GRM Info. Mgt. Servs. v Silver Autumn Hotel (N.Y.) Corp. Ltd.
2023 NY Slip Op 34384(U)
December 14, 2023
Supreme Court, New York County
Docket Number: Index No. 150206/2021
Judge: Verna L. Saunders

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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GRM INFORMATION MANAGEMENT SERVICES,
Plaintiff,

- v -

SILVER AUTUMN HOTEL (N.Y.) CORPORATION LTD. d/b/a THE WARWICK HOTEL,
Defendant.

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INDEX NO. 150206/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for **SUMMARY JUDGMENT**.

In the complaint in this action, plaintiff asserts that on January 1, 2020, the parties signed a "work, labor and services" agreement for $63,369.16 (NYSCEF Doc. No. 17, *complaint*, ¶ 3). The original agreement, for storage, storage supplies, and the destruction of files, was initially signed in 2002, but it automatically renewed until defendant canceled the contract around October 8, 2020 (NYSCEF Doc. No. 14, *statement of material facts*, ¶¶ 1-3; NYSCEF Doc. No. 16, *Acerra aff* at ¶ 9). The complaint states that plaintiff fully performed its duties under the contract but that defendant refused to pay the amount due; the statement of material facts clarifies that defendant's final payment was on February 2, 2020 (NYSCEF Doc. No. 14, ¶ 3). Accordingly, the complaint seeks judgment in the amount of $63,369.16, along with interest at the rate of 18% and costs.[1] It asserts two causes of action, for breach of contract and for account stated.

Defendant's amended answer states that, under the contract, plaintiff provided "storage of business records and materials to store business records" to defendant (NYSCEF Doc. No. 17, *amended answer*, ¶ 5). In addition, the amended answer asserts a counterclaim under the New Jersey Consumer Fraud Act (NJCFA) § 56-8-2.11,[2] which prohibits deceptive business practices and allows for a private cause of action in which the aggrieved party has the right to costs, attorney's fees, and treble damages. The counterclaim alleges that "Plaintiff advised Defendant initially and during the course of the Contract that the charges set forth in the Schedule of Charges were the same rates which were provided to other customers," that defendant relied on this representation when it entered the agreement (NYSCEF Doc. No. 17, ¶ 8), and that subsequently, defendant learned that its monthly costs exceeded those assessed to plaintiff's other customers. The counterclaim states that this was a deliberate and ongoing

[1] Plaintiff reached this amount by deducting defendant's payments and credits from a $69,475.11 bill for the destruction of files.

[2] The amended answer points out that the contract between the parties provided that "the laws of the State where the facility is located" governs the agreement and any disputes that arise under it (*id.*; *see* NYSCEF Doc. No. 18, ¶ 23). The storage unit is in New Jersey.

misrepresentation.[3] The counterclaim asserts that plaintiff's misrepresentation about the schedule of charges was deliberate and continuous. In addition, it states that because plaintiff made the same representation to all potential customers, the misrepresentation was directed at the public at large. The counterclaim seeks approximately $100,000.00 in damages, costs, treble damages, and attorney's fees. Plaintiff's reply denies all allegations in the counterclaim and asserts that defendant has unclean hands (NYSCEF Doc. No. 9).

On June 17, 2021, defendant served a notice of deposition on plaintiff (NYSCEF Doc. No. 8). There are no further documents in NYSCEF concerning the deposition. In addition, defendant filed a response to plaintiff's demand for discovery and inspection which contains 32 bate-stamped documents (NYSCEF Doc. No. 12). According to plaintiff, "[d]iscovery demands of both respective parties have been sent and answered" (NYSCEF Doc. No. 15, *Wan aff*, at ¶ 4).

Plaintiff now moves for an order that dismisses the counterclaim and grants it summary judgment (NYSCEF Doc. No. 13). In support of its motion, plaintiff provides the affidavit of Tony Acerra, plaintiff's vice president of operations for the East coast (NYSCEF Doc. No. 16). The affidavit reiterates the allegations in the complaint and statement of facts. In addition, it notes that in response to plaintiff's 2020 bills, defendant argued that "Plaintiff had overcharged Defendant for at least 10 years, and that Defendant was cancelling their contract and abandoning the items that was (*sic*) then in storage with Plaintiff, at no cost to Defendant" (*id.*, ¶ 9). Plaintiff alleges that the initial agreement (NYSCEF Doc. No. 18), defendant's history of prior payments, and defendant's acknowledgement that it stopped making payments due under the contract in February 2020 are sufficient to establish plaintiff's right to summary judgment.

Further, plaintiff contends that the contentions in defendant's counterclaim fail to state a cause of action because the parties' agreement was governed by their contract and, according to plaintiff's own affidavit, plaintiff's rates depended on a variety of factors and therefore, differed from one client to the next. It denies that it schemed to overcharge defendant, as defendant contends. More specifically, plaintiff argues that defendant has not satisfied the requirements of NJCFA § 56-8-2.11. The statute allows for a private cause of action where (1) the challenged party engages in unlawful conduct that results in (2) an ascertainable loss to the claimant and (3) the loss is causally connected to the unlawful conduct (NYSCEF Doc. No. 15, ¶ 24, quoting *Robey v PVH Corp.*, 495 F Supp 3d 311, 317 [SD NY 2020]).

As for the first prong, plaintiff contends that the counterclaim's statements concerning the alleged fraud are too generalized to support the claim, and that defendant also has not substantiated the allegation. Further, it cites its own affidavit for the proposition that it complied with its general business practices and did not engage in fraudulent activity. Second, plaintiff alleges that defendant cannot show that it lost money as the result of plaintiff's supposed fraud because defendant made payments in accordance with the agreed upon schedule of charges. Plaintiff relies on *Robey*, in which the court dismissed a cause of action alleging that she did not receive the savings she had expected, because the plaintiff received a product of satisfactory quality (NYSCEF Doc. No. 15, ¶ 24, *Robey*, 495 F Supp 3d at 319-321). Plaintiff asserts that, similarly, defendant has not alleged that its services were deficient, and therefore defendant

[3] Plaintiff indicates that defendant objected to the allegedly excessive charge for the destruction of files, which occurred around September 13, 2019 (NYSCEF Doc. No. 16, ¶ 10).

cannot state a viable counterclaim. Third, plaintiff alleges that defendant cannot show a causal nexus between plaintiff's alleged misconduct and defendant's alleged loss.

In opposition, defendant first alleges that discovery is incomplete. More specifically, it argues that it filed a notice of deposition on June 17, 2021, and that plaintiff agreed to certain dates in November but did not respond to defendant's October 21, 2021, e-mail which asked for a date during the week of November 15, 2021. Instead, plaintiff filed its motion on February 18, 2022, and inaccurately represented that it had responded to all discovery demands. Defendant speculates that plaintiff's motion seeks "to avoid the deposition . . . because the testimony to be provided by Plaintiff . . . will support [defendant's] claim" (NYSCEF Doc. No. 25, *Brodnick aff*, ¶ 12). Therefore, defendant argues that the motion should be denied as premature (*id.*, ¶¶ 13-14, citing *Tucker v New York City Tr. Auth.*, 42 AD3d 316, 317 [1st Dept 2007] [under CPLR § 3212]; *Meyers v Becker & Poliakoff, LLP*, 202 AD3d 627 [1st Dept 2022] [under CPLR § 3211]).

Even if the court reaches the merits, defendant contends that it has stated a viable cause of action under NJCFA § 56:8-2, which provides that "unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon . . . is declared to be an unlawful practice." Defendant argues that the Acerra affidavit does not challenge the merits of defendant's counterclaim because it does not address plaintiff's alleged misrepresentation that its prices were uniform. Instead, the Acerra affidavit contends that the pricing is not uniform and does not address the alleged misrepresentation.

In support of its contention that plaintiff informed it that all prices were uniform, defendant relies on 1) an e-mail from Bridget Olan, an account representative for plaintiff, which stated, "the minimum pricing is the same in all of our markets" and "the only thing that could vary is the delivery charge as it is based on distance from our facility" (NYSCEF Doc. No. 34, March 6, 2020, e-mail). The affidavit of Joseph Fox, the United States regional purchasing manager for defendant, asserts that "I understood Ms. Olan's e-mail as confirmation that [plaintiff] provided the same prices to all its customers" (NYSCEF Doc. No. 26, ¶ 5). Michael Sheh, a vice president at defendant, explains in his affidavit that Fox had asked Olan about the uniformity of pricing because "[defendant's] employees were becoming concerned that the Schedule of Charges from [plaintiff' was more than that which was charged other customers" (NYSCEF Doc. No. 27, ¶ 4). Sheh further explains that, upon investigation, defendant learned that the schedule of charges that plaintiff assessed to it were significantly higher than the schedule for the Eisenberg Sandwich Shop, which at the time was a diner owned by a relative of defendant's founder. Based on the above, it determined that "[plaintiff's] representation that its pricing was uniform was a false representation and was intended to induce Warwick to pay charges which in fact were much higher than that charged other customers for many years" (*id.*, ¶ 7; *see also* NYSCEF Doc. Nos. 35-36 [Eisenberg's Sandwich shop schedule of charges and defendant's schedule of charges, respectively]). Defendant claims that its reliance on the alleged misrepresentation kept it from negotiating for better terms or from using a different service provider.

Further, defendant contends that plaintiff's account stated cause of action lacks merit because defendant objected to the account. It points out that Acerra, plaintiff's own vice president of East Coast operations attests that around October 8, 2020, in response to plaintiff's late payment notices, defendant "alleged that Plaintiff had overcharged Defendant for at least 10 years, and that Defendant was cancelling their contract and abandoning the items that was (*sic*) then in storage with Plaintiff, at no cost to Defendant," and that in response to subsequent communications from plaintiff, defendant maintained its position (NYSCEF Doc. No. 16, ¶ 9). The Acerra affidavit further states that defendant objected to the September 13, 2019 bill for the destruction of files as excessive and claimed that other customers were charged less for identical services.

There is no reply from plaintiff and no indication that plaintiff ever requested additional time to file a reply.

Although plaintiff's motion does not specify whether it seeks relief under CPLR 3211 or CPLR 3212, it states that it seeks dismissal of the counterclaim and summary judgment on the complaint. Therefore, the court concludes that the first prong of the motion seeks CPLR 3211 relief, and the second prong seeks CPLR 3212 relief.

On a motion to dismiss a counterclaim under CPLR 3211, courts "must liberally construe the pleading and accept the facts as alleged in the [counterclaim] as true, accord [the nonmoving party] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021] [*Himmelstein*] [considering motion to dismiss a cause of action; internal quotation marks and citation omitted]; see *Tsai v Lo*, 212 AD3d 547, 548 [1st Dept 2023] [applying standard to motion to dismiss counterclaims]). Dismissal is only warranted if the counterclaim does not include the required factual allegations "or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Himmelstein*, 37 NY3d at 175 [internal quotation marks and citation omitted]).

As stated, a claim under the NJCFA must allege that plaintiff engaged in unlawful conduct that resulted in an ascertainable loss to the consumer (see *Manahawkin Convalescent v O'Neill*, 217 NJ 99, 121 [2014]). An affirmative misrepresentation is sufficient to satisfy the first element of the claim (see *Suarez v Eastern Intern.* College, 428 NJ Super 10, 30 [Superior Ct, App Div 2012]; Gupta *v Asha Enter., LLC*, 422 NJ Super 136, 147 [Superior Ct, App Div 2011]) if it was "made to induce the buyer to make the purchase" (*Gennari v Weichert Co. Realtors*, 148 NJ 582, 607 [1997]). Here, defendant has alleged sufficiently that it entered into the agreement at least in part because it relied on plaintiff's alleged misrepresentation as to the uniformity of the pricing (see *Allen v V and A Bros., Inc.*, 208 NJ 114, 131 [2011] [noting that NJCFA protects customers from affirmative acts, including "deception, fraud, false pretense, false promise, [and] misrepresentation" (internal quotation marks and citation omitted]). Moreover, plaintiff's own affidavit stating that it did not commit fraud or misrepresent the agreement is insufficient to support its dismissal motion (see *Gillespie v Kling*, 217 AD3d 566, 567 [1st Dept 2023]; *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 68 [1st Dept 2008], *affd* 13 NY3d 398 [2009]).

Plaintiff also contends that defendant has not alleged an ascertainable loss or a causal connection between the loss and the misrepresentation. Although "[t]here is little that illuminates the precise meaning that the Legislature intended in respect of the term 'ascertainable loss,'" (*Thiedemann v Mercedes-Benz USA, LLC*, 183 NJ 234, 248 [2005]), it has been defined generally as "a definite, certain and measurable loss, rather than one that is merely theoretical" (*Bosland v Warnock Dodge, Inc.*, 197 NJ 543, 558 [2009]). This may consist of an out-of-pocket loss or a quantifiable or measurable loss in value (*Alpizar-Fallas v* Favero, 908 F3d 910, 919 [3d Cir 2018]). Without such a showing, dismissal of the entire case is mandatory (*Dabus v Mercedes-Benz USA, LLC*, 378 NJ Super 105, 113 [Superior Ct, NJ App Div 2005]). An ascertainable loss can exist where the aggrieved party asserts that it was overcharged (*Heyert v Taddese*, 431 NJ Super 388, 417 [Superior Ct, NJ App Div 2013]). "'The precise amount of loss need not be known; it need only be measureable (*sic*)'" (*Eberhart v LG Elec. USA, Inc.*, 188 F Supp 3d 401, 406 [D NJ 2016] [quoting *Dzielak v Whirlpool Corp.*, 26 F Supp 3d 304, 336 (D NJ 2014)]).

In the amended answer, defendant alleges that it sustained a financial loss due to the overcharge, and Sheh's affidavit states that if defendant had known that plaintiff "provided the same services to other customers at a cost dramatically less than that which [defendant] was charged, [defendant] would have negotiated for the cost charged to other customers, or would have negotiated with a different provider of storage and disposal service" (NYSCEF Doc. No. 27, ¶ 8). After careful consideration, the court determines that this is sufficient to survive a motion to dismiss.

Case law supports this determination. *Castro v Sovran Self Storage, Inc.* (114 F Supp 3d 204 [D NJ 2015]) involved a proposed class action relating to an alleged violation by a storage company. In the case, the plaintiff alleged that he paid premiums for a storage space rental agreement that purportedly insured against water, mold, and mildew damage, but instead "received coverage so limited as to be meaningless given the purpose for which he purchased it" (*id.* at 220 [internal quotation marks and citation omitted]). The plaintiff further contended that the misrepresentations "induced him to make this purchase," and had he received copies of the insurance contracts which contained the limitations in coverage "he would not have purchased such insurance or paid the premiums . . . on the Insurance Addendum" (*id.* [internal quotation marks and citation omitted]). The Federal district court, interpreting New Jersey law, determined that this sufficiently stated an ascertainable loss (*id.*).

In another case, *Bethea v Metropolitan Life Ins. Co.* (2009 WL 690852, 2009 NJ Super Unpub. LEXIS 552 [Superior Ct, NJ App Div, March 18, 2009]), a New Jersey superior court denied a motion to dismiss a complaint where the plaintiff alleged that she sustained ascertainable loss because she paid higher premiums due to the alleged misrepresentation that the insurance company had charged her at a non-smoker rate, and that she therefore "was paying higher premiums than she would have paid had her premium rate truly been based on a non-smoker risk class as MetLife represented it would be, or had she purchased a policy from an insurer that, unlike MetLife, does offer non-smoker rates to juveniles" (*id.*, 2009 WL 690852, *5, 2009 NJ Super Unpub. LEXIS 552, *12).

Considering the standards that these cases articulated, the facts asserted in the amended answer and in defendant's opposition papers, including the Sheh affidavit, are sufficient to assert that defendant's reliance on the alleged fraud caused defendant's alleged injury (*see Moises-Ortiz v FDB Acquisition LLC*, 2023 NY Slip Op 06092, *2 [1st Dept 2023] [stating that court may consider affidavits submitted in opposition to a CPLR § 3211 motion]). Further, plaintiff's price listings for Eisenberg's Sandwich Shop and for defendant are sufficiently specific because they "allege facts that would allow the Court to quantify a difference in value" (*Schechter v Hyundai Motor. Am.*, 2020 WL 1528038, *13, 2020 US Dist LEXIS 55598, *40-41 [D NJ, March 31, 2020] [finding that information regarding the prices of other compact SUVs was sufficient]). Finally, plaintiff has not responded to defendant's arguments or expressed any other basis for dismissal of this cause of action. Accordingly, the court denies this prong of the motion.

For the same reasons as above, the court denies the prong of the motion that seeks summary judgment. As long as the counterclaim and defendant's contention that it was fraudulently induced to enter the contract remain as part of the action, there exist triable issues of fact precluding summary judgment. Accordingly, it is

ORDERED that plaintiff's motion is denied in its entirety;[4] and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon defendant.

ORDERED the parties in this action are hereby directed to appear for a conference with the court on February 7, 2024, details which shall be provided no later than February 5, 2024.

This constitutes the decision and order of this court.

December 14, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**

[4] The court notes that although defendant has challenged plaintiff's cause of action for an account stated, it does not move for affirmative relief. Therefore, the court does not consider this as a basis for dismissal of the claim (see *Lee v Colley Group McMontebello, LLC*, 90 AD3d 1000, 1000-1001 [2d Dept 2011]).