

Sandpebble Bldrs. Inc. v Mansir

2009 NY Slip Op 32443(U)

October 14, 2009

Supreme Court, Suffolk County

Docket Number: 45949-2008

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**

J. S. C.

Original Motion Date: 07-21-2009
 Motion Submit Date: 07-29-2009
 Motion Sequence No's.: 002 MG
 CASEDISP

_____ X

SANDPEBBLE BUILDERS INC.,

Plaintiff,

-against-

**DEBORAH MANSIR and the EAST
 HAMPTON UNION FREE SCHOOL
 DISTRICT,**

Defendant.

_____ X

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ORDERED, that the motion (motion sequence number 001) by defendants to dismiss the Complaint is granted in its entirety and this matter is dismissed.

BACKGROUND

This is an action essentially sounding in fraud and is related to the matter pending before this Court, *East Hampton Union Free School District against Sandpebble Builders, Inc. and Victor Canseco*, Index number 1113-2007 (the "related action"). Although the parties' familiarity with the facts is presumed from the extensive history of this case, a brief summary is warranted. Both cases revolve around the parties' relationship wherein defendant, East Hampton Union Free School District (the "School District") was renovating and/or constructing additional schools in the district and Sandpebble Builders, Inc. ("Sandpebble") was a construction management company involved in the

projects. In April of 2002, Sandpebble executed a “Standard Form of Agreement between Owner and Construction Manager” (the “contract”) which was executed on behalf of the School District by the then president of the school board, defendant Deborah Mansir (“Mansir”).

In the related action, by Decision and Order dated March 16, 2009, this Court determined that, although Education Law §1709(6) empowered the School Board to construct and renovate schools within the district, General Construction Law §41 requires that a majority of the School Board authorize the specific contract. Here, since it was undisputed that while Mansir executed the contract and the School Board authorized by resolution the hiring of Sandpebble as construction manager, it did not authorize Mansir to sign a contract. However, the Court further determined that there was a question of fact as to whether the School Board ratified the contract, despite the fact that the contract was *ultra vires* at the outset. Such determination was based, in part, on the payment of invoices submitted by Sandpebble between 2002 and 2005 and additional work performed by Sandpebble during this time period. In the context of the motion practice in the related action, Mansir submitted an affidavit wherein she stated she did not have authority to sign the subject contract. Additionally, in the March 16, 2009 Order, the Court determined that questions of fact existed as to whether the contract was abandoned and relied in part at least, on evidence submitted that East Hampton notified (via counsel) at least three (3) times in 2005 and 2006 of its belief that the contract was abandoned.¹ This action is continuing before the Court.

THE INSTANT ACTION

The submissions reflect that on or about December 2, 2008, pursuant to General Municipal Law §50-e, Sandpebble served a Notice of Claim on Mansir, the Board of Education of the East Hampton Union Free School District (the “Board”) and John Does No. 1 through 10. Thereafter, on or about December 30, 2008, Sandpebble commenced an action against Mansir only by the filing of a Summons and Verified Complaint and subsequently, on March 27, 2009, Sandpebble filed an Amended Verified Complaint naming both Mansir and the School District. The Amended Verified Complaint sets forth four (4) causes of action. The first cause of action is against Mansir for fraud and alleges that she signed

¹The Court notes that the Appellate Division has recently modified that portion of the Order (BAISLEY, J.) dated July 18, 2007 which denied dismissal of the Complaint in the related action against the principal of Sandpebble, Canseco. The Second Department found that the Complaint failed to state a cause of action against Canseco personally under the doctrine of piercing the corporate veil and dismissed the Complaint insofar as interposed against Canseco.

the contract with Sandpebble knowing that she did not have authority to enter into the contract and further knowing that Sandpebble would rely on her representation that she had such authority. The second and third causes of action are also against Mansir and allege “misrepresentation” and “principal’s lack of capacity”, respectively. Finally, the fourth cause of action is against the School District based on a theory of respondent superior. Sandpebble seeks lost profits and punitive damages.

Defendants now move pursuant to CPLR §§3211(a)(1), (5) and (7) to dismiss the instant action on the grounds that: (1) it is time barred; (2) the notice of claim was defective; and (3) the Amended Verified Complaint fails to state a cause of action. In support of the motion, defendants submit a copy of the Notice of Claim, a copy of the Complaint and Amended Verified Complaint, a Memorandum of Law, Affidavits of Counsel, a copy of the contract, a copy of the papers on the motion in the related action, a copy of resolutions of the School Board and the Appellate papers. In opposition to the motion, plaintiff submits a copy of this Court’s Order in the related action, affidavits submitted to the Court in the related action, an affirmation of counsel, Memorandum of Law and transcript of Canseco in the related action.

DEFENDANTS’ ARGUMENTS

Statute of Limitations

Defendants initially argue that the claims asserted herein are time barred and must be dismissed. Pursuant to GML §50-i and Education Law §3813(2), defendants assert that the statute of limitations applicable to a tort action against a municipality is one year and 90 days from accrual of the action. Specifically, defendants argue that the fraudulent conduct complained of (Mansir’s execution of the contract), occurred in April of 2002 and thus since the Complaint was not filed within one year and ninety days from then, the action is time barred. Moreover, defendants assert that there is no tolling of the statute of limitations pending discovery of the alleged fraudulent conduct (the so called “discovery rule”) pursuant to the applicable statutes. However, even assuming *arguendo*, the discovery rule applied to extend the statute of limitations, (which defendants do not concede), they argue that the action herein would still be time barred. Defendants note that in this case, Sandpebble could have discovered, through the exercise of reasonable diligence, that Mansir did not have the authority to execute the contract. Additionally, defendants refer to the several correspondence by their counsel in 2005 and 2006 to Sandpebble in which it was advised that there were issues with the contract. Thus, defendants argue that

at the latest, Sandpebble knew of the claim by January 2007, more than one year and ninety days from the commencement of this action. With regard to the claims against Mansir, defendants advise that the School Board passed a resolution agreeing to indemnify her for the claims in this lawsuit, and, as such, the one year and ninety day statute of limitations is applicable to those claims as well.

Turning to the claim for misrepresentation, defendants argue that there is no such cause of action in New York so the claim is really either for “negligent misrepresentation” or fraud. In either case, defendants argue the cause of action is time barred as it would have accrued on the date when Mansir made the alleged misrepresentation, April 2002. Likewise, defendants argue that the lack of capacity claim and derivative claim against the district are time barred. Therefore, defendants urge the Court to dismiss the Complaint as barred by the statute of limitations.

Notice of Claim

General Municipal Law §50-e(1)(a) and Education Law §3813(2) require that a notice of claim must be served within 90 days of accrual of the claim. In the case at bar, defendants argue that since the notice of claim was not served until December 2, 2008, it was untimely since the claim accrued no later than January 2007. Additionally, defendants argue plaintiff failed to comply with the requirements of GML §50-i(1)(b) and Education Law §3813(2) which require at least 30 days to elapse from the service of the notice of claim and commencement of the action. But here, defendants note that plaintiff commenced the action against Mansir less than 30 days after service of the notice of claim and must be dismissed. With regard to the substance of the notice of claim, defendants argue that it did not include all of the claims asserted in the Amended Verified Complaint and as such, did not comply with the requirements of GML §50-e(2). Instead, defendants assert that the notice of claim only identified a fraud claim and not the remaining causes of action. Finally, defendants argue that the notice of claim was defective because it did not name the School District but only the School Board, that such are distinct entities, and as such, plaintiff was required to serve the School District. The failure to do so, defendants argue, warrants dismissal of the action.

Failure to State a Cause of Action

Defendants argue that plaintiff's claim for fraud must fail because it failed to allege that Mansir knowingly misrepresented material facts to induce Sandpebble to enter into the contract. Defendants assert that the sole basis for the fraud claim is Mansir's November, 2008, affidavit submitted in the related action wherein she states that she did not have authority to execute the contract. They argue that

nothing in this affidavit indicates that Mansir signed the contract knowing at the time she did not have authority to sign it. Thus, defendants argue that the fraud claim is insufficient and must be dismissed. Similarly, defendants argue that the misrepresentation claim must be dismissed because plaintiff failed to allege the specific nature of the misrepresentation but instead, the Amended Verified Complaint only alleges that Mansir made a representation that she was authorized to sign the contract on behalf of the School District. The mere fact that Mansir signed the contract, is insufficient, according to defendants, to demonstrate a material misrepresentation of fact and thus, defendants urge the Court to dismiss this cause of action.

Defendants argue the third cause of action alleging a principal's lack of capacity is not recognized in New York and must be dismissed. Defendants also assert that plaintiff is not entitled to either lost profits or punitive damages in this case. With regard to the punitive damages claim which is asserted against Mansir personally, defendants argue that punitive damages are not available against a municipal corporation and since Mansir was acting within the scope of her employment (and has been indemnified by the School Board), those claims must be dismissed.

PLAINTIFF'S OPPOSITION

Statute of Limitations

Plaintiff urges the Court to reject defendants' claim that the statute of limitations accrued in April of 2002 when Mansir signed the contract. Plaintiff argues that since it performed pursuant to the agreement over a period of several years, it had no reason to know that it "had been defrauded by Mansir" and the statute of limitations should not commence running until it discovered the fraud. Plaintiff asserts that the discovery rule does apply to this case and as such the claim did not accrue until Mansir signed the affidavit in the related case in November 2008. As such, the claims are timely according to plaintiff and must not be dismissed. Addressing defendants' claim that they were put on notice by the correspondence from counsel in 2005, plaintiff asserts that these letters did not say that Mansir acted without authority. Likewise, plaintiff argues that the claims for misrepresentation, principal's lack of capacity and respondeat superior are not time barred because the claims were not known until Mansir signed the November 2008 affidavit.

Plaintiff also argues that the claims against Mansir are not governed by the one year and ninety day statute of limitations because she was sued in her individual capacity and not her official capacity,

notwithstanding the fact that the Notice of Claim stated that Mansir was “an agent acting within the scope of her duties with apparent authority...”.

Notice of Claim

Plaintiff challenges defendants’ objections to the notice of claim on the grounds that it did not cover all the claims and failed to specifically name the School District. On the first issue, plaintiff claims that the causes of action for misrepresentation, lack of capacity and respondeat superior are so closely related to the fraud claim that the notice of claim was sufficient to notify the defendants of their alleged liability. Thus, the notice of claim was adequate and this argument must be rejected according to plaintiff. Regarding the failure to name the School District, plaintiff essentially argues that any such defect (if this is actually a defect), is so trivial and insignificant that it should be disregarded by the Court. Plaintiff notes that the School Board is the governing body of the District and the District was named in the caption of the Notice of Claim.

Failure to State a Cause of Action

Contrary to the arguments of defendants, plaintiff argues that the Amended Verified Complaint states a cause of action for fraud. Plaintiff asserts that defendants’ arguments that there is an innocent explanation for why Mansir signed the contract without authority to do so, are without merit and must be rejected. Plaintiff argues that it should have the opportunity to depose Mansir so she can explain why she signed the contract when she did not have the authority to do so. With regard to the misrepresentation claim, plaintiff asserts that Mansir’s signature on the contract acted as a representation that she had authority to sign the contract. Thus, since she did not have the authority, the signature was a fraudulent misrepresentation. Plaintiff pleads with the Court to recognize that Mansir should be held accountable for her actions and the School District should be held vicariously liable for her conduct. Plaintiff argues that the allegations are sufficient to permit a reasonable inference of fraud and also to sustain the causes of action regarding Mansir’s capacity to contract. Plaintiff also argues that the fraud claim is not duplicative of the contract claim in that the fraud claim is based upon Mansir’s misrepresentation regarding her authority to sign the contract and Sandpebble’s reliance thereon.

On the issue of damages, plaintiff asserts that even if it is not entitled to recover lost profits, it would be premature at this time for the Court to dismiss the causes of action when it is only the request for relief that is inappropriate. Finally, plaintiff alleges that the Amended Verified Complaint sets forth a sufficient basis for an award of punitive damages against Mansir. Here, plaintiff argues again that the

claim is against Mansir in her individual capacity, and thus punitive damages are not prohibited by law. Plaintiff argues that Mansir's conduct was egregious, and evidences a high degree of moral culpability, thus warranting the imposition of punitive damages. Sandpebble worked on the purported contract for a period of five years and was paid by the School District and then Mansir admitted she was not authorized to sign the contract. According to plaintiff, Mansir, as the president of the School Board, violated the statute in signing the contract without authority and such conduct was so gross, wanton and willful as to justify an award of punitive damages.

Based on all of the foregoing, plaintiff urges the Court to deny the motion to dismiss in its entirety.

DEFENDANTS' REPLY

Defendants submit a reply wherein they reiterate the arguments set forth in their moving papers. Defendants urge the Court to recognize that no discovery rule applies to toll the statute of limitations in this case and thus, the action is time barred in its entirety. Moreover, even if such a rule did apply, defendants still maintain that the action was time barred. Additionally, defendants assert that the allegations of the Amended Verified Complaint are insufficient to state a cause of action for fraud and/or fraudulent misrepresentation. Finally, defendants submit that the notice of claim was defective, as set forth above, in that it neither named the School District nor provided notice of all the claims. Therefore, defendants urge the Court to grant the motion to dismiss.

DISCUSSION

Statute of Limitations and Notice of Claim

Pursuant to the provisions of Education Law §3813 and General Municipal Law §50-e, prior to the commencement of a tort action against a school district, school board or any officer thereof, a notice of claim must be filed. Such notice of claim must be filed within ninety days of the accrual of the claim. General Municipal Law §50-i(1)(c) further provides that any such action must be commenced within one year and ninety days after the happening of the event upon which the claim is based. Further, causes of action that are not included or referred to in the notice of claim are barred. *Demorcy v. City of New York*, 137 A.D.2d 650, 524 N.Y.S.2d 742 (2d Dept. 1988). *See also, Mazzilli v. City of New York*, 154

A.D.2d 355, 545 N.Y.S.2d 833 (2d Dept. 1989).

The Second Department has repeatedly recognized that in cases such as the one at bar, the cause of action accrues upon the “happening of the event” that triggers the claim and not when the damage or injury is discovered. *See, Regatta Condominium v. Village of Mamaroneck*, 303 A.D.2d 737, 758 N.Y.S.2d 348 (2d Dept. 2003); *Pleasant Ridge Homeowners’ v. T & D Construction Corp.*, 181 A.D.2d 871, 581 N.Y.S.2d 857 (2d Dept. 1992). The “discovery rule” only applies where specifically provided in the statutes. *See, e.g., Huggler v. City of New York*, 289 A.D.2d 240, 733 N.Y.S.2d 725 (2d Dept. 2001). *CPLR §214-c* (discovery rule applies to cases involving personal injuries sustained as a result of exposure to toxic substances). With regard to actions against municipal officers or employees, the question turns on whether the officer or employee was acting within the scope of his/her employment when the alleged tort was committed. If so, the municipality must indemnify him/her for damages arising therefrom and the municipality is the real party in interest and the statute of limitations contained with the General Municipal Law applies. *Ruggiero v. Phillips*, 292 A.D.2d 41, 739 N.Y.S.2d 797 (4th Dept. 2002). The question whether an employee was acting within the scope of employment is a factual one to be determined by the employer and should be set aside only if it is arbitrary and capricious. *Sanchez v. New York City Transit Authority*, 254 A.D.2d 345, 678 N.Y.S.2d 664 (2d Dept. 1998). If the employee was acting within the scope of his/her employment and is entitled to be indemnified, the municipality is the real party in interest and any claims against it are governed by the shorter statute of limitations period. *Urraro v. Green*, 106 A.D.2d 567, 483 N.Y.S.2d 80 (2d Dept. 1984).

Application of these principles to the case at bar demonstrate why the claims against Mansir and the School District must be dismissed. First, plaintiff’s arguments to the contrary notwithstanding, the School District determined that Mansir was acting within the scope of her employment and has indemnified her against all damages resulting from claims in this action. Additionally, although plaintiff is now claiming that Mansir was not acting within the scope of her employment at the time she signed the April 2002 agreement, such allegation is completely contradictory to the stated position it has propounded in the related action and in the Notice of Claim. Specifically, in the Notice of Claim, Sandpebble asserted that Mansir was “acting as an agent of the Board” and that the claims arose when Mansir executed the contract as “President and member of the District’s Board of Education”. Finally, the Notice of Claim, at ¶7 stated that Sandpebble was damaged as a result of the “fraudulent acts of Mansir, its agent *acting within the scope of her duties and with apparent authority*”. Plaintiff does explain that such was “inserted for the purpose of triggering the District’s responsibility in vicarious liability for her actions, and for no other reasons”. However, even accepting this explanation, the

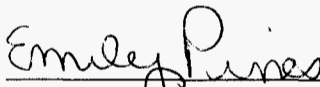
submissions reflect that Mansir executed the contract in her capacity as President of the School Board, notwithstanding the fact that the Board had not approved the contract by resolution. The School District has agreed to defend and indemnify Mansir and given the totality of the circumstances, plaintiff has failed to demonstrate that this determination lacks a rational basis or was arbitrary and capricious. However, even if Mansir were acting in her personal capacity, the causes of action against her accrued in April 2002 and are, therefore, barred under any statute of limitations. Therefore, in light of all the foregoing, the Court finds that the first cause of action for fraud arose when Mansir signed the contract in April of 2002 and thus the commencement of this action December 30, 2008 was untimely. Likewise, the second cause of action for "misrepresentation", as it is also really a repetition of the claim for fraudulent misrepresentation, is also time barred and dismissed. Additionally, the Court notes that under the provisions set forth herein, the Notice of Claim was untimely. The Court finds that the third cause of action is likewise barred by the statute of limitations. It is termed a cause of action based on a "lack of capacity". As such, it sounds in prima facie tort, which encompasses unlawful acts that do not fall within any other delineated tort. Moreover, the cause of action for "lack of capacity", was also not delineated in the Notice of Claim and therefore, for that reason as well, must be dismissed. See, GML § 50-e(2).

Finally, the Court agrees with defendants that the named defendant herein, the School District, was neither named nor served with the Notice of Claim. While such claim is also barred by the statute of limitations, having accrued in April, 2002, no Notice of Claim was filed and served upon the School District. Thus for both reasons the fourth cause of action must be dismissed.

Based on the foregoing, the motion to dismiss is granted in its entirety.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: October 14, 2009
Riverhead, New York



EMILY PINES
J. S. C.