

**Evangelical Church v Calabrese Assoc., Inc.**

2011 NY Slip Op 30560(U)

March 8, 2011

Supreme Court, New York County

Docket Number: 114160/10

Judge: Eileen A. Rakower

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

**HON. EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_

PART 15

*Justice*

Index Number : 114160/2010

**EVANGELICAL CHURCH**

VS.

**CALABRESE ASSOCIATES, INC.**

SEQUENCE NUMBER : 001

DISM ACTION/INCONVENIENT FORUM

INDEX NO. 114160/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2

3, 4

5

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

MAR 11 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/8/11



**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
EVANGELICAL CHURCH, MISSION AND SEMINARY  
INTERNATIONAL, INC. and EVANGELICAL  
MISSION AND SEMINARY INTERNATIONAL,

Plaintiffs,

Index No.  
114160/10

- against -

Mot. Seq. 001  
Decision and  
Order

CALABRESE ASSOCIATES, INC. and  
FRANK CALABRESE,

**FILED**

Defendants.

MAR 11 2011

-----X  
HON. EILEEN A. RAKOWER, J.S.C.  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs bring this action for breach of contract, breach of implied in fact agreement, and unjust enrichment as against defendant Calabrese Associates, Inc. ("CAI"). Plaintiff brings a fourth cause of action for fraudulent inducement, as against CAI and Frank Calabrese, individually ("Calabrese"). Plaintiff Evangelical Mission and Seminary International ("Mission") is the owner of property located at 248 Grand Street in the County and State of New York. Plaintiff Evangelical Church, Mission Seminary International ("Church") is the tenant at the above location.

On March 10, 2008, Church entered into a contract with CAI to perform construction work at the Grand Street location, to be commenced on March 18, 2008. The project was required to be substantially completed no later than 300 days from the commencement date. Plaintiffs allege that CAI failed to complete the work within the relevant time frame. Plaintiffs cancelled the project, without the work being completed, in June 2010.

Defendants now move, pre-answer, to dismiss the second, third and fourth

causes of action as to CAI, and the fourth cause of action as to CAI and Calabrese. Plaintiffs oppose.

Defendants, in support of their motion, submit; a copy of the contract, plaintiff's complaint; and a copy of a Bargain and Sale Deed Without Covenant Against Grantor's Acts (Individual or Corporation). Defendants first argue that Mission does not have standing to sue. As to the second cause of action, defendants argue that it is duplicative of the breach of contract cause of action. Defendants assert that there can be no valid claim for unjust enrichment because there is an express contract. Finally, defendants claim that the fourth cause of action, for fraudulent inducement, must fail as against CAI, because it merely "recasts" the contract claim.

Plaintiffs, in opposition, submit an attorney affirmation and a page of handwritten notes. Plaintiffs assert that they both have standing because they were both damaged by defendants' failure to perform on the contract. Plaintiffs claim that the second cause of action should stand because it is merely a "pleading in the alternative," and that its fraud cause of action should remain because it is plead with specificity.

Initially, Mission was not a signatory to the contract, nor does the contract "contain language evincing an intent to benefit the property owner." (*Aymes v. Gateway Demolition, Inc., et al*, 30 AD3d 196,[1st Dept. 2006]). Thus, Mission has no standing to bring the within action.

On a motion to dismiss under CPLR 3211(a)(7) "...the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory." (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 AD2d 243, 245[1st Dept. 2000]).

In their second cause of action, plaintiffs allege that:

The agreement and course of dealings between plaintiff and defendant Associates contained an implied-in-fact agreement wherein Associates agreed to complete the work within a specified time, to perform certain work based on the specifications of plaintiffs . . .to pay all of its subcontractors . . . to perform all work and pay all sums necessary to

remedy and remove all violations to the premises . . . Associates breached the implied in fact agreement . . .

An implied in fact contract “may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the presumed intention of the parties as indicated by their conduct.” (*Jemzura v. Jemzura*, 36 NY2d 496[1975]). “A promise may be implied when a court may justifiably infer that the promise would have been explicitly made, had attention been drawn to it.” (*Lapine v. Seinfeld*, 2011 WL 677371[Sup. Ct. NY Cnty.]). A contract cannot be implied in fact where . . . there is an express contract covering the subject matter involved.” (*Grombach Productions, Inc. V. Waring*, 293 NY 609[1944]).

Here, §3.3 of the Additions and Deletions Report covers the time period within which the work is to be completed by CAI. Exhibit “B,” “Contractor-Items to Consider/Include in Your Proposal - As of March 13, 2008, appended to the contract, details the work required based on the specifications of plaintiffs. Thus there can be no implied in fact contract as to those specific items.

However, as to the allegations that CAI promised to pay all of its subcontractors, and to perform all work and pay all sums necessary to remedy and remove all violations to the premises, plaintiffs state a valid claim for breach of an implied in fact contract. Those items are not covered in the express contract and the court may infer that the contract would have included such terms “had attention been drawn to it.” (see *Lapine*).

As to the third cause of action, it is well settled that the existence of an express contract bars a claim for unjust enrichment. (*Goldstein v. CIBC World Markets Corp.*, et al, 6 AD3d 295[1st Dept. 2004]).

Finally, “to recover under a theory of fraudulent inducement in a contract action, plaintiff must plead and prove “a breach of duty distinct from, or in addition to, the breach of contract.” (*Gosmile, Inc. v. Levine*, DDS, 2010 N.Y. Slip Op. 09408). “A fraud-based cause of action is duplicative of a breach of contract claim “when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract . . .” (*Manas v. VMS Associates, LLC*, 53 AD3d 441[1st Dept. 2008]).

Here, plaintiffs allege, in their fourth cause of action, that:

defendants Associates and Calabrese made representations to plaintiffs, leading plaintiffs to believe that defendants would complete their work timely, make all necessary payments to subcontractors, and remove all violations. The representations . . . were false, and defendants knew the representations were false when made.

Plaintiffs fail to state a separate claim for fraudulent inducement, as plaintiffs' fraud claim duplicates their breach of contract claim, and merely alleges that defendants did not intend to follow through on their promise to perform under the contract. For the foregoing reasons, the fourth cause of action is dismissed.

Wherefore, it is hereby

ORDERED that the motion is granted and the third and fourth causes of action of the complaint are dismissed as against Calabrese Associates, Inc.; and it is further

ORDERED that the fourth cause of action is dismissed as against Frank Calabrese; and it is further

ORDERED that defendant Calabrese Associates, Inc. is directed to serve an answer to the remainder of the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Room 308, 80 Centre Street, on Tuesday May 17, 2011 at 9:30 AM.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: March 8, 2011

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**

**MAR 11 2011**

NEW YORK  
COUNTY CLERK'S OFFICE