| **Cayley Barrett Assoc. Ltd. v IJ Peisers Sons Inc.** |
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| 2011 NY Slip Op 33837(U) |
| July 5, 2011 |
| Sup Ct, New York County |
| Docket Number: 650953/2011 |
| Judge: Carol R. Edmead |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Cayley

- v -

IJ Peisers Sons

INDEX NO. 650953/2011
MOTION DATE 6/16/11
MOTION SEQ. NO. 001
MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

| | PAPERS NUMBERED |
|---|---|
| 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**

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant to dismiss plaintiff's second, fourth and fifth causes of action pursuant to CPLR 3211 (a)(7) for failure to state a claim, and for costs and disbursements is granted solely to the extent that the second, fourth and fifth causes of action are hereby severed and dismissed from this action; and it is further

ORDERED that defendant shall serve its Answer to the remaining claims in the Complaint pursuant to the CPLR; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 2, 2011, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: 7/5/11

HON. CAROL EDMEAD J.S.C.

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 35

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CAYLEY BARRETT ASSOCIATES LTD,

Index No.: 650953/2011

Plaintiff,

- against -

IJ PEISERS SONS INC.,

Defendant.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action arising from flooring work defendant IJ Peisers Sons, Inc. ("defendant") performed at the request of plaintiff Cayley Barrett Associates Ltd ("plaintiff"), defendant moves pursuant to CPLR 3211 (a)(7) to dismiss plaintiff's second, fourth and fifth causes of action for failure to state a claim, and for costs and disbursements.

*Factual Background*

Plaintiff alleges that on April 14, 2010, the parties entered into an agreement (the "agreement") for defendant to install flooring for plaintiff at a customer's apartment in a building located on Park Avenue in Manhattan. Plaintiff claims that defendant "improperly performed the installation of the flooring" causing damage to plaintiff as well as, *inter alia*, water damage to its customer's apartment and other apartments in the building ("breach of contract"). In its second cause of action, plaintiff alleges that defendant negligently performed the installation of the flooring ("negligence"). The third cause of action alleges that defendant breached the contract by using subcontractors to install the flooring instead of its own employees as agreed, causing plaintiff's insurer to decline to renew plaintiff's insurance policy ("breach of contract"). The fourth cause of action alleges that defendant's filing of a mechanic's lien for $16,902 against the

premises caused damages to plaintiff's reputation ("defamation/libel/slander").[1] Plaintiff's fifth cause of action alleges that defendant made false representations that it would use only its employees, with knowledge of their falsity and in disregard for the truth, causing harm to plaintiff's business and reputation ("misrepresentation").

In support of dismissal, defendant argues that plaintiff's second cause of action for negligence fails to plead a separate legal duty apart from the parties' contractual duty. According to the Complaint, the parties' relationship involved an arms-length contract. In the absence of a special legal duty separate and apart from the parties' contractual duties, the defendant has no duty to the plaintiff other than through the contractual agreement.

Defendant also argues that plaintiff failed to plead special damages to support its fourth and fifth claims sounding in defamation. Plaintiff's fourth cause of action purports to assert a bare bones claim for defamation, and fails to allege the elements of a defamation claim. First, plaintiff has not alleged that defendant's act of filing a mechanic's lien is libel *per se*. Nor does defendant's act of filing a mechanic's lien rise to the level of defamation *per se*, as it does not tend "to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or even induce an evil opinion of him in the minds of right thinking persons, and to deprive him of their friendly intercourse in society." Second, the plaintiff has not alleged that the defendant's act of filing a mechanic's lien is slander to title since only the owner of the real property has standing to prosecute that cause of action and the plaintiff has not alleged that it is the owner of the property affected by the mechanic's lien. Further, such claim fails because plaintiff has not pleaded

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[1] Defendant filed three mechanics liens for work it performed as plaintiff's subcontractor on February 10, 2011. On March 18, 2011, prior to the commencement of this action in April 2011, plaintiff filed three bonds discharging the three mechanics liens.

special damages (or any damages). Likewise, while is it unclear what the plaintiff is pleading in its fifth cause of action, it appears that this cause of action appears to assert a bare bones claim for defamation. Thus, such claim also fails because plaintiff failed to plead specific damages.

Defendant also argues that if defendant forecloses on the mechanics' lien, then the plaintiff can seek a statutory remedy to defendant's statutory right to file a mechanic's lien, specifically a cause of action for willful exaggeration of a lien pursuant to New York Lien Law § 39-a. New York's Lien Law, to the extent that it sets a cap on the amount of the lien, provides that "[i]f labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay . . . a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens . . . ." In a claim for willful exaggeration of a lien, sections §§ 39 and 39-a, read in tandem, provides that a lien is willfully exaggerated and thus void when in an action to enforce a mechanic's lien or in which the validity of the lien is an issue, the court finds "that a lienor has willfully exaggerated the amount for which he claims a lien as stated in his notice of lien" and "No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice" (§ 39). If a lien has been determined to be willfully exaggerated and declared void, a cause of action may ensue pursuant to N.Y. Lien Law § 39-a. Such a remedy is available only when the lienor seeks to enforce his lien, and in an action to collect a debt rather than enforce a mechanic's lien or litigate its validity, a cause of action for willful exaggeration cannot stand.

In opposition, plaintiff objects to facts contained in the motion which are not contained in the Complaint. Plaintiff contends that defendant annexed exhibits not contained in the Complaint, and sets forth procedural history and facts not asserted in the Complaint, all of which should be ignored.

As to the second cause of action, plaintiff argues that an exception to general rule permits it to assert a negligence claim where the contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition, so as to have launched a force or instrument of harm. Plaintiff's Complaint alleges that when performing the installation of the floor pursuant to the agreement, defendant negligently left a water valve beneath the kitchen sink open, resulting in water damage to third parties, including other apartment holders in the building. Such facts are sufficient to state a negligence claim.

As to the plaintiff's fourth cause of action, plaintiff alleges that the mechanic's lien was filed without any basis, thereby causing damage to its reputation, and defendant misinterprets this allegation as defamation. Therefore, any claims of defamation are irrelevant to this cause of action.

As to plaintiff's fifth cause of action, defendant again misinterprets this claim as one for defamation. Instead, such action is one for misrepresentation, based upon representations set forth in paragraphs #15 and #16 of the Complaint which were untrue, and which representations of defendant were relied upon by plaintiff to its detriment, resulting in the loss of plaintiff's insurance carrier.

In reply, defendant argues that plaintiff's second cause of action for negligence fails and the caselaw plaintiff cites is distinguishable.

Regarding the plaintiff's fourth cause of action, plaintiff does not cite any authority to support the position that New York State recognizes a distinction between a cause of action for damage to reputation and a cause of action for defamation. The index in the New York Pattern Jury Instructions for civil cases under "Reputation" cross references "Character or Reputation" which then cross references "Defamation." Rather, plaintiff is trying to plead a defamation cause of action without pleading special damages. If plaintiff had actually suffered special damages, it could have proposed new amended pleadings in its answering papers.

As to plaintiff's fifth cause of action, even if this cause of action is one for misrepresentation, the cause of action still fails because the plaintiff has not pled a cause of action for either (a) negligent misrepresentation or (b) intentional misrepresentation (which under New York law is fraud). Plaintiff failed to plead a "special relationship" of trust and confidence between the parties, which created a duty on the part of one party to impart correct information as required.

And, if plaintiff is pleading intentional misrepresentation (which under New York law is fraud), then such claim likewise fails because plaintiff failed to plead that the plaintiff relied on this "misrepresentation" and the plaintiff's fifth cause of action should be dismissed.

*Discussion*

The standard on a motion to dismiss a pleading pursuant to CPLR 3211[a][7] for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept

1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804 [1993]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen*

*Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]).

*Second Cause of Action: Negligence*

It is "axiomatic that 'a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated'" (*Moustakis v Christie's, Inc.*, 68 AD3d 637, 892 NYS2d 83 [1st Dept 2009] *citing Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389, 521 NYS2d 653 [1987]). Thus, "defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (*Pramer S.C.A. v Abaplus Intern. Corp.*, 76 AD3d 89, 907 NYS2d 154 [1st Dept 2010]).

In support of dismissal, defendant relies on plaintiff's Complaint, and has submitted the alleged contract between the parties and copies of three liens defendant placed upon the subject property. Such documents may be submitted on a motion to dismiss the Complaint for failure to state a cause of action (*see Kliebert v McKoan*, 228 AD2d 232 (*supra*) ("Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference, nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration")).

In light of such documents, and since it is uncontested that the parties entered into an agreement for defendant to install flooring at a certain price, plaintiff's second claim for negligence arising from defendant's alleged negligence performance under such agreement cannot stand. There is no allegation that defendant's duty to properly install flooring was a duty

separate and apart from the duty to so install under the agreement between the parties.

Plaintiff's reliance on *Grant v Caprice Management Corp.* (43 AD3d 708, 841 NYS2d 555 [1st Dept 2007]) for the proposition that it negligence claim may stand is misplaced. In *Grant*, the First Department stated that while "a contractual obligation, standing alone, will generally not give rise to tort liability *in favor of a third person* . . . , an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition so as to have "launched a force or instrument of harm" *(Grant v Caprice Mgmt. Corp.*, 43 AD3d 708, 841 NYS2d 555 [2007] *citing Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142 [2002], *quoting Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). However, in *Grant*, plaintiff sought damages for personal injuries she allegedly sustained when a window installed by the defendant/contractor struck her in the head. Thus, the issue before the Court was whether the plaintiff, who was not a party to the contract at issue, could maintain her negligence claim. Here, the allegation of negligence is between the parties to the contract and thus, *Grant* is inapplicable. Thus, as plaintiff's negligence claim fails to assert a duty separate and apart from defendant's duty to perform under the parties' agreement, the second cause of action must be dismissed.

*Fourth Cause of Action: Damage to Reputation*

As to plaintiff's fourth cause of action, plaintiff failed to allege special damages to support its claim for damage to "reputation."

According to New York Pattern Jury Instructions ("PJI"), "the gravamen of an action in defamation is an injury to reputation." (Civil Division 3 D I Intro. 1). The PJI continues:

Where the plaintiff alleges an injury to his or her reputation as a result of statements made

> or contributed by the defendant, the plaintiff is relegated to whatever remedy he or she may have under the law of defamation and cannot recover under principles of negligence . . .
> (*citing Colon v Rochester*, 307 AD2d 742, 762 NYS2d 749).

As such, contrary to plaintiff's contention, plaintiff's claim for damage to its reputation is in essence one for defamation, and plaintiff failed to cite any caselaw indicating that there is a separate cause of action for damage to reputation apart from defamation.

"Defamation, the making of a false statement about a person that 'tends to expose the p[erson] to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society' . . . can take one of two forms-slander or libel" (*Ava v NYP Holdings, Inc.*, 64 AD3d 407, 885 NYS2d 247 [1st Dept 2009] (internal citations omitted)). "Generally speaking, slander is defamatory matter addressed to the ear while libel is defamatory matter addressed to the eye *(id. citing* 2 PJI2d 3:23, at 196 [2009], Prosser and Keeton On Torts, § 112, *412 at 786 [5th ed.], and Sack on Defamation, § 2.3, at 2-9 [3d ed.]).

The elements of a defamation claim are (1) a false statement; (2) published without privilege or authorization to a third party; (3) constituting fault as judged by, at a minimum, a negligence standard, and (4) either causing special harm or constituting defamation *per se (Dillon v City of New York*, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999], citing Restatement of Torts (Second) § 558; *Public Relations Soc. of America, Inc., supra* at 823). Where the defamatory statement is libelous per se the plaintiff can recover damages without pleading and proving "special harm." (*Ava v NYP Holdings, Inc., supra* at 412, fn. 3).

Plaintiff's claim that defendant filed an improper lien causing damage to plaintiff's

reputation is wholly insufficient to support its fourth cause of action. Such liens, which indicate that plaintiff failed to pay defendant, does not tend to expose plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of it in the minds of right-thinking persons, or deprives it any "friendly intercourse in society."

Since the mechanic's liens are not libelous *per se*, plaintiff must allege special damages. In this regard, plaintiff's allegations in its Complaint that it suffered damages and "damage to its reputation" is insufficient (*see also, Epifani v Johnson*, 65 AD3d 224, 882 NYS2d 234 [2d Dept 2009] (where "the complaint only alleges that [plaintiff] "has been injured in her good name and reputation, has suffered great pain and mental anguish, and has otherwise been damaged in all to her damage [sic] in a sum to be proven at the time of trial according to proof," such "assertion fails to allege special damages with sufficient particularity")). It is noted that plaintiff does not allege any special damages in opposition to the motion. Accordingly, plaintiff's fourth cause of action must be dismissed.

*Fifth Cause of Action: Misrepresentation/Fraud*

As to plaintiff's fifth cause of action sounding in negligent misrepresentation, it is established to state such a cause of action in a contractual context, a plaintiff has to allege a special relationship, independent of the contract, from which a duty of care would arise, although it may be connected with or dependent on the contract (14 NY Prac, New York Law of Torts §7:17; *Ansari v New York Univ.*, 1997 WL 257473, *6 [SDNY 1997] [holding that there was no special relationship where "plaintiff and defendants were involved in an ordinary buyer and seller relationship"]). The Court in *Ansari v New York University* explains:

A "simple breach of contract is not a tort unless a legal duty independent of the contract

> has been violated." . . . That legal duty "must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract." . . . . "A tort cause of action may accompany a breach of contract only where said contract creates a relation out of which comes a duty independent of the contractual relation." . . . . Thus, in the absence of a special relationship distinct from the contract, a negligent misrepresentation claim must fail. (*id.* at 5)

A special relationship exists when (1) the parties are in a relationship of trust and confidence, or (2) one of the parties has superior knowledge (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, 831 NYS2d 364 [2007]; *Kimmell v Schaefer*, 89 NY2d 257, 263, 652 NYS2d 715 [1996]).

Plaintiff's claim in paragraphs #15 and #16 of the Complaint that pursuant to the parties' agreement, defendant agreed that the installation of the flooring would be made by employees and not by subcontractors or anyone else, even if untrue and relied upon by plaintiff to its detriment is insufficient (*Ansari v New York Univ.* at 6 (holding that "a negligent misrepresentation claim requires 'a closer degree of trust and reliance than that of ordinary buyer and seller.'")). Plaintiff failed to plead that anything other than a commercial, arms length contractual relationship between the parties. Further, the Complaint fails to allege that defendant relied upon any such misrepresentation, and the sole affirmation by plaintiff's attorney, who does not claim to have any personal knowledge of the facts, is insufficient to rectify this deficiency in the complaint (*Friedlander v Ariel*, 94 AD2d 628, 462 NYS2d 187 [1st Dept 1987] (stating that "An affirmation by an attorney who does not claim to have any personal knowledge of the facts has no probative value")).

It is also noted that plaintiff's third cause of action alleges that defendant breached the parties' agreement by failing to use its own employees to perform the work, as agreed, and there

is also no allegation in the fifth cause of action that the alleged misrepresentation to use defendant's employees arose from a duty separate and apart from such agreement (*OP Solutions, Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 900 NYS2d 48 [1st Dept 2010] (stating that plaintiff's causes of action for negligent misrepresentation is "not separate and apart from its claim for breach of contract. The claims are predicated upon precisely the same purported wrongful conduct as is the claim for breach of contract")).

Thus, based on the above, plaintiff's fifth cause of action fails to state a claim for negligent misrepresentation.

Nor does the fifth cause of action state a claim for fraud. The elements of fraudulent misrepresentation are: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of his or her reliance (*Swersky v Dreyer and Traub*, 219 AD2d 321, 326, 643 NYS2d 33 [1st Dept 1996]). As plaintiff failed to plead or attest in opposition that it relied on the purported "misrepresentation," and since there is no fraudulent misrepresentation that arose from a duty separate and apart from its claim for breach of contract, to the extent plaintiff alleges a claim for fraud in the fifth cause of action, plaintiff's fifth cause of action is insufficiently stated.

*Costs and Disbursements*

22 NYCRR 130-1.1, which governs costs and sanctions, provides:

> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. . . .
>
> * * * * *

(c) For purposes of this Part, conduct is frivolous if:
(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
(3) it asserts material factual statements that are false.

At the outset, the Court notes that defendant failed to assert any legal arguments in support of its general request for costs and disbursements. In any event, it cannot be said that plaintiff's failure to withdraw the second, fourth and fifth causes of action at defendant's request was undertaken to delay or prolong this action, or done to harass or maliciously injure the defendant. Nor is there any indication that plaintiff made material factual statements that were false. And, it cannot be said that the second, fourth and fifth causes of action were wholly unsupported by a reasonable argument.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion by defendant to dismiss plaintiff's second, fourth and fifth causes of action pursuant to CPLR 3211 (a)(7) for failure to state a claim, and for costs and disbursements is granted solely to the extent that the second, fourth and fifth causes of action are hereby severed and dismissed from this action; and it is further

ORDERED that defendant shall serve its Answer to the remaining claims in the Complaint pursuant to the CPLR; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 2, 2011, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: July 5, 2011

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD