

Gordon v Peck

2023 NY Slip Op 34481(U)

December 20, 2023

Supreme Court, New York County

Docket Number: Index No. 652345/2023

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

DARRIN GORDON,

Plaintiff,

- v -

MARA PECK, JACK SILVER FORMAL WEAR, INC.

Defendant.

-----X

INDEX NO. 652345/2023

MOTION DATE 12/06/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DISMISS

Upon the foregoing documents, the Defendants' motion to dismiss is granted in part.

Background¹

The Complaint in this action alleges that, in 2010 or 2011, Plaintiff Darrin Gordon entered into an oral agreement with the now deceased owner of Jack Silver Formal Wear, Inc. ("Jack Silver Formal Wear") to buy the company. The agreement, by its nature, could not be completed within a year. The Complaint then alleges that, despite Plaintiff's performance on the 2010/2011 oral agreement, ownership of Jack Smith Formal Wear was never conveyed to him.

Thereafter, the Complaint alleges that in 2018, Plaintiff entered into an agreement with Defendant Mara Peck wherein, Plaintiff was credited for previous payments and then agreed to pay additional consideration for the purchase of Jack Silver Formal Wear. Plaintiff made a payment pursuant to the 2018 Agreement and Defendant Peck repudiated the 2018 agreement and refused to convey Jack Silver Formal Wear to Plaintiff.

¹ The Court would like to thank Jason Lowe, Esq. for his assistance in this matter.

In addition, prior to 2019, Plaintiff alleges he provided tuxedos to Defendants and the Defendants failed to pay for those tuxedos.

The complaint alleges a breach of contract (first cause of action) for breach of the 2018 agreement to convey Jack Silver Formal Wear to Plaintiff and for failure to pay for the tuxedos Plaintiff alleged delivered to Defendants. In addition, the complaint asserts the second (promissory estoppel), third (breach of implied-in-fact contract), and fourth (unjust enrichment) causes of action, which are quasi-contractual causes of action plaintiff states are plead in the alternative to the breach of contract. Finally, the fifth cause of action seeks replevin for personal property Plaintiff alleges Defendants have that belong to him.

Discussion

Plaintiff moves to dismiss the complaint pursuant to both CPLR 3211(a)(7).² It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. (See *Avgush v Town of Yorktown*, 303 AD2d 340, 755 N.Y.S.2d 647 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD.2d 348, 756 N.Y.S.2d 96 [2d Dept 2003]).

New York's General Obligations Law addresses application of the statute of frauds in the state providing, "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged ... if such agreement, promise or undertaking: 1. By its terms is not to be performed within one year from the making thereof..." (General Obligations Law § 5-701(a)). Thus, since the 2010/2011

² Defendants also move pursuant to CPLR 3211(a)(5), however, Defendants fail to explain the basis for dismissal pursuant to CPLR 3211(a)(5) and therefore, to the extent the motion is seeking dismissal pursuant to that section, relief is denied.

agreement, by its terms, could not be performed within one year from its making, it was not a valid agreement and is void.

Defendants' argue that the 2018 agreement acted as an invalid modification of the 2010/2011 agreement. However, since the 2010/2011 agreement is void by its terms, there could be no modification of that agreement. Rather, the Complaint's allegations are sufficient to show that the 2018 agreement which, though oral, could be performed within a year, is itself an agreement.

Similarly, Defendants' argument that the 2018 agreement is invalid for lack of consideration fails. Though it is uncertain, considering the 2010/2011 agreement is void, as to whether the \$85,000 Plaintiff claims it previously paid pursuant to the 2010/2011 could be valid consideration for the 2018 agreement, the Court does not need to reach that question because the complaint alleges Plaintiff promised to pay \$10,000 in new consideration to purchase Jack Silver Formal Wear. The \$10,000 Plaintiff promised to pay is consideration for the 2018 agreement. Giving the plaintiff the benefit of every possible inference, the 2018 agreement cannot be deemed invalid for lack of consideration at the pleading stage.

Defendants' argument that the Complaint does not allege the terms of the 2018 agreement with definiteness similarly fails. The Complaint states that Plaintiff entered into an agreement with Defendant Peck to purchase Jack Silver Formal Wear. The Complaint alleges how much Plaintiff was to pay to purchase Jack Silver Formal Wear. Defendants do not note what other terms are missing from the Complaint regarding the alleged agreement to purchase Jack Silver Formal Wear.

The Complaint's second (promissory estoppel), third (breach of implied-in-fact contract), and fourth (unjust enrichment) causes of action are quasi contractual claims. Those claims are

not duplicative of the breach of contract cause of action because there is a dispute as to whether there is a valid agreement between the parties. (*Kramer v Greene*, 142 AD3d 438, 441-442, 36 N.Y.S.3d 448 [1st Dept 2016]). Further, the claims are not barred as an attempt to circumvent the statute of frauds because the Defendants have failed, at this point, to show that the statute of frauds bars the contract claims. (*Foster v Kovner*, 44 AD3d 23, 29 [1st Dept 2007]) (“inasmuch as the breach of contract claims are not barred by the statute of frauds, this rationale is inapplicable and the unjust enrichment claim should be sustained as an alternative basis for relief in the event it is determined that there was no oral agreement”).

Nevertheless, the third cause of action, seeking relief for an implied-in-fact contract, fails to state a cause of action. “[A] contract implied in fact contemplates not assurances or promises but conduct” (*Zimmer v Town of Brookhaven*, 247 AD2d 109, 114 [2d Dept 1998]). In this case, the implied-in-fact contract cause of action only alleges assurances and promises, not conduct. Thus, the Complaint fails to state a cause of action for an implied-in-fact contract and the cause of action is dismissed.

Defendants’ argument that the other quasi contract claims are deficiently plead is rejected due to New York’s liberal pleading standard (CPLR 3013) and the need, on a motion to dismiss, to liberally construe the complaint, accept all the facts as alleged in the complaint to be true, and give the plaintiff the benefit of every possible inference.

Finally, the replevin claim, though sparse, meets the notice pleading standard (CPLR 3013). Defendants’ questions regarding the items at issue will be subject to discovery and if Plaintiff cannot identify the specific, identifiable property, the claim will be subject to dismissal upon a motion for summary judgment.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss the complaint is granted with respect to the third cause of action only; and it is further

ADJUDGED that Defendants' motion to dismiss is otherwise denied.


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12/20/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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