OCEANA SENSOR, INC. d/b/a TOTAL WEB HOSTING SOLUTIONS, Plaintiff, v. FULTON COUNTY, GEORGIA, Defendant.

CIVIL ACTION FILE NO. 1:08-CV-2981-BBM

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

2009 U.S. Dist. LEXIS 122271

April 8, 2009, Decided
April 8, 2009, Filed

SUBSEQUENT HISTORY: Summary judgment granted, in part, summary judgment denied, in part by, Motion denied by, As moot Oceana Sensor, Inc. v. Fulton County, 2009 U.S. Dist. LEXIS 120892 (N.D. Ga., Aug. 27, 2009)

PRIOR HISTORY: Total Web Hosting Solutions, Inc. v. Fulton County, 2009 U.S. Dist. LEXIS 120870 (N.D. Ga., Jan. 16, 2009)

COUNSEL: [*1] For Total Web Hosting Solutions, Inc., Plaintiff, Counter Defendant: David J. Hungeling, LEAD ATTORNEY, Law Office of David J. Hungeling, P.C., Atlanta, GA.

For Oceana Sensor, Inc., doing business as Total Web Hosting Solutions, Plaintiff: David J. Hungeling, LEAD ATTORNEY, John Andrew Robertson, Law Office of David J. Hungeling, P.C., Atlanta, GA.

For Fulton County, Georgia, Defendant: Carmen R. Alexander, Cheryl Ringer, Kaye Woodard Burwell, Nwakaego Ijeoma Okparaeke, Robert L. Martin, Vincent D. Hyman, Office of the Fulton County Attorney, Atlanta, GA.

For Fulton County, Georgia, Counter Claimant: Nwakaego Ijeoma Okparaeke, Vincent D. Hyman, Office of Fulton County Attorney, Atlanta, GA.

JUDGES: BEVERLY B. MARTIN, UNITED STATES DISTRICT JUDGE.

OPINION BY: BEVERLY B. MARTIN

OPINION

ORDER

This matter is before the court on the Motion to Dismiss [Doc. No. 6], filed by Defendant Fulton County, Georgia ("Fulton County" or "the County").

I. Factual and Procedural Background

On a motion to dismiss, the court accepts as true all factual allegations set out in the Plaintiff's Complaint. See Lotierzo v. Woman's World Med. Ctr., Inc., 278 F.3d 1180, 1182 (11th Cir. 2002). The following facts are recounted from the Complaint, [*2] and do not constitute findings of fact by the court.

The present lawsuit concerns a breach of contract dispute brought by Plaintiff Oceana Sensor, Inc. d/b/a Total Web Hosting Solutions [1] ("Oceana") against Fulton County. Oceana is a Virginia corporation that provides website hosting, design, programming, and online maintenance to over 300 clients throughout the United

States. Fulton County hired Oceana after soliciting bids from a number of vendors to provide the County with Web Hosting ISP Provider for Information Technology. Pursuant to a one year contract between the two entities, Oceana agreed to provide computer hardware as well as professional information technology services and support to Fulton County. In exchange, Fulton County agreed to pay Oceana $ 120,000 for these goods and services, to be paid upon receipt of a Purchase Order.

> 1 Oceana filed an Amended Complaint on January 22, 2009, the sole effect of which was to correct its name in the case style from Total Web Hosting Solutions, Inc. to Oceana Sensor, Inc. d/b/a Total Web Hosting Solutions.

On or around February 27, 2008, Oceana sent Fulton County a Purchase Order for "goods ordered and/or services requested by the Information [*3] Technology Department of Fulton County during the period 02/27/2008 to 02/26/2009." (Am. Compl. Ex. B.) However, Fulton County did not pay the Purchase Order according to its terms, and has since refused to pay any portion of it. Oceana states that during the term of the contract it provided both goods and services to Fulton County, and incurred expenses in the process. [2] On April 2, 2008, Oceana received a letter from Fulton County notifying Oceana that the County was terminating the contract. Despite this, Fulton County continued to use the computer hardware that Oceana had sold to the County. On May 30, 2008, Oceana sent Fulton County a statutory 10-day demand letter and notice of claim. In this correspondence Oceana requested payment in full for the principal amount owing to it as shown on the Purchase Order. Likewise contained in this letter was a statement to Fulton County that its failure to pay would result in "interest accruing on the outstanding balance at the statutory rate of 1[.5]% per month and that [Oceana] would seek attorney's fees pursuant to O.C.G.A. § 13-1-11." (Am. Compl. P 13) (internal quotations and emphasis omitted).

> 2 Neither party has provided an actual copy [*4] of the contract at issue thus far in the litigation. However Oceana states that "[t]he original term of the Agreement was one (1) year from date of contract execution." (Am. Compl. P 7.)

Oceana filed this action on September 23, 2008. The Complaint alleges three separate counts: (1) breach of contract; (2) restitution; and (3) award of interest, attorneys' fees, and costs of litigation. Fulton County filed the present Motion to Dismiss on November 25, 2008.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a court may grant a motion to dismiss when a complaint fails to state a claim upon which relief can be granted. To withstand a motion to dismiss, a complaint need not contain "detailed factual allegations," but must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Here, the court must determine whether Oceana "has alleged enough facts to suggest, raise a reasonable expectation of, and render plausible" its claims. Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1296 (11th Cir. 2007). The court construes [*5] the Complaint in Oceana's favor, and accepts the facts it alleges as true. See M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153, 1156 (11th Cir. 2006). However, "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Thus, a wholly conclusory statement of a claim cannot, without more, survive a motion to dismiss. See Weissman v. Nat'l Ass'n of Sec. Dealers, Inc., 500 F.3d 1293, 1303 (11th Cir. 2007) (citing Twombly, 550 U.S. at 561).

III. Analysis

Fulton County argues that Oceana's second count of the Complaint should be dismissed for failure to state a claim upon which relief can be granted. It first argues that Oceana is precluded from obtaining relief on the Count II claim because a written contract exists. It next argues that the claim is barred by the doctrine of sovereign immunity. Each of these arguments is addressed below.

A. Restitution Claim

Despite Oceana's express labeling of its Count II claim as one for "Restitution," Fulton County argues that this claim is in essence one for unjust enrichment. (Br. in Supp. of Def.'s Mot. to Dismiss 3.) In its Motion to Dismiss, the County argues that under Georgia law, "a claim of unjust enrichment [*6] will not lie when the claim is based upon a written contract," and thus the claim must be dismissed for failure to state a claim upon

which relief can be granted. (Id.) Oceana argues against dismissal, stating that Fulton County has improperly mischaracterized its restitution claim, and should not be permitted to rewrite Oceana's Complaint. (Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss 6-7.)

In addition to damages and specific performance, the remedy of restitution is itself one of three distinct remedies for breach of contract. PMS Constr. Co. v. DeKalb County, 243 Ga. 870, 872, 257 S.E.2d 285, 287 (1979); see also Cutcliffe v. Chesnut, 122 Ga. App. 195, 198 n.1, 176 S.E.2d 607, 610 n.1 (1970); 12-61 Arthur Linton Corbin, Corbin on Contracts § 1104 (2008) (discussing restitution as a remedy for breach of contract and noting that it is "truly a remedy for a 'breach' as is a judgment for damages."). However, restitution may be more frequently discussed in the context of providing a remedy for quasi contracts, and at times has been labeled quasi-contractual itself. See e.g., Hollifield v. Monte Vista Biblical Gardens, Inc., 251 Ga. App. 124, 131, 553 S.E.2d 662, 670 (2001) (discussing [*7] restitution as a remedy for unjust enrichment); Cotton v. Med-Cor Health Info. Solutions, Inc., 221 Ga. App. 609, 612, 472 S.E.2d 92, 96 (1996) (discussing the same); 12-61 Corbin on Contracts § 1106 (explaining that there is no good reason for describing restitution as a quasi-contractual remedy). In essence, "[t]he object of the remedy of restitution is to return the injured party to the position he occupied [b]efore his performance, i.e. to restore him to the pre-contract status quo." PMS, 243 Ga. at 872, 257 S.E.2d at 288. In a breach of contract setting, restitution "entitles a party whose express contract has been breached or repudiated to recover the reasonable value of materials furnished and services rendered, measured as of the time of performance." Id. In PMS, the Supreme Court of Georgia examined a plaintiff's complaint suing, in part, for breach of contract that sought (1) specific performance, (2) the reasonable value of its work, or (3) damages. Id. at 870, 257 S.E.2d at 286. The Court concluded that the Court of Appeals had erred in reading the plaintiff's request for "the reasonable value of its work" as seeking to recover for an implied contract. Id. at 872, 257 S.E.2d at 287. [*8] Instead, the Supreme Court recognized the availability of this remedy for a contractual dispute, and read the count as permissibly seeking restitution for breach of an express contract. [3] Id. at 872, 257 S.E.2d at 288.

> 3 Fulton County says that PMS is "inapposite to this case" but provides no substantive argument to accompany this assertion. (Def.'s Reply to Pl.'s Resp. to Mot. to Dismiss 2.)

Oceana's Count II claim reads as follows:

> **Restitution**
>
> Plaintiff restates and incorporates by reference each of the preceding paragraphs as if fully stated herein.
>
> As a result of Total Web Hosting Solution, Inc.'s work performed pursuant to the Contract, Defendant has been enriched. Defendant has also been enriched by its receipt of valuable goods, including computer hardware, for which it has not paid Plaintiff.
>
> Defendant has been unjustly enriched by its failure and refusal to make payment to Total Web Hosting Solutions, Inc. for its work performed and goods delivered to it.
>
> As a result of Defendant's unjust enrichment, Plaintiff has suffered damages of at least $ 120,000.00 for which Defendant must provide payment in restitution.

(Am. Compl. PP 20-23.) Additionally, its Count I claim alleges a breach [*9] of contract and requests damages of $ 120,000. The court finds that construing the Complaint in Oceana's favor, and accepting its factual allegations as true, Oceana has adequately stated a claim for restitution as a remedy for Fulton County's alleged breach of contract. See M.T.V., 446 F.3d at 1156. Although the substance of the Complaint contains the terms "enriched" and "unjust enrichment," the usage of those terms conveys to Fulton County the allegations of a benefit conferred pursuant to their agreement, for which Oceana has not been compensated, and the payment of which would "return the injured party to the position he occupied [b]efore his performance." See PMS, 243 Ga. at 872, 257 S.E.2d at 288. The wording of the claim makes clear it is based on Oceana's "work performed pursuant to the Contract," and it likewise describes the "materials furnished and services rendered." (Am. Compl. P 21); PMS, 243 Ga. at 872, 257 S.E.2d at 288. Thus, the mere usage of the term "unjust enrichment" to describe an

alleged unreciprocated conveyance of a benefit onto one party pursuant to a contract, does not convert the clearly labeled and pleaded restitution claim into one for a quasi contract. [*10] See 12-61 Corbin on Contracts § 1107 (describing restitution as a remedy for breach of contract as an idea that "the defendant has been *unjustly enriched* by the part performance rendered by the plaintiff") (emphasis added).

The court concludes that Count II of Oceana's Complaint is logically read as one requesting an alternative remedy of restitution for Fulton County's alleged breach of an express contract, and as so stated gives the County "fair notice of what the . . . claim is and the grounds upon which it rests." See Twombly, 550 U.S. at 555. Therefore, it does not merit dismissal as an unjust enrichment claim based upon an express contract, as Fulton County argues. [4] (Br. in Supp. of Def.'s Mot. to Dismiss 4); Donchi, Inc. v. Robdol, LLC, 283 Ga. App. 161, 167, 640 S.E.2d 719, 724 (2007) (prohibiting an unjust enrichment theory where there is an express contract). The claim having been properly stated, and suffering from no other known deficiencies, Fulton County's Motion to Dismiss Count II of Oceana's Complaint is denied.

> 4 Federal Rule of Civil Procedure 8(d)(2) provides that: "A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either [*11] in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient." Fed. R. Civ. P. 8(d)(2).

B. Sovereign Immunity

Fulton County next argues that Oceana's Count II claim fails because unjust enrichment claims against the county are barred by the doctrine of sovereign immunity. (Br. in Supp. of Def.'s Mot. to Dismiss 5.) However, as previously discussed, Oceana's Count II claim is one for restitution due to an alleged breach of contract, not a claim of unjust enrichment. The Georgia Constitution provides that "[e]xcept as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies." Ga. Const. art. I, § II, P IX(e). It continues by noting that "[t]he state's defense of sovereign immunity is hereby waived as to any action ex contractu for the breach of any written contract now existing or hereafter entered into by the state or its departments and agencies." Ga. Const. art. I, § II, P IX(c). The court in Toombs County v. O'Neal explained that "this constitutional reservation of sovereign immunity to 'the State' is a constitutional reservation [*12] of sovereign immunity to the counties of the State of Georgia." 254 Ga. 390, 391, 330 S.E.2d 95, 97 (1985); see also Waters v. Glynn County, 237 Ga. App. 438, 439, 514 S.E.2d 680, 682 (1999). As a result of this waiver, Georgia courts have permitted breach of contract suits to be brought against counties of the state. [5] See e.g., PMS, 243 Ga. at 871, 257 S.E.2d at 287; Waters, 237 Ga. App. at 439, 514 S.E.2d at 682.

> 5 Fulton County acknowledges that the Georgia Constitution waives sovereign immunity for breach of contract actions, and that this has been held to apply to counties. (Br. in Supp. of Def.'s Mot. to Dismiss 7-8.)

The court finds that Oceana, having properly stated a claim for restitution based on Fulton County's alleged breach of contract, is not barred by the doctrine of sovereign immunity. The County's Motion to Dismiss Oceana's Count II claim on this basis is likewise denied.

IV. Summary

For the foregoing reasons, Fulton County's Motion to Dismiss [Doc. No. 6] is DENIED. The parties are reminded that discovery ends on April 24, 2009.

IT IS SO ORDERED, this 8th day of April, 2009.

/s/ Beverly B. Martin

BEVERLY B. MARTIN

UNITED STATES DISTRICT JUDGE