

Raytheon Company v Foster Wheeler Energy Corporation

2004 NY Slip Op 30216(U)

May 14, 2004

Supreme Court, New York County

Docket Number:

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ

PART 03

Justice

RAYTHEON COMPANY, as AGENT for and on behalf of AES RED OAK LLC, and RAYTHEON COMPANY, in its individual capacity as PERFORMING GUAKANTOR and SUBROGEE,

Plaintiffs,

- against -

FOSTER WHEELER ENERGY CORPORATION and FOSTER WHEELER ENERGY INTERNATIONAL, INC.,

Defendants.

INDEX NO. 600789/2003

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

FOSTER WHEELER ENERGY CORPORATION,

Counterclaim Plaintiff,

- against -

RAYTHEON COMPANY and WASHINGTON GROUP INTERNATIONAL, INC.,

Counterclaim Defendant and Additional Counterclaim Defendant.

FILED
MAY 14 2004
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to _____ were read on this motion to/for

PAPERS NUMBERED

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

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying Order and Decision.

Dated: May 5, 2004

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : LAS PART 3

-----X
RAYTHEON COMPANY, as AGENT for and on behalf of
AES RED OAK LLC, and RAYTHEON COMPANY, in its
individual capacity as PERFORMING GUARANTOR and
SUBROGEE,

Index No. 600789/2003

Plaintiffs,

- against -

FOSTER WHEELER ENERGY CORPORATION and
FOSTER WHEELER ENERGY INTERNATIONAL,
INC.,

DECISION and ORDER

Defendants.

-----X
FOSTER WHEELER ENERGY CORPORATION,

Counterclaim Plaintiff,

- against -

RAYTHEON COMPANY and WASHINGTON GROUP
INTERNATIONAL, INC.,

Counterclaim Defendant
and Additional
Counterclaim Defendant.

-----X

Moskowitz, J.:

Plaintiffs/counterclaim defendants Raytheon Company, as agent for and on behalf of
AES Red Oak LLC, and Raythcon Company, in its individual capacity as performing guarantor
and subrogee (Raytheon), and “counterclaim defendant”, Washington Group International,
Inc. (WGI), move, pursuant to CPLR 3013, 3016 (b), 3211 (a) (l), (5), and (7), to dismiss
the counterclaims defendant/counterclaim plaintiff Foster Wheeler Energy Corporation (Foster
Wheeler) has asserted.

Background

This action evolves from the construction of an approximately 800 megawatt combined cycle power plant in Sayreville, New Jersey (the Project). AES Red *Oak* LLC (Red *Oak*) owns the Project. Red *Oak* retained Raytheon to serve as its agent to administer the Project. Raytheon is also the guarantor of the Project's general contractor, WGI, pursuant to an Engineering, Procurement and Construction Agreement with Red ~~Oak~~, dated October 15, 1999, that governs the overall construction of the Projects (the EPC Agreement). WGI is successor in interest to the Project's original general contractor, Raytheon Engineers & Constructors, Inc. (RE&C), that WGI acquired in 2000. Raytheon has been performing on its guaranty obligations since May 2001, when WGI entered Chapter 11 bankruptcy. Raytheon commenced the main action in its capacity as agent for Red Oak, as well as in its individual capacity as performing guarantor of the EPC Agreement. Foster Wheeler is one of the Project subcontractors.

The main action arises out of defendant Foster Wheeler's role as a subcontractor hired to supply components for the Project. Pursuant to an "Agreement for the Design, Fabrication, Delivery, Installation and Commissioning of Heat Recovery Steam Generators and Accessories," dated December 30, 1999 (the Agreement), Foster Wheeler agreed to supply the three boilers (Heat Recovery Steam Generators or HRSGs) for the Project at an agreed lump sum price of \$42,901,800.00. Each of the HRSG units is a large machine, approximately 60 feet high and 150 feet long, containing thousands of feet of piping in which the associated combustion turbine generates hot exhaust that heats feedwater that produces high pressure steam. Pursuant to Attachment M to the Agreement, defendant Foster Wheeler Energy International, Inc. (Foster Wheeler International) guarantees Foster Wheeler's performance.

Foster Wheeler's answer asserts four counterclaims, all subject to this motion. The first

counterclaim seeks unspecified damages for the fair and reasonable value of change orders and additional work that Raytheon and WGI allegedly directed Foster Wheeler to perform, as well as money damages under the Agreement's base scope of work. The second counterclaim alleges Raytheon's and WGI's breach of contract for allegedly materially changing the nature of Foster Wheeler's work, extending its work well beyond the anticipated completion date. The third cause of action alleges fraud in the inducement of Amendment No. 5 to the contract because of Raytheon and WGI supplying combustion gas turbines whose performance characteristics were materially different from those identified in the contract documents and specifications. The fourth counterclaim alleges impossibility of performance and seeks rescission of the contract and recovery on a quantum meruit basis for work performed.

The parties and their respective counsel negotiated the agreement for months prior to its execution. The Agreement is nearly 100 pages long. Attached to the Agreement are hundreds of pages of "Technical Specifications" and related documents, that further detail the scope of Foster Wheeler's responsibilities. The Technical Specifications describe, inter alia, the material performance characteristics of the Project combustion turbines to which Foster Wheeler's HRSG units attached.

Foster Wheeler warranted and represented that, prior to signing the Agreement, it had complete access to, and had thoroughly inspected, all documents and other matters necessary to perform its equipment design, construction and other work under the Agreement. Based on those warranties and representations, Foster Wheeler further agreed that it would assume all commercial risk - and not attempt to hold its counterparts liable in any manner - should Foster Wheeler later conclude that the information on which it relied for its design and construction was "insufficient" or even "incorrect." In Section 20.1 of the Agreement Foster Wheeler agreed:

Project Inspection. Foster Wheeler acknowledges and agrees that, prior to the execution of this Agreement, Foster Wheeler has made a complete and careful examination of the Deliverable Documents in existence and the drawings and specifications and other information set forth in the Technical Specifications, has made a complete and careful examination to determine the difficulties and hazards incident to the performance of the Work, including without limitation . . .(viii) all other matters that might affect Foster Wheeler's performance of the Work hereunder and has determined to its satisfaction the nature and extent of such difficulties, hazards and conditions [emphasis added].

Based on Foster Wheeler's representation of full precontractual inspection of the needed work, Foster Wheeler then agreed:

20.2 No Relief for Differing Conditions. (a) Foster Wheeler specifically acknowledges and accepts the risk of mistake or error relating to all matters within the scope of Section **20.1** hereof and agrees that, no adjustment shall be made to any of the Contract Price, the Guaranteed Completion Dates, the Progress Milestone Dates, the Payment and Milestone Schedule, the Performance Guarantees, the Work Schedule or any other provisions of this Agreement which may be affected thereby should any difficulties, hazards or conditions on, about or under the Facility Site, be different from or in addition to those identified by Foster Wheeler through its inspections and examinations referenced in Section 20.1 hereof.

(b) Foster Wheeler further agrees that no claim by Foster Wheeler of any nature whatsoever, whether based in contract, in tort (including negligence and strict liability), warranty or otherwise, will be allowed on the ground of any misunderstanding or misapprehension or other error or mistake in respect of the matters referred to in Section **20.1** hereof or on the ground of any allegation or fact that incorrect or insufficient information with respect to the matters referred to in Section **20.1** hereof was given to it by any Person or of any failure on Foster Wheeler's part to obtain correct and sufficient information, nor shall Foster Wheeler be relieved from any **risks** or obligations imposed on or undertaken by it under the Agreement on any such ground or on the ground that it did not or could not foresee any such matter which may in fact affect or have affected the performance of the Work [emphasis added].

Foster Wheeler further detailed its waiver of rights in Section 12.6 of the Agreement,

entitled "Familiarity with Conditions and Documentation." Foster Wheeler supplemented its warranty and waiver for mistakes or errors in its assessment of Project conditions as follows:

12.6.1 Familiarity with Conditions. As more fully set forth in Article 20 hereof, Foster Wheeler acknowledges and accepts the risk of mistake or error relating to all matters within the scope of Section 20.1 hereof and further acknowledges and agrees that no increase or adjustment to the Contract Price, the Guaranteed Completion Date, the Progress Milestone Dates . . . the Performance Guarantees . . . or any other provision of this Agreement which may be affected thereby will be made as a result of any such mistake or error.

12.6.2 Familiarity with Documentation. Prior to the date of this Agreement, Foster Wheeler has reviewed: (a) all documentation which is attached as an Attachment hereto. . . , (h) all documentation which comprises the Technical Specifications and all Appendices thereto . . . Foster Wheeler acknowledges and agrees that any difficulty or extra cost it may encounter in performing the Work in compliance with such documentation will not entitle it to any increase or adjustment in the Contract Price, Guaranteed Completion Dates, the Progress Milestone Dates . . . the Performance Guarantees or any other provision of this Agreement [emphasis added].

In Section 25.8, Foster Wheeler further warranted that the Agreement constituted the parties' entire undertaking, and that Foster Wheeler was not relying on any earlier oral or written extra-contractual representations between the parties:

25.8 Entire Agreement. This Agreement contains the entire agreement between the parties hereto and supersedes any and all prior written and oral agreements, proposals, negotiations, understandings and representations pertaining to the subject matter hereof. . . [emphasis added].

In Section 25.4, the parties expressly chose New York law as the law governing the Agreement:

25.4 Choice of Law. This Agreement shall in all respects be governed by and construed in accordance with the laws of the State of New York, including with respect to all matters of

construction, validity and performance, without giving effect to any choice of law rules thereof which may direct the application of the laws of another jurisdiction, and any litigation arising out of or relating to this agreement may be brought in the appropriate State or Federal Court located within the State, County and City of New York, U. S. A. and each party hereby consents to the jurisdiction of such court [emphasis added].

Amendment No. 5 to the Agreement

Attachment N to the Agreement specified dates Foster Wheeler was to complete construction of each of the three HRSG units, ranging from August 16, 2001 to October 12, 2001. Foster Wheeler failed to achieve the completion dates. Foster Wheeler became liable under the Agreement to WGI for substantial "Price Rebates." Foster Wheeler claimed that its delay was attributable to Raytheon's interference. In Amendment No. 5 to the Agreement, executed on October 8, 2001, the parties resolved their outstanding disputes.

In Amendment No. 5, Foster Wheeler bargained for and received an extension of time in which to complete its contractual work. This relieved Foster Wheeler of the obligation to pay substantial Price Rebates under the Agreement. In consideration of this waiver of Price Rebates and the release of related claims, Foster Wheeler granted Red Oak, WGI and Raytheon a general release (the General Release) of all claims, "whether such claim or impact is **known, unknown, asserted or unasserted** at the date of this Amendment No. 5 (collectively, the Waived and Released Claims) [emphasis added].

Section 15 of Amendment No. 5 provides:

FOSTER WHEELER DOES HEREBY WAIVE AND RELEASE on behalf of itself and its Subcontractors **any and all claims for cost, schedule and/or other relief under or in connection with the Agreement** due to any impact to its Work or other activities at or in connection with the Agreement or Project **up to the date of this Amendment No. 5**, whether such impact was due to acts or omissions of Washington, Washington's subcontractors or vendors for the Project, AES Red **Oak**, LLC,

AES Red Oak, LLC's contractors or vendors for the Project, Raytheon Company and Raytheon Engineers and Constructors International, Inc. and any of their contractors or vendors (collectively, the "Raytheon Parties") or any other Person, or any other cause, including any Force Majeure Event, **whether such claim or Impact is known, unknown, asserted or unasserted at the date of this Amendment No. 5 (collectively, the Waived and Released Claims)** [emphasis added].

Foster Wheeler further covenanted and agreed not to sue Red Oak, WGI or Raytheon for any of the Waived and Released Claims:

FOSTER WHEELER FURTHER COVENANTS not to sue Washington, Washington's subcontractors or vendors for the Project, AES Red Oak, LLC, AES Red Oak, LLC's contractors or vendors for the Project or the Raytheon Parties **on any Waived and Released Claims.** . . . [emphasis added].

Foster Wheeler agreed to observe certain additional dispute resolution measures for potential claims arising after the execution of Amendment No. 5 in advance of filing any litigation against Raytheon or other Project parties. Foster Wheeler breached this aspect of the Agreement, inter alia, by suing Raytheon in a New Jersey court on March 11, 2003.

Dismissal Standards

On a motion to dismiss a defense or a counterclaim, pursuant to CPLR 3211(b), on the ground that a viable defense or counterclaim is not alleged, the sole criterion is whether there exists a defense or counterclaim cognizable at law (Alharb v Sayegh, 199 AD2d 229, 230). A defendant is entitled to the benefit of every reasonable favorable inference (O'Henry's Film Works, Inc. v Nabisco, Inc., 112 AD2d 825). "If there is any doubt as to the availability of the defense, it should not be dismissed." (Duboff v Board of Higher Education of City of New York, 34 AD2d 824). However, "allegations consisting of bare legal conclusions, as well as factual claims either

inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration.” ’ (Mark Hampton, Inc. v Bergreen, 173 AD2d 220, citations omitted).

It is well-settled that a defense relying upon documentary evidence can succeed if the documents resolve all of the factual issues as a matter of law (Gephardt v Morgan Guaranty Trust Co. of New York, 191 AD2d 229, lv denied 82 NY2d 656). A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) is inappropriate if the documents do not ”definitively dispose of the claim” (Devlin v Video Services Acquisition, 188 AD2d 370, quoting Demas v 325 W. End Ave. Corn., 127 AD2d 476,477). To warrant dismissal, a defense grounded on documentary evidence must be a complete one, leaving no genuine triable issues of fact (Expocorp v Hyatt Management Corp. of New York, 134 AD2d 234).

Movant argues that the court should dismiss all of Foster Wheeler’s counterclaims because: (1) Foster Wheeler ’s fraud claim (Third Counterclaim) is nothing more than a breach of contract claim impermissibly masquerading as fraud and it does not meet the particularity requirements of CPLR. 3016 (b); (2)The General Release that Foster Whceler executed shortly before finishing work on the Project bars Foster Wheeler’s breach of contract claims (First and Second Counterclaims); and (3) Foster Wheeler’s impossibility claim (Fourth Counterclaim) does not constitute a cognizable cause of action under New York law.

Foster Wheeler’s counterclaims are based upon the allegation that the contract documents called for Raytheon to deliver a SWPC 501 combustion gas turbine, but, instead, that Raytheon delivered a SWPC 501FD2 combustion gas turbine, that allegedly had materially different performance characteristics, that ultimately and indefinitely postponed final acceptance and completion of the Project. Siemens-Westinghouse manufactured the gas turbines. Raytheon and WGI supplied them to the Project.

Foster Wheeler claims that Raytheon *knew or should have known* that it was supplying a different model turbine, one with different performance characteristics, and that Raytheon fraudulently induced Foster Wheeler into executing Amendment No. 5. Foster Wheeler claims in its opposition papers (not in its pleading) that the atypical characteristics of the 501FD2 gas turbines include the velocity profile and pressure pulsations and unpredictable exhaust flows and temperatures. However, Foster Wheeler also states that Siemens-Westinghouse claims that information concerning the performance characteristics of the gas turbines is proprietary information and, accordingly, has refused to release such information to Foster Wheeler, Raytheon, or WGI.

In order to plead a cause of action for fraud, plaintiff must allege representation of a material existing fact, falsity, scienter, deception **and** injury (Lanzi v Brooks, 54 AD2d 1057, affd 43 NY2d 778). The mere additional allegation that the contracting party did not intend to meet his contractual obligation does not convert a contract action into one for fraud (Comtomark, Inc. v Satellite Communications Network, Inc., 116 AD2d 499, 500; Tesoro Petroleum Corp. v Holborn Oil Co., 108 AD2d 607, appeal dismissed 65 NY2d 637).

CPLR 3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." In order to comply with CPLR 3013, a pleading must identify the transaction and indicate the theory of recovery with sufficient specificity to enable the court to control the case, and the opponent to prepare (see Foley v D'Agostino, 21 AD2d 60). A pleading must allege evidentiary facts to support its claim for relief and not merely assert conclusions (Glenesk v Guidance Realty Corp., 36 AD2d 852, 853). Affirmative defenses that are "totally bereft of factual data" and "merely plead

conclusions of law without supporting facts are insufficient" (Bentivegna v Meenan Oil Co., 126 AD2d 506,508)

With particular respect to fraud, as the Second Circuit held in Novak v. Kasaks, (216 F3d 300, 307-308 [2d Cir], cert. denied 531 US 1012 [2000]):

[P]laintiffs must allege facts that give rise to a strong inference of fraudulent intent. "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Acito v IMCERA Group, 47 F3d 47 at 52 [2d Cir 1995] (quoting Shields v Citytrust Bancorp, 25 F3d 1124 at 1128 [2d Cir 1994]) (internal citations omitted). .. We described the type of motive and opportunity required to plead scienter under our pre-reform standard as follows:

Motive would entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged. Opportunity would entail the means and likely prospect of achieving concrete benefits by the means alleged. Shields, 25 F.3d at 1130. ... Rather, plaintiffs had to allege that defendants benefitted in some concrete and personal way from the purported fraud.

Here, the thrust of Foster Wheeler's fraud counterclaim is contained in the following allegations:

26. WGI and Raytheon knew or should have known of the atypical performance characteristics of the combustion gas turbines.

27. Despite the fact that WGI and Raytheon knew or should have known of the atypical performance characteristics of the combustion gas turbines at the time that Amendment No. 5 was executed, they did not notify Foster Wheeler of the atypical performance characteristics and, instead, allowed Foster Wheeler to execute the amendment adjusting the schedule which has now been rendered moot.

Foster Wheeler's counterclaim is based on mere conclusory allegations. These conclusory allegations of fraud fail to identify the fraudulent statement or omission; who made the fraudulent statement or omission; when it was made or concealed; why there was any falsehood, and what

motive Raytheon would possibly have had to make such a material misrepresentation. The fraud claim alleges no *facts* showing that Raytheon knowingly made any untrue representations, knowing that they were untrue, and intended for Foster Wheeler to rely upon any such untrue representations, or that Foster Wheeler's alleged reliance was justified - particularly given Foster Wheeler's contractual representations that it had all the information it required and assumed the risk if it did not. Indeed, the element of knowingly making untrue representations is refuted by Foster Wheeler's own admission that Siemens-Westinghouse, the manufacturer of the gas turbines, refused to release such information to Foster Wheeler, Raytheon or WGI because the performance characteristics of the gas turbines were proprietary information.

Even assuming, arguendo, that Raytheon and WGI had warranted the performance characteristics of the gas turbines, a warranty merely relieves the other party of the duty to ascertain facts for himself, that is but one prong -justifiable reliance - to establish in a cause of action for fraud (see Century 21, Inc. v F.W. Woolworth Co., 181 AD2d 620).

It is proper to dismiss a fraud claim where a claimant has "failed to articulate a misrepresentation of a material existing fact" (WorldCom, Inc. v Segway Mktg. Ltd., 262 AD2d 164). Foster Wheeler does not quote a single statement from Raytheon regarding the combustion turbines, much less a statement on which Foster Wheeler purportedly relied. Foster Wheeler does not describe the purportedly "atypical" performance characteristics of the combustion turbines, nor what "typical" performance characteristics might be, nor what corresponding performance characteristics the Agreement's Technical Specifications required (if any), nor the nature or extent of the purported difference between such characteristics, nor why or how such difference might be material.

Foster Wheeler does not identify the so-called "atypical performance characteristics" (the alleged material omission) among the myriad "performance characteristics" of the combustion

turbines, does not plead one fact giving rise to the inference that Raytheon knew of the (unidentified) “atypical performance characteristics” before Amendment No. 5 was executed; and Foster Wheeler certainly does not plead that Raytheon intentionally concealed material information. Indeed, Foster Wheeler pleads none of the elements of fraud with the requisite particularity.

These allegations are clearly deficient (see Desideri v D.M.F.R. Group (USA) Co., 230 AD2d 503, 505). In Desideri, the defendant asserted a fraud counterclaim, alleging that the plaintiff, in return for a bribe from a third party, intentionally misrepresented the value of a certain company to investors, knowing that the investors would rely on his advice and pay an inflated price for the company's stock. The Appellate Division held: “This pleading is clearly deficient in that the facts constituting the fraud are not ‘stated in detail’ (CPLR 3016 [b]).” [affirming dismissal of the counterclaim on summary judgment, after noting that nothing on the record cured the pleading deficiency]. Like the defendant in Desideri, Foster Wheeler has failed to plead its fraud claim “in sufficient detail to clearly inform [the adverse party] with respect to the incidents complained of” as CPLR 3016 (b) requires (Desideri, 230 AD2d at 505).

At most, Foster Wheeler has alleged that Raytheon did not supply what it allegedly represented in the Agreement that it would supply. This is not fraud. It is nothing more than an alleged breach of the Agreement (see New York Univ v Continental Ins. Co., 87 NY2d 308, 316 [“where a party is merely seeking to enforce its bargain, a tort claim will not lie”]). New York courts uniformly and consistently hold that, where “the purported misrepresentation was directly related to a specific provision of the contract,” the “fraud claim . . . only restates a breach of contract claim [and] may not be maintained” (Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114, 115; see e.g., Modell's N.Y. Inc. v Noodle Kidoodle, Inc., 242 AD2d 248, 250; Caniglia v Chicago Tribune -New York News Syndicate Inc., 204 AD2d 233,234; Gordon v Dino

De Laurentiis Corp., 141 AD2d 435, 436 [“It is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract”]).

Foster Wheeler’s claim that it should be relieved of its General Release because Amendment No. 5 was induced by fraud fails to state a cause of action. Foster Wheeler’s fraud claim is nothing more than a breach of contract claim dressed up as fraud. Foster Wheeler’s own pleading contends that the representations at issue were part of the contract. As a matter of law, Foster Wheeler cannot convert its breach of contract claim into one for fraud merely by denominating it as such.

Nor has Foster Wheeler specified which of the myriad Technical Specifications - occupying hundreds of pages within the Project documents - allegedly underlies Foster Wheeler’s fraud claim. This failure to articulate what it is that Raytheon allegedly represented or concealed about the combustion turbines is fatal to Foster Wheeler’s fraud claim (CPLR 3016 [b]; Barclay Arms, Inc. v Barclay Arms Assocs., 74 NY 2d 644,646-47; WorldCom, 262 AD2d at 164; Chrysler Credit Corp. v Dioguardi Jeep Eagle, Inc., 192 AD2d 1066, 1067 [“proposed . . . counterclaim based upon fraud is insufficient on its face because defendants have failed to set forth in detail the alleged fraudulent representations”]; Mountain Lion Baseball Inc. v Gaiman, 263 AD2d 636, 638 [“In our view plaintiffs complaint, which fails to set forth the substance of, the dates upon which or the persons to whom the alleged misrepresentations purportedly were made, falls far short of satisfying the pleading requirement imposed by CPLR 3016 [b]”]).

Further, a claim of fraud is “properly dismissed as deficient” where the claimant does not allege that the respondent made a representation “known by him to be false when made” (Neff v Steven Schwartzapfel, P. C., 254 AD2d 137, 138); Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 [dismissing fraud claim for failure to allege that omission was fraudulent or “how defendants could possibly have known” that plaintiff lacked essential information];

Bernstein v Golden Press Holding, L.L.C., 293 AD 2d 414, 414-15 [dismissing fraud claim for failure to allege facts giving rise to an inference that “defendants had a preconceived **and** undisclosed intent” to act contrary to their representations or that statements were false when made)].

The Court of Appcals has held:

The single allegation of scienter, without additional detail concerning the facts constituting the alleged fraud, is insufficient under the special pleading standards required under CPLR 3016 (b), and, consequently, the cause of action should have been dismissed.

Credit Alliance Corp. v Arthur Andersen & Co., 65 NY 2d 536, 554; see Fink v Citizens Mortgage Banking Ltd., 148 AD2d 578, 578 [dismissing fraud claim, where scienter element was merely inferred and was “unsupported by any factual allegations and was conclusory”].

Where a “complaint is devoid of any but the most conclusory allegations that defendant . . . knew or should have known” about the alleged fraudulent conduct, that complaint fails “to support the scienter element of its claim” (National Westminster Bank USA v Wechsel, 124AD2d 144, 148, appeal denied 70 NY2d 604 [reversing denial of motion to dismiss aiding and abetting fraud claim]). Even where “plaintiffs allege that defendant ‘knew or should have known’” about **an** alleged misrepresentation, “under New York law a claim for fraud requires an intent to deceive” (Haggerty v United Mining Corn., 1992 WL 230128, * 6 n. 3 [SD NY 1992], affd 7 F3d 220 [2d Cir 1993]); see Lama Holding, 88 NY 2d at 421; Ruff v Genesis Holding Corp., 728 F Supp 225, 227-28, 230 [SD NY 1990]). Even where a plaintiffs reliance upon a dcfendant’s representations is undisputed, merely adding conclusory allegations that those representations were false and made with intcnt to deceive will not satisfy the requirements of CPLR 3016 (b) (Lakeville Pace Mech., Inc. v Elmar Realty Corn., 276 AD2d 673, 676-77).

Foster Whceler’s implication that Raytheon intended to defraud Foster Wheeler by misrepresenting or conccaling unspecified “performance characteristics” of the combustion

turbines, thereby causing the HRSGs to fail in some unspecified fashion, that in turn allegedly would have caused the entire Project, for which Raytheon was responsible, to fail, defies common sense. Raytheon had nothing to gain, and much to lose, economically and otherwise, from the delay and expense that would inevitably result from such a failure. Why Raytheon would pursue this senseless course is not explained. The absence of any cogent explanation for an alleged fraud is a basis for dismissal (see P. Schoenfeld Asset Mgt. LLC v Cendant Corp., 142 FSupp2d 589, 611-12 [D NJ 2001] [dismissing fraud claim, where defendant's motive as plaintiff alleged "is illogical and inconsistent with" plaintiffs allegations as to defendant's long-term plans]; see also Matsushita Elec. Indus. Co., Ltd. v Zenith Radio Corp., 475 US 574, 596-97 [1986] [reversing finding of price fixing conspiracy, given "the absence of any plausible motive to engage in the conduct charged," and determining that plaintiff could show only "an economically senseless conspiracy"]).

Moreover, Foster Wheeler contracted away any right to assert its fraud claim. The Agreement and its Amendments and, more particularly, the General Release in favor of Raytheon and others that Foster Wheeler executed on October 8, 2001 bars Foster Wheeler's claims for fraud. In the Agreement, Foster Wheeler represented that the Technical Specifications were not only complete and accurate in its view, but also that Foster Wheeler explicitly "acknowledge[d] and accept[ed] the risk of mistake or error" to the extent that the information incorporated into the parties' Agreement later proved to be "incorrect or *insufficient*" (§ 20.2 [a]-[b]).

Significantly, in section 20.2 (b) of the Agreement, Foster Wheeler explicitly agreed not to bring any claims, including tort claims, "on the ground of any misunderstanding or misapprehension or other error or mistake in respect of the matters referred to in Section 20.1 hereof or on the ground of any allegation or fact that **incorrect or insufficient information** with respect to the matters referred to in Section 20.1 hereof was given to it by any Person or of any

failure on Foster Wheeler's part to obtain correct and sufficient information. ...”

The General Release in Amendment No. 5 bars Foster Wheeler's contract claims.

As previously noted, Foster Wheeler agreed, in Amendment No. 5 to give a General Release and covenanted and agreed not to sue Red Oak, WGI or Raythcon for supplying incorrect information or failing to supply sufficient information. Although Foster Wheeler asserts that these provisions are not a release, they clearly are.

As a general rule, when a release is clear and unambiguous on its face and knowingly and voluntarily entered into, it will be enforced as a private agreement between the parties (Mangini v McClurg, 24 NY2d 556, 563; Thaler v LaRocca, 174 AD2d 731). When parties in roughly equivalent bargaining positions sign a release in a commercial context, the general rule is that, if the language of the release is clear, it will be enforced according to its terms (Locafrance U.S. Corp. v Internodal Systems Leasing, 558 F2d 1113, 1115 [2d Cir 1977]; In re Schaefer, 18 NY2d 314, 317). In the absence of fraud, duress, illegality, or mistake, a general release bars an action on any cause of action arising prior to its execution (Mergler v Crystal Properties Associates Ltd., 179 AD2d 177, 178). The burden is on the party seeking to avoid the consequences of a release (ibid. at 181) to establish the existence of any of the traditional bases for setting aside a release - duress, illegality, fraud, or inutual mistake (Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603, 616).

By this General Release, Foster Wheeler released precisely the kind of contractual claims that Foster Wheeler has asserted in this action (First and Second Counterclaims). In the First Counterclaim, Foster Wheeler seeks monies allegedly owed under the Agreement for “certain extra and additional work” allegedly caused by “alterations, modifications, additions to and deductions from, the scope of work.” In the Second Counterclaim, Foster Wheeler seeks compensation for additional and other unnecessary costs that it alleges it incurred because the “nature of the work, as

contemplated by Foster Wheeler, was materially changed” due to a laundry list of purported breaches of the Agreement by Raytheon.

As pled, the General Release included in Amendment No. 5 bars these claims.

Accordingly, Foster Wheeler’s contractual claims should be dismissed, pursuant to CPLR 3211 (a) (1) and 3211 (a) (5).

Because Foster Wheeler has not alleged that any event giving rise to a contractual claim transpired after October 8, 2001, this court dismisses Foster Wheeler’s contract claims in their entirety under CPLR 3013, 3211 (a) (1) and 3211 (a) (5), because the General Release in Amendment No. 5 bars them (see Mergler, 179 AD2d at 181; Tavoulareas, 292 AD2d 256,257).

The effect of the General Release also underscores Raytheon’s entitlement to relief from Foster Wheeler’s improperly pled “fraud” count. The basis for Foster Wheeler’s “fraud” count is alleged Contract Documents, dated as of December 31, 1999, almost two years before the General Release of Amendment No. 5. Even were Foster Wheeler to allege innocent ignorance, or lack of appreciation, of combustion turbines’ “performance characteristics” on October 8, 2001 (after almost two years of contract work), that allegation would be thoroughly irrelevant. To the extent that Foster Wheeler’s claims are based on disputes as to scheduling or specifications, Foster Wheeler has alleged nothing more than “unknown” or “unasserted” claims extant as of October 8, 2001, that Foster Wheeler fully released in exchange for good value.

The Impossibility Claim

Foster Wheeler’s “claim” of impossibility (Fourth Counterclaim) must be dismissed for three reasons: (1) this claim does not exist under New York law; (2) the impossibility “claim” is based on nonexistent fraud; and (3) Foster Wheeler has not alleged the necessary substantive elements of impossibility.

The law in New York is clear: impossibility does not exist as a separate cause of action; it is merely an affirmative defense (Kel Kim Corp. v Central Mkts., Inc., 70 NY2d 900, 902).

Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome (ibid.). The defense of impossibility, that the court applies narrowly, excuses a party's nonperformance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, an unanticipated event that the parties could not have foreseen or guarded against in the contract must have produced the impossibility. (ibid.). Difficulty or even improbability of accomplishment without great financial loss will not release an obligor (Standard Oil Co. of New York v Central Dredging Co., 225 App Div 407, affd 252 NY 545). Financial difficulty or economic hardship, even insolvency or bankruptcy, is not such an impossibility as to excuse a defendant from liability in damages for failure to perform the contract (407 East 61st Garage v Savoy Fifth Ave. Corp., 23 NY2d 275, 281-82).

The delays and costs Foster Wheeler allegedly incurred clearly do not reach the level of "objective impossibility" (see 407 East 61st Garage, 23 NY2d at 281-82). Nor were the delays and costs "unforeseen" in the Agreement: Foster Wheeler not only foresaw the possibility of these occurrences, Foster Wheeler waived all rights and assumed the risk regarding them.

Accordingly, defendants' impossibility counterclaim is dismissed pursuant to CPLR 3211 (a)(7).

Although defendant has requested leave to replead if the court grants the motion, the court should not grant leave to replead unless the court is satisfied that the party has good grounds to support the counterclaims (CPLR 3211 [e]; ATI, Inc. v Ruder & Finn, Inc., 42 NY2d 454, 461).

Evidence should support defendants' request for leave to replead as on a motion for summary judgment (Hickey v National League of Professional Baseball Clubs, 169 AD2d 685 and defendants must include a copy of a proposed new pleading (Abbott v Herzfeld & Rubin, P.C., 202 AD2d 351, lv dismissed in part, denied in **part** 83 NY2d 995). Defendants have failed to make the requisite showing needed for the court to grant leave to replead. Accordingly, leave to replead is denied.

Conclusion

Accordingly, it is hereby

ORDERED that the courts grants the motion without leave to renew and dismisses Foster Wheeler's counterclaims. The answer is deemed amended accordingly

Dated: May ^{5th}, 2004

ENTER:



J.S.C.

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