

**Permasteelisa S.p.A. v Lincolnshire Management,
Inc.**

2004 NY Slip Op 30292(U)

July 26, 2004

Supreme Court, New York County

Docket Number: 603046/2003

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

-----X

PERMASTEELISA S.p.A.,

Plaintiff,

INDEX NO. 603046/2003

- against -

MOTION DATE _____

LINCOLNSHIRE MANAGEMENT, INC., STRUCTURAL PRODUCTS, LLC, ELLIOTKRACKO, JOHN R. BARKER, EMIL Z. SHER, JOHN W. NORD, LUIS J. MORALES, STEPHEN H. SURMAN, GEORGE J. HENRY, DOUGLAS BAGIN, GEORGE ARMIGER, C. JOHN ANDERSON and JIM ANDERSON,

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Defendants.

-----X

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 _____

FILED

AUG 02 2004

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is

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

Dated: July 26 2004

Kay
KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

-----X
PERMASTEELISA S.p.A.,

Plaintiff,

Index No. 603046/2003

- against -

LINCOLNSHIRE MANAGEMENT, INC.,
STRUCTURAL PRODUCTS, LLC, ELLIOT
KRACKO, JOHN R. BARKER, EMIL Z. SHER,
JOHN W. NORD, LUIS J. MORALES, STEPHEN
H. SURMAN, GEORGE J. HENRY, DOUGLAS
BAGIN, GEORGE ARMIGER, C. JOHN
ANDERSON and JIM ANDERSON,

Defendants.
NEW YORK
COUNTY CLERK'S OFFICE

DECISION & ORDER
FILED
AUG 02 2004

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KARLA MOSKOWITZ, J.S.C.:

This order consolidates sequence motions numbers 001 and 002 for disposition. In these motions, two groups of co-defendants seek dismissal, pursuant to CPLR 3211 and 3212. For the following reasons, the court grants both of these motions and dismisses this action.

BACKGROUND

The Parties

Plaintiff Permasteelisa S.p.A. (Permasteelisa), licensed and headquartered in Treviso, Italy, is a multinational corporation that specializes in the design, fabrication and installation of "curtainwall," i.e., building facades. See Notice of Motion (motion sequence number 001), Exhibit E (Complaint), ¶¶ 7-21. This action arises out of Permasteelisa's 2003 purchase of Glassalum Holdings Corp. (Glassalum), a New York corporation that engaged in the same business as, and competed with, Permasteelisa in the New York construction market. *Id.*, ¶ 1.

The defendants fall into two groups. The defendants in the first group (the "Lincolnshire" defendants") are Lincolnshire Management, Inc. (Lincolnshire), a Delaware holding company

with its principal place of business in New York; Structural Products, LLC (“Structural Products”), a Delaware corporation that owned Glassalum, Lincolnshire (the company that owned Structural Products) and George J. Henry, Douglas Bagin, and George Armiger, all of whom are officers of Lincolnshire. (Id., ¶¶ 8-9, 16-18). The Lincolnshire defendants, collectively, sold Structural Products’ interest in Glassalum to Permasteelisa. (Id., ¶ 1). The second group of moving co-defendants (hereinafter the “Glassalum defendant”) consists of Elliot Kracko, John R. Barker, Emil Z. Sher, John W. Nord, Luis J. Morales and Stephen H. Surman, all of whom were shareholders and officers of Glassalum who sold their respective interests to Permasteelisa, along with the Lincolnshire defendants. (Id., ¶¶ 10-15). The other named co-defendants, C. John Anderson and Jim Anderson, were also officers of Glassalum; however, Permasteelisa has previously withdrawn its claims against them. (Id., ¶¶ 19-20; Memorandum of Law in Support of Motion [motion sequence number 001], at 1, fn 1).

The Purchase Agreement

On March 19, 2003, Permasteelisa entered into a contract with Structural Products and the Glassalum defendants to purchase Glassalum for the sum of \$28,140,000.00 (the Purchase Agreement). (See Notice of Motion [motion sequence number 001], Exhibit E [Complaint], ¶ 61; Exhibit E, Attachment 1). Paragraph 5.11 of the Purchase Agreement states as follows:

5.11. Access to Information. Without in any way limiting [Glassalum]’s representations and warranties set forth herein, [Permasteelisa] acknowledges that it has been provided with information concerning [Glassalum] ... that it has determined to be relevant to its purchase of [Glassalum].

(See Notice of Motion [motion sequence number 001], Exhibit E, Attachment 1, at 22). As regards that “information,” paragraph 4.07 of the Purchase Agreement recites that Glassalum “has delivered to [Permasteelisa] the consolidated financial statements of [Glassalum], dated as

of December 31, 2002 ...”. (Id. at 12). Paragraph 5.12 of the Purchase Agreement further states as follows:

5.12 Buyer’s Knowledge. (a) [Permasteelisa] has no knowledge of any facts or circumstances which (with or without notice or lapse of time or both) would cause any representation or warranty of [the co-defendants] contained in this Agreement to be untrue or incorrect in any material respect.

(b) [Permasteelisa] expressly waives any and all claims with respect to or arising out of the matters or transactions referred to in the letter dated March 6, 2003 from counsel for [Permasteelisa] to counsel for [Structural Products] as set forth in Section 5.12 of the Buyer’s Disclosure Schedule.

Id. at 22. The following excerpt details the “matters and transactions” to which the above-mentioned March 6, 2003 letter referred:

As we previously informed you, the terms and conditions to the Buyer’s Obligations have not been met, including without limitation, the following terms and conditions:

1. Sellers have failed to provide complete copies of the Construction Contracts, as agreed;
2. Sellers have failed to provide all of the Collective Bargaining Agreements and to provide a knowledgeable party to address labor issues, as Permasteelisa initially requested on February 13, 2003;
3. Permasteelisa’s dissatisfaction with the information obtained through its Customer Diligence;
4. The lack of a reasonably satisfactory answer from a surety company as to an adequate bonding facility for the Company; and
5. Permasteelisa’s finding that there has been a Material Adverse Effect on the business, financial conditions and results of operations of the Company.

(Id., Attachment 2, at 37-43 [pages not numbered]). Paragraph 9.14 of the Purchase Agreement sets forth a general merger clause. (Id., Attachment 1, at 33).

Before finalizing its purchase of Glassalum, Permasteelisa conducted extensive negotiations with the defendants and performed substantial corporate due diligence work in order

to ascertain Glassalum's true sale value. (See Notice of Motion [motion sequence number 001], Exhibit E [Complaint], ¶¶ 21-28). Permasteelisa alleges that, throughout this process, defendants provided inaccurate, incomplete or misleading material regarding Glassalum's financial status. (Id., ¶¶ 29-57). Permasteelisa also notes that defendants agreed to lower Glassalum's purchase price four times, from a starting request of \$60,000,000.00 to the final purchase price of \$28,140,000.00. (Id., ¶¶ 23, 34, 37, 61). Permasteelisa now claims that it based the final purchase price mainly upon the information contained in Glassalum's December 31, 2002 consolidated financial statement. (Id., ¶ 2). Permasteelisa also claims that, after it completed the Glassalum purchase, it learned that Glassalum had been experiencing severe cost overruns at many of its construction projects, that Glassalum was subject to substantial undisclosed liability for both insurance premiums and litigation costs and that Glassalum's officers had involved the company in unnecessarily expensive self-dealing contracts. (Id., ¶¶ 64-71). Permasteelisa bases these claims upon the information contained in Glassalum's March 19, 2004 consolidated financial statement. (Id., ¶¶ 3, 65).

Prior Proceedings

Permasteelisa commenced this action in September of 2003 and argues that the defendants should be held liable, under a variety of legal theories, for concealing the above-mentioned financial information until after the closing date of Glassalum's sale. The complaint specifically sets forth causes of action for: 1) fraudulent inducement to contract; 2) breach of contract; and 3) breach of the implied covenant of good faith and fair dealing. (See Notice of Motion [motion sequence number 001], Exhibit E (Complaint), ¶¶ 72-85). The co-defendants thereafter initiated their respective motions to dismiss in March of 2004.

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test is "not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Rodgers v Lenox Hill Hosp., 239 AD2d 140, 142, quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48. To this end, the court must accept all of the facts alleged in the complaint as true and determine whether they fit within any cognizable legal theory. See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303. However, documentary evidence that flatly contradicts the plaintiff's factual claims will rebut the presumption of truth and the favorable inferences. Scott v Bell Atlantic Corp., 282 AD2d 180, 183 *affd as mod by* Goshen v Mutual Life Insurance Co. of New York, 98 NY2d 314, citing Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692. Thus, the court can sustain none of Permasteelisa's causes of action. Even under CPLR 3211's liberal standard of review, the express terms of the Purchase Agreement or well established principles of contract law bar the claims.

Permasteelisa's first claim, alleging fraudulent inducement to contract, fails because Permasteelisa cannot establish the requisite element of justifiable reliance. The Court of Appeals has long held that "the rule that fraud in the inducement vitiates a contract [is] subject to exception where the person claiming to have been defrauded has by his own specific disclaimer of reliance ... himself been 'guilty of deliberately misrepresenting [his] true intention'." (See Citibank, N.A. v Plapinger, 66 NY2d 90, 94, citing Danann Realty Corp. v Harris, 5 NY2d 317, 323; see also General Bank v Mark II Imports, Inc., 293 AD2d 328; Marine Midland Bank, N.A. v CES/Compu-Tech, Inc., 147 AD2d 396). Here, in paragraph 5.12 of the Purchase Agreement,

Permasteelisa specifically disclaims the right to rely upon any of the numerous improprieties, that its counsel detailed in his March 6, 2003 letter to Glassalum's counsel, in any future litigation.

(See Notice of Motion [motion sequence number 001], Exhibit E, Attachment 1, at 22).

Permasteelisa's suggestion that the disclaimer was general, instead of specific, is plainly incorrect, given the specific reference in it to "the matters or transactions referred to in the letter dated March 6, 2003." (*Id.*) Permasteelisa's reliance on this court's decision in J.A.O. Acquisition Corp. v Stavitsky (192 Misc 2d 7 [Sup Ct, NY County 2001]) is misplaced, because the contract that was the subject of the fraudulent inducement claim in that action contained no disclaimer clause. (See Consolidated Memorandum of Law in Opposition to Defendants' Motions, at 20). Thus, the rule Citibank, N.A. v Plapinger precludes Permasteelisa from alleging the element of justifiable reliance in its fraudulent inducement claim. Accordingly, the court dismisses Permasteelisa's first cause of action.

Permasteelisa's second cause of action, for breach of contract, specifically alleges that defendants:

- a. Knowingly fail[ed] to provide accurate schedules of completion costs for Glassalum's construction projects or the underlying documents that would have established the inaccuracies in Glassalum's completion schedules, in breach [of] the Purchase Agreement, including Section 4.22; and
- b. Knowingly fail[ed] to disclose that, since February 21, 2003, Glassalum had suffered a Material Adverse Effect (as defined in Article I of the Purchase Agreement), in breach of the Purchase Agreement, including Section 4.22; and
- c. Knowingly provid[ed] financial statements that do not reflect Glassalum's undisclosed liabilities, in breach of the Purchase Agreement, including Section 4.07.

(See Notice of Motion [motion sequence number 001], Exhibit E [Complaint], ¶ 78). Both the Lincolnshire defendants and the Glassalum defendants argue that Permasteelisa has expressly

waived the right to bring these claims. [See Memorandum of Law in Support of Motion [motion sequence number 001], at 11-13; Memorandum of Law in Support of Motion [motion sequence number 002], at 13-15. They specifically assert that the allegations in the complaint are claims that Permasteelisa waived in paragraph 5.12 (b) of the Purchase Agreement, because that provision incorporates, by reference, the matters discussed in March 6, 2003 letter from Permasteelisa's counsel and because those matters are the same as the claims in this case (Id.).

The court agrees. Permasteelisa, nonetheless, raises three arguments in opposition. First, Permasteelisa argues that construing the waiver, set forth in paragraph 5.12 (b) of the Purchase Agreement, in the manner that the defendants urge would nullify all of the Purchase Agreement's various warranty provisions. (See Consolidated Memorandum of Law in Opposition to Defendants' Motions, at 29-31). In response, the Lincolnshire defendants correctly point out that paragraph 9.02 of the Purchase Agreement specifically states that "notwithstanding anything to the contrary in this Agreement ... the representations and warranties of the Seller and the Company contained in this Agreement are qualified by Section 5.12." (See Reply Memorandum of Law in Further Support of Motion [motion sequence number 001], at 13-15). The Glassalum defendants also correctly point out that the waiver set forth in paragraph 5.12 (b) does not affect 19 out of the Purchase Agreement's 26 warranties. (See Reply Memorandum of Law in Further Support of Motion [motion sequence number 002], at 8-9). A plain reading of the Purchase Agreement reveals nothing that would set paragraph 5.12 (b) irreconcilably at odds with the Purchase Agreement's other provisions. Accordingly, the court rejects Permasteelisa's first argument.

Second, Permasteelisa argues that the court must construe paragraph 5.12 (b) of the Purchase Agreement narrowly as a specific waiver that does not apply to the matters in the

breach of contract claim. (See Consolidated Memorandum of Law in Opposition to Defendants' Motions, at 31-33). As discussed supra, however, the court has already found that the allegations in the complaint do, in fact, refer to matters that the waiver set forth in paragraph 5.12 (b) of the Purchase Agreement covers. The court also notes, in passing, that Permasteelisa's argument is inconsistent with its earlier suggestion that the aforementioned paragraph was a general disclaimer, instead of a specific one. (Id. at 20-23). Accordingly, the court rejects Permasteelisa's second argument.

Finally, Permasteelisa argues that "section 5.12 (b) should not be enforced as a waiver because it is part of a Purchase Agreement procured through fraud," and "[s]uch releases are not enforceable in New York." (See Consolidated Memorandum of Law in Opposition to Defendants' Motions, at 33). However, this argument necessarily presupposes the existence of "fraud," and the court has already determined that Permasteelisa cannot allege the existence of all of the elements of a fraud claim. Therefore, the court rejects Permasteelisa's third argument and dismisses Permasteelisa's second cause of action for breach of contract.

Permasteelisa's third cause of action, alleging breach of the implied covenant of good faith and fair dealing, clearly fails as a matter of law. This "cause of action ... is duplicative of [the] cause of action alleging breach of contract, since every contract contains an implied covenant of good faith and fair dealing." (See Apfel v Prudential-Bache Securities, Inc., 183 AD2d 439, aff'd as mod 81 NY2d 470). The language of the complaint containing no additional factual allegations belies Permasteelisa's contention that "the good faith claim alleges breaches outside the contract's written terms." (See Consolidated Memorandum of Law in Opposition to Defendants' Motions, at 28 and see Notice of Motion [motion sequence number 001], Exhibit E (Complaint), ¶¶ 81-85). Accordingly, the court finds that Permasteelisa's third cause of action

should also be dismissed.

In unsolicited sur-reply correspondence, Permasteelisa's counsel raises the final argument that Glassalum's March 19, 2004 consolidated financial statement sufficiently supports the allegations in the complaint, because that financial statement, and any claims arising from it, would not be subject to the waiver contained in paragraph 5.12 (b) of the Purchase Agreement. (See Plaintiff's Letter Dated June 2, 2004). Both the Lincolnshire defendants and the Glassalum defendants protest that this submission was procedurally improper and that the court should not consider it. (See Defendants' Respective Letters Dated June 2, 2004). The court declines to do so, however, because Permasteelisa correctly points out that it specifically mentioned the March 19, 2004 financial statement in the complaint and that the argument it raises is not new. (See Notice of Motion [motion sequence number 001], Exhibit E [Complaint], ¶¶ 3-65; Plaintiff's Letter Dated June 2, 2004).

However, the court rejects Permasteelisa's argument because it is clear that the only claims that Permasteelisa could assert, based on fraud contained in the March 19, 2004 financial statement, would be the same claims that it had already agreed to waive. Accordingly, the court grants both motions in full and dismisses the complaint.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby


ORDERED that the motion of co-defendants Lincolnshire Management, Inc., Structural Products, LLC, George J. Henry, Douglas Bagin, and George Armiger, seeking dismissal, pursuant to CPLR 3211, is granted and the complaint is dismissed with costs and disbursements to the co-defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the motion of co-defendants Elliot Kracko, John R. Barker, Emil Z.

Sher, John W. Nord, Luis J. Morales, Stephen H. Surman seeking dismissal, pursuant to CPLR 3211, is granted and the complaint is dismissed with costs and disbursements to the co-defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 16, 2004

ENTER


J.S.C.

FILED
AUG 02 2004
NEW YORK
COUNTY CLERK'S OFFICE