SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 13165/09

MOTION DATE: Aug. 11, 2010
Motion Sequence # 003

COX & COMPANY, INC.,

Plaintiff,

-against-

SOURCE BUILDERS & CONSULTANTS, LLC, STERLING MANAGEMENT, INC., JACK GOLD and MARC SHAW,

Defendants.

SOURCE BUILDERS & CONSULTANTS, LLC, STERLING MANAGEMENT, INC., JACK GOLD and MARC SHAW, in its own behalf and on behalf of all other similarly situated Lienors, Mechanics, Materialman, Laborers, Claimants and/or Creditors, for payment for work and/or materials due and owing in connection with the construction and improvement of certain real property described herein,

Defendants and Counterclaim Plaintiffs,

-against-

COX & COMPANY, INC.,

Plaintiff and Counterclaim Defendant,

COX & COMPANY, INC. **Index no. 13165/09**

-and-

WARREN ACHENBAUM, STEVEN LANDRY, JAMES JAFFE, STEEL EQUITIES, PLAINVIEW STEEL, LLC, STEEL O, LLC, JOSEPH LOSTRITO, GARY DELUCA, ARCHITECTURAL ELEMENTS FLOORING, KITCHEN AND BATH, LLC, MERRILL LYNCH COMMERCIAL FINANCE CORP., NEW YORK COMMUNITY BANK, NEW YORK COMMUNITY BANKCORP, INC., NASSAU COUNTY INDUSTRIAL DEVELOPMENT AGENCY, VERIZON NEW YORK, INC., JOHN DOES and JANE DOES #1-10, and JOHN DOE and JANE DOES CORPORATIONS #1-10,

Additional Counterclaim Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Affirmation in Support..... X
Memorandum of Law..... XX

Motion by plaintiff, Cox & Company, Inc. ("Cox") and counterclaim defendants Warren Achenbaum, Steven Landry and James Jaffe (the "Cox Individuals"), pursuant to CPLR 3212(e), for an Order, *inter alia*, granting them partial summary judgment as against defendants, Source Builders & Consultants, LLC, Sterling Management, Inc., Jack Gold and Marc Shaw, is **granted** in part and **denied** in part.

This dispute arises out of mechanic's liens filed by a project manager and its affiliated company, a general contractor, for approximately $1.3 million dollars.

Plaintiff, Cox & Company, Inc. ("Cox") is a manufacturer of machinery used to de-ice commercial aircraft. Defendant, Sterling Management, Inc. ("Sterling") is a New York corporation engaged in the business of providing project management and construction management services for corporate interior design and construction. Defendants, Jack Gold ("Gold") and Marc Shaw ("Shaw") are the principals of Sterling.

They are also the principals of defendant, Source Builders & Consultants, LLC ("Source"), a New York corporation engaged in construction management and general contractor services.

In 2007, Cox sought to relocate its offices from Manhattan to Nassau County, and eventually secured a lease on premises located at 1664 Old Country Road, Plainview, New York (hereinafter referred to as the "Property"). Cox engaged Sterling to act as its project manager in connection with a project to convert the property into a manufacturing and office facility ("the Project") by November 30, 2008.

Cox' agreement with Sterling provided that Sterling would solicit bids for the project, assist Cox in the selection of contractors, and manage and oversee the Project on behalf of Cox to ensure that it was completed within budget and on time. It was agreed that Sterling would be paid $319,640.00 for the full and proper performance of its services and duties.

After reviewing the bids for the Project, Sterling advised Cox that its affiliate, Source, could perform the Project for a lesser sum within the time frame required by Cox. Sterling also offered to reduce its fee for acting as project manager by $104,325.00, i.e. to the amount of $215,315.00, if Cox entered into the agreement with Source.

On August 18, 2008, Cox engaged Source to act as the general contractor and construction manager with regard to the Project. Pursuant to Cox' agreement with Source, Source was to be paid $5,612,145.00 plus 9% for general conditions, overhead and profit ($505,093.00), or a total of $6,117,238.00. This amount was subject to adjustment for insurance costs and approved changed orders. If the actual cost was greater than the projected cost, the increase was to be paid by Cox. Conversely, if the actual cost was less than the projected costs, the savings was to be passed on to Cox. Source also negotiated a four percent (4%) "upcharge" on each change order invoice for its overhead and insurance.

Pursuant to the Source Agreement, it was agreed that Cox's representative would be Frank DeBlanco and Source's representative would be Gary DeLuca.

James Jaffe, the Chief Financial Officer of Cox, alleges in his affidavit that on or about October 15, 2008, defendants stated that Source would be unable to meet the Substantial Completion Date, i.e., November 30, 2008, and that, as a result, Cox would have to pay overtime charges of at least $250,000.00.

Thereafter, on October 20, 2008 (approximately one month before the Substantial Completion Date), Source submitted to Cox a request for payment demanding $543,144.62 for unapproved change orders. Jaffe maintains that the request for payment was the first notice to Cox of any of the change orders and was not supported by any documentation other than invoices from an entity called Architectural Elements Flooring, Kitchen and Bath, LLC ("AE"). Cox demanded supporting documentation from the defendants, but to no avail. Jaffe further alleges that Cox subsequently learned that Source contracted most of the work to AE, whose principal or owner is Gary DeLuca, i.e., the Project Superintendent for Cox.

Jaffe claims that thereafter, following the defendants' demands for payments of the Change Orders and the overtime charges, the defendants subsequently represented that if Cox agreed to enter into a second agreement, increasing the contract amount to a fixed, stipulated sum of $6,850,000.00, Source would complete the Project on time, and the change orders and additional labor would be absorbed into the new contract. Cox agreed and entered into an amended contract, dated November 7, 2008 with Source (the "Amended Agreement").

After the execution of the Amended Agreement, Source claimed an additional $388,222.52 for new change orders arising subsequent to October 15, 2008. On February 23, 2009, Sterling submitted a final invoice in the amount of $110,770.00 to Cox for its work on the Project.

After reviewing the new change orders, Cox contacted several of the subcontractors to obtain further support for the increases in work and material and negotiated directly with the subcontractors. Jaffe maintains that in an effort to determine the actual cost of the Project, and seek support for the numerous change orders, he provided a number of subcontractors, including Concrete FX, Hi-Lume Corporation, and P&W Electric, with copies of the invoices received from Source and/or AE. Jaffe claims that he learned at that point that several invoices provided to him by Source and/or AE were false.

Around May 1 through May 5, 2009, Cox negotiated direct payments to several of the subcontractors on the Project for the correct balances reflecting the work that they actually performed. Six contractors entered into agreements with Cox to provide it with releases and lien waivers. Specifically, Cox entered into agreements with and made direct payments to the following subcontractors: (1) P&W in the amount of $156,879.00; (2) Pyramid Air Conditioning, Inc. in the amount of $181,692.00; (3) Concrete FX in the amount of $41,241.50; (4) Horowitz Plumbing & Heating, Inc. in the amount of $46,800.00; (5) Hi-Lume in the amount of $36,305.00; and (6) Liberty Doors, Inc. in the

amount of $11,761.44.

On May 8, 2009, Cox's counsel advised Source of the agreements and the payments to be made by Cox to the subcontractors totaling $474,678.94. On May 13, 2009, counsel for Source and AE acknowledged receipt of the May 8th letter. However, on May 19, 2009 Source filed an amended lien against the Property in the amount of $1,149,342.80. The mechanic's lien apparently included the $474,678.94 that Cox had already agreed to pay directly to the subcontractors. The Verified Itemized Statement dated May 19, 2009 in support of Source's lien included invoices from all six of the subcontractors, including P&W, Pyramid, Concrete FX, Horowitz, Hi-Lume and Liberty. Thereafter, on June 4, 2009, Cox demanded that Source reduce its lien to reflect the agreements Cox entered into to pay $474,648.94 directly to several subcontractors.

On May 19, 2009, Sterling placed a new mechanic's lien against the Property in the amount of $143,269.26. As noted, this amount exceeds the balance owed to Sterling as reflected in its most recent and final invoice submitted to Cox for its work on the Project.

When Source failed to substantiate the Change Orders and New Change Orders, Cox refused to pay the amounts demanded by Source. Jaffe maintains that this also led to disputes with Sterling since Cox's position was that Sterling did not exercise any oversight for the project.

Cox brings this action to invalidate the liens and asserts the following causes of action: (1) against Source - rescission of Amended Agreement (dated November 7, 2008); (2) against Source - breach of the Source Agreement; (3) against Source - willful exaggeration under Lien Law; (4) against Source - breach of Amended Agreement; (5) against Source - willful exaggeration under Lien Law; (6) against Sterling - negligent misrepresentation; (7) against Sterling - breach of the Sterling Agreement; (8) against Sterling - fraud; (9) against Source - fraud; (10) against Gold and Shaw - tort; and (11) against Source: violation of New York Lien Law §77. In their answer, defendants Source, Sterling, Gold, and Shaw assert various counterclaims, including a counterclaim for foreclosure of the mechanic's liens (See plaintiff's ex. 2 at 50).

Plaintiff Cox and counter claim defendants Achenbaum, Landry and Jaffe move for partial summary judgment against the named defendants to the extent of:

(1) a determination that Source's mechanic's lien is void based upon willful exaggeration and awarding Cox the appropriate damages pursuant to New York Lien Law

§39-a, or in the alternative, reducing Source's mechanic's lien by at least $508,621.95;

(2) a determination that Sterling's mechanic's lien is void based upon willful exaggeration and awarding Cox the appropriate damages pursuant to New York Lien Law §39-a, or in the alternative, reducing Sterling's mechanic's lien by at least $32,499.26;

(3) a dismissal of Source's fraud, negligent misrepresentation and tortious interference counterclaims (Nos. 11, 12 and 17);

(4) a dismissal of Source and Sterling's unjust enrichment and quantum meruit counterclaims (Nos. 13-16).

Plaintiff and counterclaim defendants' motion for partial summary judgment is denied as to plaintiff's request for a determination that Source and Sterling's mechanic's liens are void pursuant to Lien Law §39 on the basis of willful exaggeration, or an award of damages pursuant to New York Lien Law §39-a. Lien Law § 39 provides that these remedies are available in a "proceeding to enforce a mechanic's lien."

> "*In any action or proceeding to enforce a mechanic's lien* upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon" (emphasis added).

Lien Law § 39-a similarly provides:

> "*Where in any action or proceeding to enforce a mechanic's lien* upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor" (emphasis added).

However, it appears that where plaintiff brings an action for a judgment declaring the mechanic's lien void and defendant counterclaims for foreclosure of the lien, the court has jurisdiction to resolve the issue of wilfull exaggeration ***Executive Towers at Lido v Metro Constr. Servs***, 303 AD2d 545 [2nd Dept. 2003].

Nevertheless, a finding of willful exaggeration "requires proof that the lienor deliberately and intentionally exaggerated the lien amount" (***J. Sackaris & Son, Inc. v. Terra Firma Const. Mgt. & Gen. Contr., LLC***, 14 AD3d 538, 541 [2nd Dept. 2005]). In

support of its motion for summary judgment, plaintiff submits affidavits from subcontractors asserting that they did not perform the services described in certain invoices, presumably corresponding to mechanic's liens, and that the invoices are forgeries. The court concludes that plaintiff has established prima facie that one or more of the liens was willfully exaggerted.

In opposition to the motion, Sterling has submitted an affidavit that the work was in fact performed by another subcontractor. The court further notes that Sterling now concedes that although a lien was filed for $143,269.26, the amount actually owed has been recalculated at $128,273.20. The lien law is intended to punish wilful exaggeration and not "honest differences" with respect to the amount of the lien or its validity ***E-J Electric Installation Co. v Miller & Raved, Inc.***, 51 AD2d 264, 265 [1st Dept 1976]). The court determines that defendant has shown a triable as to whether the lien was willfully exaggerated. Thus, summary discharge of the subject liens based on a claim of willful exaggeration is not proper at this stage of the case. The issue of the defendants' alleged wilful exaggeration of the subject liens-a necessary determination for purposes of both Lien Law §§39 and 39-a-should be resolved at the trial of the defendants' lien foreclosure counterclaim (***Aaron v. Great Bay Contr.***, 290 AD2d 326 [1st Dept. 2002]; ***Wellbilt Equip. Corp. v. Fireman***, **supra**; ***Guzman v. Estate of Fluker***, **supra**; ***Coppola Gen. Contr. Corp. v. Noble House Constr. of NY***, **supra**).

Upon the instant motion, Cox and the Cox Individuals also seek summary dismissal of Source's fraud, negligent misrepresentation and tortious interference counterclaims (Nos. 11, 12 and 17) and Source and Sterling's unjust enrichment and quantum meruit counterclaims (Nos. 13-16) on the grounds that all of these claims are all duplicative of their breach of contract counterclaims. Plaintiff's motion for partial summary judgment is granted to the extent of **dismissing** defendants' fraud, negligent misrepresentation, and tortious interference counterclaims.

Source's eleventh counterclaim against Cox and the Cox Individuals sounds in fraud. The counterclaim is premised upon allegations that prior to entering into the Amended Agreement on November 7, 2008, Cox and the Cox Individuals fraudulently misrepresented the ability of Cox to compensate Source under the Amended Agreement (*Verified Answer* ¶¶602-621). The damages sought by Source for the alleged fraud is $1,149,342.80 - the exact amount sought by Source for Cox's alleged breach of contract (*Id.* at ¶¶362 and 621).

A fraud claim is duplicative of a claim for breach of contract "when the only fraud alleged is that a defendant was not sincere when it promised to perform under the

contract" (***MaNas v. VMS Assocs, LLC***., 53 AD3d 451, 453 [1st Dept. 2008]). A critical factor in determining whether a fraud claim is duplicative of a contract claim is whether the plaintiff seeks damages that are independent of those damages available under its claim for breach of contract (***Linea Nuova, S.A. v. Slowchowsky***, 62 AD3d 473 [1st Dept. 2009]). Source's fraud claim merely alleges that Cox did not intend to compensate Source under the Amended Agreement and seeks the identical relief that Source seeks in its claim for breach of contract. Therefore, inasmuch as a cause of action for fraud will not arise when the only fraud relates to a claim for breach of contract claim (***Gordon v. DeLaurentiis Corp.***, 141 AD2d 435 [1st Dept. 1988]; ***Alamo Contract Builders v. CTF Hotel***, 242 AD2d 643 [2nd Dept. 1997]), defendants' eleventh counterclaim for fraud which is duplicative of the breach of contract claim (first counterclaim) fails and is **dismissed**.

Defendants' twelfth counterclaim for negligent misrepresentation and seventeenth counterclaim for tortious interference are also **dismissed** as duplicative of their breach of contract claim. Source's negligent misrepresentation counterclaim does not allege a breach of duty independent from any contractual obligations (***Moustakis v. Christie's Inc.***, 68 AD3d 637 [1st Dept. 2009]; ***Grenman-Pederson Inc. v. Levine***, 37 AD3d 250 [1st Dept. 2007]). This claim alleges that Cox misrepresented its ability to pay Source under the Amended Agreement and, thus, breached its duty to "accurately represent its ability to fulfill the payment obligations under the Amended Agreement" (*Verified Answer*, ¶¶622-637). This purported "duty" however is not independent of Cox's contractual obligations to compensate Source and does nothing more than reiterate Source's position that Cox breached the Amended Agreement by failing to pay Source as required by the contract. Further, Source's negligent misrepresentation claims seeks $1,149,342.80 – the same amount that Source seeks as a recovery for its breach of contract claim (*Id.* at ¶637).

Similarly, Source's seventeenth counterclaim styled "tortious interference" is also **dismissed** as being a disguised contract claim (*Id.* at ¶¶ 716-727). Source alleges that Cox engaged in certain conduct that (1) frustrated Source's ability to meet the Substantial Completion date; and (2) resulted in Source incurring unnecessary costs (*Id.* at 716-727). These allegations link the alleged tortious conduct to the disputed contract. Source claims that "as a result of Cox's intentional interference with the Amended Agreement" Source has suffered damages in the amount of $1,149,342.80 (*Id.* at 727). Thus, Source has alleged only that Cox wrongfully interfered with the Amended Agreement, which is a rephrasing of Source's breach of contract claim. Source's tortious interference claim does not allege the required elements of such a claim, including any wrongful interference with either: (1) a contractual relationship that Source maintains with a third party; or (2) a

prospective business relationship (***Kevin Spence & Sons, Inc.v. Boar's Head Provisions, Co., Inc.***, 5 AD3d 352, 354 [2nd Dept. 2004]). Therefore Source's tortious interference counterclaim is **dismissed** as duplicative of its breach of contract claim.

Finally, defendants Source and Sterling's unjust enrichment and quantum meruit counterclaims are also **dismissed**. The existence of a valid and enforceable written agreement precludes recovery under quasi-contractual theories, such as unjust enrichment or quantum meruit, for events arising under the same subject matter (***Yenrab Inc. v. 794 Linden Realty, LLC***, 68 AD3d 755, 758 [2nd Dept. 2009]; ***Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.***, 70 NY2d 382, 388-89 [1987]). Further, quasi-contract claims are also **dismissed** as being duplicative of claims seeking damages for breach of contract (***Bouchard Transp. Co., Inc. V. NY Islanders Hockey Club, LP***, 40 AD3d 897, 898 [2nd Dept. 2007]; ***Fortune Limousine Serv., Inc. v. Nextel Comm's***, 35 AD3d 350, 353 [2nd Dept. 2006]). Both Source and Sterling are parties to what they allege are valid and enforceable written agreements with Cox. The allegations contained in the unjust enrichment and quantum meruit claims by Source and Sterling claim that Cox and its employees accepted the benefits of Source's and Sterling's work without paying for it (*Verified Answer,* ¶¶638-715). However, the work performed by Source and Sterling on the Project is plainly covered under their agreements with Cox. Thus, the unjust enrichment and quantum meruit claims are duplicative of the breach of contract claims and are therefore **dismissed**.

This shall constitute the decision and order of this Court.

Dated AUG 12 2010

J.S.C.

ENTERED

AUG 17 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE