

**125 W. 22nd St. Holding, LLC v Calabrese  
Assoc., Inc.**

2008 NY Slip Op 32249(U)

August 1, 2008

Supreme Court, New York County

Docket Number: 0602315/2007

Judge: Charles E. Ramos

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

Charles Edward Ramos

53

PRESENT: \_\_\_\_\_  
*Justice*

PART \_\_\_\_\_

Index Number : 602315/2007  
125 WEST 22ND ST. HOLDING, LLC  
vs  
CALABRESE ASSOCIATES, INC.  
Sequence Number : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

s 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

is decided in accordance with  
accompanying memorandum decision and order.

**FILED**

AUG 12 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/11/08

  
HON. CHARLES E. RAMOS 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: COMMERCIAL DIVISION

-----X  
125 WEST 22<sup>ND</sup> STREET HOLDING, LLC,

Plaintiff,

-against-

CALABRESE ASSOCIATES, INC. and FRANK CALABRESE

Defendants  
-----X

Index No.  
602315/07

**FILED**  
AUG 12 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Charles Edward Ramos, J.S.C.:

Defendants Calabrese Associates, Inc. (CAI) and Frank Calabrese (together, defendants) move to dismiss the second through six cause of action of the complaint, for failure to state a cause of action (CPLR 3211 [a] [7]).

**Background**

Plaintiff 125 West 22<sup>nd</sup> Street Holding, LLC (plaintiff) owns real property located at 22<sup>nd</sup> Street, in Manhattan, New York. On June 28, 2005, plaintiff and CAI entered into an agreement ("CAI Agreement"), whereby CAI was to provide construction services, including labor, materials, and other services for the renovation of plaintiff's property (Project). The CAI Agreement contained a "Contract Sum" of \$13,977,000, and required that CAI obtain a performance bond to ensure proper performance. Some days after execution of the agreement, CAI informed plaintiff that it could not obtain the required bond. CAI and/or Frank Calabrese, CAI's principal, then recommended that plaintiff engage Pav-Lak Industries, Inc. (Pav Lak) to complete the Project.

On July 6, 2005, plaintiff and Pav Lak entered into an

agreement (Pav Lak Agreement), whereby Pav Lak would perform constructions services for the Project, for a sum of \$14,000,000. The signatories to the Pav Lak Agreement are plaintiff and Pav-Lak, who is named as "Contractor." CAI is named in the Pav Lak Agreement as the "Construction Manager" for the Project, but is not a signatory.

The Pav Lak Agreement does not detail what role CAI was to play as Construction Manager. A rider to the Pav Lak Agreement indicates that "[t]he Construction Manager [CAI] is acting as the disclosed and lawfully authorized agent of the Owner [plaintiff]," but otherwise does not specify CAI's duties thereunder (Exhibit C, annexed to the Rubin Affidavit).

In the complaint, plaintiff alleges that Calabrese acted as the intermediary between plaintiff and Pav Lak, and in this capacity, reported the percentage of the Project work completed, and delivered payment from plaintiff to Pav Lak. While performing these duties, Calabrese allegedly inflated the reported percentage of work completed by certifying to plaintiff that 40% of the Project had been completed, while records from Pav-Lak allegedly indicate that only 34% of the Project was completed. Relying on the percentage reported by Calabrese, plaintiff then submitted an inflated payment of \$5,435,623.52 to Calabrese with the understanding that these funds would be forwarded to Pav Lak, to pay it for its services. Instead, Calabrese allegedly delivered \$3,863,007.00 to Pav Lak, and retained the \$1,572,614.48 balance for CAI and himself,

personally. Upon learning of the absconded funds, plaintiff terminated the CAI Agreement, barred CAI and Calabrese from further participation with the Project, and instituted this action. Plaintiff alleges six causes of action, for breach of contract, fraud, negligent misrepresentation, respondeat superior, unjust enrichment, and conversion. All of the causes of action are the subject of this motion, with the exception of the breach of contract claim.

#### DISCUSSION

When evaluating a motion to dismiss for failure to state a cause of action, all facts alleged by the plaintiff are presumed to be true, and will be accorded every favorable legal inference (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). Defendants move to dismiss the causes of action for fraud, negligent misrepresentation, unjust enrichment and conversion on the ground that they are duplicative of the cause of action for breach of contract. Additionally, defendants contend that the cause of action for respondeat superior should be dismissed, because it is intrinsically tied to the inviable cause of action for negligent misrepresentation.

##### I. Fraud

In order to adequately state a cause of action for fraud, a plaintiff must allege the misrepresentation of a material fact, scienter, justifiable reliance, and injury (*Pope v Saget*, 229 AD3d 437, 441 [1<sup>st</sup> Dept 2006], *app denied* 8 NY3d 803 [2007]). Pursuant to CPLR 3016 (b), each element must be pleaded in

detail.

Plaintiff alleges that subsequent to the execution of the CAI Agreement, defendants materially misrepresented CAI's financial wherewithal to complete the Project in a timely and professional manner. Additionally, plaintiff alleges that subsequent to the execution of the Pav Lak Agreement, defendants materially misrepresented the percentage of the Project completed, and the amount of payments due to Pav Lak, in order to deceive the plaintiff. In reliance upon defendants' misrepresentations, plaintiff remitted payment to defendants, far in excess of what was due (Compl. ¶ 39-40). As a result of defendants misrepresentations, plaintiff sustained the financial loss of \$1,572,614.48.

Affording the complaint the most favorable inferences, plaintiff sufficiently pled a cause of action for fraud in connection with defendants' alleged false representations relating to the CAI Agreement, the inflated work completed on the Project, and the amount due Pav Lak. At this pre-discovery stage, plaintiffs are understandably unable to provide further details of the defendants' alleged fraudulent intent, that is likely within their own knowledge (*see Pludeman v Northern Leasing Systems, Inc.*, 40 AD3d 366, 367 [1<sup>st</sup> Dept 2007]). Nonetheless, the pleadings sufficiently describe the manner in which defendants deceived plaintiff into believing that more of the Project had been completed, in order to obtain additional funds for themselves. Consequently, plaintiff should be afforded

an opportunity to conduct discovery in order to flush out the details of its cause of action.

Further, these alleged misrepresentations are extraneous to both the CAI and Pav Lak Agreements, and arise from misrepresentations allegedly made by defendants concerning performance of the Pav Lak Agreement, duties that plaintiff sufficiently allege are collateral to the CAI Agreement. Therefore, the fraud cause of action is not duplicative of the breach of contract cause of action, that is based upon breach of the CAI Agreement (*compare ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397 [1<sup>st</sup> Dept 2008]).

## II. Negligent Misrepresentation

To state a claim for negligent misrepresentation, a plaintiff must allege the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information, a misrepresentation, and reasonable reliance (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

The complaint does not directly state that the relationship shared between plaintiff and defendants was "special or privity-like." Nonetheless, this allegation is discernible from the complaint. Defendant CAI is named as "Construction Manager" in the Pav Lak Agreement. This designation is repeated on the cover sheet and in the rider, annexed to the Pav Lak Agreement (Exhibit B, annexed to the Rubin Affidavit). Because CAI was not a direct party to the Pav-Lak Agreement, but had specific responsibilities and duties outlined in the contract, and the

parties allegedly verbally agreed that CAI would assume additional duties, plaintiff sufficiently alleges the existence of a privity-like relationship. Plaintiff also sufficiently alleges that defendants falsely reported the percentage of Project completion and payments due under the Pav Lak Agreement (Compl. ¶ 50).

Generally, causes of action for negligent misrepresentation should be dismissed when they are duplicative of a breach of contract claim that arise from the same circumstances, but such a claim may be sustained if a legal duty independent of the contract has been breached (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 [1987]). Under *Clark-Fitzpatrick*, plaintiff's cause of action for negligent misrepresentation is viable, because it sufficiently alleges duties separate and extraneous to contractual duties that arise from the CAI Agreement that defendants breached.

### III. Conversion

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Vigilant Ins. Co. of America v. Housing Authority of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]). Further, where money is turned over by a plaintiff to a defendant to be used for a specific purpose, and it is not used for that purpose, an action for conversion may be maintained (see e.g. *Gamiel v Curtis & Riess-Curtis, P.C.*, 16 AD3d 140, 141 [1<sup>st</sup> Dept 2005]).

Plaintiff sufficiently pleaded a claim for conversion of the \$1.6 million in Project funds that were intended as payment to Pav Lak (Compl. ¶ 73, 75).

#### IV. Unjust Enrichment

A claim for Unjust Enrichment lies in the absence of a contract when one party has been enriched at the expense of another (*Nakamura v Fujii*, 253 AD2d 387, 390 [1<sup>st</sup> Dept 1998]). Further, it is well-established that unjust enrichment is a quasi-contract claim and cannot be pled when there is a valid contract between the parties (*Adelaide Productions, Inc. v BKN Intern. AG*, 38 A.D.3d 221, 225 [1st Dept 2007]).

Plaintiff alleges that defendants have been unjustly enriched, by the retention of \$1.6 million in Project funds. Defendants argue that the claim for unjust enrichment fails, because there is a valid agreement governing the parties' relationship. According to plaintiff, the funds at issue were intended as payment to Pav Lak under the Pav Lak Agreement, while the breach of contract claim arises out of defendants' alleged breach of the CAI Agreement. Further, plaintiff claims that defendants were not parties to the Pav Lak Agreement, and consequently, that there was no valid agreement between them concerning the funds at issue. Resolving this issue involves disputed issues of fact, the resolution of which is improper on a motion to dismiss for failure to state a cause of action. Therefore, according the plaintiff every favorable inference, the claim for unjust enrichment is sufficiently alleged.

V. Respondeat Superior

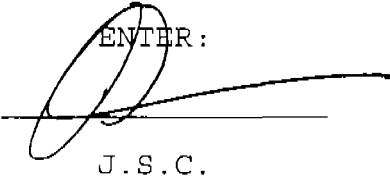
An employer may be held liable for intentional torts committed by an employee while acting "within the scope of the employment" (*Ramos v. Jake Realty Co.*, 21 AD3d 744, 746 [1st Dept 2005]). Whether Calabrese acted within the scope of his employment is a question of fact. If the Court accepts the allegations in the complaint as true for the purposes of evaluating the motion, then plaintiff's claim for Respondeat Superior is sufficiently pleaded. For the foregoing reasons, defendants' motion to dismiss is denied in its entirety.

Accordingly, it is

ORDERED, that defendants' motion to dismiss is denied in its entirety, and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: August 1, 2008

ENTER:  
  
J.S.C.

**HON. CHARLES E. RAMOS**

**FILED**  
AUG 12 2008  
COUNTY CLERK'S OFFICE  
NEW YORK