

<b>National Pub. Energy, Inc. v Prospect Capital Corp.</b>
2011 NY Slip Op 33644(U)
July 25, 2011
Supreme Court, Nassau County
Docket Number: 000572-11
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**NATIONAL PUBLIC ENERGY, INC.,**

**Plaintiff,**

**-against-**

**PROSPECT CAPITAL CORPORATION f/k/a  
PROSPECT ENERGY CORPORATION,**

**Defendant.**  
-----x

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 000572-11  
Motion Seq. No.: 1  
Submission Date: 5/24/11**

**The following papers having been read on this motion:**

- Notice of Motion, Affirmation in Support and Exhibit.....x**
- Memorandum of Law in Support.....x**
- Affirmation in Opposition and Exhibits.....x**
- Reply Affirmation in Further Support.....x**

This matter is before the Court for decision on the motion filed by Defendant Prospect Capital Corporation f/k/a Prospect Energy Corporation ("Defendant") on March 15, 2011 and submitted on May 24, 2011. For the reasons set forth below, the Court denies the motion.

**BACKGROUND**

**A. Relief Sought**

Defendant moves for an Order, pursuant to CPLR § 3211(a)(7), granting Defendant's motion to dismiss the Verified Complaint ("Complaint").

Plaintiff National Public Energy, Inc. ("Plaintiff") opposes Defendant's motion.

**B. The Parties' History**

The Complaint ("Complaint") (Ex. A to Levine Aff. in Supp.) alleges as follows:

On or about April of 2006, Defendant entered into a contract ("Contract") with Plaintiff,

pursuant to which Defendant retained Plaintiff to perform project management, development and consulting services. Plaintiff alleges that Greg Blair (“Blair”), the President of Plaintiff, entered into the Contract, an oral contract, with John F. Barry III and Grier Eliasek, the Presidents of Defendant corporation. Barry and Eliasek allegedly had the authority to enter into contracts on behalf of Defendant.

Plaintiff alleges that it fulfilled its obligations under the Contract and that Defendant made payments to Plaintiff in 2006 and 2007 for services rendered. Plaintiff alleges that Defendant failed to remit payments to Plaintiff for services rendered by Plaintiff in 2008 pursuant to the Contract.

The Complaint contains two (2) causes of action. The first, sounding in fraud, alleges that Defendant, through its employees, made false representations to Plaintiff to induce Plaintiff to enter into the Contract “for the purposes of stealing Plaintiffs’ services for their own financial benefit” (Compl. at ¶ 23). Plaintiff also seeks punitive damages in the first cause of action. In the second cause of action, Plaintiff Defendant breached the agreement between the parties.

Plaintiff now withdraws its fraud claim (Croutier Aff. in Opp. at ¶ 4). In response to Defendant’s argument that the breach of contract claim lacks adequate specificity, counsel for Plaintiff (“Plaintiff’s Counsel”) affirms that Defendant “has three boxes of correspondence between the parties and...is fully aware that the instant action is a result of defendant’s failure to pay the plaintiff for services rendered as agreed” (*id.* at ¶ 10). Plaintiff’s Counsel also provides copies of e-mails (Exs. A and B to Croutier Aff. in Opp.) that, he submits, demonstrate Defendant’s knowledge of the specifics of this action.

In reply, Defendant’s counsel submits that Plaintiff’s reference to boxes of documents and emails does not satisfy the requirement that the Complaint provide the specific terms of the contract on which liability for breach is predicated.

### C. The Parties’ Positions

Defendant submits that the remaining breach of contract cause of action is not viable because, other than alleging the approximate date when the contract was formed, Plaintiff has failed to provide adequate allegations to support a breach of contract claim, such as the nature of the contractual obligation alleged to have been violated, or the nature of the alleged breach.

Plaintiff opposes Defendant’s motion, submitting that it has adequately alleged the

elements of a breach of contract. Plaintiff alleges that the Complaint is sufficient because it alleges that Defendant “retained the plaintiff to perform a job, the plaintiff performed that job, and the defendant failed to pay the plaintiff as promised” (Crouiter Aff. in Opp. at ¶ 5). Plaintiff notes that the Complaint alleges the time period when the Contract was allegedly formed, sets forth the nature of services to be provided and alleges that Defendant failed to compensate Plaintiff for those services.

In reply, Defendant submits that Plaintiff may not rely on the documentation allegedly produced, or the emails to which Plaintiff refers, to remedy the insufficiencies of the Complaint.

### RULING OF THE COURT

#### A. Standards for Dismissal

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

#### B. Contract Cause of Action

In a breach of contract action, plaintiff is required to plead the provisions of the contract on which the claim is based. *Griffin Brothers v. Yatto*, 68 A.D.2d 1009 (3d Dept. 1979), citing *Lupinski v. Village of Ilion*, 59 A.D.2d 1050 (4<sup>th</sup> Dept. 1977). The complaint must, *inter alia*, set forth the terms of the agreement on which liability is predicated, either by express reference or by attaching a copy of the contract. *Chrysler Capital Corp. v. Hilltop Egg Farms, Inc.*, 129 A.D.2d 927, 928 (3d Dept. 1987), citing, *inter alia*, *Lupinski, supra*.

#### C. Application of these Principles to the Instant Action

While mindful that the Complaint does not contain extensive details, the Court denies Defendant’s motion to dismiss the cause of action for breach of contract, based on the Court’s

conclusion that the Complaint adequately pleads the provisions of the Contract on which Plaintiff's claim is based. Specifically, the Complaint alleges that in April of 2006, the parties entered into an agreement pursuant to which Plaintiff would provide project management, development and consulting services to Defendant. The Complaint alleges that Plaintiff provided those services and that Defendant failed to compensate Plaintiff for services provided in 2008.

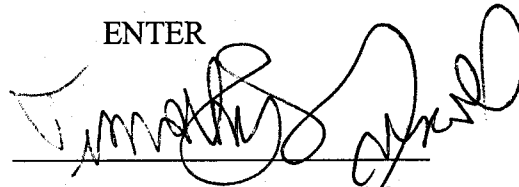
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on August 30, 2011 at 9:30 a.m.

DATED: Mineola, NY  
July 25, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
JUL 29 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE