

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

PRIME 135 NYC, LLC

X

Plaintiff,

-against-

MAJOR CONSTRUCTION CO., INC.

Defendant.

X

DECISION & ORDER

Index No.: 651966/2017

Motion Seq No 5

Hon. Sabrina B. Kraus

The following e-filed documents, listed by NYSCEF document number were read on this motion: 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, and 94.

BACKGROUND

Plaintiff commenced this action alleging breach of contract and related causes of action arising out of plaintiff's rental of space to open a restaurant and the construction done on said space by defendant.

PROCEDURAL HISTORY

Plaintiff filed an initial summons and complaint in April 2017, alleging five causes of action against defendant: breach of contract, tortious interference with contract, fraud, unjust enrichment, and breach of implied warranty.

In August 2017, defendant appeared by counsel and in October 2017, defendant moved for dismissal of several causes of action. In September 2018, the court (Reed, J) granted the motion to the extent of dismissing the causes of action for tortious interference with contract and

fraud, without prejudice and granted leave to re-plead. The balance of the relief sought in the motion was denied.

In October 2018, plaintiff filed an amended summons and complaint, which added Joseph Mendler (JM) as a defendant, and again asserted four causes of action, breach of contract, fraud, unjust enrichment and breach of implied warranty. As to JM the complaint alleged he was the alter ego of defendant and sought to pierce the corporate veil.

In November 2018, defendant filed an answer to the first amended complaint and asserted seven affirmative defenses including: failure to state cause of action, failure to plead fraud with particularity, and failure to name a necessary party.

At the same time, JM moved for an order dismissing the amended complaint as against him. That motion was granted by the court (Reed, J) in May 2019 and all claims as against JM were dismissed.

A preliminary conference was held in January 2019 and a schedule set for discovery.

A compliance conference was held in April 2019, extending the parties time to comply with discovery, and directing a note of issue be filed by August 30, 2019.

In July 2021, the court (Kelly, J) granted plaintiff's counsel's motion to be relieved. New counsel for plaintiff appeared in August 2021.

THE PENDING MOTION

In August 2021, plaintiff filed a motion seeking: leave to serve a supplemental summons and second amended complaint; leave to add JM as a party; and for an order converting this action into a special proceeding pursuant to Article 10 of the New York Business Corporation Law based on the dissolution of defendant in August 2019.

For the reasons stated below the motion is denied.

Plaintiff's Motion to Convert this Action into a Special Proceeding Is Denied

Plaintiff moves to convert this action into a special proceeding for the court to supervise the dissolution and liquidation of defendant. Plaintiff relies on CPLR § 103 and BCL § 1008 in seeking said relief.

CPLR § 103(c) provides:

If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution. If the court finds it appropriate in the interests of justice, it may convert a motion into a special proceeding, or vice-versa, upon such terms as may be just, including the payment of fees and costs.

N.Y. C.P.L.R. 103 (McKinney). This provision is not applicable to the case at bar. This action was not mistakenly commenced by plaintiff in the wrong form, which is the remedy CPLR § 103(c) seeks to address. Rather over two years, after this action was commenced defendant dissolved. A corporation that has dissolved does not cease to exist and may take steps necessary to wind up its affairs. Such a corporation may sue and be sued [BCL § 1005(a); *Rodgers v Logan* 1212 AD2d 250(1st Dept 1986)].

BCL § 1008(a) provides :

At any time after the filing of a certificate of dissolution under this article the supreme court in the judicial district where the office of the corporation was located at the date of its dissolution, in a special proceeding instituted under this section, upon the petition of the corporation, or, in a situation approved by the court, upon the petition of a creditor, claimant, director, officer, shareholder, subscriber for shares, incorporator or the attorney-general, may suspend or annul the dissolution or continue the liquidation of the corporation under the supervision of the court and may make all such orders as it may deem proper in all matters in connection with the dissolution or the winding up of the affairs of the corporation

N.Y. Bus. Corp. Law § 1008 (McKinney).

Plaintiff's true interest in seeking this relief is reflected in the proposed ninth cause of action for an accounting. However, as defendant points out, BCL § 1008 does not provide for an accounting, and the appellate authority does not support the courts issuing rulings pursuant to that section to conduct a valuation of corporate assets upon dissolution. *See eg Ravitz v. Furst*, 65 A.D.3d 1049, 1050 (2d Dep't 2009) (*Supreme Court properly refused to supervise a corporate dissolution when the requested relief, valuation of good will, is not set forth in BCL §§1005 through 1008*); *Matter of Oak St. Mgt*, 307 A.D.2d 320 (2d Dep't 2003) (*Supreme Court erred in appointing a referee to hear and report as to the value of the corporation's assets because post-dissolution procedures in a judicial dissolution proceeding are set forth in Business Corporation Law §§1005 through 1008 and do not include the appointment of a referee*).

Based on the foregoing plaintiff's motion to convert this action to a special proceeding is denied, as is that portion of the motion which seeks to amend the complaint to include a cause of action for an accounting.

Plaintiff's Motion to Amend

CPLR § 3025(b) provides:

Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading

However, to conserve judicial resources, an examination of the underlying merit of the proposed amendment is mandated (*Megarix Furs v Gimbel Bros.*, 172 AD2d 209 [1991]), and such a motion "must be supported by an affidavit of merits and evidentiary proof that could be

considered upon a motion for summary judgment” (*Nab-Tern Constructors v City of New York*, 123 AD2d 571, 572 [1986]).

A motion to amend must pass a two-prong test:

First, the proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading. If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as a matter of law.

The next step is for the nisi prius court to test the pleading's merit. The merit of a proposed amended pleading must be sustained, however, unless the alleged insufficiency or lack of merit is clear and free from doubt. The party opposing the motion to amend, therefore, must overcome a presumption of validity in favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient. This does not mean, however, that those facts need to be proven at this stage.

(*Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989] [citations and quotations omitted]; see also *Stack v O'Higgins*, 2009 NY Slip Op 30874[U], at 6 [New York Supreme Court, New York County Apr. 2, 2009] [citing *Daniels*]).

North River Restaurant, LLC v. Paratore, No. 1104102008, 2011 WL 11074352, at 3–4 (N.Y. Sup. Ct. Mar. 28, 2011).

Defendant's argument that the motion to amend must be denied because there is no affidavit of merit is rejected as the proposed amended pleading is verified and pursuant to CPLR § 105(u) is considered to satisfy the requirement of submission of an affidavit.

As such the court will address the proposed amendments.

***It Is Law of the Case That the Cause of Action for
Fraud as Against Mendler Can Not Be Sustained***

On April 30, 2019, this Court granted the motion to dismiss the first amended complaint as alleged against JM. In issuing the order, the Court dismissed the Second Cause of Action alleging fraud against JM. The Second Cause of Action of the First Amended Complaint asserts

the same purported misrepresentations against JM as are alleged in the Proposed Second Amended Complaint against Major.

In dismissing the Second Cause of Action, the Justice Reed held the alleged representations “are, or would be easily verifiable with any sort of due diligence” and as such there could be no justifiable reliance upon the alleged representations. Based on the foregoing, the motion to essentially reinstate the claim as against JM is denied.

The Motion to Amend the Complaint to Add an Extra Paragraph on the Third Cause of Action for Unjust Enrichment Is Granted

The first amended complaint already contains a cause of action for unjust enrichment as against defendant. The proposed amended pleading seeks only to add an additional paragraph and leave to so amend is granted.

The Motion to Amend the Complaint to Add a Fifth Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing Is Denied

“A cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is ‘intrinsically tied to the damages allegedly resulting from a breach of the contract’” *Hawthorne Group v. RRE Ventures*, 7 A.D.3d 320, 323 (1st Dep’t 2004), quoting *Canstar v. Jones Constr. Co.*, 212 A.D.2d 452, 453 (1st Dep’t 1995).

A claim for the breach of the implied covenant of good faith and fair dealing is duplicative of a claim for breach of contract, where both claims arise from the same operable facts. *Netologic, Inc. v. Goldman Sachs Group, Inc.*, 110 A.D.3d 433, 434 (1st Dep’t 2013) Here, the Fifth Cause of Action is based upon the same facts which give rise to the First Cause of Action and seeks the same damages. As such, it fails to state a cause of action as a matter of law.

The Motion to Amend the Complaint to Add a Cause of Action for Careless Contractual Work Is Denied

A breach of contract between parties cannot be transformed into a tort unless a legal duty independent of the contract itself has been violated. *Clark-Fitzpartick, Inc. v Long Island RR Co.* 70 N.Y.2d 382, at 389. Here, the proposed amended pleading does not allege that defendant had a duty independent of the acknowledged contractual agreement between the parties. The Proposed Complaint, alleges that defendant failed to properly perform its work under the parties' contract.

Under New York law, a restatement of the contractual obligations asserted in a cause of action for breach of contract does not give rise to a claim for negligence. *Id* at 389-390. Such allegations are duplicative of the breach of contract claims under the circumstances presented herein. *See Board of Managers of Soho North 267 West 124th Street Condominium v. NW 124 LLC*, 116 A.D.3d 506, 507 (1st Dep't 2014); *Sutton Apts. Corp. v. Bradhurst 100 Dev. LLC*, 107 A.D.3d 646, 648 (1st Dep't 2013); *Stardial Comm. Corp. v. Turner Constr. Co.*, 305 A.D.2d 126 (1st Dep't 2003).

The Motion to Amend the Complaint to Include a Cause of Action for Duress Is Denied

In order to justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach in the contract which substantially defeats the purpose thereof (*Callanan v. Keeseville, Ausable Chasm & Lake Champlain R. R. Co.*, 199 NY 268, 284).

Babylon Assocs. v. Suffolk Cty., 101 A.D.2d 207, 215(1984). Giving the proposed amended pleading the broad reading it is entitled to, these allegations are not made. The alleged threat was made after the contract had been entered into, and is not alleged to be a failure of consideration or to have rendered plaintiff unable to perform.

“Repudiation of an agreement on the ground that it was procured by duress requires a showing of *both* (1) a wrongful threat, and (2) the preclusion of the exercise of free will.”

Fred Ehrlich, P.C. v. Tullo, 274 A.D.2d 303, 304 (2000). Here the proposed amended pleading does not allege that plaintiff entered into the contract based on a threat and therefore the pleading is insufficient on its face.

The motion to include a cause of action for Interference with Prospective Economic Advantage is Granted

“To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff’s prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby (*see Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]).” *Jacobs v. Continuum Health Partners, Inc.*, 7 A.D.3d 312, 313 (2004). The proposed amended pleading does include allegations that defendant wrongfully interfered in plaintiff’s ability to obtain outside contractors and the allegations are sufficient to allow the requested amendment.

The motion to amend the complaint to include causes of action for Trustee Conversion and Trustee Waste/Management is granted

The primary opposition submitted by defendant to these proposed amendments is that the proposed amended pleading fails to allege that defendant made a distribution to JM and that JM has received these assets. However said allegations are clearly made in the paragraph 93 of the proposed amended pleading.

CONCLUSION

Wherefore it is hereby

ORDERED that plaintiff's to convert this action into a special proceeding is denied; and it is further

ORDERED that plaintiff's motion for leave to add Joseph Mendler as Trustee as a party to this action, and to serve a supplemental summons is granted; and it is further

ORDERED that plaintiff's motion for leave to serve a second amended verified complaint is granted as to the causes of action for interference with prospective economic advantage, Trustee conversion and Trustee Waste Management, as well as amending the cause of action for unjust enrichment to include an additional paragraph is granted; and it is further

ORDERED that the balance of the relief sought by plaintiff is denied; and it is further

ORDERED that Plaintiffs shall file the second supplemental summons and second amended complaint to NYSCEF within 10 days of the NYSCEF filing date of the decision and order on this motion; and it is further

ORDERED that the second supplemental summons and second amended complaint shall be deemed served upon Major Construction Co. Inc. as of the NYSCEF filing date of the second supplemental summons and amended complaint or upon Plaintiff's service of a copy of this order with notice of entry upon them, whichever is later; and it is further

ORDERED that Major Construction Co. shall answer or respond to the second amended complaint within 20 days of its service; and it is further

ORDERED that Plaintiffs shall serve new party defendant Joseph Mendler as Trustee with process per the CPLR on or before March 1, 2022, or the case shall be dismissed as against

Mendler, and shall e-file an affidavit of service of process on Mendler on or before March 1, 2022; and it is further

ORDERED that Mendler shall answer or respond to the second amended complaint per the CPLR; and it is further


ORDERED that the County Clerk and the Clerk of the Trial Support Office shall amend their records to reflect the change in the caption described herein; and it is further

ORDERED that service of this order upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

Dated: January 12, 2022

HON. SABRINA B. KRAUS



Hon. Sabrina B. Kraus
AJSC