CFG Merchant Solutions, LLC v Big Bear Mech. LLC

2023 NY Slip Op 32663(U)

July 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 535754/2022

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of July 2023

HONORABLE FRANCOIS A. RIVERA

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CFG MERCHANT SOLUTIONS, LLC,

Plaintiff,

- against -

BIG BEAR MECHANICAL LLC D/B/A BIG BEAR MECHANICAL, AMBER GRAVES and MARK A. APODACA,

Defendants.

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DECISION & ORDER

Index No.: 535754/2022

Oral Argument: 6/8/2023

Cal. No.; 30, Ms. No.: 1

Recitation in accordance with CPLR 2219(a) of the papers considered on the joint notice of motion of Big Bear Mechanical LLC D/B/A Big Bear Mechanical, Amber Graves, and Mark A. Apodaca (hereinafter the defendants or the movants) filed on January 25, 2023, under motion sequence number one, for an order dismissing the complaint pursuant to CPLR 3211(e)[1]. The motion is opposed.

-Notice of motion
-Affirmation in support
Exhibits A–B
-Memorandum of law in support
-Affidavit of defendant Apodaca in support
-Memorandum of law in opposition

BACKGROUND

On December 8, 2022, CFG Merchant Solutions, LLC (hereinafter CFG) commenced the instant action by filing a summons with notice with the Kings County

[1] The movants stated in the notice of motion that the motion was pursuant to CPLR 3211(e). The affirmation of counsel in support stated that the motion was pursuant to CPLR 3211(a)(7), CPLR 3211(a)(8) and General Obligations Law 5-1402.

Clerk's office (KCCO). On December 13, 2022, CFG filed three affirmations of service of the summons with notice, one for each of the moving defendants, with the KCCO. On January 5, 2023, the movants filed a joint notice of appearance and demand for a complaint with the KCCO. On January 18, 2023, CFG filed a complaint with the KCCO.

The complaint alleges thirty-seven allegations of fact in support of five denominated causes of action. The first cause of action is for breach of contract. The second is for breach of a personal guarantee. The third is for unjust enrichment. The fourth is denominated as a claim for specific performance. The fifth is denominated as a claim for fees, costs, and expenses.

The complaint alleges the following salient facts. On November 2, 2022, CFG and the movants entered into a merchant agreement (hereinafter the agreement), a copy of which was annexed as exhibit A to the complaint, whereby CFG purchased the movants' future receivables, valued at $51,450.00 for $35,000.00. Pursuant to the terms and conditions of the agreement, all parties agreed to establish a depositing account to which the movants' settlement amounts due from each transaction of receivables were to be deposited and from which CFG would receive a specific daily amount of $571.66 by means of automatic ACH debiting.

Between November 2 and 28, 2022, the movants made some of the foregoing ACH payments in the total amount of $6,288.26 as required under the agreement. On November 29, 2022, the movants caused the ACH payments to stop, leaving a balance due of $57,910.25 which includes a default fee of $2,500.00, block account fee of $2,500.00, UCC filing fee of $195.00, and a third-party collection fee of $7,553.51.

Pursuant to the agreement, Amber Graves, and Mark A. Apodaca personally guaranteed that Big Bear Mechanical LLC would perform its obligations thereunder and that they would be personally liable for any loss suffered by CFG because of a breach of the agreement. The movants agreed that in the event of its default under the agreement, the full purchase amount, minus the receivables already remitted to CFG, plus all fees due under the agreement, would become immediately due and payable in full CFG. Accordingly, the defendants are in default of the agreement and Amber Graves and Mark A. Apodaca are in default of their respective guaranties. By reason of the foregoing, CFG has been damaged by the movants' breach of contract in the sum of $57,910.25 with interest from November 29, 2022.

LAW AND APPLICATION

The movants seek to dismiss the complaint pursuant to CPLR 3211 (a) (7) and (8) and General Obligations Law 5-1402. On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) and (8), a court should first determine whether it has personal jurisdiction over the defendants before addressing any other basis for dismissal. On a motion to dismiss for lack of personal jurisdiction pursuant to CPLR 3211(a)(8), the plaintiff has the burden of establishing the fact of jurisdiction (*Krajewski v. Osterlund, Inc.*, 111 A.D.2d 905, 490 N.Y.S.2d 609 [2nd Dept 1985]).

The movants submitted a memorandum of law setting forth their reasoning behind the claim of lack of personal jurisdiction. It is noted that the movants are not claiming improper service of the commencement papers. The individual defendants do not deny

signing the agreement as guarantors and as authorized representatives of Big Bear Mechanical LLC.

Paragraph twenty-seven of the agreement states the following:

> Governing Law; Venue; Service of Process. This Agreement and all acts and transactions hereunder and thereunder and all rights and obligations of Buyer and Seller shall be governed, construed and interpreted in accordance with the internal laws of the State of New York. Seller: (i) agrees that all actions or proceedings relating directly or indirectly hereto shall, the exclusive venue therefore shall be either Kings County, State of New York, or New York County, State of New York, at Buyer's sole option; (ii) consents to the jurisdiction and venue of any such court and consents to service of process in any such action or proceeding by personal delivery or any other method permitted by law; and (iii) waives any and all rights Seller may have to object to the jurisdiction of any such court, or to transfer or change the venue of any such action or proceeding

The movants not only expressly consented to the personal jurisdiction of the Kings County Supreme Court but also expressly waived any defense to the venue selected by CFG. A defendant can consent to personal jurisdiction (*see Creative Resources, Inc. v Rumbellow*, 244 AD2d 383 [2d Dept 1997]). This can occur when a party agrees by contract to submit to jurisdiction in a given forum (*see Oak Rock Fin., LLC v Rodriguez*, 148 AD3d 1036, 1038 [2nd Dept 2017]). Such a forum selection clause, when it is part of the contract that forms the basis of the action, will be enforced, obviating the need for a separate analysis of the propriety of exercising personal jurisdiction (*see id.*). This is the case even where a party lacks sufficient minimum contacts with the forum state (*P.S. Fin., LLC v. Eureka Woodworks, Inc.*, 214 A.D.3d 1, 17–18 [2nd Dept 2023]). Consequently, the Court need not address the movants' claim that the complaint should be dismissed pursuant to General Obligations Law 5-1402.

A guarantor of a contract is also deemed to have consented to personal jurisdiction in New York when he or she signs a guaranty that incorporates the terms of the contract, including the forum selection clause (*see Professional Merchant Advance Capital, LLC v Your Trading Room, LLC*, 123 AD3d 1101, 1102 [2d Dept 2014]). Such is the case here, therefore, the court has personal jurisdiction over each one of the movants.

The plaintiffs have met their burden by establishing that the defendants waived all jurisdictional defenses. Accordingly, the movants' motion to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction is denied.

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*E & D Grp., LLC v. Vialet*, 134 AD3d 981, 982 [2nd Dept 2015]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]). A court is ... permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7) (*E & D Grp., LLC*, 134 AD3d 981, *citing Sokol v. Leader*, 74 A.D.3d 1180 at 1181 [2nd Dept 2010]; see CPLR 3211[c]; *Mawere v. Landau*, 130 A.D.3d 986, 988 [2nd Dept 2015]).

However, on a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party ... and a plaintiff will not be]). Both causes of action flow from an alleged breach of the same agreement. penalized because he [or she] has not made an evidentiary showing in support of his [or

her] complaint (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 [1976]; see *Nonnon v. City of New York*, 9 N.Y.3d 825, 827 [2007]).

When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (*E & D Grp., LLC*, 134 AD3d 981 *citing Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; see *Mawere*, 130 A.D.3d at 988; *Nasca v. Sgro*, 130 A.D.3d 588, 589 [2nd Dept 2015]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Travelsavers Enterprises, Inc. v. Analog Analytics, Inc.*, 149 A.D.3d 1003, 53 N.Y.S.3d 99 [2nd Dept 2017]). Rather, a court must determine only whether the facts as alleged fit within any cognizable legal theory (*Id.*).

CFG's first cause of action is for breach of the agreement and the second cause of action is for breach of the personal guarantee by the individual defendants. Both causes of action stem from a breach of the same agreement. To plead a cause of action for breach of contract, a plaintiff usually must allege that: (1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations; and (4) defendant's breach resulted in damages (*34-06 73, LLC v. Seneca Ins. Co.*, 39 N.Y.3d 44 [2022]).

The complaint sufficiently pleads a cause of action for breach of contract as asserted against all the movants and for breach of the guaranty agreement by Amber Graves and Mark A. Apodaca, the individual movants.

The third cause of action is for unjust enrichment. The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v. Analog Analytics, Inc.*, 149 A.D.3d 1003, 1006 [2nd Dept 2017]). The theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties. The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. A quasi contract only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed to prevent a party's unjust enrichment (*Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 [1987]). In the case at bar, CFG's causes of action flow from the movants' alleged breach of the agreement. The pleadings arise from the same nucleus of common facts and does not allege separate or distinct. The unjust enrichment claim is therefore not only duplicative of the breach of contract claims but also is precluded based on the existence of a valid agreement.

The fourth cause of action is denominated as a claim for specific performance. Specific performance is an equitable remedy for a breach of contract, rather than a

separate cause of action (*Walton & Willet Stone Block, LLC v. City of Oswego Cmty. Dev. Off.*, 206 A.D.3d 1688 4th Dept 2022]). It is therefore dismissed as a cause of action without prejudice to pursue as a potential remedy.

The fifth cause of action is denominated as a claim for fees, costs, and expenses. CFG explained in their memorandum of law in opposition that the movants consented to these item as recoverable in the computation of CFG's damages occasioned by the movants breach of the agreement. As clarified by CFG, these items do not plead a separate cause of action. Rather they are items potentially recoverable as damages for breach of the agreement. The fifth cause of action is dismissed without prejudice to CFG's pursuit of these items as a remedy and as part of CFG's potential measure of damages.

CONCLUSION

The motion by Big Bear Mechanical LLC D/B/A Big Bear Mechanical, Amber Graves, and Mark A. Apodaca for an order dismissing the complaint pursuant to CPLR 3211(a)(7) and (8) and pursuant to General Obligations Law 5-1402 is denied.

The movants are directed to file their answer to the complaint by no later than thirty days after notice of entry of the instant decision and order.

ENTER:

Francois A. Rivera
J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.