PowerFlex Solar, LLC v Solar PV Pros, LLC
2022 NY Slip Op 35226(U)
December 22, 2022
Supreme Court, Albany County
Docket Number: Index No. 905013-22
Judge: Richard M. Platkin
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STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

POWERFLEX SOLAR, LLC,

Plaintiff,

DECISION & ORDER

-against-

SOLAR PV PROS, LLC,
MEITUS ENERGY SERVICES, LLC,
and EOS ORGANIZATION, LLC,

Defendants.

Index No.: 905013-22

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Plaintiff PowerFlex Solar, LLC ("PowerFlex") commenced this commercial action to recover damages from defendant Solar PV Pros, LLC ("SPVP") for its alleged breach of a contract to supply monocrystalline modules for use in solar projects. PowerFlex also sues defendants EoS Organization, LLC ("EoS") and Meitus Energy Services, LLC ("Meitus") based on their alleged agreements to supply SPVP with certain components needed for the modules.

In lieu of answering, SPVP and EoS move under CPLR 3211 (a) (8) to dismiss PowerFlex's complaint for lack of personal jurisdiction.[1] EoS alternatively seeks dismissal of the claims against it under CPLR 3211 (a) (1) and (7). PowerFlex opposes the motions.

BACKGROUND

PowerFlex is a Delaware limited liability company, with its principal place of business in California (*see* NYSCEF Doc No. 1 ["Complaint"], ¶ 1).[2]

SPVP is a California limited liability company, with its principal place of business in California (*see id.*, ¶ 3; NYSCEF Doc No. 23 ["Saris Aff."], ¶ 2).

Meitus is an Illinois limited liability company, with its principal place of business in Illinois (*see* Complaint, ¶ 4).

EoS is a Delaware limited liability company, with its principal place of business in Florida (*see id.*, ¶ 5; NYSCEF Doc No. 10 ["Green Aff."], ¶ 2).

PowerFlex contracted with SPVP to purchase the modules in November and December 2019 (*see* Complaint, ¶ 9). The modules were to be delivered to solar projects in New York, Rhode Island and California (*see id.*, ¶ 10; NYSCEF Doc Nos. 2, 24 ["Purchase Orders"]).

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1 Meitus has not appeared in this action.

2 At the time of the transactions at issue, PowerFlex was known as EnterSolar, LLC (*see* Complaint, ¶ 2).

SPVP then "entered into an agreement with EoS to supply [it with] necessary components of the modules PowerFlex had purchased" (Complaint, ¶ 11). "EoS, in turn, entered into an agreement with Meitus to supply EoS with necessary components of the modules PowerFlex had purchased" (*id.*, ¶ 12).

"In late 2019, PowerFlex paid $1,158,383.26 to SPVP as an agreed-upon deposit on the module purchases" (*id.*, ¶ 13). However, "PowerFlex has never received any of the modules ordered, or indeed any performance whatsoever under its purchase agreements with SPVP" (*id.*, ¶ 14). PowerFlex further alleges that "a significant portion of [its] deposit payment . . . was received by both EoS and Meitus" (*id.*, ¶ 15; *see also id.*, ¶ 16).

PowerFlex commenced this action on July 1, 2022, seeking to recover the deposit paid for the modules, together with the consequential damages sustained by reason of their non-delivery. The Complaint alleges four causes of action: (1) breach of contract (SPVP); (2) unjust enrichment (all defendants); (3) breach of contract on the third-party beneficiary theory (EoS and Meitus); and (4) conversion (all defendants).

In lieu of answering, EoS and SPVP move separately under CPLR 3211 (a) (8) to dismiss the action for lack of personal jurisdiction, and EoS also moves to dismiss the contract and conversion claims alleged against it.

DISCUSSION

A. EoS's Role

Initially, the proof submitted by EoS establishes that many of PowerFlex's factual allegations regarding EoS's role in the supply of the subject modules are incorrect.

PowerFlex alleges that "SPVP entered into an agreement with EoS," pursuant to which EoS was to "supply SPVP with necessary components of the modules PowerFlex had purchased"

(Complaint, ¶ 11). However, EoS's proof shows that it contracted with Meitus, not SPVP (*see* Green Aff., ¶¶ 3, 6; *id.*, Exs. 1-3 ["Meitus-EoS Agreements"]).

Further, the Complaint alleges that the Meitus-EoS Agreements required Meitus "to supply EoS with necessary components of the modules PowerFlex had purchased" from SPVP (Complaint ¶ 12). In fact, the agreements called for Meitus to *purchase* modules *from* EoS (*see* Green Aff., Exs. 1-3).

And while EoS was aware that Meitus had contracted to resell the modules to SPVP, EoS "did not know who [SPVP] would sell the solar panels to . . . . At the time, EoS did not know about PowerFlex," and it "first found out about PowerFlex after Meitus breached the [Meitus-EoS] Agreements" (Green Aff., ¶ 5). EoS acknowledges, however, that one of its agreements with Meitus called for the shipment of goods to a project in New York (*see id.*, ¶ 8 & Ex. 3-C).

The foregoing facts are not disputed by PowerFlex via affidavits or other competent proof (*see Fischbarg v Doucet*, 9 NY3d 375, 381 n 5 [2007]; *see also* NYSCEF Doc No. 29, p. 2)

B. Personal Jurisdiction

A defendant may move for pre-answer dismissal based on lack of personal jurisdiction (*see* CPLR 3211 [a] [8]). As is pertinent here, "a New York court may not exercise personal jurisdiction over a non-domiciliary unless two requirements are satisfied: the action is permissible under the long-arm statute (CPLR 302) and the exercise of jurisdiction comports with due process" (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019] [citation omitted]). "If either the statutory or constitutional prerequisite is lacking, the action may not proceed" (*id.*).

"The party seeking to assert personal jurisdiction bears the ultimate burden of proof to establish a basis for such jurisdiction. However, to successfully oppose a motion to dismiss for lack of personal jurisdiction, the plaintiff need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the court" (*Sacco v Reel-O-Matic, Inc.*, 183 AD3d 567, 568 [2d Dept 2020] [internal quotation marks, citations and brackets omitted]). In other words, the plaintiff need only make a "sufficient start" at demonstrating jurisdiction (*Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]).

PowerFlex asserts that long-arm jurisdiction over defendants is available under CPLR 302 (a) (1), which permits the "exercise [of] personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." According to PowerFlex, "defendants each contracted to supply monocrystalline solar modules for a solar project in New York state (Central Islip), and a large portion of plaintiff's damages arise from defendants' failure to satisfy those contractual agreements with respect to the New York project" (Complaint, ¶ 6).

"[T]o determine whether personal jurisdiction exists under CPLR 302 (a) (1), the court must determine (1) whether the defendant purposefully availed itself of the privilege of conducting activities within the forum State by either transacting business in New York or contracting to supply goods or services in New York, and (2) whether the claim arose from that business transaction or from the contract to supply goods or services" (*Malczuk v Michaels Org.*, 70 Misc 3d 218, 221 [Sup Ct, Queens County 2020] [internal quotation marks and citations omitted]; *see D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 297 [2017]).

In applying CPLR 302 (a) (1), courts ordinarily look to the following factors:

> (1) whether the purchase orders and other documents provide for shipment to New York; (2) whether the defendant collected New York sales tax in connection with the transaction; (3) whether the defendant solicited the contract in New York; (4) whether the defendant entered New York for purposes of performing the contract; and (5) any other factor showing that defendant voluntarily

> and purposefully availed itself of the privilege of transacting business in New York (*Wickers Sportswear, Inc. v Gentry Mills, Inc.*, 411 F Supp 2d 202, 210 [ED NY 2006], citing *Traver v Officine Meccaniche Toshci SpA*, 233 F Supp 2d 404, 412 [ND NY 2002]).

"The 'due process' element is satisfied where the nondomiciliary has minimum contacts with New York State and based upon those contacts, defendant could or should have reasonably anticipated being 'haled into court' here" (*English v Avon Prods., Inc.*, 206 AD3d 404, 407 [1st Dept 2022], quoting *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000]).

It is undisputed that EoS and SPVP did not (and would not) collect New York sales tax in connection with the contracts, they did not solicit any of the contracts in New York, and they did not enter New York to perform under the contracts (*see* Saris Aff., ¶¶ 5-6, 8; Green Aff., ¶¶ 4, 7, 9). Nonetheless, PowerFlex argues that the New York courts "clearly may exercise personal jurisdiction over both EoS and SPVP pursuant to CPLR § 302 (a) (1), because, in the words of the statute, both defendants 'contract[ed] anywhere to supply goods or services in' New York" (NYSCEF Doc No. 29, p. 1), which also satisfies the due process element (*see id.*, pp. 6-7).

SPVP admits contracting with PowerFlex to supply 3,969 solar modules to a project site in New York (*see* Saris Aff., ¶¶ 3-4; Purchase Orders). Specifically, the November 12, 2019 purchase order issued by PowerFlex calls for the modules referenced therein to be shipped to a project in Central Islip, New York.[3]

This is "contract[ing] anywhere to supply goods . . . in the state" within the meaning of CPLR 302 (a) (1), regardless of "whether (the goods were) actually shipped or not" (*Anderson Dev. Corp. v Isoreg Corp.*, 154 AD2d 859, 860-861 [3d Dept 1989]; *accord Fica Frio, Ltd. v Seinfeld*, 434 F Supp 3d 80, 88-90 [SD NY 2020]).

[3] The two other purchase orders, dated November 27, 2019 and December 9, 2019, request that the modules referenced therein be shipped to projects in Rhode Island and California, respectively.

And by contracting to supply goods in New York, SPVP "not only created a jurisdictional predicate under CPLR 302 (a) (1), it also established the constitutionally required minimum contacts and satisfied due process requirements by purposely availing itself of the privilege of conducting activities in New York, invoking the benefits and protections of its laws" (*Anderson Dev. Corp.*, 154 AD2d at 860 [internal quotation marks and citations omitted]; *see also* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B C302:9 ["As a general matter, . . . a defendant who purposefully seeks to benefit from the New York commercial market by agreeing to ship goods . . . here can reasonably expect to be sued in New York for either faulty performance or nonperformance of the agreement. Recognizing that due process would permit the assertion of jurisdiction in most such cases, the Legislature was persuaded to add the supply-of-goods-or-services provision" (citations omitted)]).[4]

EoS likewise admits to contracting to supply the same number of solar modules to the same New York project (*see* Green Aff., Ex. 3-C). The only difference is that SPVP contracted directly with PowerFlex to supply the modules to the New York customer, while EoS contracted with Meitus to supply the modules to the customer. The Court finds this distinction to be inconsequential, however.

By its plain terms, CPLR 302 (a) (1), permits long-arm jurisdiction where a defendant "contracts anywhere . . . to supply goods . . . in the state." "What matters is that the non-domiciliary contracted and intended to send the goods to New York" (*Holbrook Plastic Pipe*

[4] In *Benifits by Design Corp. v Contractor Mgt. Servs., LLC* (75 AD3d 826 [3d Dept 2010]), relied upon by SPVP and EoS, jurisdiction under CPLR 301 (a) (1) did not exist because the defendant, an escrow agent, "merely serv[ed] as a conduit for the transfer of documents," and thus did not supply goods or services in New York (*id.* at 830). And in *Carpino v National Store Fixtures*, 275 AD2d 580 [3d Dept 2000]), there was no "proof of . . . contracts to supply goods . . . within the State," and the mere "knowledge of a product's destination, in and of itself, [was deemed] insufficient" absent some proof of a purposeful New York affiliation by the defendant (*id.* at 581).

Supply, Inc. v Jackson, 2006 WL 8441408, *4 [ED NY, Jan. 3, 2006] [citation omitted]).

"Further, the plaintiff need not be in privity of contract with the supplier of the goods to sustain jurisdiction" (*id.* [collecting New York authorities]). "The statutory requirement is simply that the cause of action 'arise from' the defendant's supply of goods or services in New York" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B C302:9, quoting CPLR 302 [a] [1]).

And this is not a case where EoS is being haled into the New York courts based on the "random, fortuitous, or attenuated contacts [it made] by interacting with other persons affiliated with the State" (*Williams v Beemiller, Inc.*, 159 AD3d 148, 157 [4th Dept 2018] [internal quotation marks and citations omitted], *affd* 33 NY3d 523 [2019]). EoS is subject to the personal jurisdiction of the New York courts because it purposefully sought to benefit from the New York market for solar modules by contracting to ship goods into New York, and, as such, "can reasonably expect to be sued in New York for . . . nonperformance of the agreement" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B C302:9).

The Court therefore concludes that it has personal jurisdiction over both EoS and SPVP under CPLR 302 (a) (1) to the extent that PowerFlex's claims arise from defendants' agreements to supply goods in New York.

Accordingly, defendants' motions under CPLR 3211 (a) (8) are granted to the limited extent of dismissing PowerFlex's claims pertaining to the modules to be delivered to Rhode Island and California, and the motions are otherwise denied.

C. Other Arguments for Dismissal (EoS)

EOS also moves for dismissal under CPLR 3211 (a) (1) and (7). Although its notice of motion purports to seek dismissal of all claims (*see* NYSCEF Doc No. 8), the arguments made in its memorandum of law are limited to the claims for breach of contract and conversion (*see generally* NYSCEF Doc No. 9). As such, the unjust enrichment claim stands unchallenged.

On a motion to dismiss under CPLR 3211 (a) (7), the courts' "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" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotation marks and citation omitted]). The complaint "is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference" (*State of New York v Jeda Capital-Lenox, LLC*, 176 AD3d 1443, 1445 [3d Dept 2019] [internal quotation marks and citations omitted]). "Dismissal . . . is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [citations omitted]).

"[A] motion pursuant to CPLR 3211 (a) (1) must be granted where the documentary evidence 'conclusively refutes plaintiff's factual allegations' and establishes a defense as a matter of law" (*Doller v Prescott*, 167 AD3d 1298, 1299 [3d Dept 2018], quoting *Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 106 [2018]). "Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deed, contracts, and any other papers, the contents of which are essentially undeniable" (*Ganje v Yusuf*, 133 AD3d 954, 956-957 [3d Dept 2015] [internal quotation marks and citation omitted]).

1. Breach of Contract (Third-Party Beneficiary)

A party suing for breach of contract as a third-party beneficiary "'must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost" (*Greg Beeche, Logistics, LLC v Cross Country Constr., LLC*, ___AD3d ___, ___, 2022 NY Slip Op 06203, *1-2 [3d Dept, Nov. 3, 2022], quoting *State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]).

The New York Court of Appeals has allowed a third party "to enforce a contract in two situations: when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was 'an intent to permit enforcement by the third party'" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018], quoting *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]).

The first situation clearly has no applicability here, and neither the Complaint nor PowerFlex's opposition identifies any language within the Meitus-EoS Agreements showing that the agreements were intended for PowerFlex's benefit or evincing an intention to allow PowerFlex to enforce the agreements. The agreements do not even mention PowerFlex, instead referring to Meitus as the "Buyer" and "purchase[r]" of the modules (Green Aff., Exs. 1-3, Recitals). Moreover, EoS and Meitus are prohibited from assigning their rights in the agreements to "any third party" without prior written notice (*id.*, ¶ 14.3), and the remedies section of the agreements refers only to EoS and Meitus (*see id.*, ¶ 13). In sum, the plain language of the Meitus-EoS Agreements evinces an intent to benefit Meitus and EoS, and no one else (*see IMS Engrs.-Architects, P.C. v State of New York*, 51 AD3d 1355, 1357-1358 [3d Dept 2008], *lv denied* 11 NY3d 706 [2008]).

In any event, even if PowerFlex could claim the status of a third-party beneficiary of the Meitus-EoS Agreements, neither the Complaint nor PowerFlex's opposition sets forth non-conclusory allegations that EoS breached such agreements (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 425 [1996]). The only competent evidence before the Court is that Meitus breached the agreements (*see* Green Aff., ¶ 5).

Accordingly, PowerFlex's breach of contract claim against EoS must be dismissed.

2. Conversion

"'Two key elements of conversion are (1) [the] plaintiff's possessory right or interest in the property and (2) [the] defendant's dominion over the property or interference with it, in derogation of [the] plaintiff's right'" (*Ciprich v Atwood*, 163 AD3d 1332, 1334 [3d Dept 2018], quoting *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]).

"Where the property alleged to have been converted is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*East Schodack Fire Co., Inc. v Milkewicz*, 140 AD3d 1255, 1256 [3d Dept 2016] [internal quotation marks and citations omitted]).

"Further, where possession of property is initially lawful, conversion occurs when there is a refusal to return the property upon demand" (*Salatino v Salatino*, 64 AD3d 923, 925 [3d Dept 2009] [citations omitted], *lv denied* 13 NY3d 710 [2009]).

PowerFlex has not sufficiently alleged a possessory right in the deposit funds paid by Meitus to EoS. Such funds were paid pursuant to contracts by which Meitus, as purchaser, agreed to pay EoS, as seller, "a non-refundable, non-cancellable deposit" (Green Aff., Exs. 1-3, ¶ 10). As stated above, PowerFlex was not a party to, or intended beneficiary of, the Meitus-EoS Agreements, and it has not identified any plausible basis upon which to assert a possessory right in the deposit funds paid by Meitus under such agreements. And even if Meitus had a claim to the return of such funds, there is no allegation that it made a demand upon EoS.

For all these reasons, the conversion claim against EoS must be dismissed.

CONCLUSION

Based on the foregoing, it is

ORDERED that EoS and SPVP's motions under CPLR 3211 (a) (8) are granted to the limited extent of dismissing PowerFlex's claims pertaining to the modules to be delivered to Rhode Island and California, and the motions are otherwise denied; and it is further

ORDERED that the branch of EoS's motion under CPLR 3211 (a) (1) and (7) is granted to the extent of dismissing the causes of action for breach of contract and conversion as against EoS, and the motion is otherwise denied; and it is further

ORDERED that EoS and SPVP shall answer PowerFlex's complaint within **twenty (20) days** from the date of this disposition; and finally it is

ORDERED that a remote preliminary conference shall be scheduled, and the parties shall confer in advance of the conference regarding (1) their willingness to proceed to mediation or other form of alternative dispute resolution, and (2) a schedule for the completion of all necessary disclosure.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for PowerFlex shall promptly serve notice of entry on all parties entitled to such notice.

Dated: Albany, New York
December 22, 2022

RICHARD M. PLATKIN
A.J.S.C.

12/22/2022

Papers Considered:

NYSCEF Doc Nos. 1-2, 8-10, 22-27, 29, 31.