any separate legal claim. Rather, it seeks to hold defendant Villar individually liable for the actions of the corporate defendant. This theory of liability fails as a matter of law.

“A corporate officer is not subject to personal liability for actions taken in furtherance of the corporation’s business under the well-settled rule that an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent’s intention to substitute or superadd his personal liability for, or to, that of his principal.” Worthy v New York City Housing Authority, 21 AD3d 284, 286 (1st Dept. 2005). This presumption may be rebutted

where a plaintiff meets the “heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.” TNS Holdings v MKI Sec. Corp., 92 NY2d 335, 339 (1998); see Retropolis, Inc. v 14th St. Dev. LLC, 17 AD3d 209 (1st Dept. 2005).

There is no plausible argument here that Villar was not acting in furtherance of Alpha’s business with regard to the plaintiff’s allegations. Moreover, there are no facts alleged to indicate that Villar acted on his own behalf or intended to bind himself personally for his actions, sufficient to rise to the level of dominating the transaction attacked. Based on the foregoing, Villar’s motion to dismiss the complaint as against him is granted.

D. Fifth Cause of Action

The fifth cause of action seeks to recover the monies the plaintiff paid to Alpha under a theory of unjust enrichment. As the defendants correctly contend, however, “where there is an express contract no recovery can be had on a theory of implied contract.” SAA-A v Morgan Stanley Dean Witter & Co., 281 AD2d 201, 203 (1st Dept. 2001); see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). Inasmuch as the plaintiff’s unjust enrichment claim seeks the same damages and is premised on exactly the same facts as his breach of contract claims, the fifth cause of action is dismissed as duplicative.

V. CONCLUSION

Accordingly, it is

ORDERED that the motion of the defendant AlphaPerformance USA, LLC, pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7) to dismiss the complaint as against it is granted to the extent

that the third and fifth causes of action of the complaint are dismissed as against AlphaPerformance USA, LLC, and the motion is otherwise denied; and it is further

ORDERED that the motion of the defendant George Villar pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7) to dismiss the complaint as against him is granted, and the complaint is dismissed against the defendant George Villar in its entirety; and it is further

ORDERED that the remaining defendant, AlphaPerformance USA, LLC, shall file an answer to the surviving claims in the complaint within 30 days; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference, to be conducted remotely via Microsoft Teams, on December 2, 2021, at 11:30 a.m.

This constitutes the Decision and Order of the court.

DATED: August 4, 2021



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON