

**John Galt Corp. v Travelers Casualty and Surety
Company of America**

2009 NY Slip Op 30969(U)

April 27, 2009

Supreme Court, New York County

Docket Number: 603295/07

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 603295/2007
JOHN GALT CORP.
vs.
TRAVELERS CASUALTY & SURETY
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____
MOTION DATE 10/27/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ this motion to/for _____

PAPERS NUMBERED

1-2 + exh. bits

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

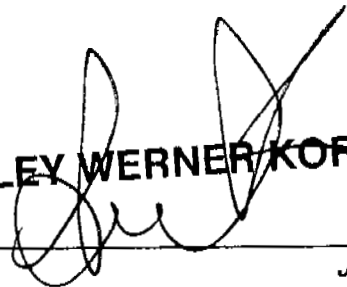
Upon the foregoing papers, it is ordered that this motion

FILED
APR 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

JUSTICE SHIRLEY WERNER KORNREICH

Dated: 4/27/09



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 54

-----X
THE JOHN GALT CORP.,

Plaintiff,

-against-

Index No. 603295/07

TRAVELERS CASUALTY AND SURETY COMPANY
OF AMERICA, FEDERAL INSURANCE COMPANY,
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
ZURICH AMERICAN INSURANCE COMPANY, BOVIS
LEND LEASE LMB, INC., and LOWER MANHATTAN
DEVELOPMENT CORPORATION,

Defendant.
-----X

FILED
APR 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Kornreich, J.:

In this pre-answer motion to dismiss, defendant Lower Manhattan Development Corporation (LMDC) moves to dismiss the fifth, sixth, seventh, and eighth causes of action asserted in the amended complaint, the only causes of action against it. CPLR 3211 (a) (1) and (7). Those causes of action seek recovery upon theories of breach of contract, quantum meruit, account stated, and tortious interference with business relations. Plaintiff, The John Galt Corp. (Galt Corp.), cross-moves for leave to serve a second amended complaint asserting claims for tortious interference with contract and *prima facie* tort against LMDC.¹ CPLR 3025 (b).

This action arises out of three construction contracts regarding the decontamination and

¹Both motions were submitted previously to the Supreme Court, Rockland County, in the action entitled *The John Galt Corp. v Bovis Lend Lease LMB, Inc.*, Sup Court, Rockland County, Index No. SU-2007-08324. Pursuant to decision and order issued on May 12, 2008 (Hon. Herman Cahn, J.), the Rockland County action was transferred to this court and consolidated for all purposes with the instant action.

deconstruction of the former Deutsche Bank building (the "Building") located at 130 Liberty Street in lower Manhattan, which had sustained significant damage as a result of the September 11, 2001 terrorist attacks. LMDC is a subsidiary of nonparty New York State Urban Development Corporation and was created in the aftermath of the terrorist attacks to coordinate the remembrance, rebuilding, and revitalization efforts in lower Manhattan. In August 2004, LMDC purchased the Building in order to decontaminate and deconstruct it and redevelop the open site as part of the World Trade Center Memorial and Redevelopment Plan.

In October 2005, LMDC, as owner, entered into a contract with defendant Bovis Lend Lease LMB, Inc. (Bovis), as general contractor-construction manager, to decontaminate and deconstruct the Building (the LMDC/Bovis contract). The LMDC/Bovis contract required Bovis to perform the planning, engineering, maintenance, cleaning, abatement and removal of interior materials, Building deconstruction and disposal of removed materials, including potential human remains, material containing asbestos, and World Trade Center dust materials, and site work in connection with the deconstruction of the Building. The original contract price was in the lump sum amount of \$74,839,869. Three subsequent contract amendments increased the total contract price to \$84,389,869. In the contract, Bovis agreed to guaranty its performance to LMDC by obtaining payment and performance bonds in favor of LMDC. Bovis alleges that it obtained the required bonds from defendants Travelers Casualty and Surety Company of America, Federal Insurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company.

In furtherance of its obligations under the LMDC/Bovis contract, Bovis retained Galt Corp., as subcontractor, pursuant to two trade subcontracts (the Bovis/Galt subcontracts). In the

first subcontract, dated February 13, 2006, Galt Corp. agreed to perform all of the deconstruction work required under the contract in exchange for the sum of \$25 million, which was later increased to \$29 million. By the second subcontract, dated February 21, 2006, Galt Corp. agreed to perform all of the asbestos decontamination work required under the contract in exchange for the sum of \$33.5 million. Galt Corp. alleges that this sum was increased to an amount in excess of \$100 million as a result of interference by LMDC with the decontamination subcontract.

On Saturday, August 18, 2007, a fire occurred at the Building which took the lives of two New York City firefighters². It also significantly damaged the Building. On August 23, 2007, an allegedly unrelated incident occurred at the Building involving falling equipment. On August 28, 2007, Bovis terminated the Bovis/Galt subcontracts, citing breaches of contract and delays allegedly caused by Galt Corp.

Subsequently, Galt Corp. commenced an action against Bovis to recover \$19,647,872.56 allegedly due it for labor actually performed, and equipment and materials supplied under the Bovis/Galt subcontracts and more than \$50 million in profits lost allegedly as a result of Bovis's early termination of the subcontracts. Galt Corp. later joined LMDC as a direct defendant on identical factual allegations as those it asserts against Bovis. In the amended complaint, Galt Corp. asserts causes of action for breach of contract, *quantum meruit* relief, account stated, and tortious interference with business relations against each defendant. In its answer, Bovis denies all claims and asserts a counterclaim for breach of contract in the amount of \$60 million. In its

²On December 22, 2008, following a 16-month investigation by the Manhattan District Attorney's Office into the circumstances surrounding the fire, a Manhattan grand jury charged Galt Corp., a Galt Corp. executive, a Galt Corp. foreman, and a Bovis site safety manager in a criminal indictment for manslaughter.

reply to the counterclaim, Galt Corp. denies all allegations of wrongdoing and admits that it entered into the Bovis/Galt subcontracts. LMDC now seeks to dismiss all claims asserted against it on grounds of failure to state any legally viable cause of action and documentary evidence, citing CPLR 3211 (a) (1) and (7).

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true. *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 (1979); *see* CPLR 3211 (a)(7). "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." *Franklin v Winard*, 199 AD2d 220 (1st Dept 1993) (internal citation omitted); *see* CPLR 3211 (a)(1). The court may grant dismissal where the documentary evidence submitted resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim. *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *aff'd* 94 NY2d 659 (2000).

LMDC first seeks to dismiss the fifth cause of action for breach of the Bovis/Galt subcontracts as fatally defective on its face on grounds that no privity of contract existed between itself and Galt Corp. and that, when Bovis hired Galt Corp., Bovis did so in its capacity as an independent contractor of LMDC. In opposition, Galt Corp. contends that the Bovis/Galt subcontract terms are ambiguous and that some of them may be interpreted to indicate that, when Bovis executed the subcontracts with Galt Corp., it was acting as LMDC's agent and that, therefore, LMDC, as the disclosed principal, is bound by the subcontracts.

The breach of contract claim is not legally cognizable. To assert a viable contract claim, the plaintiff must allege the formation of a contract between itself and the defendant,

performance by the plaintiff, the consideration, the defendant's failure to perform, and resulting damages. *Furia v Furia*, 116 AD2d 694, 695 (2d Dept 1986). A basic principle of contract law is that, "[w]ithout an agreement, there can be no contract and . . . without a contract there can be no breach." *Kleinschmidt Div. of SCM Corp. v Futuronics Corp.*, 41 NY2d 972, 973 (1977). For this reason, courts have held that "a subcontractor may not assert a cause of action to recover damages for breach of contract against a party with whom it is not in privity," such as the project owner. *Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club, Inc.*, 156 AD2d 550, 551 (2d Dept 1989); see e.g. *Delta Elec., Inc. v Ingram & Greene*, 123 AD2d 369, 370 (2d Dept 1986); *Martirano Constr. Corp. v Briar Contr. Corp.*, 104 AD2d 1028, 1030 (2d Dept 1984); *Contelmo's Sand & Gravel, Inc. v J & J Milano, Inc.*, 96 AD2d 1090, 1091 (2d Dept 1983).

Galt Corp. bases the contract claim asserted against LMDC on the Bovis/Galt subcontracts. Amended Complaint, ¶¶ 46-49, 52-55. However, there is no dispute that LMDC, in its own capacity, did not enter into the subcontracts. The subcontracts themselves demonstrate that LMDC did not execute either document and is never referred to as a party.

The documentary evidence negates Galt Corp.'s contention that Bovis entered into the subcontracts as LMDC's agent. The express terms of the LMDC/Bovis contract and the Bovis/Galt subcontracts conclusively establish that Bovis did not enter into the subcontracts as agent for LMDC or as its disclosed principal, but rather acted as an independent contractor. See *Data Elec. Co., Inc. v Nab Constr. Corp.*, 52 AD2d 779, 780 (1st Dept 1976) (declining to enforce subcontractor's contract claim against owner where contract provided that subcontractor was deemed agent solely of general contractor and no written agreement providing for third-party rights against owner existed). *Kelly Masonry Corp. v Presbyterian Hosp.*, 160 A.D.2d 192 (1st

Dept 1992), is not in point. In that case, there were no explicit contractual terms disavowing an agency relationship between the owner and the construction manager.

Here, the documentary evidence negates Galt Corp.'s contention that Bovis was LMDC's agent. The LMDC/Bovis contract's General Conditions, including Schedule A, were expressly made part of the contract documents included in the Bovis/Galt subcontracts. *See* Bovis/Galt Subcontracts § 8. The LMDC/Bovis contract provided in relevant part:

CONTRACTOR AS INDEPENDENT CONTRACTOR. Except as set forth in Article 4 and notwithstanding any other provision of this Contract, *[Bovis's] status* (and that of any subcontractor) *shall be that of an independent contractor and not that of an agent or employee of LMDC.* Accordingly, neither [Bovis] nor any subcontractor shall hold itself out as, or claim to be acting in the capacity of, an employee or agent of LMDC

LMDC/Bovis Contract, Gen. Conditions, Schedule A, Art. I, § A1.2 [emphasis added]. The single exception to Bovis's independent contractor status was narrowly defined in Article 4 of the contract. Pursuant to the express terms of Article 4, LMDC reserved the right to delegate agency authority to Bovis solely with respect to the procurement of materials, equipment, or supplies required for the project, apparently to take advantage of LMDC's sales and use tax-exempt status. *See id.*, Gen. Conditions, Chap. I, Art. 4; *see also* Tax law § 1116 (a), 1230 (a). Article 4 further provides that, upon LMDC's express consent, Bovis may delegate such agency to its subcontractors. *Id.* Significantly, the article also provides that "[t]he agency created in this Article shall continue until terminated by either LMDC or [Bovis] . . . The agency created in this Article is *limited to its terms and shall not be construed as having any broader meaning.*" *Id.* [emphasis added].

The LMDC/Bovis contract also provided that all subcontractors would be deemed agents

of Bovis and that no act of Bovis or LMDC could create any rights in favor of a subcontractor and against LMDC. In relevant part, the contract provided that:

No consent to any assignment or other transfer, and no approval of any subcontractor, shall under any circumstances operate to relieve [Bovis] of any of [Bovis's] obligations; no subcontract, no approval of any subcontractor and no act or omission of LMDC or the Owner's Representative shall create any rights in favor of such subcontractor and against LMDC; and as between LMDC and [Bovis], all assignees, subcontractors, and other transferees shall for all purposes be deemed to be agents of [Bovis]

Id., Gen. Conditions, Chap. 4, Art. 25.

Moreover, Galt Corp.'s contention that Bovis might have had apparent authority to bind LMDC is without merit. "[A]pparent authority is dependent on verbal or other acts by a principal which reasonably give an appearance of authority to conduct the transaction" with the third party. *Greene v Hellman*, 51 NY2d 197, 204 (1980). The provisions cited above, which prohibit the creation of an agency relationship between LMDC and Bovis or by any subcontractor hired by Bovis, were known and agreed to by Galt Corp. Thus, Galt Corp. could not reasonably conclude that any action by Bovis made it an agent of LMDC.

Contrary to Galt Corp.'s contention, the Bovis/Galt subcontracts' terms providing that Galt Corp. will not be paid by Bovis until Bovis is paid by LMDC, do not suggest that Bovis was acting as LMDC's agent when it contracted with Galt Corp. See Bovis/Galt Subcontracts, Arts. 5-7 and Gen. Conditions, §18.1. The "pay-when-paid" provisions do not render them illusory because such provisions, as a matter of law, do not prevent enforcement of a mechanics lien. *West-Fair Electric Contractors v. Aetna Casualty & Surety Co.*, 87 N.Y.2d 148, 158 (1995) ("paid-when-paid" provision that creates condition precedent void under Lien Law §34 and does

not prevent enforcement of lien). Recognizing that principal of law, the Bovis/Galt subcontracts provide that the "pay-when-paid" provision does not impair or diminish John Galt's rights under the Lien Law. *See* Bovis/Galt Subcontracts, Art. 6 and Gen. Conditions, §18.1). Moreover, Galt Corp. agreed in the Bovis/Galt subcontracts it "specifically acknowledges and freely agrees to accept the risk that the Owner [LMDC] may not pay Construction Manager [Bovis]." Bovis/Galt Subcontracts, Art. 5. Further, Galt Corp. agreed that it would receive payment solely by foreclosure of a mechanics lien or from funds paid to Bovis that were designated by the LMDC for disbursement to Galt Corp., that Bovis' receipt of such funds was a condition precedent to payment, that Bovis made no representations as to the financial condition of LMDC, and that Galt Corp. assumed the credit risk regarding the LMDC. *Id.*, Arts. 5-7.

Galt Corp.'s contention that LMDC is liable pursuant to Article 11 of the Bovis/Galt subcontracts is without merit because the claim that LMDC willfully or negligently interfered with Galt Corp.'s performance directly contradicts the terms of the Bovis/Galt subcontracts regarding compliance with governmental standards. Article 11 of the decontamination subcontract provide that "neither [LMDC] nor [Bovis] shall have responsibility or liability for the performance of the Work unless [LMDC] or [Bovis] willfully or negligently interferes with or prevents the performance of the contract duties or Work." Bovis/Galt Decontamination Subcontract, Art. 11. The deconstruction subcontract similarly provides that "neither [LMDC] nor [Galt Corp.] shall have responsibility or liability for the performance of the Work unless [LMDC] or Agencies willfully or negligently interferes with or prevents the performance of the contract duties or work." Bovis/Galt Deconstruction Subcontract, Art. 11. Galt Corp. contends that LMDC interfered with the decontamination work by improperly inviting governmental

regulatory agencies to access the work site, to inspect the work, and to apply standards far more stringent than those required by the decontamination subcontract and accepted industry standards, and prevented Galt Corp. from performing its work in a proper and efficient manner. Galt Corp further contends that LMDC's interference resulted in an increase of the decontamination subcontract price from \$33.5 million to more than \$100 million.

However, the Bovis/Galt subcontracts specifically provide that Galt Corp. agreed to comply with all governmental laws and regulations and to perform the work in accordance with “the most stringent of applicable current codes and standards whether or not said codes or standards are indicated in drawings and/or specifications.” *See*, Bovis/Galt Deconstruction Subcontract, Exh. B, Scope of Work, p. 1 and Arts. 47 and General Conditions, Art. 7; Bovis/Galt Decontamination Subcontract, Exh. B, Scope of Work, p. 1 and Arts. 49, 53 and 69. In addition, the Bovis/Galt subcontracts provided that in the event that there were conflicts between applicable codes, the plans and specifications and industry standards, “the most stringent shall prevail and are included.” Bovis/Galt Deconstruction and Decontamination Subcontracts, Exh. B., Scope of Work, p. 1. Further, both subcontracts provided that if at any time during the course of the work a safety requirement had to be implemented, Galt Corp. was required to comply and would “not be entitled to any additional costs, expenses charges or fees to comply with government agency ... mandated safety requirements.” Bovis/Galt Deconstruction Subcontract, Exh. B, Scope of Work, Art. 47(c) and Bovis/Galt Decontamination Subcontract, Exh. B, Scope of Work, Art. 81(o). Hence, the most stringent governmental standards for performance of the work were agreed to by Galt Corp., even if they exceeded the subcontracts’ requirements, and inspections by governmental agencies, whether or not they were called in at

LMDC's request, do not amount to willful or negligent interference.

Galt Corp. also urges that LMDC is bound to the Bovis/Galt subcontracts because LMDC exercised significant control over Galt Corp., its personnel and its subcontractors, and ratified the subcontracts by participating in the selection and approval of Galt Corp. and by requiring Bovis to submit qualifying information and obtain LMDC's approval before hiring a particular subcontractor, including Galt Corp. *See* LMDC/Bovis Contract, Gen. Conditions, Art. 25; Bovis/Galt Subcontracts, Special Conditions of Trade Contract, at 3. In addition, Galt Corp. contends that it relied on LMDC's ratification and approval of itself as subcontractor and the Bovis/Galt subcontracts when it accepted the project and performed the work pursuant to the subcontracts.

As previously noted, Galt Corp. agreed that it was contracting only with Bovis and that LMDC's approval of subcontracts would not create rights by subcontractors against LMDC. Moreover, LMDC's approval of the subcontracts was required by law. LMDC is a subsidiary of the Urban Development Corporation d/b/a Empire State Development Corporation, a corporate governmental agency and public benefit corporation. LMDC/Bovis Contract, Cover Sheet, §4. Public agencies are required by statute to reserve the right to approve the retention of subcontractors by general contractors or construction managers as a means to ensure that responsible contractors and subcontractors are hired to work on projects, which are supported by public funds. State Finance Law §138; *see*, 89 NY Jur 2d, Public Works & Contracts §53. For all of the foregoing reasons, that branch of the motion to dismiss the breach of contract claim is granted and the fifth cause of action is dismissed as against LMDC.

LMDC next seeks to dismiss the sixth cause of action for *quantum meruit* and unjust

enrichment on the ground that the subject matter of the claim is covered by the Bovis/Galt subcontracts. In opposition, Galt Corp. contends that it is entitled to plead alternative legal theories and to recover the fair and reasonable value of its work, in the event that no written contract is found to exist between itself and LMDC. "The existence of an express agreement, whether oral or written, governing a particular subject matter precludes recovery in *quasi contract* for events arising out of the same subject matter." *Morales v Grand Cru Assoc.*, 305 AD2d 647, 647 (2d Dept), *lv denied* 100 NY2d 510 (2003), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). The prohibition against *quasi-contractual* claims in the face of a written contract applies not only to the contracting parties, but to non-contracting parties as well. Thus, a "landowner is not liable to a subcontractor for work performed on the owner's property in furtherance of the subcontract in the absence of an agreement to pay the general contractor's debt or circumstances giving rise to such an obligation." *Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club, Inc.*, *supra*, 156 AD2d at 551; *Westinghouse Electric Supply Co. v R.P. Brosseau & Co.*, 156 A.D.2d 851, 853 (3d Dep't 1989), *app. den.* 94 N.Y.2d 760 (2000); *Contelmo's Sand & Gravel, Inc. v J & J Milano, Inc.*, *supra*, 96 AD2d at 1091; *Schuler-Haas Electric Corp. v Wager Constr. Corp.*, 57 A.D.2d 707 (4th Dep't 1977). Here, the Bovis/Galt subcontracts do not include an express promise by LMDC to pay Galt Corp. and, therefore, the branch of the motion to dismiss the *quasi contract* claim against LMDC is granted.

LMDC contends that the seventh cause of action based on the theory of account stated is not legally viable on grounds that no contract exists between it and Galt Corp. and that Galt Corp. never issued a single invoice for payment to LMDC. In opposition, Galt Corp. contends that LMDC is liable to it for breach of the Bovis/Galt subcontracts and for the fair and reasonable

value of the work it performed and equipment and materials it supplied for LMDC's benefit.

"It has long been established that 'where an account is made up and rendered, he who receives it is bound to examine the same, or to procure some one to examine it for him; if he admits it to be correct, it becomes a stated account and is binding on both parties – the balance being the debt which may be sued for and recovered at law' " *Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 (1st Dept 1983), quoting *Lockwood v Thorne*, 11 NY 170, 174 (1854). An account stated assumes the existence of some indebtedness between the parties or an express agreement to treat the statement as an account stated; it cannot be used to create liability where none otherwise exists. *M. Paladino, Inc. v J. Lucchese & Son Contr. Corp.*, 247 AD2d 515, 516 (2d Dept 1998), citing *Gurney, Becker & Bourne, Inc. v Benderson Dev. Co., Inc.*, 47 NY2d 995, 996 (1979).

Here, pursuant to the terms of the LMDC/Bovis contract and the Bovis/Galt subcontracts, it is clear that LMDC never contracted with Galt Corp. for the performance of any work at the project, nor did it expressly agree to make any payments directly to Galt Corp. In accordance with the terms of the subcontracts, Galt Corp. issued invoices only to, and demanded payment only from, Bovis, albeit until commencement of this action. There is no dispute that Galt Corp. never issued a single application for payment, requisition, or invoice directly to LMDC, and that LMDC never made any payments directly to Galt Corp. In the absence of invoices or detailed statements of services, an action for account stated does not lie *Baron & Gleich v Epstein*, 168 AD2d 589, 589-590 (2d Dept 1990). As a result, that branch of the motion to dismiss the account stated claim is granted and the seventh cause of action is dismissed as against LMDC.

Last, LMDC seeks to dismiss the eighth cause of action for tortious interference with

prospective business relations and economic advantage on grounds that Galt Corp. has failed to identify any specific business relationship that was allegedly impaired by LMDC or any specific culpable acts allegedly performed by LMDC. In opposition, Galt Corp. contends that the claim is legally viable on grounds that it has adequately alleged all elements of a tortious interference claim and that more specific facts regarding the alleged misconduct of LMDC and Bovis are exclusively within the knowledge and possession of those companies.

In the tortious interference claim, Galt Corp. alleges that, beginning on August 18, 2007, LMDC and Bovis engaged in a campaign of falsely and wrongfully discrediting and disparaging Galt Corp., its personnel, and its affiliates. Galt Corp. also alleges that, when LMDC and Bovis terminated it from the project 10 days later, on August 28, 2007, they did so wrongfully and without just cause. Galt Corp. further alleges that, as a result of this misconduct, Galt Corp. and its affiliates lost construction contracts that were either already awarded to them or for which they were under consideration.

In order to state a legally cognizable claim for tortious interference with prospective contract rights or economic advantage, the plaintiff must allege with specific factual support direct interference with a third party and that the defendant acted wrongfully, by the use of dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff. *Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 (2004). To survive a motion to dismiss, the plaintiff must allege facts specifically identifying the prospective business relationship that was impaired by the defendant's conduct. As John Galt has not named the parties to any specific contract they would have obtained, they have failed to satisfy the "but for" causation required by this tort. *Vigoda v. DCA Prods. Plus Inc.*, 293 A.D.2d 265, 266-267 (1st Dept 2002); *Business*

Networks of N.Y., Inc. v Complete Network Solutions Inc., 265 AD2d 194, 195 (1st Dept 1999). Galt Corp. merely restates the basic elements of the claim, without alleging any specific facts at all. See Amended Complaint, ¶¶ 65-69. For example, it alleges merely that "LMDC used unlawful means to interfere with Galt's business relations and economic advantage." *Id.*, ¶ 65. Galt Corp. has failed to allege any facts identifying a specific prospective business relationship that was impaired by LMDC. Galt Corp.'s contention that discovery is necessary regarding this claim is not persuasive. Its potential economic relationships are within its own knowledge and must be plead to sustain this cause of action.

Finally, Galt Corp. cross-moves for leave to serve a second amended complaint in which it asserts two new theories of liability against LMDC, tortious interference with contract and *prima facie* tort. In opposition, LMDC contends that each proposed claim is fatally defective. "A motion for leave to amend a pleading is committed to the sound discretion of the trial court. Generally, leave to amend a pleading is, in the absence of prejudice or surprise to the opposing party, freely granted." *Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc., LLC*, 4 AD3d 290, 293 (1st Dept 2004) [internal citations omitted]; see CPLR 3025 (b). However, "[w]here a proposed defense plainly lacks merit, . . . amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend" must be denied. *Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 (1989).

The proposed tortious interference cause of action is palpably without merit. To establish a claim for tortious interference with an existing contract, the plaintiff must plead "the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." *White Plains Coat & Apron Co.*,

Inc. v Cintas Corp., 8 NY3d 422, 426 (2007); *Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 (1st Dept 1998). "[T]he interference must be intentional, not merely negligent or incidental to some other, lawful, purpose." *Alvord & Swift v Stewart M. Muller Constr. Co., Inc.*, 46 NY2d 276, 281 (1978). Conclusory and boilerplate allegations are not sufficient to sustain a claim for tortious interference with contract. *Ruha v Guior*, 277 AD2d 116, 116 (1st Dept 2000); *M.J. & K. Co., Inc. v Matthew Bender & Co., Inc.*, 220 AD2d 488, 490 (2d Dept 1995). Here, Galt Corp. has failed to allege any specific factual basis for the proposed claim other than to repeat the allegations that LMDC allowed or caused governmental agencies to inspect the work and impose unduly stringent standards. As previously noted, the most stringent standards imposed by governmental authorities were agreed to by Galt Corp. and, obviously, served a lawful purpose.

Similarly without merit is the proposed 10th cause of action for prima facie tort. To state a legally viable claim of *prima facie* tort, the plaintiff must plead the following elements: "(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." *Freihof v Hearst Corp.*, 65 NY2d 135, 142-143 (1985); *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 258 (1st Dept 1992), *lv denied* 81 NY2d 709 (1993). No recovery is possible unless the alleged wrongdoer is shown to have acted solely from "disinterested malevolence." *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 (1983), quoting *American Bank & Trust Co. v Federal Reserve Bank of Atlanta*, 256 US 350, 358 (1921) (Holmes; J.). Disinterested malevolence has been defined as meaning that the wrongdoer's motivation arises solely out of malice and is exclusively directed to injure or damage another. *See, id.* An "essential element of [a prima facie tort claim] is an allegation of special damages, fully and accurately stated with

sufficient particularity so as to identify and causally relate the actual losses to the allegedly tortious acts. Failure to do so lays the cause of action open to summary dismissal." *Broadway & 67th St. Corp. v City of New York*, 100 AD2d 478, 486 (1st Dept 1984). "Broad and conclusory terms are simply insufficient to fulfill this critical element of the allegations." *Varela v Investors Ins. Holding Corp.*, 185 AD2d 309, 311 (2d Dept 1992), *aff'd* 81 NY2d 958 (1993) [internal citation omitted]. Further, "damages pleaded in . . . round sums, without any attempt at itemization, must be deemed allegations of general damages," rather than of special damages *Leather Dev. Corp. v Dun & Bradstreet, Inc.*, 15 AD2d 761, 761 (1st Dept 1962), *aff'd* 12 NY2d 909 (1963).

Again, the basis of the proposed claim is that LMDC intentionally inflicted harm by allowing the excessive interference by governmental authorities and by inducing Bovis to wrongfully terminate the Bovis/Galt subcontracts. Galt Corp.'s claim that the subcontracts did not require its work to be subject to such inspections is flatly wrong and it cannot be said that permitting or requesting governmental inspections evinces disinterested malevolence. In addition, Galt Corp.'s allegation that it sustained \$50 million in damages, as a result of LMDC's conduct is not sufficient to fulfill the pleading requirement of special damages. Consequently, the cross motion to serve a second amended complaint is denied in its entirety. Accordingly, it is

ORDERED that the motion to dismiss is granted in its entirety and the fifth, sixth, seventh, and eighth causes of action asserted in the amended complaint against defendant Lower Manhattan Development Corporation (LMDC) are severed and dismissed, with costs and disbursements to LMDC as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

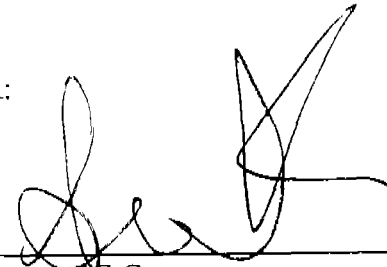
ORDERED that the remainder of the action asserted against defendant Bovis Lend Lease LMB, Inc. shall continue; and it is further

ORDERED that the cross motion to amend is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a status conference on May 21, 2009, at 9:30 a.m. in Part 54, Room 418, of the courthouse located at 60 Centre St., New York, N.Y.

Dated: April 27, 2009

ENTER:



J.S.C.

FILED
APR 29 2009
COUNTY CLERK'S OFFICE
NEW YORK