Epicurean Circle Inc. v Toji Dev. NY Inc.
2024 NY Slip Op 35456(U)
May 30, 2024
Supreme Court, Queens County
Docket Number: Index No. 728659/2021
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

EPICUREAN CIRCLE INC.,

Plaintiff,

-against-

TOJI DEVELOPMENT NY INC., and TAEHWAN KWON,

Defendants.

IAS Part - 42

Index No.: 728659/2021

Motion Date: 2/15/24

Motion Cal. No. 22

Motion Seq. No. 3

The following electronically filed ("EF") documents read on this motion by Toji Development NY Inc. ("Toji") and Taehwan Kwon ("Mr. Kwon") (collectively, the "defendants") for an order: (1) dismissing the second and third causes of action of plaintiff's amended complaint under CPLR § 3211(a)(7) for failure to state a claim; and (2) granting such other, further, and different relief as the Court deems appropriate and just.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.................................	EF 27 - 30

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages based upon alleged breach of contract. In particular, Epicurean Circle Inc. ("Epicurean" or 'plaintiff") alleges that on or about October 15, 2020, the parties entered into a written agreement to construct a restaurant at 20 West 53rd street, New York, NY 10019 ("subject premises"). The agreed upon amount for the Project was $988,857.47. However, the plaintiff alleges that it paid more than the contract price, but that the project remains unfinished. The plaintiff alleged that the defendants abandoned the project, refused to reconcile discrepancies, used different materials than the project required, and

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"diverted payments made by Epicurean for the project and applied and misappropriated said payments towards an entirely different project. As a result, on December 30, 2021, the plaintiff commenced the instant action. As a result, on December 30, 2021, the plaintiff commenced the instant action. Thereafter, on May 4, 2022, the plaintiff amended the complaint, to include to the following causes of action: fraud, conversion and unjust enrichment, etc.

It is well settled law that when considering a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint, or counterclaim, as true, accord the plaintiff the benefit of every possible favorable inference, and determine only if the facts alleged fit within any cognizable legal theory. (*Maddicks v. Big City Property, LLC,* 34 NY3d 116 [2019]; *Patel v. Gardens at Forest Hills Owners Corp.,* 181 AD3d 611 [2d Dept 2020]; *Hampshire Props. v. BTA Bldg. & Developing, Inc.*, 122 AD3d 573 [2d Dept 2014]; *Chanko v. American Broadcasting Cos.,* 27 NY3d 46 [2016]; *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 NY3d 324 [2013]; *Travelsavers Enterprises, Inc. v. Analog Analytics, Inc.,* 149 AD3d 1003 [2d Dept 2017].) Here, the court finds that the plaintiff failed to articulate a cognizable legal theory based upon fraud, conversion, and unjust enrichment.

Moreover, the plaintiff failed to articulate a viable cause based upon fraud. It is well settled that the "[t]he elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*see Ross v. Louise Wise Servs., Inc.,* 8 NY3d 478, 488 [2007]; *Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 421 [1996].) A claim rooted in fraud must be pleaded with the requisite particularity under CPLR § 3016 (b)." (*See Eurycleia Partners, LP v. Seward & Kissel, LLP,* 12 NY3d 553, at 559 [2009]; *Matter of Pesola Trust, etc.,* 166 AD3d 885 [2d Dept 2018]; *Hausen v. North Fork Radiology, P.C.*, 171 AD3d 888 [2d Dept 2019].) Here, plaintiff's second and third causes of action do not meet the statutory requirements of particularity, as the mere mention of the term "fraud" without more details, falls far short of the pleading requirements of CPLR § 3016 (b).

Additionally, the plaintiff's cause(s) of action based upon unjust enrichment is also unavailing. It is well settled law that "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Goel v. Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013] [internal quotation marks omitted];

see also Reingold v. Bowins, 180 AD3d 722 [2d Dept 2020]). However, "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corssello v. Verizon New York, Inc.,* 18 NY3d 777, 790 [2012]; *Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski*, 14 AD3d 644, 645 [2d Dept 2005]; *Bettan v. Geico Gen. Ins. Co.*, 296 AD2d 469 [2d Dept 2002]). This is because a quasi-contract cause of action only exists in the absence of a valid contract governing the very same events being asserted in a quasi-contract cause of action (*Clark-Fitzpatrick, Inc. v. Long Is. R. Co.,* 70 NY2d 382, 388 [1987]). Here, the amended complaint makes it abundantly clear that the nexus for second and third causes of action is based upon the defendants' breach of the construction contract, which was executed between the parties. As such, the court finds that plaintiff's unjust enrichment claim is duplicative of its cause of action to recover damages for breach of contract. (*see Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski*, 14 AD3d 644, 645 [2d Dept 2005]).

Lastly, to successfully plead a cause of action to recover damages for conversion "a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right" (*Alpha/Omega Concrete Corp. v. Ovation Risks Planners, Inc.*, 197 AD3d 1274 [2d Dept 2021] citing *Giarrdini v. Settanni*, 159 AD3d 874, 875 [2d Dept 2018]; *World Ambulette Transp., Inc. v. Lee,* 161 AD3d 1028, 1030-1031 [2d Dept 2018]). "'[C]onversion occurs when funds designated for a particular purpose are used for an unauthorized purpose'" (*Petrone v. Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017], quoting *East Schodack Fire Co., Inc. v. Milkewicz*, 140 AD3d 1255, 1256 [2d Dept 2016]). "Tangible personal property or specific money must be involved" (*Independence Discount Corp. v. Bressner*, 47 AD2d 756, 757 [1975] [emphasis omitted]; *see RD Legal Funding Partners, LP v. Worby Groner Edelman & Napoli Bern, LLP*, 195 AD3d 968 [2d Dept 2021]). Furthermore, it is well established that while a cause of action alleging conversion cannot be predicated upon a mere breach of contract, the contracting party may also be held liable in tort where the conduct which constitutes a breach of contract also constitutes a breach of a duty distinct from, or independent of, the breach of contract. (*Connecticut New York Lighting Company v. Manos Business Management Company, Inc.*, 171 AD3d 698 [2d Dept 2019] citing *Sommer v. Federal Signal Corp.,* 79 NY2d 540, 551 [1992]; *North Shore Bottling Co. v. Schmidt & Sons*, 22 NY2d 171, 179 [1968]; *Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev.*

Corp., 64 AD3d 85 [2d Dept 2009]). Here, plaintiff's conversion claim "allege[d] no independent facts sufficient to give rise to tort liability" and, thus, is nothing more than a restatement of its breach of contract claim. (*see Fesseha v. TD Waterhouse Inv. Servs.*, 305 AD2d 268 [1st Dept 2003]; *Interstate Adjuster, Inc. v. First Fid. Bank, N.A.*, 251 AD2d 232 [1st Dept 1998]).

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the plaintiff's second and third causes of action in its amended complaint is granted, without opposition; and it is further,

ORDERED that defendants shall serve a copy of this Order with Notice of Entry upon the plaintiff on or before June 25, 2024.

The foregoing constitutes the decision and order of the court.

Dated: May 30, 2024
Long Island City, New York

Maurice E. Muir

MAURICE E. MUIR, J.S.C.

FILED
6/3/2024 TA
COUNTY CLERK
QUEENS COUNTY

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