SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

SATO CONSTRUCTION CO., INC., d/b/a FLAG WATERPROOFING & RESTORATION COMPANY,

INDEX No. 7690/10

MOTION DATE: June 24, 2010
Motion Sequence # 001

Plaintiff,

-against-

17 AND 24 CORPORATION,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Memorandum of Law..... X
Reply Memorandum of Law..... X

Motion by defendant 17 and 24 Corporation to dismiss the complaint is **granted** as to plaintiff's claim for defamation and **denied** as to plaintiff's breach of contract claims.

This is an action for breach of contract and defamation. Defendant 17 and 24 Corporation is the owner of the Rockefeller Apartments located at 17 West 54th Street in Manhattan. On October 25, 2007 plaintiff Sato Construction Co entered into a contract with 17 and 24 to perform window restoration and related work at the building. The contract provided that the price for performing the work was $4,619,379.

Section 14.1 of the agreement provides that the contractor may terminate the contract if work is stopped for a period of 30 consecutive days through no fault of the contractor by reason of a court order, an act of government, the architect's failure to issue a certificate for payment or the owner's failure to make payment, or the owner's failure to provide evidence that financial arrangements have been made to fulfill its obligations under the contract.

Section 14.2.1 of the agreement provides that the owner may terminate the contract for cause if the contractor persistently fails to supply proper workers or materials, fails to make payment to subcontractors, persistently disregards public regulations, or is otherwise guilty of a substantial breach of the contract.

Section 14.2.2 provides that the owner, upon certification by the architect that sufficient cause exists, may, upon 7 days' written notice, terminate employment of the contractor and take possession of all equipment and material, accept assignment of subcontracts, and finish the work by whatever reasonable method the owner may deem expedient.

Section 14.2.3 provides that if the owner terminates the contract for cause, the contractor shall not be entitled to further payment until the work is complete.

Plaintiff alleges that on or about January 15, 2009, 17 and 24 suspended Sato's work on the project. On March 5, 2009, the architect wrote to 17 and 24 advising them that due to the severe deterioration of many of the windows, Sato was not capable of restoring at least 20% of the steel windows as contemplated in the contract. In a subsequent letter dated February 12, 2010, the architect stated that its letter constituted certification pursuant section 14.2.2. of the contract. On February 23, 2010, defendant gave Sato written notice of termination by certified mail, return receipt requested. Pursuant to ¶ 15 of the rider to the contract, a notice given in this manner is deemed given two business days after mailing.

On April 20, 2010, plaintiff commenced the present action for breach of contract. Plaintiff alleges that defendant wrongfully terminated the contract in that cause for termination did not exist and defendant failed to give the required 7 day notice. In the first cause of action, plaintiff seeks damages in the amount of $1,072,023, presumably its lost profit on the contract. In the second cause of action, plaintiff seeks $153,542 in retainage monies due upon wrongful termination. In the third cause of action, plaintiff seeks $33,750 in damages for defendant's failure to remit payment pursuant to certain payment applications. In the fourth cause of action, plaintiff seeks $8,437.50 in damages for defendant's failure to

pay an application which was allegedly approved. In the fifth cause of action, plaintiff asserts a claim for defamation per se based upon a letter defendant sent to third parties stating that the contract had been terminated for cause. The third parties were employees of defendant, as well as the architect and a subcontractor. Plaintiff alleges that this statement was made in a negligent or reckless manner. In this cause of action, plaintiff seeks $5,000,000 in damage to its reputation, future lost income, and punitive damages.

Defendant moves to dismiss the first, second and fourth causes of action on the ground that a defense is founded upon documentary evidence pursuant to CPLR 3211(a)(1). Defendant argues that the architect's certification that sufficient cause exists was binding upon all parties. Defendant further argues that its notice of termination was timely. Defendant moves to dismiss the third and fourth causes of action for failure to state a cause of action pursuant to CPLR 3211(a)(7). Defendant argues that because termination was for cause and the work is not complete, plaintiff is not yet entitled to payment pursuant to the terms of the contract. Defendant moves to dismiss the fifth cause of action for defamation for failure to state a cause of action. Defendant argues that the statement was true, that it was not defamatory, and was protected by the qualified privilege of common interest.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (***AG Capital Funding Partners v. State Street Bank and Trust Co.***, 5 NY3d 582, 591 [2005]).

Construction contracts frequently confer upon architects or engineers the power to make binding decisions as to factual disputes that fall within their particular expertise, but excluding legal matters of contract interpretation (***Crimmins Construction v New York***, 74 NY2d 166,171 [1989]). Section 14.2.2 provides that the owner, upon the architect's certification that sufficient cause exists, may take certain action to protect its interests and complete the project. The court notes that Section 14.2.1, which defines when the owner may terminate the contract for cause, does not contain a similar upon certification by the architect provision. Thus, there does not appear to be "a clear, explicit and unequivocal" agreement to submit to the architect a dispute as to cause for termination of the contract (Id). Plaintiff has alleged a sufficient breach of contract claim based on wrongful termination, regardless of whether defendant's notice of termination was timely. Defendant's motion to dismiss the first, second and fourth causes of action on the ground of a defense founded upon documentary evidence is **denied**.

On this motion to dismiss, the court must assume that defendant did not have cause

for termination of the contract. Accordingly, plaintiff's breach of contract claims based upon non-payment are not premature. Defendant's motion to dismiss the third and fourth causes of action for failure to state a cause of action is **denied**.

Defamatory statements are generally not actionable absent a showing of special damages. There is a recognized exception to this rule when the statement imputes incompetence, incapacity, or unfitness in the performance of one's profession (***Allen v CH Energy Group***, 58 AD3d 1102 [3d Dept 2009]). However, where defendant accuses plaintiff of a "single instance" of unprofessional conduct, there can be no implication that plaintiff is generally incompetent or unfit in his business or profession (Id at 1103-04). A qualified privilege protects a communication whenever the speaker and the listener share a common interest in the subject matter of the conversation. The common interest privilege protects communications involving various kinds of economic interests. The privilege can be overcome by a showing of malice which means knowledge of falsity or reckless disregard of whether it was true (***Sokol v Leader***, 904 NYS2d 153 [2d Dept 2010]). However, plaintiff has no obligation to show evidentiary facts to support his claim of malice on a motion to dismiss for failure to state a cause of action (Id).

Because plaintiff has alleged that the statement was made in a reckless manner, it has sufficiently alleged malice. Thus, plaintiff's defamation claim cannot be dismissed at the pleading stage based upon the common interest privilege. However, because defendant stated that only one contract was terminated for cause, it accused plaintiff of unprofessional conduct in only a single instance. Thus, plaintiff does not allege that defendant claimed that it was generally incompetent in the construction business. The statement alleged is not defamatory. Defendant's motion to dismiss plaintiff's defamation claim for failure to state a cause of action is **granted**.

So ordered

ENTERED
SEP 10 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated 7 Sept Ember 2010

Stephen A Bucaria
J.S.C.