

**Coastal Sheet Metal Corp. v RJR Mech., Inc.**

2007 NY Slip Op 31513(U)

May 16, 2007

Supreme Court, New York County

Docket Number: 0400303/2006

Judge: Richard B. Lowe

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

PRESENT: Lowce  
*Justice*

PART 56m

Coastal Sheet metal Corp

INDEX NO. 400303/06

MOTION DATE 5/9/07

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

- v -

RJR Mechanical, Inc

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
MAY 22 2007  
NEW YORK COUNTY

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM/ DECISION**

RICHARD M. LOWCE  
*[Signature]*

Dated: 5/16/07

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 56

-----x

COASTAL SHEET METAL CORP.,

Index No: 400303/06

*Plaintiff*

*-against-*

**DECISION AND ORDER**

RJR MECHANICAL, INC., NEW YORK STATE  
UNIVERSITY CONSTRUCTION FUND, MID-STATE  
SURETY CORPORATION, FIREMAN'S FUND  
INSURANCE COMPANY, and John and Jane Does as  
OTHER LIEN HOLDERS UNKNOWN,

*Defendants*

**FILED**  
MAY 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----x

**RICHARD B. LOWE III, J:**

Plaintiff Coastal Sheet Metal Corp. ("Coastal") moves this Court by Order to Show Cause pursuant to CPLR 3025(b) to amend its complaint to include additional Defendants and causes of action, and for an extension of the Note of Issue date. Defendants RJR Mechanical, Inc ("RJR") and Mid-State Surety Corporation ("Mid-State") (collectively, "the Defendants") oppose the instant Order to Show Cause. They also cross-move to dismiss the complaint as against them pursuant to CPLR 3211(a)(1) and 3211(a)(5), and for sanctions pursuant to 22 NYCRR § 130.

## BACKGROUND

The issue in dispute is Coastal's allegation that it was not paid monies RJR owes it under a contract. Non-party Leewan Construction Corporation ("Leewan") was the contractor on a project at the State University of New York Health Sciences Center in Brooklyn. Leewan hired Coastal as the subcontractor to perform certain sheetmetal and ductwork work. RJR assumed Leewan's contractor-obligations, and retained Coastal as the subcontractor.

Coastal deposed Randy Karpman's ("Karpman"), RJR's prior counsel in the instant action, on April 10, 2007. During the deposition, Karpman was questioned on fifteen cancelled checks, representing RJR's alleged payment to Coastal for the latter's sub-contracting work. It is RJR's intent to use these checks as evidence that Coastal was indeed paid for the work performed.

Karpman testified to the following during the deposition: Checks 70279, 61536, and 61427 were deposited in an account with the name "C.S.M." at First Union National Bank. Coastal never maintained an account at that bank. Check numbers 61427 and 61536, which were dated February 21, 2001 and February 27, 2001 respectively, were drafted to "C.S.M.", not to Coastal. At that time, Harry Vassallo ("Vassallo") was Coastal's president and charged with collecting payments due. Currently, Vassallo operates a business called "Complete Spiral Manufacturing" or "C.S.M."

Furthermore, Karpman testified that Roy Leibowitz ("Leibowitz"), an RJR principal, directed him to draft checks 61427 and 61536 to "C.S.M.", rather than to "Coastal Sheet Metal, Corp." This request allegedly came from Vassallo. Still further, the summary of checks that

Karpman prepared pursuant to Coastal's discovery demands differed from that which Leibowitz prepared. Karpman's list includes the three checks deposited in the C.S.M. account; Leibowitz's summary does not.

RJR requires double-endorsement of all checks it issues. Karpman testified that he signed all three of these checks, Leibowitz co-signed one, and John Fattorusso ("Fattorusso"), another RJR principal, co-signed the other.

Coastal avers that based upon Karpman's deposition, it has a basis to amend its complaint to add Karpman, Vassallo, Leibowitz, and Fattorusso (collectively, "the Proposed Defendants") as defendants. The proposed amended complaint asserts a fraud claim against them.

## **DISCUSSION**

### *Amending the Complaint*

A party may amend its pleadings at any time, and leave to amend is freely given. (*See, CPLR 3025(b)*) However, when the proposed amendment lacks merit and serves no purpose, the motion to amend should be denied. (*See, Katechis v Our Lady of Mercy Medical Center*, 36 AD 3d 514 [1<sup>st</sup> Dept 2007].) The Defendants oppose Coastal's proposed amendment and request to extend the deadline for the Note of Issue filing on four grounds. Each will be addressed in turn.

#### *A. Fraud/Statute of Limitations*

"An action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable due diligence have discovered it." (*CPLR 213(8)*)

Here, there is no dispute that the statute of limitations bars Coastal's fraud claim premised *on when the fraud actually occurred*. To be sure, the check's alleged diversion happened in February 2001, over six years before Coastal brought its allegation to this Court's attention in April 2007. Rather, the issue for resolution is when Coastal should have reasonably discovered the alleged fraudulent activity.

"In order to start the limitations period regarding discovery, a plaintiff need only be aware of enough operative facts so that, with reasonable diligence, [it] could have discovered the fraud." (*Lucas-Plaza Housing Development Corp v Corey*, 23 AD 3d 217 [1<sup>st</sup> Dept 2005]). The Defendants contend that Coastal had mechanisms in place where they should have reasonably discovered the alleged fraud prior to the April 2007 deposition.

In support of their argument, the Defendants proffer Laurence Kupferschmid's (Kupferschmid) deposition from a different litigation that Coastal was a party to. Kupferschmid is currently Coastal's president, and served as its chief executive officer and secretary from 1998-2003. Kupferschmid testified that he

receive[d] financial statements on a monthly basis. I would have job meetings on a weekly basis. . .and we would communicate. . .if we had any problems with contractors.

(*Memo in Opp'n, Ex 2 at page 13, lines 14-23*)

I [oversaw] the company's global operation as far as. . .payment schedules that we were receiving or not receiving. . .

(*Id at page 14, lines 16-23*)

Furthermore, he testified, summarily, that Coastal was diligent in monitoring its billing. Specifically, monthly meetings were held with the accountant so that they could personally review statements and ensure that the business was properly run. (*See, Id, generally*)

Kupferschmid's deposition indicates that Coastal is a company that was/is diligent in its financial operations. It certainly would have known if it did not receive monies owed to it under the Coastal-RJR agreement. Indeed, it must have, since the original complaint asserted claims for the outstanding balance on said contract. However, Coastal alleges that three checks *made by* RJR were diverted to another bank account, with two of those checks drafted to C.S.M. rather than Coastal. While Coastal's due diligence would have learned that RJR's payment was not received, it would not have revealed the alleged fraud and the proposed defendants' involvement therein. The genesis of its discovery would have been, as it was, when RJR submitted the fifteen checks to Coastal on or about June 2006; Coastal is within the 2-year limitations period to commence a fraud action premised upon when it reasonably should have discovered it.

In addition, Kupferschmid testified that there was a litigation against Vassallo, where he was alleged to have used company dollars for personal expenses. (*See, Id at page 40, lines 15-25*) The Defendants argue that Coastal knew in 2002 that Vassallo was misappropriating corporate assets for his own benefit. Accordingly, they aver that since Vassallo's activities were discovered then, the statute of limitations period ended in 2004. But the allegation in that action has no bearing on the claim here that Vassallo directed Leibowitz to submit checks meant for Coastal to another account.

In the prior litigation, Kupferschmid testified that Coastal discovered that Vassallo used "company dollars for personal expenses." (*Id at lines 20-21*) Coastal's allegation was premised on invoices uncovered, which allegedly demonstrated that corporate assets were used to pay Vassallo's personal expenses. (*See, Id at page 43, lines 1-19*)

Coastal was certainly aware of Vassallo's alleged nefarious behavior with respect to paying personal expenses. It was not aware, nor could have it been aware at that time, that Vassallo allegedly directed Leibowitz to draft two of the three checks to CSM and diverted all three checks to another account. The former litigation was narrowly tailored to specific assertions against Vassallo; the current claim is outside of that alleged behavior. Accordingly, the statute of limitations does not bar the fraud claim against the Fraud Defendants in the instant action.

*B. Collateral Estoppel*

The Defendants argue that since Vassallo's alleged fraud on Coastal was already litigated, Coastal is collaterally estopped from amending its complaint. "The doctrine of collateral estoppel prevents a party from re-litigating an issue that was raised, necessarily decided, and material in the first action, provided that the [opposing] party had a full and fair opportunity to litigate the issue." (*Sam v Metro-North Commuter Railroad*, 287 AD 2d 378 [1<sup>st</sup> Dept 2001].) "Two requirements must be met before collateral estoppel can be invoked: (1) there must be an identity of issue which was necessarily decided in the prior action and is decisive of the present action, and (2) there must have been a full and fair opportunity to contest the decision now said to be controlling." (*Lumbermens Mut. Cas. Co v 606 Restaurant, Inc.*, 31 AD 3d 334 [1<sup>st</sup> Dept 2006].)

Here, while the proposed claim against Vassallo also sounds in fraud, it is distinct from that asserted in the previous litigation. There, Vassallo allegedly siphoned Coastal's assets for his personal use as well as mismanaged certain, named accounts. Specific invoices were used to support the use-for-personal-benefit assertion. Here, the proposed claim against Vassallo

pertains to a *specific* action, namely the diversion of RJR's payments from Coastal to C.S.M. This was not alleged in the prior lawsuit and, accordingly, will not be decided upon in that lawsuit when judgment is rendered. Because Vassallo was accused of enumerated fraudulent activity in one action, that is not decisive of the separate claim proposed in the instant action. Furthermore, Vassallo did not have the opportunity in that prior action to defend whether he instructed Leibowitz to draft the check to someone other than Coastal, and deposit the check in another account. Accordingly, collateral estoppel does not bar Coastal from asserting the proposed claims.

### *C. Improper Piercing the Corporate Veil*

The Defendants contend that the asserted fraud claims against the Proposed Defendants Leibowitz, Karpman, and Fattorusso is in actuality an action to pierce the corporate veil. They argue that applicable New York law does not allow veil-piercing under Coastal's proposed pleadings.

Under New York Law, piercing the corporate veil requires a showing that (1) the owners exercised complete dominion over the corporation with respect to the transaction in dispute and (2) that such dominion was used to commit a fraud or wrong against the plaintiff. (*See, Guptill Holding Corp v State of New York*, 31 NY 2d 897 [1972].) "The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation." (*Morris v New York State Department of Taxation and Finance*, 82 NY 2d 135 [1983].) An attempt to pierce the corporate veil "does not constitute a

cause of action independent of that against the corporation; rather it is an assertion of facts that will persuade the court to impose the corporate obligation on its owners.” (*Id.*)

The Defendants correctly aver that Coastal failed to address or justify piercing the corporate veil in its proposed amended complaint. This is because Coastal’s proposed amended claims do not attempt to do so.

In the proposed amended complaint, as in the original, Coastal’s first through fourth causes of action are premised upon breach of contract. Its contention is that the named Defendants breached the agreement entered into, and that it is entitled to \$397,818.74 plus interest premised on the alleged default.

The proposed fifth cause of action for fraud against the Proposed Defendants is plead as such a claim, and seeks the return of \$112,812.50 in checks allegedly diverted from it, plus punitive damages. Coastal does not plead that Leibowitz, Karpman, and Fattorusso are liable for corporate RJR’s alleged default on the agreement. Rather, it pleads that individual RJR personnel schemed with Vassallo to divert a portion of the payments due to Coastal away from it. Corporate veil-piercing is not an issue here, and Coastal’s request to amend the complaint will not be denied on this ground.

#### *D. The Proposed Complaint’s Merits*

The Defendants contend that the motion for the proposed amended complaint should be denied because the fraud claim contained therein is without merit. They assert two grounds for the proposed claim’s lack of merit: the fraud claim is inadequately plead and it is duplicative of the breach of contract claim.

In order to sustain a claim for fraud, “there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury [damages].” (*Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD 2d 64 [1<sup>st</sup> Dept 2003].) Furthermore, “each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b) that the circumstances surrounding the fraud be pleaded in detail.” (*Bramex Associates, Inc v CBI Agencies, Ltd*, 149 AD 2d 383 [1<sup>st</sup> Dept 1989].)

Here, Coastal pleads in the amended complaint:

On or about February 20, 2001, Defendants Vassallo, Leibowitz, Fattorusso, and Karpman (“Fraud Defendants”) did, with full knowledge and intent to act for their personal gain, defraud Plaintiff in the amount of \$112,812.50. The Fraud Defendants effectuated this fraud by drafting three checks. . .for the express purpose of depositing those checks in the First Union Account opened and controlled by Defendant Vassallo, while counting those funds against the total contract price owed on the contract.

(*Proposed Amended Complaint at page 9, ¶ 27*)

Plaintiff relied on the false representations made by the Fraud Defendants that payment would be made pursuant to the terms of the Project Agreement.

(*Id at page 10, ¶ 28*)

In order to adequately plead misrepresentation, the first element in a fraud claim, it is incumbent upon Coastal to show that the former made a factual statement that was either untrue or known to be untrue when made. (*See, Golub Associates v Lincolnshire Management, Inc*, 1 AS 3d 237 [1<sup>st</sup> Dept 2003].) Here, Coastal pleads that it relied on the Proposed Defendants promise that payment would be made pursuant to the contract to its detriment. As to Leibowitz, Karpman, and Fattorusso, this pleading is adequate because these proposed Defendants were/are

RJR's employees. Indeed, they were/are part of the universe of RJR personnel who would have been expected to make such representation during the contract-negotiation process.

Vassallo, however, does not fall within this ambit. He was not employed by RJR, but rather by Coastal. He could not have therefore induced Coastal to enter into the contract by making promises, *on RJR's behalf*, that it would pay Coastal as per the contract's terms. In order to sufficiently plead a fraud claim against Vassallo, a separate misrepresentation must be attributable to him. None is plead. Accordingly, Coastal fails to meet its fraud-pleading burden with respect to Vassallo.

Although Coastal may have sufficiently plead a fraud claim against Leibowitz, Karpman, and Fattorusso, both the alleged misrepresentation and the damages incurred relate back to the breach of contract claim. "To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties." (*Krantz v Chateau Stores of Canada*, 256 AD 2d 186 [1<sup>st</sup> Dept 1998]; *See, also, First Bank of Americas v Motor Car Funding, Inc.*, 257 AD 2d 287 [1<sup>st</sup> Dept 1999].) "No cause of action for fraud is stated or exists where the only fraud charged relates to a breach of a contract." (*See, Dalton v Union Bank of Switzerland*, 134 AD 2d 174 [1<sup>st</sup> Dept 1987].)

Here, Coastal pleads that it relied on the Proposed Defendants' misrepresentations that RJR would make payments as required on the project. Indeed, the fraud claim relates to the breach-of-contract claim because Coastal alleges that it relied on the representations that it would get paid on the project when it entered into the contract. Moreover, Coastal fails to plead a duty on the part of the Proposed Defendants separate and apart from their obligation, as RJR's principals, to enter into a contract in good-faith. This proposed fraud claim is merely a regurgitation of the breach of contract claim, and cannot stand.

Furthermore, the damages plead are identical to that in the original complaint. There, Coastal seeks the outstanding balance it avers it is owed under the agreement, which is \$397,818.74 . In the proposed amended complaint, it seeks \$112,812.50 from the Proposed Defendants, which is included in the total amount sought from the original Defendants. An amended complaint with new claims is without merit when the damages resulting thereto are not separate and distinct from that which was already plead. (*See, Atton v Bier M.D.*, 12 AD 3d 240 [1<sup>st</sup> Dept 2004].) The damages plead here are in fact identical.

Coastal does seek punitive damages, in addition to the identical contract damages, from the Proposed Defendants in the proposed amended complaint. "Punitive Damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights." (*Rocanova v Equitable Life Assur. Soc of US*, 83 NY 2d 603 [1994].) Punitive damages are, however, recoverable if the breach of contract involves "a fraud evincing a high degree of moral turpitude" that was "aimed at the public generally." (*Id.*)

Here, the fraud plead in the proposed amended complaint was an alleged private wrong committed against Coastal. Indeed, it was money owed to them that the Proposed Defendants

allegedly siphoned. It was not a wrong directed at the public at large. Rather it is an alleged tort committed by one group of individuals upon a corporate entity. Punitive damages were therefore not proper.

A court, in its discretion, may deny a request to amend a complaint when the proposed amendments do not state a prime facie cause of action. (*See, Detrinca v DeFillipo*, 165 AD 2d 505 [1<sup>st</sup> Dept 1989].) Since the proposed complaint fails to plead a cognizable claim for fraud separate and apart from the breach of contract claim, the Order to Show Cause to amend the complaint and extend the date for filing the Note of Issue is denied.

### *The Defendants' Cross-Motion*

#### *A. Dismissal Pursuant to CPLR 3211*

The Defendants cross-move pursuant to CPLR 3211(a)(1) and (a)(5) seeking to dismiss the claims against them. Since the Defendants's purported documentary evidence is premised on Coastal's alleged payment, their motion to dismiss under both CPLR 3211 subsections will be addressed concurrently.

"A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that a defense is grounded in documentary evidence." (*CPLR 3211(a)(1)*) Factual claims that are "either inherently incredible or flatly contradicted by documentary evidence" are to be dismissed pursuant to CPLR 3211(a)(1). (*Kliebert v. McKoan*, 228 AD 2d 232 [1<sup>st</sup> Dept 1996].)

Here, Coastal alleges that

Pursuant to the terms of the agreement between first Leewan and then RJR and

the defendant sureties and Coastal, plaintiff would be paid a total base contract amount of \$950,000.00. . .It was further agreed. . .at the time that RJR entered into the agreement with Coastal. . .that Coastal had a base contract performed from the point forward of \$787,550. . .The approved extra work and change orders performed by Coastal amounted to \$116,073.12.. . .Accordingly, Coastal performed work. . .in an agreed and approved amount by all defendants of \$903,623.12. . .To date Coastal has been paid \$505,804.38

*(Complaint at page 5, ¶ 9)*

Furthermore, Coastal alleges that “. . .To date plaintiff is owed \$397,818.74 for the work agreed and fully performed.” *(Id at page 6, ¶ 10)*

In support of its contention that documentary evidence exists to warrant Coastal’s claim’s dismissal, the Defendants direct this Court to the contract between RJR and Coastal. *(See, Memo in Opp’n, Ex 6)* They aver that the \$787,550.00 original contract price was reduced via change orders to \$684,096.00 and that their exhibit reflects this. However, the proffered document does not contain any change orders reflecting the claimed reductions. Rather, it simply contains the then-established contract price of \$787,500.00.

Next, the Defendants proffer the canceled checks, which were partially the subject of Coastal’s Order to Show Cause, as documentary evidence that Coastal’s claim for \$397,818.74 should be dismissed. Here, these 15 canceled checks total \$618,616.88. As discussed, *supra*, three of these checks were allegedly not deposited in Coastal’s bank account and two of the three checks were not drafted to it.

Dismissal pursuant to CPLR 3211(a) is proper when “the documentary evidence utterly refutes plaintiff’s factual allegations. . .” *(Goshen v Mutual Life Insurance Co of New York, 98 NY 2d 314 [2002].)* The check’s submission as documentary evidence do not adhere to this standard articulated by the Court of Appeals. Here, Coastal alleges that it was paid \$505,804.38

and is still owed \$397,818.74. The canceled checks total \$618,616.00. A simple mathematical calculation indicates that the checks could include the amount Coastal alleges it was paid, i.e. \$505,804.38, plus the \$112,812.50 allegedly diverted to a different account.<sup>1</sup> This could reduce the alleged \$397,818.74 outstanding amount due to \$285,006.24<sup>2</sup> because there is an indication that RJR paid \$112,812.50 collectively in three checks. But the canceled checks do not “utterly refute” Coastal’s claim. Indeed, issues of fact remain as to issuance of these three checks and reasons for their failure to arrive at Coastal’s account. Accordingly, the Defendants’ motion to dismiss pursuant to CPLR 3211(a)(1) is denied.

The cross-motion is similarly denied under CPLR 3211(a)(5). Under this subsection, a party may move for dismissal when “the cause of action may not be maintained because. . .of payment. . .” Here, in consideration of the previous analysis, it cannot be determined conclusively that Coastal was paid, in whole or in part, the amount it alleges it is due.<sup>3</sup>

#### *B. Sanctions Pursuant to 22 NYCRR § 130*

The Defendants seek the imposition of sanctions upon Coastal’s counsel under 22 NYCRR § 130. This statute provides that counsel may be sanctioned due to her/his frivolous behavior in connection with prosecuting or defending an action.

“Once there is a finding of frivolousness, sanction is mandatory.” (*Nyitray v New York Athletic Club in the City of New York*, 274 AD 2d 326 [1<sup>st</sup> Dept 2000].) Here, there is no such finding that Coastal’s counsel brought the instant Order to Show Cause frivolously. They

<sup>1</sup> \$505,804.38+ \$112,812.50 = \$618,616.88.

<sup>2</sup> \$397,818.74 - \$112,812.50 = \$285,006.24.

<sup>3</sup> In further support of its cross-motion, the Defendants assert several allegation that Coastal “had a pattern of inconsistency with its billing statements.” (*Memo in Opp’n at page 27*). This allegation is an issue of fact, that requires resolution by a fact finder, and is not appropriate for a motion to dismiss pursuant to CPLR 3211. Accordingly, these allegations will not be addressed in this decision.

articulated in their moving papers their contention that leave should be granted to amend the pleadings, and offered arguments in support thereof.

**CONCLUSION**

For the foregoing reasons, it is hereby

ORDERED that Coastal's Order to Show Cause is denied, and it is further

ORDERED that Defendants' cross-motion for dismissal pursuant to CPLR 3211(a)(1) and (a)(5) is denied, and it is further

ORDERED that the Defendants' cross-motion for sanctions under 22 NYCRR § 130 is denied.

This shall constitute the decision and order of this Court.

**Dated:** May 16, 2007

**ENTER:**



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**RICHARD B. LOWE, III, J.S.C.**

**FILED**  
MAY 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE