Baravarian v Unique Treasures, LLC
2024 NY Slip Op 35264(U)
May 14, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 625832/2023
Judge: James Hudson
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INDEX NO.: 625832/2023

Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVI
Memorandum Decision

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE: 11/20/23 (#001)
MOTION DATE: 1/30/24 (#002)
FINAL DATE: 5/8/24
Mot. Seq. #: **001 – MotD**
002 - MG

---X
MANOUTCHEHRE BARAVARIAN,

Plaintiff,

-against-

UNIQUE TREASURES, LLC and DAVID ANTEBI,

Defendants.
---X

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Defendants, Unique Treasures, LLC ("Unique") and David Antebi request an order (mot. seq. 001): 1) pursuant to **CPLR (a) (1), (4), (5), (7), (8)**, dismissing the complaint, with prejudice; or, in the alternative; 2) consolidating this action with those actions filed under index numbers 603362/2021, 606482/2022 and 608879/2022; and 3) awarding legal fees associated with this motion.

Plaintiff, Manoutchehre Baravarian requests an order (mot. seq. 002) pursuant to **CPLR 2309**, accepting *nunc pro tunc* the filing of affidavits of service in conformity with **RPL 309-b**.

This is an action alleging breach of contract and unjust enrichment. The matter concerns a September 16th, 2017 consignment agreement (NYSCEF Doc No. 3, "Contract"). The consignor, Manoutchehre (a/k/a Mike) Baravarian, is the proprietor of Malachite Art, a Northport, NY gallery and restoration shop specializing in malachite and lapis lazuli decorative objects. The consignee is Unique Treasures, LLC ("Unique"), a Fort Lauderdale, FL gallery and collectibles store. Its principal, David Antebi, executed the contract both in his corporate capacity and as guarantor.

Mr. Baravarian has previously filed three (3) cases with identical allegations under separate index numbers. The first, filed under Index number 603362/2021, is an active matter in which the summons and complaint are not accompanied by affidavits of service. The last activity is a March 1st, 2021 verification of the complaint. The second, filed under Index Number 606482/2022, contains only a summons and complaint filed April 5th, 2021, and has not yet been assigned. The third action, filed under Index Number 608879/2022, is marked disposed. Unique and Mr. Antebi moved therein for dismissal pursuant to **CPLR 3211 (a) (1), (7), (8)**. The Court determined that Mr. Baravarian filed Florida affidavits of service without certificates of conformity. On January 3rd, 2023 the Court, by decision and order dismissed the complaint for lack of personal jurisdiction pursuant to **CPLR 3211 (a) (8)**. The Court did not address the requests for dismissal pursuant to **CPLR 3211 (a) (1), (7)**.

In this fourth (4th) filing of his complaint, Mr. Baravarian repeats his allegations. The Court notes that he again served process of the summons and complaint in the State of Florida without the required certificates of conformity.

Unique and Mr. Antebi have filed a motion requesting dismissal of the complaint pursuant to **CPLR 3211 (a) (1), (4), (5), (7), (8)**.

Mr. Baravarian has filed a cross-motion to accept his affidavits of service with certificates of conformity, *nunc pro tunc*.

The Court will first consider the plaintiff's cross-motion, which, if successful, will render the defendants' request for dismissal due to lack of personal jurisdiction moot. Mr. Baravarian has filed two (2) corrected affidavits of service as exhibits (NYSCEF Doc No. 30).

Although neither is accompanied by a certificate of conformity, the corrected affidavits of service are significantly in compliance with the statutes governing whether an out-of-state acknowledgement is taken in conformity with New York law. Additionally, the cross-motion is unopposed. (*see **21st Mortgage Corporation v. Rudman***, 201 AD3d 618, 624-625, 161 NYS3d 257 [2d Dept 2022]; ***Midfirst Bank v. Agho***, 121 AD3d 343, 351-352, 991 NYS2d 623 [2d Dept 2014]). The Court finds that the corrected affidavits of service are legally sufficient and will grant the relief requested in the cross-motion.

The Court will now consider the defendants' dismissal motion.

Initially, the Court will not grant the defendants' request for consolidation or joint trial of this action with any of the previous noted cases. That request is addressed to the sound discretion of the Court (***RCN Const. Corp. v. Fleet Bank, N.A.***, 34 AD3d 776, 825 NYS2d 140 [2d Dept 2014]). It is the well-reasoned opinion of the Court that granting either consolidation or joint trial is not in the interests of justice or judicial economy (***Lecorps v. Bromberg***, 127 AD3d 931, 6 NYS3d 627 [2d Dept 2015]). The prior cases are duplicative of the case at bar. Consolidation is also be denied because the instant action is subject to a meritorious motion to dismiss (***HSBC Bank USA, N.A. v. Francis***, 214 AD3d 58, 59, 185 NYS3d 173 [2d Dept 2023]).

The defendants allege that they are entitled to dismissal of the complaint as *res judicata*, **CPLR 3211 (a) (5)**. They argue that the Court, in its January 3rd, 2023 order comprehensively granted their prior dismissal motion. As discussed above, the Court granted dismissal solely due to lack of personal jurisdiction. That order does not have the preclusive effect which the defendants allege. The Court will not dismiss the complaint pursuant to **CPLR 3211 (a) (5)**.

The Court will next consider defendants' request for dismissal because there are other actions pending between the same parties for the same cause of action (**CPLR 3211 [a] [4]**). The Court recognizes that the plaintiff has thrice previously filed for identical relief. **CPLR 3211 (a) (4)** states that the Court need not dismiss upon this ground, but may make such order as justice requires. The Court will decide the motion in this action. The Court, in its discretion, will not dismiss this case for the reason of duplicative pending actions (*see* ***Baczkowski v. D.A. Collins Const. Co., Inc.***, 89 NY2d 499, 655 NYS2d 848, 678 NE2d 460 [1997]).

For purposes of the balance of this dismissal analysis, the Court must accept the allegations made in the complaint as true, accord them the benefit of every reasonable inference, and determine only whether the allegations support any cognizable legal theory (***Connolly v. Long Island Power Authority***, 30 NY3d 719, 728, 70 NYS3d 909, 94 NE3d 471 [2018]). The criterion is whether Mr. Baravarian has a cause of action; not whether on has been stated (***Maddicks v. Big City Properties, LLC***, 34 NY3d 116, 123, 114 NYS3d 1, 137 NE3d 459 [2019]; ***Leon v. Martinez***, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]). The Court will also consider whether the plaintiff can succeed upon any reasonable view of the stated facts (***Aristy-Farer v. State***, 29 NY3d 501, 509, 59 NYS3d 877, 81 NE3d 360 [2017]).

Moving to the request for dismissal of the complaint upon documentary evidence (**CPLR 3211 [a] [1]**), the defendants cite to the parties' contract as a document in support of their requested relief. The September 16th, 2017 Consignment Agreement is fully executed. The contract speaks for itself (***Weg v. Kaufman***, 159 AD3d 774, 776, 72 NYS2d 135 [2d Dept 2018]; ***In re 1545 Ocean Ave., LLC***, 72 AD3d 121, 128, 893 NYS2d 590 [2d Dept 2012]). The execution of the contract indicates that the parties understood the contents and assent to its terms (***British West Indies Guar. Trust Co., Inc. v. Banque Internationale a Luzembourg***, 172 AD2d 234, 567 NYS2d 731 [1st Dept 1991]). The Court recognizes that the parties are experienced businesspersons who possessed the ability to obtain the benefit of counsel in contract formation and execution. The Court will enforce the contract pursuant to its terms (***Vermont Teddy Bear Co. v. 538 Madison Realty***, 1 NY3d 470, 475, 775 NYS2d 765, 807 NE2d 874 [2004]; ***Loughlin v. Meghi***, 186 AD3d 1633, 1639, 132 NYS3d 65 [2d Dept 2020]).

Documents such as a contract and any other papers of undeniable content will be considered (***Hohwald v. Farm Family Casualty Insurance Company***, 155 AD3d 1009. 1010, 66 NYS3d 316 [2d Dept 2017]; ***Fontanetta v. John Doe 1***, 73 AD3d 78, 84-85, 989 NYS3d 569 [2d Dept 2010]). The documentary evidence presented must resolve all factual issues as a matter of law and conclusively dispose of the allegations made by Mr. Baravarian (***B&A Realty Management, LLC v. Gloria***, 192 AD3d 851, 853, 144 NYS3d 443 [2d Dept 2021]). The Court will not consider letters, emails and affidavits, which fail to meet the requirements of documentary evidence (***Magee-Boyle v. Reliastar Life Ins. Co. of N.Y.***, 173 AD3d 1157, 1159, 105 NYS3d 90 [2d Dept 2019]).

In reviewing the primary document, the Court notes that the contract listed Manoutchehre (aka Mike) Baravarian as the consignor and Unique Treasures LLC and/or Mr. David Antebi as consignee.

The contract states the following:

> Paragraph 2 – Consignee may also at its own election return goods in original condition to consignor at consignee's cost and expense;
>
> Paragraph 3 – The consignee agrees to use its best efforts to sell the goods for the consignor's account on cash terms . . .
>
> Paragraph 4 – The consignee agrees that upon sale, to deliver such proceeds to the consignor within seven days of said sale or reassigned;
>
> Paragraph 8 – "Risk of loss of goods or damage to the goods shall be the responsibility of the consignee while said goods are in the possession of the consignee . . .
>
> Paragraph 9 – Either party may terminate this agreement. Upon termination, all unsold goods in original condition, shall be returned to the consignor and at the expense of the consignee, together will payment of any monies due;
>
> Paragraph 10 - . . . in the event the consignor takes any legal action against any of the parties due to default of the consignee or the undersigned, all parties hereby agree that the consignee and the Guarantor shall be responsible for all legal and attorneys' fees . . .

> Paragraph 11 – In the event that the merchandise on consignment is not sold within a period of one year from the date of delivery the balance of all monies due to the consignor shall be due and payable immediately.

The contract also contains a consigned merchandise inventory list which notes forty-nine separate items. It is uncontroverted that the items consist of what is colloquially referred to as "antiques". The list does not contain any entries regarding the condition of any item or whether at the time of receipt by Unique, any item bore condition damage or evidence of previous use which might negatively impact value.

The contract does not contain any terms or provision regarding merchandise repair or consignor travel expenses to substantiate Mr. Baravarian's demand for $7,500 as reimbursement of his alleged travel and repair expenses.

The defendants also rely on the shipping order manifest and a series of color photographs as documentary proof that items which were returned by the consignee to the consignor were undamaged at the time of shipment (NYSCEF Doc. 19). The manifest, which is dated February 28th, 2018, lists the shipper as Unique Treasures LLC, the intended recipient as Mike Malachite, and the shipper as RAM Trucking ("RAM"). That return was timely per contract paragraph 11. Unique argues RAM is not its representative (***Cross v. Supersonic Motor Messenger Courier, Inc.***, 140 AD3d 503, 33 NYS3d 252 [1st Dept 2016]). The defendants contend that any loss or damage alleged to have occurred to the consigned items during shipment is not their responsibility under the contract.

The plaintiff, in opposition, argues that the manifest does not qualify as a business record because the defendants have not laid a proper foundation. That argument is a trial objection regarding the business records exception to the hearsay rule (*see* ***SK Industries,***

LLC v. Jackson, 198 AD3d 830, 155 NYS3d 428 [2d Dept 2021]). The manifest is offered in the instant motion only as a document indicating that the consigned goods left the defendants' possession, control, and responsibility.

The defendants argue that the pre-shipment photographs of the returned items are documentary proof of their good condition at the time of shipment by RAM (***Champion v. Take Two Interactive Software, Inc.***, 64 Misc3d 530, 535, 100 NYS3d 838 [Sup Ct. New York County 2019]).

Plaintiff's counsel opposes the photographs as "... show[ing] at most the single side of the exterior of the merchandise ..." (Affirmation, NYSCEF Doc. No. 28, para 22). That opposition does not discuss any specific damage to any item which was shipped. Paragraph 12 of the complaint alleges $25,000 in damages associated with repair and depreciation of merchandise returned in a damaged condition but does not allege that damage to any item occurred while the merchandise was in the possession of Unique. Contract paragraph 2 states that the goods will be returned in original condition. The contract does not define that term. The contract merchandise inventory sheet does not contain any statement regarding the condition of the merchandise at the time of its receipt by Unique.

The photographs include record of clocks and candelabra as part of the return shipment to Mr. Baravarian. The complaint includes, without specificity, a demand for $32,000 in "damages for clocks and candelabras which have purportedly been lost by defendants or their agents" (NYSCEF Doc. No. 2, para. 12). The defendants have provided documentary proof that clocks and candelabra were included in the shipment and have demonstrated that RAM is not their representative or agent.

Mr. Baravarian further argues that the documents do not resolve his allegations that Unique has failed to reimburse him for merchandise which was sold and/or lost. His counsel argues that the breach of contract cause of action "principally [concerns] [Unique] failing to sell merchandise that was entrusted to them" (NYSCEF Doc. No. 28, para. 11). Contract paragraph 4 provides that Unique/Mr. Antebi will use "best efforts" to sell the consigned goods. That term is undefined by the contract. It is uncontroverted that unsold goods were timely returned to Mr. Baravarian pursuant to contract paragraph 11.

The Court notes that the complaint alleges damages of $150,000, despite alleging $77,000 in itemized damages. The Court declines to speculate.

The documents submitted by the defendants are sufficient to dismiss all but two of the complaint allegations: 1) the allegation that Mr. Baravarian incurred $12,500. in damages associated with deposit or advance payments pursuant to contract paragraph 4; and 2) a demand for attorneys' fees in the event it is determined that the defendants failed to render payment to the plaintiff for consigned merchandise which was sold, per contract paragraph 10. All other allegations of the first and second causes of action for breach of contract by Unique or Mr. Antebi will be dismissed pursuant to **CPLR 3211 (a) (1)**.

Considering the request for dismissal pursuant to **CPLR 3211 (a) (7)**. The Court will confine its analysis to the remaining third cause of action for unjust enrichment.

Where the parties have entered a contract, there can be no quasi-contractual claims arising from the same subject matter (***IDT Corp. v. Morgan Stanley Dean Witter & Co.***, 12 NY3d 132, 142, 879 NYS2d 355, 907 NE2d 268 [2009]). The theory of unjust enrichment lies as a quasi-contract claim (***Goldman v. Metropolitan Life Ins. Co.***, 5 NY3d 561, 572, 807 NYS2d 583, 841 NE2d 742 [2005]). Mr. Baravarian and Unique and Mr. Antebi having executed a valid and enforceable contract precludes recovery on a theory of unjust enrichment (***Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.***, 70 NY2d 382, 388, 521 NYS2d 653, 516 NE2d 190 [1987]). The defendants' request that the third cause of action for unjust enrichment be dismissed for failure to state a cause of action upon which legal relief may be obtained, will be granted.

Accordingly, it is

ORDERED, that the motion (mot. seq. 001) by the defendants, Unique Treasures, LLC and David Antebi, which requests, pursuant to **CPLR 3211 (a) (1), (7)**, that the complaint be dismissed, *with prejudice*, is granted, except for the allegation of $12,500. in damages associated with any unremitted deposit or advance payments and attorneys' fees related to that allegation; and it is further

ORDERED, that the request, in the alternative, that this action be consolidated with those actions filed under index numbers 603362/2021, 606482/2022 and 608879/2022, is denied; and it is further

ORDERED, that the request that the complaint be dismissed pursuant to **CPLR 3211 (a) (4), (5)** is denied; and it is further

ORDERED, that the request that the complaint be dismissed pursuant to **CPLR 3211 (a) (8)**, is denied as moot; and it is further

ORDERED, that the request for an award of attorneys' fees associated with this motion, is denied; and it is further

ORDERED, that the cross-motion (mot. seq. 002) by the plaintiff, Manoutchehre Baravarian, which requests, pursuant to **CPLR 2309**, that the corrected affidavits of service upon the defendants be accepted, *nunc pro tunc*, is granted.

This memorandum also constitutes the Order of the Court.

Dated: May 14th, 2024
Riverhead, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court