

Buyer's Intl., LLC v Millman

2011 NY Slip Op 34016(U)

October 6, 2011

Sup Ct, New York County

Docket Number: 650464/10

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN
Justice

PART 3 EFM

BUYERS INTERNATIONAL LLC,

INDEX NO. 650464/2010

JOSEPH MILLMAN, et al

MOTION DATE 9/15/2011

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for Dismiss (renewed)

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10-6-11

Eileen Branstén
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

-----X

BUYER'S INTERNATIONAL, LLC,

Plaintiff,

Index No.: 650464/10

Motion Date: 09/15/2011

-against-

Motion Seq. No.: 001, 003

JOSEPH MILLMAN a/k/a JOE MILLMAN d/b/a
MILLMAN DIAMOND CORPORATION and
MILLMAN DIAMOND CORPORATION,

Defendants.

-----X

PRESENT: EILEEN BRANSTEN, J:

Motion sequences 001 and 003 are consolidated for disposition.

In motion sequence 001, defendants Joseph Millman ("Millman") and Millman Diamond Corporation ("MDC") (collectively "Defendants") move to dismiss the original complaint pursuant to CPLR 3211 (a) (7).

In motion sequence 003, Defendants renew their motion to dismiss as against the Amended Complaint, raising additional grounds for their sought relief.

Buyer's International LLC ("Plaintiff") opposes.

BACKGROUND

Plaintiff is a New York limited liability company.

Millman is MDC's principal.

Plaintiff and Defendant are each in the jewelry and precious gems business.

Plaintiff alleges that it transacted business with Defendants from 2001 through 2009.

Plaintiff alleges that the nature of the parties' dealing was as follows: Plaintiff

transferred precious gems, stones and jewelry to Defendants pursuant to jewelry memoranda ("Memos"). Pursuant to the Memos, Plaintiff remained the owner of the items transferred to Defendants, retaining title until Defendants sold those items to third parties. At some point Defendants were obligated to either pay the prices indicated in Memos or return the items transferred thereby, although Plaintiff does not allege a specific time period in which this was to happen.

Plaintiff attaches to the Amended Complaint documents which it alleges to be Memos. Plaintiff does not clarify whether the attached Memos represent the basis upon which Plaintiff's claims rest or are merely intended to be examples.

Plaintiff alleges that Defendants ceased making payments due under the Memos. Plaintiff further alleges that it demanded payments due under the Memos or return of the items transferred thereby.

ANALYSIS

I. Standing

Defendants first contend that Plaintiff lacks standing to bring the claims in the Amended Complaint. Defendants argue that only Buyer's International, Inc., a New Jersey corporation, has a potential interest in Plaintiff's causes of action. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss ("Defendants' 001 Memo"), § II; Defendants' Reply Memorandum of Law in Support of Motion to Dismiss ("Defendants 001

Reply Memo”), pp. 3-4; Reply Affirmation of Bruce Rosenberg in Support of Motion to Dismiss (“001 Rosenberg Reply Affirm.”), ¶ 3; Defendants’ Reply Memorandum of Law in Support of Renewed Motion to Dismiss (“Defendants 003 Reply Memo”), pp. 4-5.

Plaintiff claims that Buyer’s International, Inc. assigned to it all interest in the property at issue in this lawsuit pursuant to Exhibit A to the Amended Complaint. Exhibit A, titled “Assignment,” purports to transfer to Plaintiff “all rights, titles, and interest to and all Merchandise [defined therein as “stones, diamonds and precious jewels” delivered to third parties in the jewelry industry] owned by Buyer’s International, Inc., the return of such Merchandise and all claims for payment held by third parties for said Merchandise.” *See also* Amended Complaint ¶ 4 (alleging that Plaintiff is the “owner, successor in interest and assignee of all rights, title and claims of Buyer International Inc.’s interests in the subject goods”).

The court does not decide whether Exhibit A constitutes a valid and binding assignment. However, Plaintiff’s allegations, coupled with Exhibit A, suffice to render dismissal for lack of standing unwarranted at this time.

II. Verification

Defendant next asserts that the Amended Complaint must be dismissed for defective verification. Defendant claims that “because Mr. Steven Bottner [Plaintiff’s former principal] is deceased, there is no one that could possibly verify this complaint as true, leaving it, in its entirety, to be inadmissible hearsay. In fact, a verified pleading must be

verified with someone personal knowledge according to CPLR § 3215 (f).” Defendants’ Memorandum of Law in Support of Renewed Motion to Dismiss (“Defendants 003 Memo”), p. 6; *see also* Defendants’ 003 Reply Memo, p. 4.

CPLR § 3215 addresses default judgment, not verification. Defendants’ citation thereto adds no support to its argument. CPLR § 3020 addresses verification. Section 3020 states that verification shall be made by an officer of a domestic corporation. The Amended Complaint was verified by Ellen Bottner, widow of Steven Bottner. In her verification, Mrs. Bottner identifies herself as Plaintiff’s managing member. She is thus qualified to verify the complaint pursuant to the CPLR.

Additionally, the remedy for defective verification under the CPLR is to treat the “defectively verified pleading . . . as an unverified pleading.” CPLR 3022. Rule 3022 further clarifies that, where verification is mandatory, the party entitled to verification may treat the unverified pleading as a nullity, “provided he gives notice with due diligence to the attorney of the adverse party that he elects to do so.” *Id.* The record contains no indication that Defendants duly notified Plaintiff of their intention to treat the Amended Complaint as a nullity. Rather, Defendants responded to the Amended Complaint with a renewed motion to dismiss.

Lastly, to the extent that Defendants attempt to distinguish Plaintiff from Buyer’s International, Inc. in seeking to have the court find the Amended Complaint’s verification

defective, that issue is not properly before the court. Defendants raised that argument for the first time at oral argument and the court therefore declines consideration thereof. *See OFSA Fund II, LLC v. Canadian Imperial Bank of Commerce*, 82 A.D.3d 537, 538 (1st Dep't 2011); *Sun Pharmaceutical Industries, Ltd. v. Levitt*, 21 Misc.3d 1127(A), 5 (Sup. Ct. NY County).

The court declines to dismiss the Amended Complaint on the basis of allegedly defective verification.

III. Amendment

Defendants argue that the Amended Complaint should be dismissed as procedurally irregular because Plaintiff withdrew its motion for leave to file the amended complaint. *See* Defendant's 003 Memo, p. 5.

The court permitted Plaintiff to file the Amended Complaint. *See* December 14, 2010 Order (Bransten, J.). Defendants argue that the court's permission is procedurally irregular, but Defendants do not contend that the alleged irregularity adversely affects the merits of the controversy or is otherwise prejudicial. Defendant's allegation of procedural irregularities does not provide sufficient reason for the court to dismiss the Amended Complaint.

IV. Failure to State a Cause of Action

CPLR 3211 (a) (7) permits a party to move for dismissal of one or more causes of action on the ground that "the pleading fails to state a cause of action."

On a motion to dismiss pursuant to CPLR 3211 (a) (7), “the sole criterion is whether the pleading states a cause of action, and if from [the pleading’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail.” *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). The “pleadings must be liberally construed and the facts alleged accepted as true; the court must determine only whether the facts as alleged fit within any cognizable legal theory.” *Wiener v. Lazard Freres & Co.*, 672 N.Y.S.2d 8, 13 (1st Dep’t 1998) (internal quotations omitted).

a. Breach of Contract

Plaintiff must state four elements to plead a breach of contract: (1) the existence of a valid contract; (2) non-performance by the defendant; (3) performance by the plaintiff; and (4) damage to the plaintiff as a result of defendant’s non-performance. *JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 (2d Dep’t 2010).

Plaintiff alleges that the Memos constitute contracts with Defendants. *See* Amended Complaint ¶ 19. Plaintiff contends that Defendants have failed to perform under the Memos by ceasing to make required payments beginning in December 2009. *Id.*, ¶¶ 15, 20. Plaintiff alleges that it performed under the contracts by transferring possession of the property at issue to Defendants. *Id.*, ¶¶ 8, 9, 19. Plaintiff contends that it was damaged By Defendants’

failure to make proper payments. While Plaintiff's allegations are sparse, they sufficiently state a cause of action.

Defendants contend that Plaintiff's cause of action for breach of contract is lacking in specificity and, therefore, must be dismissed. Defendants' 001 Memo, § IV; Defendants' 003 Reply Memo, pp. 5-6.

CPLR § 3013 requires that "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions . . . intended to be proved and the material elements of each cause of action[.]" It is clear from the Amended Complaint that Plaintiff intends to prove that it gave jewelry to the Defendants which was neither returned nor paid for. That contention provides the basis for each of Plaintiff's causes of action, including its cause of action for breach of contract. Plaintiff is not required to have perfect knowledge of all pertinent facts at this early stage in the litigation. Therefore, Plaintiff's cause of action for breach of contract is adequately specific.

Defendants also argue, half-heartedly, that Plaintiff's contractual cause of action is precluded by the statute of limitations. Defendants invoke both the CPLR's 6-year statute of limitations and the UCC's 4-year statute of limitations. Plaintiff's 003 Memo, pp. 6-7; Plaintiff's 003 Reply Memo, p. 7. However, in neither case do Defendants address the issue of when Plaintiff's contractual claims accrued, nor is it otherwise clear that any of Plaintiff's claims accrued outside of the pertinent limitations period. Defendants further do not attempt

to clarify whether the underlying transactions were commission-based and what effect, if any, that issue has on the accrual of Plaintiff's claims.

Defendants' motion to dismiss Plaintiff's cause of action for breach of contract is denied.

b. Conversion

"Conversion is the unauthorized assumption and exercise of the right or ownership over goods belonging to another to the exclusion of the owner's rights." *Mirvish v. Mott*, 75 A.D.3d 269, 274 (1st Dep't 2010) (internal citations omitted). The cause of action accrues upon "[s]ome affirmative act - asportation by the defendant or another person, denial of access to the rightful owner or assertion to the owner of a claim on the goods, sale or other commercial exploitation of the goods by the defendant[.]" *State of New York v. Seventh Regiment Fund*, 98 N.Y.2d 249, 260 (2002).

Plaintiff alleges that it transferred property to Defendants pursuant to the Memos. Amended Complaint, ¶ 23. Plaintiff further alleges that Defendant sold some portion of that property to third parties. *Id.* Plaintiff contends that Defendant has returned to it neither the unsold property nor the proceeds from the sold property, despite Plaintiff's alleged demand that Defendants do so. *Id.*, ¶ 24. Plaintiff's allegations suffice to state a cause of action for conversion.

Defendants' opposition is twofold.

First, Defendants argue that a three year statute of limitations prohibits Plaintiff from maintaining a cause of action for conversion with respect to the majority of the Memos. Defendants' 001 Memo, § VI; Defendants' 003 Reply Memo, p. 7. However, Plaintiff's cause of action did not accrue when Defendant took possession of the property at issue, but, rather, when Defendant interfered with Plaintiff's right of possession over that property. *See Seventh Regiment Fund*, 98 N.Y.2d at 260. Plaintiff's conversion theory is that Defendant interfered with its right of possession when Defendant ceased making payments and refused to return unsold property. Plaintiff alleges that this happened sometime around December of 2009. Defendants' statute of limitations argument thus does not provide a basis for dismissal of Plaintiff's cause of action.

Second, Defendant contends that "Plaintiff's claim for conversion is facially defective since Plaintiff is claiming breach of contract as well as a quasi contract claim of unjust enrichment." Defendants' 001 Memo, § VI. It appears that Defendants argue that Plaintiff's cause of action should be dismissed as duplicative of Plaintiff's contract claim and unjust enrichment claims.

CPLR 3014 states that "causes of action may be stated alternatively or hypothetically." Plaintiff's pleading is therefore initially proper.

Additionally, while Plaintiff has alleged the existence of a binding contract, it has neither shown such an agreement to exist nor that the alleged agreement controls the dispute

herein. At this early stage, the record does not contain sufficient information for the court to determine the precise nature of Plaintiff's allegations and its entitlement to relief thereon. Therefore, although Plaintiff's causes of action for breach of contract, unjust enrichment and conversion all arise from the same set of operative facts, dismissal of one as duplicative of another is not warranted at this time.

Defendants' motion to dismiss Plaintiff's cause of action for conversion is denied.

c. Accounting

Plaintiff claims to be entitled to an accounting "in order to determine which third parties currently possess their property and the whereabouts of the goods or the monies that should accrue to Plaintiff from the sale of its goods." Amended Complaint, ¶ 29.

Plaintiff presents no argument in opposition to Defendants' motions as they concern Plaintiff's cause of action for an accounting.

The right to an accounting is "premised on the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Adam v. Cutner & Rathkopf*, 238 A.D.2d 234, 242 (1st Dep't 1997). Thus, to maintain a cause of action for an accounting, Plaintiff must allege both the existence of a fiduciary duty and a breach thereof. CPLR 3016 (b) requires that "where a cause of action is based upon . . . breach of trust, the circumstances constituting the wrong shall be stated in detail." Here, Plaintiff alleges neither a fiduciary

duty nor the requisite breach with sufficient detail to maintain its cause of action for an accounting. Plaintiff does not employ the words “confidential” or “fiduciary” anywhere in the Amended Complaint. Plaintiff’s assertion that “[b]ecause many thousands of dollars are entrusted to others using [jewelry memoranda], a large measure of trust is required in the industry” is vague, generalized and inadequately tied to Plaintiff’s cause of action for an accounting. Amended Complaint ¶ 11. Plaintiff simply alleges the existence of a normal business relationship, to which no fiduciary duty or enhanced level of trust is ascribed.

Plaintiff’s cause of action for an accounting is dismissed.

d. Unjust Enrichment

To state a cause of action for unjust enrichment, Plaintiff must allege that Defendants were “enriched, at [Plaintiff’s] expense, and that ‘it is against equity and good conscience to permit [Defendants] to retain what is sought to be recovered.’” *Georgia Malone & Co. v. Ralph Rieder*, 86 A.D.3d 406, 408 (1st Dep’t 2011) (quoting *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173 [2011]).

Plaintiff alleges that it gave Defendants certain property to sell on a consignment basis. Plaintiff further alleges that Defendant ceased making required payments for that property, that it demanded payment for or the return of that property, and that Defendants refused to make any further payment or return the property. Plaintiff contends that Defendants were enriched by retaining both the proceeds from sold property and the balance

of the unsold property. Amended Complaint, ¶¶ 30-34. Plaintiff has thus stated a cause of action for unjust enrichment.

Defendants argue that Plaintiff's cause of action for unjust enrichment is duplicative of its cause of action for breach of contract and must be dismissed. Defendants contend that both causes of action "seek damages for events arising from the same subject matter which is governed by the alleged contract." Defendants' 001 Memo, § V.

The existence of a valid, written agreement between the parties ordinarily precludes recovery on a theory of unjust enrichment. *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009). However, the existence of a valid contract governing the subject matter at issue is in dispute in this case. Plaintiff may therefore simultaneously maintain its causes of action for breach of contract and unjust enrichment. *See Auguston v. Spry*, 282 A.D.2d 489, 491 (2d Dep't 2001).

Defendants' motion to dismiss Plaintiff's cause of action for unjust enrichment is denied.

The court has considered the parties remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Defendants' motion to dismiss, motion sequence 001, is DENIED as moot; and it is further

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ORDERED that Defendants' renewed motion to dismiss the Amended Complaint, motion sequence 003, is GRANTED with respect to Plaintiff's cause of action for an accounting and that cause of action is dismissed; and it is further

ORDERED that Defendants' renewed motion to dismiss the Amended Complaint, motion sequence 003, is otherwise DENIED.

This constitutes the decision and order of the court.

Dated: New York, New York
October 6, 2011

ENTER



Hon. Eileen Bransten, J.S.C.