

Kovalenko v Bhatti Gen. Contr. & Dev.

2023 NY Slip Op 34981(U)

August 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 505994/2023

Judge: Rupert V. Barry

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Index No.: 505994/2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 13

YOSEF SIMCHA KOVALENKO,

Plaintiff,

-against-

BHATTI GENERAL CONTRACTING &
DEVELOPMENT and FARHAN ALI
BHATTI,

Defendants.

Motion Seq. No.: 1

Cal. No.: 25

Index No. 505994/2023

DECISION & ORDER

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Defendant’s motion to dismiss: NYSCEF Doc. Nos.: 1 – 4; 7- 15.

Background:

This action was commenced by summons and verified complaint alleging Defendants Bhatti General Contracting & Development (“BGCD”) and Farhan Ali Bhatti (“Bhatti”) (collectively, “Defendants”) improper conduct in falsely holding BGCD out as a licensed home improvement contractor, inducing Plaintiff to enter into a home improvement contract in reliance on that misrepresentation, failing to perform on that contract, and ultimately abandoning the project it promised to complete.

Defendants pursuant to CPLR § 3211(a)(7) seek to dismiss the following causes of action of Plaintiff’s Complaint: *First* (Fraud in the Inducement), *Second* (Violation of GBL § 349), *Fourth* (Unjust Enrichment), *Fifth* (Negligence), *Sixth* (Violation of Article 3-A of New York’s Lien Law), *Seventh* (Veil Piercing), *Eighth* (Breach of the Implied Covenant of Good Faith and Fair Dealing), and *Ninth* (Breach of the Implied Warranty of Workmanlike Performance) and seeks to dismiss Defendant Bhatti from the case.

Legal standard:

The standard on a motion to dismiss a pleading is well established. “[P]ursuant to CPLR 3211(a), the pleading must be afforded a liberal construction and the court must ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable

Index No.: 505994/2023

inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Qureshi v. Vital Transp., Inc.*, 173 AD3d 1076, 1077 [2d Dept. 2019]). This Court must determine whether the alleged causes of action are sustainable upon any reasonable view of the facts as stated (*Schneider v. Hand*, 296 AD2d 454, 454 [2d Dept. 2002]).

While this Court must accept Plaintiff’s allegations in his verified complaint as true, this Court ordinarily may not assume that Bhatti’s declarations are true. New York courts specifically recognize that a defendant’s own affidavit and denials of wrongdoing are rarely sufficient to support granting a motion to dismiss (*see Lawrence v. Graubard Miller*, 11 NY 3d 588, 595 [2008]) “[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they ‘establish conclusively that [petitioner] has no [claim or cause of action]’” *citing Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Thus, this Court will not rely on Bhatti’s affidavit to contradict any of Plaintiff’s claims for the sole purpose of dismissal.

Piercing the Corporate Veil:

Defendant Bhatti contends that all causes of action should be dismissed against Bhatti because he is not a party to the contract and therefore Plaintiff cannot sustain this action against him in his personal capacity. But there are numerous alleged facts here that justify allegations of veil-piercing to proceed to discovery (*see Cortlandt St. Recovery Corp. v. Bonderman*, 31 NY3d 30, 49 [2018]) [“It is sufficient at the pleading stage that the alleged facts and the inferences drawn from them establish the basic elements of the doctrine of piercing the corporate veil: the individual defendants adopted the corporate scheme, created the corporate shells to further the scheme, misused the corporate form to commit a fraud ...”].

Here, Plaintiff has clearly met the low bar with sufficient allegations that BGCD was operating as an unlicensed home improvement contractor and that Defendant Bhatti formed BGCD ten days before entering into the subject home improvement contract (Complaint ¶ 23, 27). The allegations that Defendants disregarded these statutes is sufficient to permit – at the pleading stage – an alter ego theory of liability. Accordingly, Defendants’ Motion to dismiss Bhatti is denied.

Index No.: 505994/2023

Fraud in the Inducement:

Separate from any breach of contract claim against Defendants, Plaintiff alleges that Bhatti made false representations of fact that induced him to enter a contract with and tender more than \$260,000 in payments to BGCD. [Complaint ¶¶ 11-24].

New York law specifically recognizes cause of action for fraud in the inducement when the misrepresentation is collateral to the contract it induced (*WIT Holding Corp. v. Klein*, 282 AD2d 527, 528 [2d Dept. 2001] “[A] misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud”). “A false statement of intention is sufficient to support an action for fraud, even where that statement relates to an agreement between the parties” (*Wright v. Selle*, 27 AD3d 1065, 1067 [4th Dept. 2006] [citing *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 NY2d 112, 122 [1995]]). Here, while any breach of contract claims between Plaintiff and BGCD would be based on its failure to perform the renovation contract, Plaintiff’s fraudulent inducement claim is based on the allegations that Bhatti misrepresented BGCD’s legal standing, resources, capabilities, staffing and ability to complete the work before the end of August 2022 and that those misrepresentations induced Plaintiff to enter the contract with BGCD and to transmit hundreds of thousands of dollars in payments. [Complaint ¶¶ 11-24]

Violation of NY GBL § 349:

Defendants argue that Plaintiff’s allegations do not make out a claim under NY GBL § 349 because the Complaint does not support a finding that Defendants’ misleading conduct concerned the consuming public generally. Yet the consumer-oriented prong is independent of whether the underlying transaction was between two parties – most consumer transactions are. Instead, the consumer-oriented prong is to be construed liberally and courts must question whether the deceptive conduct is similar in nature to conduct faced by other consumers and whether it could occur in other instances (*Suitor v. Fein, Such & Crane, LLP*, No. 15-CV-438, 2015 WL 6455142, at *6[WDNY Oct. 26, 2015] [The requirement that defendants engaged in ‘consumer-oriented’ conduct has been construed liberally]).

Plaintiff’s claim for deceptive business practices is based upon allegations that BGCD held itself out as a licensed home improvement contractor (Complaint ¶ 11), that neither Defendant was licensed, in violation of the Admin. Code (*id.* ¶¶ 23, 27), that Bhatti had therefore made a material

Index No.: 505994/2023

misrepresentation to Plaintiff, that this misrepresentation was made to other similarly situated homeowners (*id.* ¶ 11), and was thus consumer-oriented, and that Plaintiff reasonably relied on this misrepresentation and suffered damages (*id.* ¶ 24). None of the statements in Bhatti's Affidavit refute these allegations. These allegations are sufficient to support a claim that Defendants' misrepresentations affect consumers at large.

Unjust Enrichment:

Defendants do not deny the propriety of Plaintiff's breach of contract claim in this action but seek to limit Plaintiff's complaint by moving to dismiss his claim for unjust enrichment even though that claim is properly pleaded and does not fail to state a cause of action and is not impermissibly duplicative.

In New York causes of action for unjust enrichment can be pleaded in the alternative to claims for breach of contract and that dismissal of the claim would be premature (*See Auguston v. Spry*, 282 AD2d 489, 491 [2d Dept 2001] [finding that on defendant's motion to dismiss under CPLR 3211[a][7] "plaintiff adequately pleaded causes of action [] alleging breach of contract and unjust enrichment. Additionally, the causes of action alleging breach of contract and unjust enrichment may be pleaded alternatively"]; *see also Canzona v. Atanasio*, 118 AD3d 841, 842-43 [2d Dept 2014]). Here Plaintiff has adequately pleaded causes of action alleging breach of contract and unjust enrichment (Complaint ¶¶ 26-37).

Negligence:

Defendants argue that Plaintiff's negligence should be dismissed because the cause of action is duplicative of Plaintiff's breach of contract claim. However, the nature of the injury, the manner in which the injury occurred, and the resulting harm are separate and distinct as between the two claims. A defendant "may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (*Logan v. Empire Blue Cross & Blue Shield*, 275 AD2d 187, 192 [2d Dept. 2000], *mot. lv. app. disp.*, 96 N.Y.2d 823 [2001]). In *Sommer v. Federal Signal Corp.*, 79 NY2d 540 (1992), the Court of Appeals stated that "[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. . . . Professionals . . . for example, may be subject to tort liability for failure to exercise

Index No.: 505994/2023

reasonable care, irrespective of their contractual duties. In these instances, it is policy, not the parties' contract, that gives rise to a duty of due care" (*Id.* at 551-52 [*citations omitted*]).

Contractors are regulated professionals in New York State. Defendants are required to adhere to standards of care that are imposed by law, in addition to those imposed upon it by common industry practice. Here, with his negligence claim, Plaintiff is not seeking enforcement of the bargain that was set forth in the Contract for the improvements to his home. While the Complaint allege numerous breaches of the Contract, it also details numerous breaches of the statutory obligations and profession-specific regulations that fall outside the scope of the Contract (Complaint ¶¶ 25-30, 61-69).

Article 3-A of the Lien Law:

An owner has standing to bring Article 3-A claims against its general contractor when that contractor improperly diverts funds from the trust overseen by that contractor (*Ippolito v. TJC Dev., LLC*, 83 AD3d 57, 59 [2d Dept. 2011]). The court in *Ippolito* held that the an owner is a beneficiary of a trust created under Article 3-A, because: (a) funds provided to the contractor for deposit in the trust remain the property of the owner, under Lien Law § 71-a, until: (1) the proper payment by the contractor for the purposes of the home improvement project; or (2) default or breach by the owner which excuses the contractor's performance (but only to the extent of any reasonable liquidated damage amount and only after 7 days prior written notice to the owner); or (3) substantial performance of the contract; and (b) owners are entitled to a disbursement of trust funds under Lien Law § 71(2)(f). Therefore, owners have standing to bring claims against a trustee for the use of trust assets for any purpose other than the expenditures authorized in Lien Law § 71 before all trust claims have been paid or discharged (*Id.*; see also *People v. Hollowell*, 168 AD2d 970, 971 [4th Dept 1990] [*'trust claims' . . . include claims of owners to funds advanced by them to contractors for the construction of home improvements*]).

Bhatti is subject to personal liability of a Lien Law Diversion. "... Homeowners who entered into a contract for home improvements were beneficiaries of the trust created by operation of Lien Law § 70, and they had standing to assert a cause of action pursuant to Lien Law article 3-A against [the entity contractor], or its officers or agents, alleging that the funds they paid to TJC were improperly diverted within the meaning of Lien Law § 72." *Id.* at 59; see also *Holt Constr. Corp. v. Grand Palais, LLC*, 108 A.D.3d 593 (2d Dept. 2013) ("[t]his Court has held that the

Index No.: 505994/2023

individual officers of a corporate trustee may be held personally liable pursuant to Lien Law article 3-A for knowingly participating in a diversion of trust assets”).

As asserted in his complaint, money paid by Plaintiff to BGCD constituted trust funds at all times herein pertinent, because substantial completion was never reached (Complaint ¶ 37). To the extent that BGCD still has these funds in escrow or if they were never placed in escrow or they were diverted, then Plaintiff arguably has a cause of action against Bhatti.

Breach of Implied Covenant of Good Faith and Fair Dealing:

Plaintiff alleges that as a result of Defendants’ actions, he was deprived of the right to receive the benefits under the Contract with BGCD (Complaint ¶¶ 83-87). *See Zurakov v. Register.Com, Inc.*, 304 AD2d 176 (1st Dept 2003) (reinstating breach of the implied covenant claim where plaintiff alleged that he was deprived of the right to receive the benefits under his contract with defendant).

The mere fact that a plaintiff also asserts a breach of contract claim does not mean that a claim for breach of the covenant of good faith and fair dealing cannot stand (*25 Bay Terrace Assocs., L.P. v. Public Serv. Mut. Ins. Co.*, 144 AD3d 665 [2d Dept 2016] [affirming denial of defendant’s motion pursuant to CPLR § 3211 on a claim for breach of the implied covenant of good faith and fair dealing]; *Gutierrez v. Gov’t Emps. Ins. Co.*, 136 AD3d 975, 976 [2d Dept 2016]). Accordingly, Plaintiff has properly alleged a cause of action for breach of the implied covenant of good faith and fair dealing and that claim cannot not be dismissed at this juncture.

Implied Warranty of Workmanlike Performance:

The allegations in the Complaint [¶¶27-35] sufficiently pleaded that Defendants breached the implied warranty of workmanlike performance when they performed the work on Plaintiff’s home that was shoddy and did not meet the standards imposed upon them by statute and by the administrative code which declares the follow acts, each alleged in the Complaint to have been committed by Defendants, “prohibited”:

Deviation from or disregard of the plans or specifications or any terms and conditions agreed to under a home improvement contract in any material respect without the written consent of the owner; **NY Admin. Code § 20-393(1)**
Willful or deliberate disregard and violation of the building, sanitary, fire and health laws of this city; **NY Admin. Code § 20-393(6)**

Index No.: 505994/2023

Failing to perform work under a home improvement contract in a skillful and competent manner; **NY Admin. Code § 20-393(11)**

Persons engaged in building operations shall provide reasonable and adequate protection for the safety of all persons and property affected thereby; and all such operations shall be conducted in accordance with and subject to the safety requirements of this article and the building code, and the safety requirements of article ten of the labor law. **NYAdmin. Code § 26-228 (“General safety requirements”)**

Accordingly, Plaintiff has properly alleged a cause of action for breach of the implied warranty of workmanlike performance and this cause of action cannot not be dismissed at this juncture.

UPON due deliberation upon the forgoing documents Defendants have failed to establish their entitlement to dismissal of Defendant Bhatti or any of the causes of action contained in Plaintiff’s verified complaint. Accordingly, it is hereby

ORDERED, that Defendants’ motion to dismiss is **DENIED** it its entirety. It is further

ORDERED, that Defendants shall file an answer within 30 (thirty) days of the date this Decision and Order is entered with the clerk.

This constitutes the decision and order of this Court.

*All applications not specifically addressed herein are Denied.

Dated: August 9, 2023


HON. RUPERT V. BARRY, A.J.S.C.

HON. RUPERT BARRY

KINGS COUNTY CLERK
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