

Theodoli v Poliform S.P.A.

2023 NY Slip Op 33522(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 651596/2023

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

KATRIN THEODOLI

Plaintiff,

- v -

POLIFORM S.P.A.,

Defendant.

-----X

INDEX NO. 651596/2023

MOTION DATE 06/30/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and following oral argument, the motion to dismiss is granted in part.

Background and Factual Allegations

This action arises out of allegations defendant ("Poliform") breached its contract with plaintiff ("Theodoli") to provide building materials and remodeling services.

Plaintiff alleges in 2019 she purchased from the defendant "high-end custom made decorative and building materials" for her New York City apartment. In addition to the materials, plaintiff alleges the defendant promised to perform remodeling services such as installation of its products by "highly skilled Italian employees" who it allegedly agreed to send from Italy to New York. Plaintiff claims that as a result of the COVID-19 pandemic, the defendant was no longer able to send employees from Italy, and instead suggested plaintiff hire another company to perform the installation and remodeling work, Antalia. Plaintiff alleges she did not want to hire Antalia but was persuaded by Poliform and its representation that Antalia was a licensed contractor and had performed work on a "luxury design showroom in uptown Manhattan."

Plaintiff alleges while under the supervision of Poliform, Antalia repeatedly pushed back the project's final completion deadline until it finally abandoned the project leaving plaintiff's apartment uninhabitable. Moreover, Plaintiff claims she did not receive much of the goods and services she claims she was owed under her agreement with the defendant.

Defendant moves to dismiss the complaint pursuant to CPLR § 3211(a)(7). Plaintiffs oppose the instant motion. For the reasons set forth below, defendants' motion to dismiss is granted in part.

Standard of Review

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83 [1994]. If the Court finds plaintiff is entitled to a recovery upon any reasonable view of the stated facts the Court must declare the plaintiff's complaint to be legally sufficient. *219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 509.

Discussion

I. Procedural Issues

As a threshold issue, defendant asserts plaintiff's affidavit and exhibit attached to its opposition papers should not be considered by the court in assessing the sufficiency of plaintiff's complaint.

In assessing a motion to dismiss, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). The

"court's attention should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one." *R.H. Sanbar Projects v. Gruzen Partnership*, 148 A.D.2d 316, 318.

Therefore, the Court finds for the purposes of this motion to dismiss, the Court will consider plaintiff's affidavit and corresponding exhibit in determining whether plaintiff has met its burden in the pleadings.

II. Breach of Contract

a. Goods

Defendant argues plaintiff's breach of contract claim as it pertains to the sale of goods should be dismissed for failure to comply with the statute of frauds. Defendant asserts pursuant to the statute of frauds, a contract for the sale of more than \$500 worth of goods, is not enforceable "unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. *Bazak Intern. Corp v. Mast Industries, Inc.* 73 N.Y.2d 113 (1989). In response, plaintiff argues that the email signature from the email containing the alleged contract is enough to comport the contract with the statute of frauds, and regardless the transaction falls under UCC 2-201 which provides an exception to the statute of frauds "with respect to goods for which payment has been made and accepted or which have been received and accepted."

While the defendant is correct that the document plaintiff offers as the "contract", does not comply with the statute of frauds, the Court finds the agreement does fall under the exception set forth in UCC 2-201. While defendant asserts UCC 2-201 does not apply because plaintiff has not accepted the goods, this reading of the statute unfairly narrows its scope, and ignores the part

of the statute which not only covered goods with that been received or accepted, but also goods for which payment has been made an accepted. Here, plaintiff alleges she paid the defendant Poliform for the goods, the money was accepted and not returned, thus invoking the exception set forth in UCC 2-201.

b. Services

The next issue is whether plaintiff has plead the necessary elements for breach of contract as it pertains to the installation and remodeling services it alleges Poliform agreed to provide. Again, defendant argues plaintiff has failed to plead the necessary elements for a breach of contract claim, that there was in fact a contract in the first place.

It is well established to recover damages for breach of contract, plaintiff must show (1) the existence of a valid, enforceable contract between the parties (2) the plaintiff's full performance thereunder (3) the defendant's breach of the contract and (4) resulting damages. *see Detringo v South Island Family Medical LLC*, 158 AD3d 609 [2nd Dept 2018]. To establish the existence of an enforceable contract, plaintiff must demonstrate the existence of an offer, acceptance of the offer, consideration, mutual assent and an intent to be bound. *Kowalchk v. Stoup*, 61 A.D.3d 118 (2009).

The complaint must set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract. *Chrysler Capital Corp. v. Hilltop Egg Farms*, 129 A.D.2d 927, 928). If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract. *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 482).

Here, the Court finds although plaintiff's complaint may be unartfully drafted, in giving all favorable inferences to the plaintiff, plaintiff has sufficiently pleaded a cause of action for breach of contract. It is alleged that the services were to be performed by defendant, the plaintiff was invoiced for such services, and the entity that ultimately performed such services was the entity that the defendant defendant "guaranteed" the work of.

As such, in regard to plaintiff's breach of contract claim for services, defendant's motion to dismiss is denied.

III. Negligent Misrepresentation

It is well established that a claim for negligent misrepresentation requires the existence of a "special relationship of trust and confidence" between the parties so as to create "a duty for one party to impart correct information to another." *Hudson River Club v. Consolidated Edison Co.*, 275 A.D.2d 2018 (2000); *J.A.O Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144 (2007). A special relationship exists where (1) the parties are in a relationship of trust and confidence or (2) one of the parties has superior knowledge. *MBIA Ins. Co. v. GMAC Mtge. LLC* 30 Misc.3d 856 (2010) citing *Kimmell v. Schaefer* 89 N.Y.2d 257 (1996).

Defendant moves to dismiss plaintiff's negligent misrepresentation claim on the basis that as matter of law, there was no special relationship of trust and confidence between Poliform and Theodooli. In response, plaintiff alleges there was a special relationship with the defendant Poliform because Poliform had "superior knowledge" in home design and contracting, while Theodooli was merely a customer and thus looked to Poliform for its special expertise.

The Court finds here, even assuming plaintiff's assertions to be true, the circumstances are not those which amount to that of a special relationship for the purposes of a negligent

misrepresentation claim. While plaintiff is correct that a special relationship of trust and confidence can arise where one of the parties has superior knowledge, it is a misstatement of the law that just because one party has “superior knowledge” there will always be a special relationship for the purposes of a negligent misrepresentation claim. To interpret otherwise would be nonsensical and create a duty in any situation where one party with superior knowledge allegedly makes a misrepresentation to another. As such, the case law explains that a special relationship requires a closer degree of trust than an ordinary business relationship. *H & R Project Assocs. v. City of Syracuse*, 289 A.D.2d 967 (2001); *Wright v. Selle* 27 A.D.3d 1065 (2006).

Here, the relationship described by plaintiff is that of an ordinary business relationship, which does not rise to the level required for a negligent representation claim. Here, the complaint alleges Poliform is a manufacturer of specialty goods and in addition to purchasing such items from Poliform, Ms. Theodooli hired Poliform as her construction manager and contractor. Even assuming these facts to be true, as a matter of law, this does not amount to a special relationship for the purposes of a claim for negligent misrepresentation. Therefore, with respect to plaintiff’s claim for negligent misrepresentation, the defendant’s motion to dismiss is granted.

IV. Home Improvement Business Law

Next, defendant argues plaintiff’s claim under New York General Business Law 770 should be dismissed on the grounds that the law does not allow for a private right of action. In response, plaintiff argues while the attorney general may pursue an action under GBL § 770, this does not bar a private right of action as defendant suggests.

To support its position, defendant points to the Supreme Court, Bronx County's decision in *Escabi v. Twins Contracting, LLC. Escabi v. Twins Contracting, LLC.*, 2022 N.Y.Misc. LEXIS 2282 (2022). In *Escabi*, the Court held GBL § 770 does not provide a private action, and actions can only be brought on behalf of the people of the state of New York. While *Escabi* is not binding, the Court finds the *Escabi* Court's analysis persuasive and demonstrative here.

In *Escabi*, a homeowner sued the contractor she hired to rebuild her home after a fire, alleging a violation of GBL § 770 for failure to provide the homeowner with a written agreement in compliance with GBL § 770. The Court denied plaintiff's cause of action under GBL § 770, interpreting GBL § 774(1) as only punishable by the Attorney General. Moreover, the Court found, "it is clear that while an owner who has been induced into executing an agreement by fraud may sue for damages resulting therefrom, technical violations, as defined by GBL § 773, may only be enforced by the attorney general. Accordingly, the only private right of action created by GBL § 770 is that promulgated by GBL § 772(1)." *Id.* The Court agrees this analysis. The statute's prescription that technical violations can only result in a civil penalty not to exceed \$100 supports the *Escabi* court's interpretation. Moreover, while plaintiff's opposition papers raise the issue of fraud with respect to section 772(1), this is allegation is not plead in Plaintiff's complaint nor affidavit. Therefore, defendant's motion to dismiss plaintiffs cause of action under GBL § 770 is granted.

V. LIEN LAW

Finally, defendant moves to dismiss plaintiff's claim for a violation of the New York Lien Law. In her complaint, plaintiff alleges pursuant to the New York Lien Law, a contractor is required to deposit funds from a homeowner into a trust account, and claims defendant violated

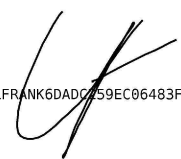
this law when it “co-mingled the finds received from Plaintiff with the funds of others and/or Defendant’s own funds, and/or used or applied said funds, or portions of same, for purposes unrelated to the project.” Defendant moves to dismiss this cause of action, arguing plaintiff failed to plead a claim under the Lien law because according to the defendant, the Lien Law does not require the contractor keep the funds in a separate trust account.

At this stage the Court must take plaintiff’s factual allegations as true and afford plaintiff if under any reasonable view of the stated facts the Court must declare the plaintiff’s complaint to be legally sufficient. Here, because plaintiff’s complaint does allege, even if generally, that portions of the funds were used, which would mean they were not kept in the trust account untouched, the Court finds plaintiff has plead a cause of action under the Lien law. Upon the foregoing documents, it is

ADJUDGED that defendants’ motion to dismiss is granted in part; and

ORDERED that the third and fourth causes of action are hereby dismissed, and the motion is otherwise denied.

10/5/2023
DATE


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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE