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OF THE COMMITTEE ON OPINIONS

MARCAL MANUFACTURING, LLC

Plaintiff,

v.

CONSTELLATION NEWENERGY,
INC.

Defendant.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET No. C-141-19

OPINION

Argued: October 11, 2019

Decided: October 21, 2019

Appearances: Eric Suggs and Scott B. McBride, (Lowenstein Sandler LLP, attorneys) for Plaintiff
Mark Salah Morgan and Michael J. Fitzpatrick, (Day Pitney LLP, attorneys) for
Defendants

HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the Court by way of Motion to Dismiss, with prejudice, for failure to state a claim upon which relief can be granted, pursuant to R. 4:6-2(d), filed on September 17, 2019 by Lowenstein Sandler LLP, attorneys for Plaintiff Marcal Manufacturing, LLC, D/B/A Soundview Paper Company, LLC (“Plaintiff”). On October 3, 2019, Day Pitney LLP, attorneys for Defendant Constellation NewEnergy Group, Inc., F/K/A Constellation Energy Group, Inc. (“Defendant”), filed opposition to Plaintiff’s Motion. On October 7, 2019, Plaintiff filed a reply in further support of its Motion to Dismiss Defendant’s counterclaim. The Court heard oral argument on October 11, 2019.

BACKGROUND

The matter before the Court originated due to a devastating fire at the Marcal Manufacturing Elmwood Park facility. The ongoing business, and contract, between both Plaintiff and Defendant was frustrated by the impact that this fire had on Plaintiff's facility. As a result of the fire, the contract's *force majeure* provision was enacted.

By way of background, a complaint was filed on May 31, 2019, and subsequently, an amended verified complaint was filed on July 12, 2019, seeking a preliminary injunction, and ultimately a permanent injunction, to enjoin Defendant from breaching its electric supply service contract with Plaintiff without a valid basis. In response, on August 13, 2019, Defendant filed an answer to the amended verified complaint with a counterclaim, which has become the basis for the instant Motion to Dismiss the counterclaim.

Defendant's counterclaim asserts one count of unjust enrichment, which Plaintiff seeks to dismiss. Defendant's counterclaim states that, as a result of Plaintiff's *force majeure* declaration, Defendant was no longer required to continue its performance pursuant the Agreement, but ultimately conferred a benefit upon Plaintiff by paying Plaintiff's monthly transmission and capacity costs to PSE&G. This payment that Defendant made on behalf of Plaintiff ran from February 2019 through May 2019, totaling \$1,200,000.00, which has not been reimbursed by Plaintiff.

As a result, Plaintiff filed the instant Motion on September 17, 2019, asserting that Defendant's claims are governed by an enforceable contract, and thus should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

LEGAL STANDARD

A party may move to dismiss for failure to state a cause of action under R. 4:6-2(e). Dismissal is warranted where no cause of action is identified or suggested by the facts. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989).

When reviewing the pleadings under such a motion, courts will accept well-plead facts as true and provide the non-moving party favorable factual inferences that are reasonable. Ibid. Moreover, a court must search in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Ibid. Accordingly, if there is no basis for relief and discovery would not provide one, dismissal is appropriate. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). However, if a generous reading of the allegations “merely suggests a cause of action,” it will survive the motion. F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

At this stage of the litigation, the Court should not be concerned with the plaintiff’s ability to prove the allegations, but rather should ascertain whether the facts alleged suggest a cause of action. Somers Const. Co. v. Bd. of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961).

While legitimate inferences are to be drawn in favor of the non-moving party, a court need not credit bald assertions or legal conclusions. Printing Mart, supra, 116 N.J. at 768. A motion to dismiss for failure to state a claim may be addressed to specific counts, and the court, on a motion to dismiss, has the discretion to dismiss only some of the counts. See Jenkins v. Region Nine Housing, 306 N.J. Super. 258 (App. Div. 1997), certif. den. 153 N.J. 405 (1998) (dismissing contract and fraud claims, but sustaining intentional interference and promissory estoppel theories).

ANALYSIS

Here, when accepting all well-plead facts as true, and analyzing in depth with great liberality, the Court finds it is clear that Defendant's counterclaim states a cause of action.

First, Plaintiff argues that Defendant's counterclaim of unjust enrichment should be dismissed because the parties' dispute is governed by a contract that is both valid and enforceable, and thus Defendant fails to state a claim upon which relief can be granted.

A claim of unjust enrichment must allege facts that (1) "the opposing party 'received a benefit and that retention of that benefit without payment would be unjust,'" and (2) the plaintiff "expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that failure of remuneration enriched defendant beyond its contractual rights." Thieme v. Aucoin-Thieme, 227 N.J. 269, 288 (2016) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007)).

Citing to an unpublished opinion, Plaintiff further argues that a party cannot maintain a claim for unjust enrichment when an express contract governs the subject matter at issue.

Dialectic Distribution LLC v. Power Play Mktg. Grp., LLC, No. CV 2:18-03388, 2018 WL 6839571, at *4 (D.N.J. Dec. 31, 2018). In accordance, Plaintiff contends that it is indisputable that a contract existed between the parties and that Defendant contends as much in its pleadings.

Thus, Plaintiff argues that because there was an enforceable contract existing between the parties, Defendant's counterclaim should be dismissed.

On the other hand, Defendant's counterclaim contends that Plaintiff was unjustly enriched by payments Defendant made, amounting to \$1.2 million, to cover Plaintiff's transmission and capacity costs to PSE&G arising after the destruction of the fire. Moreover, Defendant claims that these costs it paid on behalf of Plaintiff occurred during a period of time

when both parties were excused from further performance under the contract due to the declaration of *force majeure*. Accordingly, with the original agreement centered around Defendant selling Plaintiff all of its electricity requirements, Defendant argues that the devastating fire to Plaintiff's facility, which resulted in a major decrease in Plaintiff's electricity usage, resulted in Defendant covering \$1.2 million of Plaintiff's ongoing electricity costs over the next four months between February and May 2019. As such, Defendant argues that it has conferred a benefit upon Plaintiff, and is thus owed a reimbursement for the transmission and capacity costs that Defendant paid on behalf of Plaintiff following the *force majeure* declaration.

Primarily, Defendant argues that just because a contract exists between two parties does not mean that a *prima facie* claim for unjust enrichment should be dismissed, when, as in here, performance under an agreement has been excused. Furthermore, Defendant contends that because Plaintiff declared *force majeure*, the parties were then excused from performing under the Agreement and both of the parties were shielded from liability between each other.

As pointed out by Defendant, "the mere existence of a written contract between the parties does not bar an unjust enrichment claim; if the written document is unenforceable, the [claimant] may have an unjust enrichment claim." In re Prudential Ins. Co. of Am. Sales Practices Litig., 975 F. Supp. 584, 621-22 (D.N.J 1996). Furthermore, the case Facto v. Pantagis found that a party may bring a quasi-contract claim when performance under a written agreement has been excused by the declaration of a *force majeure* clause. Facto v. Pantagis, 390 N.J. Super. 227, 233-34 (App. Div. 2007).

In *Pantagis*, the plaintiff and defendant formed a contract for a wedding reception at a banquet hall owned by the defendant. Id. at 228. The wedding reception was forced to end early due to a power outage at the banquet hall, which led to the plaintiff filing a breach of contract

action against the defendant for the return of the deposit paid for the reception. *Id.* at 228-30.

Although the trial court dismissed the plaintiffs' claims, finding that the defendant's performance was excused because the power outage constituted force majeure, the Appellate Division reversed and remanded the case, holding that the trial "court erred in concluding that because defendants did not breach the contract, the plaintiffs are not entitled to recover the money they prepaid for the wedding reception." *Id.* at 233.

Thus, in *Pantagis*, the Appellate Division both agreed that the power outage was a force majeure event excusing the parties' contractual performance, and found that the plaintiffs were not obligated to pay the entire contract amount for the wedding reception. *Id.* at 234.

Accordingly, Defendant argues that Plaintiff's invocation of the *force majeure* clause subsequently alleviated performance obligations under the Agreement for either party.

Furthermore, despite the excused obligations, Defendant continued to pay Plaintiff's costs owed to PSE&G in the total amount of \$1.2 million. As such, Defendant argues for reimbursement of these payments to satisfy the amount of the benefit conferred upon Plaintiff.

In furtherance of this notion that the alleviation of contract obligations may warrant some restitution-based relief, the Restatement (Third) of Restitution and Unjust Enrichment § 34(1)(2011) states that "[a] person who renders performance under a contract that is subject to avoidance by reason of mistake or supervening change of circumstances has a claim in restitution to recover the performance or its value, as a necessary to prevent unjust enrichment."

Although generally, the existence of a contract will bar a claim for unjust enrichment, both federal and New Jersey law have allowed quasi-contract claims when performance obligations under an agreement have been excused.

Here, upon Plaintiff's declaration of *force majeure*, it is evident that "business as usual" under the Agreement had ceased. The very nature of a *force majeure* provision is to invoke a new phase of a business relationship after uncontrollable circumstances have impacted the current agreement.

Thus, upon a general and liberal reading of the counterclaim, at this stage in the litigation Defendant has plead specific facts that would support a sufficient cause of action for unjust enrichment. Thus far in the litigation, there are clear disputes of fact that emphasize the need for discovery in this action, such as the impact that the *force majeure* provision had on both the Agreement and the parties' business relationship and performance obligations.

Moreover, if it is found that declaration of *force majeure* excused the parties from performing under the Agreement, then Defendant would have a plausible claim for relief. As such, this Court finds that Defendant has stated a cause of action for which relief could be granted.

Therefore, Plaintiff's Motion to Dismiss Defendant's counterclaim for failure to state a claim upon which relief can be granted is hereby denied. An order accompanies this decision.