

Fracht FWO, Inc. v TPR Holdings, LLC

2022 NY Slip Op 31549(U)

May 11, 2022

Supreme Court, New York County

Docket Number: Index No. 652186/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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| <p>PRESENT: <u>HON. LOUIS L. NOCK</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>FRACHT FWO, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>TPR HOLDINGS, LLC,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p> | <p>PART 38M</p> <p>INDEX NO. <u>652186/2021</u></p> <p>MOTION DATE <u>07/08/2021</u></p> <p>MOTION SEQ. NO. <u>001</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p> |
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15

were read on this motion for DISMISSAL.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that the motion to dismiss the complaint is denied for the following reasons.

Plaintiff commenced this action on April 4, 2021 based upon allegations of Plaintiff transporting freight (with bills of lading) and Defendant receiving the transported goods between the dates of October 11, 2018 and May 19, 2019. Plaintiff commenced a prior action in the U.S. District Court for the Southern District of New York against the Defendant, based upon the same claims, on April 3, 2020 under Civil Action No. 1:20-ev-2706. *See*, NYSCEF Doc. No. 12. Defendant then moved to dismiss that federal complaint alleging that Plaintiff's claims were based upon state law causes of action. *See*, NYSCEF Doc. No. 13. The District Court Action was dismissed based upon lack of federal question jurisdiction. Plaintiff thereafter commenced the instant action.

The instant motion asserts that the complaint's three causes of action, alleging a failure to pay for the goods, fails to state causes of action (CPLR 3211 [a] [7]).

On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, "the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." *Alden Global Value Recovery Master Fund. L.P. v KevBank N.A.*, 159 AD3d 618, 621-622 (1st Dept 2018). Under CPLR 3211(a)(7), pleadings are to be afforded a liberal construction and the plaintiff is afforded every possible favorable inference. *Leon v Martinez*, 84 NY2d 83 (1994). Further, a motion court must only determine "whether the facts as alleged fit within any cognizable legal theory." *Id.*, at 87-88. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005).

Per CPLR 3013 a complaint is sufficient if it alleges facts that are sufficiently particular to give the court and the defendants proper notice of the "transactions occurrences, or series of transactions [and] occurrences" intended to be proven. *Herrmann v CohnReznick LLP*, 155 AD3d 419, 419-420 (1st Dept 2017). Moreover, modern pleading rules focus on whether the pleader has a cause of action that is discernible from the allegations in the complaint. *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 (1976).

The complaint sets forth three causes of action. The first cause of action is for breach of contract. The second cause of action seeks recovery under an account stated. The third cause of action seeks legal fees based upon a contractual agreement.

The essential elements of a cause of action to recover damages for breach of contract are: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages. *See, Agway, Inc. v Curtin*, 161 AD2d 1040 (1990). Plaintiff's complaint has alleged all of these elements and the Defendant's motion should be denied. The complaint alleges (1) formation of a contract between Plaintiff and Defendant; (2)

performance by Plaintiff; (3) defendant's failure to perform and (4) resulting damage. Regarding the formation of the contract (i.e., the Terms and Conditions submitted by Plaintiff under NYSCEF Doc. No. 3), the complaint not only makes the allegation of the contract, but also sets forth in paragraph "5" the dates of the contract and also the terms of the contract in paragraph "6".

Plaintiff alleges that it performed under the contract by transporting goods pursuant to Defendant's request as set forth in paragraph "8" of the complaint. The complaint alleges the failure to perform by Defendant by stating that the Defendant failed to pay the amounts due, in Paragraph "10" of the Complaint. Finally, the Plaintiff's damages are set forth in paragraph "11" of the complaint, as \$298,380. The damages are further alleged by virtue of a statement of account setting forth the amounts owed. *See*, NYSCEF Doc. No. 4. Thus, the first cause of action sets forth the elements for breach of contract and places Defendant on notice of Plaintiff's claim in compliance with CPLR §3013. Therefore, Defendant's motion must be denied regarding the first cause of action.

Plaintiff's second cause of action seeks damages for an account stated. The basic premise of a claim for account stated are, "where an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated unless fraud, mistake or other equitable considerations are shown." *Cushman & Wakefield v Kadmon*, 175 AD3d 1141 (1st Dept 2019) (citation and internal quotations omitted). Paragraph "16" of the complaint states that Plaintiff regularly billed the Defendant for the sums due satisfying the requirement that the account was presented, that Defendant received the bills and retained the billing statements without objection. All of the

elements of account stated were alleged in the complaint and the Defendant's motion must, therefore, be denied as to the second cause of action.

The third cause of action seeks legal fees based upon a contractual arrangement between the parties. It is well settled that legal fees may only be recovered if they are provided for by statute or, as in this case, a contractual agreement between the parties. *E.g., Brill Physical Therapy, P.C. v Leaf*, 82 AD3d 413 (1st Dept 2011). Paragraph "19" of the complaint refers to paragraph "13" of the Terms and Conditions, which provide for legal fees incurred by Plaintiff. *See also*, Terms and Conditions, NYSCEF Doc. No. 4. Thus, the motion to dismiss the third cause of action should be denied.

Defendant expends effort in criticizing the complaint for citing federal statutes within the allegations forming the first cause of action for breach of contract (49 USC 13710). However, as stated above, the task of the court on a motion to dismiss for failure to state a claim is premised on the question whether a cognizable claim has been stated as a result of the allegations (*see, Leon, supra; Rovello, supra*). As discussed above, sufficient allegations have been stated to support the statement of a claim, under New York law, for breach of contract. Indeed, Defendant's memorandum of law submitted to federal District Court strenuously argued that Plaintiff's claims are state law claims (*see, NYSCEF Doc. No. 13*).

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied.

This will constitute the decision and order of the court.

ENTER:



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| <u>5/11/2022</u> | | | <u>LOUIS L. NOCK, J.S.C.</u> |
| DATE | | | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| APPLICATION: | <input type="checkbox"/> GRANTED | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |