TC Servs. USA Inc. v Ideal Home Health Inc.
2023 NY Slip Op 33635(U)
October 17, 2023
Supreme Court, Kings County
Docket Number: Index No. 509272/2023
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

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TC SERVICES USA INC. a/k/a WOTC.COM,
Plaintiffs, Index # 509272/2023

- against - October 17, 2023

IDEAL HOME HEALTH INC.,
Defendant,

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The plaintiff has moved pursuant to CPLR §3211 seeking to dismiss counterclaims filed by the defendant. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, on October 7, 2021 the defendant hired the plaintiff to obtain Internal Revenue Tax Credits, specifically Federal Employee Retention Tax Credits [hereinafter ERTC]). Initially, the parties agreed the plaintiff would be paid fifteen percent of all credits recovered and later that amount was reduced to twelve percent. The complaint alleges the plaintiff obtained credits in the amount of $4,734,921.38 and sought a twelve percent fee in the amount of $568,190.56. The complaint alleges the plaintiff performed another similar service and was never paid and that other similar services will incur fees to the plaintiff when the defendant files their tax returns. The complaint alleges defendant refused to pay the amounts sought and instituted this lawsuit. The complaint alleges causes of

action for breach of contract and account stated. The defendant answered the complaint and asserted counterclaims alleging fraud and deceptive business practices pursuant to General Business Law §349. The plaintiff has now moved seeking to dismiss those counterclaims and, as noted, the defendant opposes the motion.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as true, whether the defendant can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the counterclaim are deemed true and all reasonable inferences may be drawn in favor of the defendant (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

To successfully plead on a claim of fraudulent inducement, it must be shown that there was a knowing misrepresentation of material present facts, which were intended to deceive another party and induce that party to act on it, resulting in injury (see, Piccoli v. Cerra Inc., 216 AD3d 1188, 190 NYS3d 424 [2d Dept., 2023]). However, the party alleging the fraudulent inducement "is expected to exercise ordinary diligence and may not claim to have reasonably relied on a defendant's representations [or silence] where he [or she] has means

available to him [or her] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation" (Feldman v. Bryne, 210 AD3d 646, 178 NYS3d 525 [2d Dept., 2022]). Therefore, where the party can verify the representations with due diligence there can be no cause of action for fraudulent inducement (Avery v. WJM Development Corp., 197 AD3d 1141, 153 NYS3d 511 [2d Dept., 2021]).

The fraud in the inducement counterclaim alleges that "plaintiff represented that it provided specialized skills and expertise in obtaining ERTC that could not be performed by Defendant in the ordinary course of its business" (see, Verified Answer with Counterclaims, ¶35 [NYSCEF Doc. No. 8]). The counterclaim alleges that in fact no such specialized skill was required and thus the plaintiff induced the defendant to agree to the unnecessary contract.

However, the existence of the ERTC and the manner in which they could be obtained were matters of public record (see, Urstadt Biddle Properties Inc., v. Excelsior Realty Corp., 65 AD3d 1135, 885 NYS2d 510 [2d Dept., 2009]). Thus, the defendant could have easily referred to such information to determine whether it was necessary to hire the plaintiff. The defendant argues that, in truth, at the time the agreement was entered on October 7, 2021 it had no way of knowing it could obtain any of the credits without hiring plaintiff. However, the Internal

Revenue Service guidance all predates the contract entered into between the parties and surely, with ordinary intelligence, the defendant could have discovered whether it could have engaged in the process itself.

Next, the defendant argues that even if that guidance was available, the plaintiff never informed the defendant of the risks of seeking ERTC. The specific risks the defendants references is essentially the fact that taxes are required to be paid upon receipt of any credits and tax returns filed, therefore, required amendments. However, that can hardly be classified as a "risk". Rather, the fact taxes had to be paid upon receipt of any credits merely means the credit was thereby reduced. That is not a risk whereby the omission of that information amounts to fraud. The defendant may have an argument that the amount owed to the plaintiff should be reduced accordingly and this issue may be appropriate as a defense to the exact amount sought by plaintiff. Of course, the strength of that argument will depend on the language of the agreement entered between the parties. Indeed, further discovery will clarify that issue if at all. In any event a minimization of a credit received can hardly be termed a risk sufficient to create a claim of fraudulent representation.

Therefore, since the defendant could have easily discovered the nature of plaintiff's work and whether in fact such work was

of an expert nature or even required at all, the motion seeking to dismiss this counterclaim is granted.

Turning to the motion seeking to dismiss the counterclaim based upon General Business Law §349, it is well settled that to pursue a claim based upon General Business Law §349 the plaintiff must establish the challenged act or practice was consumer oriented, that it was misleading in a material way and that the plaintiff suffered harm as a result of such practices (Stutman v. Chemical Bank, 95 NY2d 24, 709 NYS2d 892 [2000]).

Concerning General Business Law §349 "in the case of omissions in particular...the statute surely does not require businesses to ascertain consumers' individual needs and guarantee that each consumer has all relevant information specific to its situation. The scenario is quite different, however, where the business alone possesses material information that is relevant to the consumer and fails to provide this information" (see, Oswego Laborer's Local 214 Pension Fund v. Marine Midland Bank N. A., 85 NY2d 20, 623 NYS2d 529 [1995]). Thus, there can be no cause of action where "a consumer could not reasonably obtain such information" (Paradowski v. Champion Petfoods USA Inc., 2023 WL 3829559 [2d Cir. 2023]). Thus, there really can be no deceptive practices where the information that supports allegations of deception were readily available to the defendant.

As already explained, the plaintiff's work was not

misleading at all where the defendant had the ability to consult with Internal Revenue guidelines and make an informed decision whether they still wised to hire the plaintiff. Therefore, the plaintiff did not engage in any deceptive practices at all. Consequently, this counterclaim is dismissed as well.

Thus, the motion seeking to dismiss the counterclaims is hereby granted.

So ordered.

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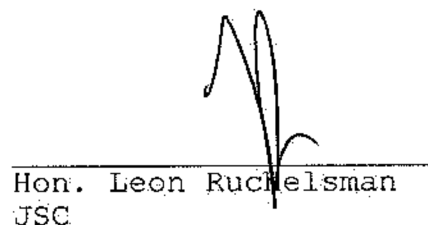

Dated: October 17, 2023
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC