

**Alacrity Services, LLC v GAB Robins North America,
Inc.**

2004 NY Slip Op 30288(U)

October 4, 2004

Supreme Court, New York County

Docket Number: 604058/03

Judge: Sherry Klein Heitler

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Sherry Klein Heitler
Justice

PART 30

0604058/2003

ALACRITY SERVICES LLC.
VS
GAB ROBINS NORTH AMERICA INC.

INDEX NO. 604058/03

MOTION DATE _____

MOTION SEQ. NO. (au)

MOTION CAL. NO. _____

SEQ 1
DISMISS ACTION

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 this motion

is decided in accordance with the memorandum decision dated Oct 4, 2004

FILED
OCT 06 2004
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: Oct 4, 2004

Sherry Klein Heitler
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

-----X
ALACRITY SERVICES, LLC,

Plaintiff,

-against-

GAB ROBINS NORTH AMERICA, INC.,

Defendant.
-----X

SHERRY KLEIN HEITLER, J.:

Defendant GAB Robins North America, Inc. (GAB) moves, pursuant to CPLR § 3211(a)(7), for dismissal of the complaint of Alacrity Services, LLC (Alacrity) for failure to state a cause of action. GAB, in its memorandum of law, has also requested that the court consider sanctions, pursuant to NYCCR § 130-1.1(a).

FILED

OCT 06 2004

NEW YORK
COUNTY CLERKS OFFICE

Alacrity is the purchaser of a business product called PTC-Net from non-party Project, Time and Cost (PTC). PTC-Net uses an internet-based program (of the same name) to adjust property and casualty insurance claims, and maintain a network of contractors to make repairs to property at predetermined charges. Defendant GAB is in the business of adjusting claims for insurers.

On March 30, 2000, PTC and GAB contemporaneously entered into both a Security Purchase Agreement (the SP Agreement), and a Strategic Alliance and PTC-Net User Agreement (the User Agreement) (collectively, the Agreements). As part of the SP Agreement, GAB invested \$3 million in PTC, and acquired 2% (986.4016 shares) of PTC stock. Under the User Agreement, GAB would

¹GAB's motion to dismiss, although only referencing CPLR § 3211(a)(7), relies heavily on the principle of res judicata, and is, thus, primarily pursuant to CPLR § 3211(a)(5).

have exclusive use of the PTC-Net program for the third-party claims adjusting market for a term of three years.

In April of 2001, however, PTC rescinded the User Agreement, claiming that: (I) GAB was attempting to tie up the PTC-Net system and keep it off the market; and (ii) GAB did not make any referrals to PTC as it had promised in the negotiations preceding the signing of the Agreements. Upon rescission by PTC, GAB demanded that its investment of \$3 million be returned. PTC refused.

GAB filed a Demand for Arbitration with the American Arbitration Association (AAA) on August 17, 2001 (AAA, No. 30 Y 181 00838 01, or the Arbitration) alleging the rescission of the Agreements and seeking the return of the \$3-million investment. PTC filed a complaint against GAB in United States District Court, Northern District of Georgia, Atlanta Division (Project Time & Cost, Inc. v GAB Robins N. Am., Inc., Civil Action File No. 1:01-CV-2453-WBH, or the Georgia Action), seeking a preliminary injunction to enjoin GAB from proceeding to arbitration. By order of October 26, 2001, the request for a preliminary injunction was denied and the proceeding was stayed pending the outcome of the Arbitration.

In its Answer to the Demand for Arbitration, PTC asserted, among other affirmative defenses, that GAB's claims are barred by the defenses of unclean hands and fraud. PTC also asserted counterclaims, among others, for breach of contract, due to: (I) GAB's alleged failure to make any referrals as promised; and (ii) GAB's intention to impair PTC's competitive potential.

On February 27, 2002, Alacrity was formed, and all interest in PTC-Net was transferred from PTC to Alacrity on March 27, 2002. (Subsequently, 100% of the interest in Alacrity was transferred to PTC shareholders, and, in turn, transferred to Greenwich Street Capital.) GAB then moved, in

the Georgia Action, to compel Alacrity to participate in the Arbitration. The court in the Georgia Action denied GAB's motion.

On March 27, 2002, PTC and Alacrity entered into a Litigation Control Agreement in which they agreed that the Arbitration "will be managed [by either party] in a manner to achieve an entry of a final order with the effect of res adjudicata with respect to the subject matters of the [Arbitration]." Adelman Aff., Exh. 18, at 1.

By decision dated August 29, 2002, the arbitrator awarded GAB \$3 million in exchange for the return of the shares of class B common stock of PTC, and denied all of PTC's counterclaims. The arbitration award was confirmed, with costs to GAB, in the Georgia Action, by order of September 25, 2002.

Alacrity has brought this action claiming fraudulent inducement to enter into the Agreements, and prima facie tort for the harm inflicted on PTC-Net.

Fraudulent Inducement

GAB argues that Alacrity's claims (I) are barred by the doctrine of res judicata; (ii) are barred by the doctrine of judicial estoppel (or the doctrine of estoppel against inconsistent positions); and (iii) that, in any event, the complaint fails to meet the particularity requirement for fraud claims under CPLR § 3016.

"[I]n general the doctrines of claim preclusion and issue preclusion between the same parties (more familiarly referred to as res judicata or direct estoppel) apply as well to awards in arbitration as they do to adjudications in judicial proceedings." American Ins. Co. v Messinger, 43 NY2d 184, 189-190 (1977). "At the core of the doctrine of res judicata is the concept that a valid final judgment bars further actions between the same parties on the same cause of action. If the same 'gravamen

of ... wrong' is at issue, the subsequent action is barred." Jefferson Towers, Inc. v Public Serv. Mut. Ins. Co., 195 AD2d 311, 313 (1st Dept 1993) (citations omitted) (emphasis added).

In its Answer to the Demand for Arbitration, PTC asserted several affirmative defenses, including that "GAB's claims are barred, in whole or in part, by the defense of fraud." Adelman Aff., Exh. 6, at 7. Nonetheless, though the facts alleged by Alacrity in this cause of action bear a resemblance to the facts alleged by PTC in the Arbitration (see Adelman Aff., Exh. 6, ¶¶ 13-25), Alacrity, having not been a participant in the Arbitration, cannot be said, as a matter of law, to have had a full and fair opportunity to litigate its claim for fraudulent inducement. Nationwide Mech. Contrs. Corp. v Hokkaido Takushoku Bank Ltd., 188 AD2d 871, 873 (3rd Dept 1992); Allstate Ins. Co. v Toussaint, 163 AD2d 444, 448 (2nd Dept 1990); . Corto v Lefrak, 155 AD2d 246, 246 (1st Dept 1989).

There is no clear indication that the issue of fraudulent inducement was material to the Arbitration, or essential to the award given therein. See Ryan v New York Tel. Co., 62 NY2d 494, 500-01 (1984). In fact, neither the Arbitration award, nor the transcripts of the proceedings submitted, make any specific mention of the allegation that GAB fraudulently induced PTC or PTC-Net to enter into either of the Agreements. See Adelman Aff., Exhs. 6, 9, 10, 11; see also Independent Assn. of Plastic and Fibre Workers, Local No. 1 v Spaulding Fibre Co., Inc., 90 AD2d 972, 972 (4th Dept 1982) (an action cannot be precluded by arbitration and award if the subject matter of the action was not reached by the arbitrator, and if "an issue not passed upon by the arbitrators is the subject of a later action, obviously the award is not a bar to that action") (internal citation omitted).

The Arbitration was also limited to the question of rescission of the SP and User Agreements. See Adelman Aff., Exh. 3. An award which follows a general submission extending to all demands which either party has against the other may have preclusive effect as to any matters fairly within the meaning and intention of the submission. However, an award made pursuant to a limited submission of certain questions does not foreclose later litigation of matters not included in the original submission. David Assoc. v Bevona, 109 AD2d 623, 624-625 (1st Dept 1985).

Further, as Alacrity was a separate entity from PTC, the Arbitrator had no power to award damages to Alacrity for fraudulent inducement or prima facie tort. See Gidatex, S.r.L. v Campaniello Imports, Ltd., 13 F Supp 2d 420, 424 (SD NY 1998) (“[r]es judicata does not apply ... where the initial forum did not have the power to award the full measure of relief sought in the later litigation”) (citation and internal quotation marks omitted).

Thus, Alacrity’s claim for fraudulent inducement is not precluded by res judicata because: (I) there is no definitive indication in the award or transcript that the Arbitration addressed fraudulent inducement; (ii) Alacrity, having not participated in the Arbitration at all, has clearly not had a full and fair opportunity to litigate the matter; and (iii) given the limited question submitted, the Arbitration could not have resulted in an award of damages to Alacrity.

Nevertheless, Alacrity’s claim for fraudulent inducement must be dismissed for failure to state a claim upon which relief can be granted. The complaint lacks the specificity required under CPLR § 3013 or CPLR § 3016, and the complaint fails to allege facts indicating a present intent of GAB not to honor its obligations at the time of signing of the Agreements. Moreover, the SP and the User Agreements both indicate that the parties did not rely on oral representations or warranties not contained in the Agreements.

To maintain a claim for fraudulent inducement, Alacrity must allege facts tending to show that GAB made a false representation of a material fact, with scienter, and that PTC (Alacrity's predecessor-in-interest) justifiably relied upon that representation to its detriment. Gaidon v. Guardian Life Ins. Co. Of America, 94 N.Y.2d 330, 348 (1999); Channel Master Corp. v Aluminium Ltd. Sales, Inc., 4 NY2d 403, 406-07 (1958).

Here, Alacrity offers only that GAB promised to make referrals to PTC and did not. Alacrity alleges no facts indicative of scienter, nor does Alacrity provide any proof that PTC justifiably relied on the representation. Thus, the complaint fails to make out the elements of fraudulent inducement.

Moreover, a claim based on fraud has a heightened requirement for particularity. Alacrity offers no indication of when GAB allegedly promised to make referrals to PTC or the context of such discussions. See e.g. Glickman v Alper, 236 AD2d 230, 231 (1st Dept 1997) (details of the time and context of the statements in question must be sufficient to give defendants a fair opportunity to defend); Bramex Assocs., Inc. v. CBI Agencies, Ltd., 149 AD2d 383, 384 (1st Dept 1989) (the circumstances surrounding the fraud must be pleaded in detail).

Further, in order for Alacrity to maintain a complaint based upon a statement of GAB's future intention, Alacrity must allege facts to show that GAB, "at the time the promissory representation was made, never intended to honor or act on [the] statement." Lanzi v Brooks, 54 AD2d 1057, 1058 (3rd Dept 1976), affd 43 NY2d 778 (1977) (emphasis added); see also P. Chimento Co. v Banco Popular de Puerto Rico, 208 AD2d 385, 386 (1st Dept 1994), quoting Lane v McCallion, 166 AD2d 688, 690 (2nd Dept 1990) ("[a]bsent a present intent to deceive, a statement of future intentions, promises or expectations is not actionable as fraud"). "Moreover, any inference drawn from the fact

that [an] expectation did not occur is not sufficient to sustain the plaintiff's burden of showing that the defendant falsely stated his intentions." Lanzi v Brooks, 54 AD2d at 1058.

Here, Alacrity has alleged no facts whatsoever to make such a showing of present intent to deceive. Instead, Alacrity offers conclusory allegations about the intentions of GAB, with no indication of any factual basis from which such conclusions may be drawn. "It is the general rule that fraud cannot be predicated upon statements which are promissory in nature at the time they are made and which relate to future actions or conduct. Mere unfulfilled promissory statements as to what will be done in the future are not actionable as fraud." Brown v Lockwood, 76 AD2d 721, 731 (2nd Dept 1980) (citations omitted).

Finally, where a contract disclaims reliance upon any representations not contained therein, a claim in fraud based on alleged representations not incorporated into the contract may be barred. See Goldberg v KZ 72nd, 171 AD2d 525, 527 (1st Dept 1991); 37 Am Jur 2d, Fraud and Deceit § 325.²

In this regard, the SP Agreement provides that it contains "the entire agreement among the parties with respect to the subject matter hereof and supersede[s] all prior and contemporaneous arrangement[s] or understanding[s] with respect thereto." SP Agreement, Adelman Aff., Exh. 1, at 36.

Moreover, the User Agreement provides, more stringently, that it

²The SP and User Agreements state that they are governed by Georgia Law. However, similarly to New York Law, Georgia Law provides that merger clauses in contracts stating that there has been no reliance upon any representations not contained in the contract, operate to waive claims for fraudulent inducement. In such a situation, a fraud-in-the-inducement claim may be maintained only where the party claiming fraud can show that it lacked knowledge of the contract's contents. See Carpenter v Curtis, 196 Ga App 234, 236, 395 SE2d 653 (1990).

constitutes the entire agreement between the parties and supersedes any prior arrangement or understanding, whether oral or written, including the Letter of Intent between the parties dated March 10, 2000, regarding the providing of access to the PTC Network and the providing of Network Services and there are no representations, inducements, promises or agreements, oral or written, upon which any party relied or which induced the party to enter this Agreement not contained herein.

User Agreement, Adelman Aff., Exh. 1, at 62.

Alacrity's claim for fraudulent inducement lacks the specificity required under either CPLR § 3013 or CPLR § 3016, in that it fails to allege facts indicating a present intent of GAB not to honor its obligations at the time of signing the Agreements, and the Agreements themselves indicate that the parties are not relying on any other oral representations or warranties. Thus, Alacrity's claim for fraudulent inducement is dismissed.

Prima Facie Tort

Alacrity's claim for prima facie tort, similarly, is not subject to res judicata because it was never raised in the Arbitration. As a non-party to the Arbitration, Alacrity had no opportunity to raise it, and the Arbitration award could not have granted Alacrity any relief. Rembrandt Indus., Inc. v Hodges Intl., Inc., 38 NY2d 502, 504 (1976) (where the basis of an action is an issue that was not passed upon by the arbitrators, res judicata does not apply); see also Hinchey v Sellers, 7 NY2d 287, 292-93 (1959); Cine-Source, Inc. v Burrows, 180 AD2d 592, 594 (1st Dept 1992) (“[p]arties to an arbitration proceeding are barred by the doctrine of res judicata from relitigating only those matters which were actually contested and therefore determined by the award”) (citation omitted) (emphasis added).

Furthermore, “... a second action may not be barred even if both actions arise from an identical course of dealing, if the necessary elements of proof and evidence required to sustain

recovery vary materially.” Jefferson Towers, Inc. v Public Serv. Mut. Ins. Co., *supra*, 195 AD2d at 313. As Alacrity’s claim for prima facie tort was never raised in the Arbitration, and requires a substantially different showing than that of fraudulent inducement, it is not precluded on the basis of res judicata.

GAB has also moved, however, to dismiss the prima-facie-tort claim for failure to state a claim. On such a motion, the test to be applied is whether, upon examination of the four corners of the pleading, the factual allegations contained in the pleading indicate the existence of any cause of action cognizable at law. Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977). A complaint is required to contain statements of sufficient particularity to give the court and the parties notice of the transactions and occurrences intended to be proved, along with the material elements of each cause of action. CPLR § 3013.

“The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful. A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages.” Freihofer v Hearst Corp., 65 NY2d 135, 142-143 (1985) (citations omitted).

Here, Alacrity has proffered only conclusory allegations that GAB intentionally inflicted harm on PTC, that GAB dissuaded third parties from doing business with PTC and took these actions without excuse, and that Alacrity suffered special damages as a result. These unsupported allegations are insufficient to maintain a claim for prima facie tort.

The claim of prima facie tort is not a substitute for existing torts. Knapp Engraving Co. v Keystone Photo Engraving Corp., 1 AD2d 170, 172 (1st Dept 1956), quoting Ruza v Ruza, 286 App

Div 767, 770 (1st Dept 1955) (“where specific torts account for all the damages sustained, whether provable as general damages or pleadable and provable as special damages, prima facie tort does not lie”). Here, Alacrity claims that GAB dissuaded third parties from doing business with PTC in an effort to destroy its business. These allegations correspond to the tort of interference with business relations, which “applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant.” WFB Telecoms., Inc. v NYNEX Corp., 188 AD2d 257, 257(1st Dept 1992). Thus, this allegation does not implicate a cause of action for prima facie tort.

Alacrity claims that GAB entered into the Agreements in order to eliminate PTC-Net as a competitor, and that GAB refused to make referrals to PTC because such referrals would erode GAB’s profit. To maintain a claim for prima facie tort, however, Alacrity must show that GAB acted with “disinterested malevolence.” Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 333 (1983). “[S]elf-interest negatives malice, even though the means employed might be of questionable morality and ethical validity. Competition as such, no matter how vigorous or even ruthless, is not a tort at common law.” Benton v Kennedy-Van Saun Mfg. & Eng. Corp., 2 AD2d 27, 29 (1st Dept 1956). GAB’s alleged pecuniary motive negates the claim for prima facie tort.

Finally, Alacrity alleges that it has suffered special damages by its alleged loss of reputation, loss of capital, denial of business, wasted expenditure of capital, and denial of business dealings with third parties. Yet, none of these allegations are supported with any facts from which an inference of special damages could be drawn. Alacrity does not state how much capital was lost, the identity of any third party that refused to do business with Alacrity as a result of GAB’s actions, or even how

capital expenditure was wasted. In short, Alacrity has alleged no specific, measurable loss attributable to the alleged conduct. See *Freihofer v Hearst Corp.*, supra, 65 NY2d at 143.

As Alacrity's complaint has failed to state any claim upon which relief can be granted, and is dismissed, the court will not address GAB's arguments based on judicial estoppel.

Although Alacrity's arguments have been unavailing, they are not utterly without merit so as to be "frivolous" within the meaning of 22 NYCRR 130-1.1(c). GAB's request for sanctions is denied.

Accordingly, it is hereby

ORDERED that the motion of defendant GAB Robins North America, Inc. for an order dismissing the complaint of plaintiff Alacrity Services, LLC for failure to state a cause of action is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

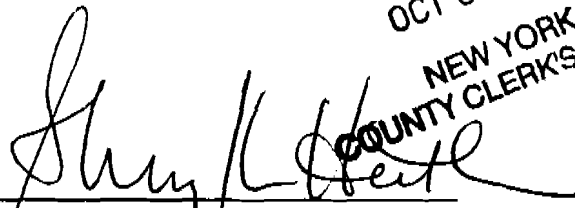
ORDERED that the request of defendant GAB Robins North America, Inc. for sanctions, pursuant to NYCCR § 130-1.1(a) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the decision and order of the court.

DATED: October 4, 2004

FILED
OCT 06 2004
NEW YORK
COUNTY CLERK'S OFFICE



SHERRY KLEIN HEITLER
J.S.C.