First-Citizens Bank & Trust Co. v County of Suffolk
2024 NY Slip Op 35467(U)
May 6, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 203285/2022
Judge: John J. Andrews
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SHORT FORM ORDER **INDEX NO.: 203285/2022**

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable John J. Andrews

FIRST-CITIZENS BANK & TRUST COMPANY, **Plaintiff,** **-against-** **THE COUNTY OF SUFFOLK,** **Defendants.**	**MOTION DATE: 12/19/23 001** **3/6/24 002** **SUBMITTED: 3/28/24** **MOTION NO. 001 MD** **002 MD** **PLATZER, SWERGOLD, GOLDBERG, LATZ & JASLOW, LLP** **Attorneys for Plaintiff** **475 Park Avenue South, 18th Floor** **New York , New York 10016** **CHRISTOPHER J. CLAYTON, ESQ.** **COUNTY ATTORNEY** **Attorneys for Defendant** **H. Lee Dennison Building** **100 Veterans Memorial Highway** **P.O. Box 6100** **Hauppauge, new York 11788-0099**

Upon the following papers read on these motions for summary judgment; Notice of Motion and supporting papers by plaintiff, filed November 27, 2023; Notice of Cross Motion and supporting papers by defendant, filed January 31, 2024; Answering Affidavits and supporting papers by defendant, filed January 31, 2024 (001); by plaintiff, filed March 8, 2024 (002); ; Replying Affidavits and supporting papers by plaintiff, filed March 8, 2024 (001) by defendant March 27, 2024 (002); it is

ORDERED that these motions are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motion by plaintiff First-Citizens Bank & Trust Company is denied; and it is further

ORDERED that the motion by defendant The County of Suffolk is denied.

Plaintiff First-Citizens Bank & Trust Company, (FCB), alleges that by merging with CIT

Bank, N.A., (CIT), it became the assignee of Carousel Industries of North America, Inc.'s, (Carousel), rights arising from a commercial equipment lease within a Master Use Agreement, (MUA), between it and defendant The County of Suffolk, (the County). FCB alleges, inter alia, that the County breached the contract by purportedly terminating it without a proper basis to do so, and by failing to pay in full all monies due thereunder.

FCB now moves for summary judgment in its favor arguing, among other things, that documentary evidence presented in support of its motion establishes its entitlement to summary judgment on its breach of contract and account stated claims. It also moves to dismiss the County's affirmative defenses on the basis that they are defectively pleaded. In support of its motion, plaintiff submits, inter alia, the pleadings, a certificate of assignment, invoices, emails, and the affidavit of David Di Donato, Jr.

Mr. Di Donato states in his affidavit that he is Vice President, Equipment Finance Recovery for FCB, is FCB's custodian of records, and that he bases his affidavit on personal knowledge he obtained by reviewing the books and records that FCB maintains in its regular course of business. He states that on December 2, 2014, the County executed and delivered MUA No. 0002949 to Carousel, which contained provisions for the lease of equipment to be utilized in maintaining its 911 emergency call system. Mr. Di Donato states that Carousel then assigned its rights under the MUA to CIT Bank, N.A., effective June 2016, and that FCB merged with CIT on January 4, 2022. He states that on or about November 25, 2015, equipment listed in "Equipment Schedule No. 00020" of the MUA was leased to the County, and the schedule was modified by letter agreement on June 10, 2016, and accepted by the county on June 29, 2016. Mr. Di Donato states that the modification obligated the County to pay a total of $2,292,872.40 in arrears over 6 installments.

Mr. Di Donato states that on November 23, 2020, the County sent an email purporting to terminate the MUA as of January 1, 2021, because it engaged Motorola to provide the services for its 911 system going forward. He states that FCB did not agree to this termination, and based on his interpretation of the MUA the County breached the contract by terminating it prior to full payment without the happening of a "non-appropriation" event, which is defined in the MUA. He states that the County still owes FCB payments covering the final year of the MUA, which encompassed June 2020 through May 2021. Mr. Di Donato states that despite issuing a statement to the County for its 6th payment under the MUA, FCB has not been paid. The Court notes that the statement referred to in Mr. Di Donato's affidavit is an invoice issued by Carousel Industries that is dated April 8, 2021, and seeks a payment of $343,928.91.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (**Alvarez v Prospect Hosp.**, 68 NY2d 320; **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851). Summary judgment should not be granted when facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (**Walker v Ryder Truck Rental and Leasing**, 206 AD3d 1036). The movant has the initial burden of proving entitlement to summary judgment. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (**Walker v Ryder Truck Rental and Leasing**, supra). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (**Vega v Restani Constr. Corp.**, 18 NY3d 499). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; **Alvarez v Prospect Hosp.**, supra; **Zuckerman v City of New York**, 49 NY2d 557).

A cause of action sounding in breach of contract requires plaintiff to prove that: (1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations; and (4) defendant's breach resulted in damages (**34-06 73, LLC v Seneca Ins. Co.**, 39 NY3d 44). To bring an action for account stated, plaintiff must prove: (1) evidence of an account (a bill), based on a prior transaction between the parties, which was presented by one party to another; (2) the recipient accepted the account (bill) as correct, either expressly or implicitly by failing to object to the amount stated therein within a reasonable timeframe; and (3) evidence the recipient had promised to pay the amount stated (*see* **National Commerce Exch. of Long Is., Inc. v. Cosmopolitan Coach, Ltd.**, 120 AD3d 1208; **American Exppress Centurion Bank v Cutler**, 81 AD3d 761). For an assignment of contractual rights to be valid it must transfer the assignor's entire interest to the assignee and completely divest the assignor of all control over the thing assigned (*see* **In re Stralem**, 303 AD2d 120).

FCB's submission demonstrates that the County and Carousel entered into a contract. However, its submission fails to eliminate all material issues of fact as to whether FCB has standing to bring a suit against the County as an assignee of that contract (*see* **Alvarez v Prospect Hosp.**, supra; **Winegrad v New York Univ. Med. Ctr.**, supra). Specifically, FCB submits an invoice dated April 8, 2021, from Carousel to the County seeking payment under the contract, which creates a question of fact as to whether Carousel assigned its entire interest in the contract to either CIT or FCB, or whether it continued to exercise control over payments on the contract (*see* **Fairlane Fin. Corp. v Longspaugh**, 144 AD3d 858; **In re Stralem**, supra). This question of fact regarding standing, among other things, precludes summary judgment as to both the breach of contract and accounts stated claim. Accordingly, FCB's motion is denied. The court now turns its attention to the branch of FCB's motion seeking to dismiss the County's affirmative defenses.

When moving to dismiss affirmative defenses, the plaintiff bears the burden of demonstrating that the affirmative defenses are without merit as a matter of law because they either do not apply under the factual circumstances of the case, or fail to state a defense (*see* **Lewis v US Bank N.A.**, 186 AD3d 694; **Shah v Mitra**, 171 AD3d 971; **Wells Fargo Bank, N.A. v Rios**, 160 AD3d 912). In the context of a motion to dismiss an affirmative defense, "the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (**LG Funding, LLC v United Senior Props. of Olathe, LLC**, 181 AD3d 664, 665 [internal citations omitted]; *see* **Gonzalez v Wingate at Beacon**, 137 AD3d 747). Where there is any doubt regarding the availability of a defense, it should not be dismissed (*see* **Lewis v US Bank N.A.**, supra; **LG Funding, LLC v United Senior Props. of Olathe, LLC**, supra; **Shah v Mitra**, supra).

FCB's submission fails to satisfy the Court that it met its initial burden in demonstrating that the affirmative defenses proffered by the County are without merit as a matter of law (*see* **Lewis v US Bank N.A.**, supra; **Shah v Mitra**, supra; **Wells Fargo Bank, N.A. v Rios**, supra). The Court now turns its attention to the County's cross-motion for summary judgment in its favor dismissing the complaint against it.

The County cross-moves for summary judgment in its favor dismissing FCB's complaint against it arguing, inter alia, that FCB lacks standing to sue it based on a lack of privity of contract and purported inadequacies in the alleged assignment between Carousel and CIT. In support of its motion the County submits, inter alia, a letter, invoices, a private label vendor agreement, and a printout from a website. Given that the Court has already determined that there exists material issues of facts as to, among other things, whether Carousel assigned its rights under the MUA to CIT, and whether FCB stands as the current assignee in light of its merger with CIT, summary judgement is inappropriate at this time (*see* **Fairlane Fin. Corp. v Longspaugh**, supra; **In re Stralem**, supra).

Any argument not explicitly addressed herein was considered and deemed to be unpersuasive.

Dated: May 6, 2024

John J. Andrews, J.S.C.

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