

Kilgore Co., LLC v Harper Inv., Inc.

2012 NY Slip Op 33406(U)

March 8, 2012

Sup Ct, New York County

Docket Number: 650930/2011

Judge: Bernard J. Fried

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BERNARD J. FRIED**

E-FILE

PART 60

Index Number : 650930/2011

KILGORE COMPANIES, LLC

vs.

HARPER INVESTMENTS, INC.

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. 650930/11

MOTION DATE _____

MOTION SEQ. NO. 002

The
Not
Ans
Ref

for

No(s). _____
No(s). _____
No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

Dated: 3/8/2012


_____, J.S.C.
HON. BERNARD J. FRIED

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

----- X
KILGORE COMPANIES, LLC,

Plaintiff,

Index No. 650930/2011

- against -

HARPER INVESTMENTS, INC., HARPER
CONTRACTING, INC., HARPER SAND & GRAVEL,
INC., HARPER EXCAVATING, INC., HARPER READY
MIX CO., RULAN J. HARPER and PAULA HARPER,

Defendants.

DECISION AND ORDER

HARPER INVESTMENTS, INC., HARPER
CONTRACTING, INC., HARPER SAND & GRAVEL,
INC., HARPER EXCAVATING, INC., HARPER
READY MIX COMPANY, RULON J. HARPER,
and PAULA F. HARPER,

Plaintiffs,

Index No. 651490/2011

-against-

HARPER-KILGORE, LLC, now known as KILGORE
COMPANIES, LLC, and SUMMIT MATERIALS, LLC,

Defendants.

----- X

APPEARANCES:

For Harper Investments, Inc.,
Harper Contracting, Inc.,
Harper Sand & Gravel, Inc.
Harper Excavating, Inc.
Harper Sand & Gravel, Inc.
Harper Ready Mix
Company, Rulan J. Harper,
and Paula F. Harper:

For Kilgore Companies, LLC, and Summit
Materials, Inc.:

Duval & Stachenfeld LLP
101 Park Avenue
11th Floor
New York, NY 10178
(Richard J. Schulman)

Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, NY 10166
(Marshall R. King, Jonathon Siebald).

FRIED, J.:

These competing CPLR 3211 (a) motions to dismiss arise in related actions stemming from a July 12, 2010 asset purchase agreement (the agreement), as amended July 31, 2010, pursuant to which Kilgore Companies, LLC (Kilgore) purchased substantially all of the assets of the following five entities (the sellers): Harper Investments, Inc., Harper Contracting, Inc., Harper Sand & Gravel, Inc., Harper Excavating, Inc., and Harper Ready Mix Co. (the sellers).

According to the complaint in the Kilgore action, the sellers fraudulently induced Kilgore to enter the agreement by providing falsified books and records. The sellers allegedly did not properly record over \$3 million in accounts payable, some dating back to 2009, which improperly inflated the earnings, with the result that Kilgore paid \$15 million more for the businesses than they were worth. The purchase price was \$57.5 million, with \$7.5 million payable in equal installments over 15 years (the deferred payment agreement).

Kilgore filed its complaint against the sellers (the Kilgore action) on April 7, 2011, and amended it on May 18, 2011. On May 31, 2011, the sellers filed a complaint (the Harper action), which seeks declaratory relief on essentially the same issues as in the Kilgore action, and added Summit Material, LLC (Summit) as a defendant. Summit is the parent company of Kilgore. Rulan J. Harper, the president of Harper Investments, Inc., is also a defendant, along with the sellers, in the Kilgore action.

In motion sequence 001, Kilgore and Summit move, pursuant to CPLR 3211 (a) (4) and (7), to dismiss the complaint in the Harper action, on the ground of another action pending, and for failure to state a cause of action, arguing that the later-filed Harper action is duplicative of the Kilgore action, and that Summit is not a proper party because it is not a party to the agreement.

The motion is granted to the extent of dismissing the Harper action as against Summit, conditioned upon the representation at oral argument by counsel for Summit that Summit will make itself available for discovery to the same extent as though it were a party, and consolidating the Harper and Kilgore actions for all purposes, and is otherwise denied.

In motion sequence 002, the sellers move, pursuant to CPLR 3211 (a) (7), to dismiss the first through the fourth causes of action in the amended complaint in the Kilgore action, which sound, respectively, in fraudulent inducement, gross negligence, negligent misrepresentation, and unjust enrichment, for failure to state a cause of action. The motion is granted in part, dismissing the second and third causes of action, which sound, respectively, in negligent misrepresentation, and gross negligence, for failure to state a cause of action (CPLR 3211 [a] [7]). The fourth cause of action, sounding in unjust enrichment, has been withdrawn, according to counsel at oral argument.

The underlying issue in these actions is a dispute under the agreement over the sums of money, or specific property, that Kilgore is entitled to, if any, as indemnification for misrepresentations or breaches by the sellers, as contemplated by the agreement, and whether Kilgore properly exercised its right of set-off under the agreement. The four categories for which indemnification is sought are misrepresentation and falsification of books, records and

financial statements; failure to transfer equipment covered by the agreement; the cost of additional warranty or punch list work that sellers were responsible for under contracts with third parties; and \$83,818 in invoices from Wheeler Machinery Company.

Section 6.1 of the agreement, captioned, "Indemnification of the Acquiror," provides, as pertinent, that the sellers shall indemnify Kilgore "in respect of any and all losses ... sustained ... in connection with ... (a) any breach of representations or warranties made by Sellers in this Agreement ... [,] (b) the breach of any covenant, agreement or obligation ... contained in this Agreement, and (c) any and all Assumed Liabilities" (Ex. 1 to King aff.).

Section 6.3 (e), captioned "Offset," provides, as pertinent, that Kilgore

shall have the right ... to set off and apply against the Deferred Payable Amount or any future payments owed to the Sellers ... under the Corporate Office Lease or the Pit 16 Agreement the amount of any indemnity claims made by [Kilgore] against the Seller[s] ... pursuant to the provisions of this Agreement Any such set-off and application may be made by [Kilgore] of amounts due and owing by the Sellers and their Affiliates, and such amount shall, without any further action on the part of any party, be deemed applied and set off against such future payments

(ex. 1 to Kilgore Complaint).

Section 6.3 provides further that Kilgore shall give 15 day's notice to the sellers of its intent to set off, upon the expiration of which, Kilgore may set off the amounts claimed, in the absence of "a resolution that is acceptable to Kilgore in its sole discretion" (*id.*).

Kilgore served the sellers with notice of the amounts it claimed under each of the four categories, the sellers disputed the items, some adjustments were made, and Kilgore began to set off the remaining amounts against the office lease payments, under a July 31, 2010 lease, with annual rent of \$500,000. The sellers began eviction proceedings for non-payment of the office lease, and this action followed. The eviction proceedings are temporarily

stayed. The agreement contains a forum selection clause designating this court as the proper forum.

While the complaint in the Harper action would more appropriately be submitted as an answer asserting affirmative defenses, both actions place in issue the propriety of Kilgore's setoffs, and the validity of Kilgore's claims for indemnification pursuant to the agreement. Except for the gross negligence and negligent misrepresentation causes of action in the Kilgore action, the remaining causes of action in both complaints plead sufficient facts to state causes of action under the lenient standard of CPLR 3211 (a) (7). The Harper action seeks declaratory relief on its claims that Kilgore's indemnification claims are violative of the implied covenant of good faith and fair dealing, and that Kilgore did not provide the sellers with a sufficient explanation of the amounts being offset.

Kilgore's first cause of action for fraud in the inducement, while marginal and seeking only the same contractual measure of damages as in the contract claims, nonetheless satisfies CPLR 3211 (a) (7) because it contains factual allegations concerning each of the required elements necessary for a cause of action for fraudulent inducement, and these allegations must be considered in a light most favorable to Kilgore (*see Matlin Patterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]).

To state a claim for fraud under New York law, a plaintiff must plead with particularity: (1) a misrepresentation or omission of material fact; (2) that the defendant knew to be false (scienter); (3) that the defendant made with the intention of inducing reliance; (4) upon which plaintiff reasonably relied; and (5) damages (*see Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1st Dept 1996]).

Kilgore has pleaded facts with sufficient particularity to support each of the required elements (*see Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995]), under CPLR 3211 (a) (7) to satisfy the particularity requirement of CPLR 3016 (b). A fraud complaint need only “allege the basic facts to establish the elements of the cause of action ... [S]ection 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct [citation omitted]” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). The complaint “need only provide sufficient detail to inform defendants of the substance of the claims [citation and internal quotation marks omitted]” (*Kaufman v Cohen*, 307 AD2d 113, 120 [1st Dept 2003]).

While Kilgore has sufficiently pleaded scienter and reliance, it is dubious whether the sloppy bookkeeping by the sellers rises to the level of fraudulent intent, and whether Kilgore can show reasonable reliance in light of the unilateral right to set off at least \$8 million under the “pay now, fight later” indemnification provisions. Upon completion of discovery, the sellers may, if so advised, move to dismiss the fraudulent inducement cause of action in the context of a summary judgment motion.

Accordingly, it is

ORDERED that the motion (motion sequence 001) of Kilgore Companies, LLC and Summit Materials, LLC, to dismiss the complaint in the Harper Investments, Inc. action (Index no. 651490/2011) on the ground of another action pending (CPLR 3211 [a] [4]), and for failure to state a cause of action (CPLR 3211 [a] [7]), is granted to the extent of dismissing the Harper action as against Summit, conditioned upon the representation at oral argument by counsel for Summit that Summit will make itself available for discovery to the

same extent as though it were a party, and consolidating the Harper and Kilgore actions for all purposes, and is otherwise denied; and it is further

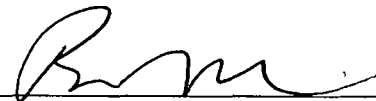
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party in motion sequence 001 shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the motion (motion sequence 002) of defendants Harper Investments, Inc., Harper Contracting, Inc., Harper Sand & Gravel, Inc., Harper Excavating, Inc., Harper Ready Mix Company, Rulan J. Harper, and Paula F. Harper pursuant to CPLR 3211 (a) (7), to dismiss the first through the fourth causes of action in the amended complaint in the Kilgore action, is granted, to the extent of dismissing the second and third causes of action, and is otherwise denied.

DATED: 3/8/2012

E N T E R:



J. S. C.

HON. BERNARD J. FRIED