

**Haradon v DB Gen. Contr., Inc.**

2013 NY Slip Op 31017(U)

April 29, 2013

Supreme Court, Suffolk County

Docket Number: 9309/2012

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
**I.A.S. TERM, PART 37 - SUFFOLK COUNTY**

**PRESENT:**

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

\_\_\_\_\_  
JILL HARADON and ERIC HARADON,

Plaintiffs,

-against-

BD GENERAL CONTRACTING, INC. d/b/a  
START TO FINISH CONSTRUCTION and  
BRUCE DISTLER,

Defendants.  
\_\_\_\_\_

ORIG. RETURN DATE: JULY 13, 2012  
FINAL SUBMISSION DATE: JULY 19, 2012  
MTN. SEQ. #: 001  
MOTION: MG

**PLTF'S/PET'S ATTORNEY:**  
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Upon the following papers numbered 1 to 9 read on this motion \_\_\_\_\_  
**TO DISMISS**

Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Affidavit and  
Affirmation in Opposition and supporting papers 5-7; Reply Affirmation 8; Reply  
Memorandum of Law 9; it is,

**ORDERED** that this motion by defendants, BD GENERAL CONTRACTING, INC. d/b/a START TO FINISH CONSTRUCTION and BRUCE DISTLER (collectively "defendants"), for an Order, pursuant to CPLR 3211 (a) (7), dismissing plaintiffs' Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth causes of action for failure to state a cause of action, and dismissing the complaint in its entirety as to defendant, BRUCE DISTLER ("Distler"), is hereby **GRANTED** in its entirety for the reasons set forth hereinafter. The Court has received opposition hereto from plaintiffs.

Plaintiffs, JILL HARADON and ERIC HARADON (collectively "plaintiffs"), commenced this action with the filing of a summons and verified

*RAK*

complaint on or about April 3, 2012, seeking to recover damages arising out of an agreement entered into between plaintiffs and defendant BD GENERAL CONTRACTING, INC. d/b/a START TO FINISH CONSTRUCTION to perform certain alterations and renovations to plaintiffs' home located at 100 Crestwood Road, Rocky Point, New York. Distler is an officer of the corporate defendant. Plaintiffs allege that they paid a total of \$327,275 to defendants pursuant to the parties' contract, but that defendants have failed to complete the work contemplated by the contract and have failed to perform the work in an acceptable manner. As such, plaintiffs seek damages herein in the amount of \$45,000, dismissal of two Mechanic's Liens filed by defendants, as well as an award of attorney's fees. Plaintiffs' complaint alleges that between August 29, 2011 and January 6, 2012, defendants provided plaintiffs with six written proposals/estimates, whose terms plaintiffs accepted. Thus, these proposals became a contract between the parties ("Contract").

Defendants have now moved to dismiss nine out of ten causes of action herein. Plaintiffs' complaint contains the following ten causes of action: (1) breach of contract; (2) property damage; (3) negligence; (4) unjust enrichment; (5) lien dismissal; (6) negligent misrepresentation; (7) deceptive acts or practices under General Business Law § 349; (8) fraud; (9) breach of the covenant of good faith and fair dealing; and (10) costs and reasonable attorneys' fees. Defendants argue that to the extent a viable cause of action exists against "START TO FINISH CONSTRUCTION," it is limited to plaintiffs' First cause of action for breach of contract, as all the other causes of action in the complaint are duplicative of the breach of contract claim, superfluous, or fail to state a cause of action. Accordingly, defendants move to dismiss the Second through Tenth causes of action. The Court will address defendants' arguments *seriatim*.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true in determining whether the complaint states any legally cognizable cause of action (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether the plaintiffs have a cause of action and not whether they may ultimately be successful on the merits (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]).

An alleged breach of contract cannot be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract (see *Rich v New York Cent. & Hudson Riv. R. R. Co.*, 87 NY 382 [1882]; *Riffat v Continental Ins. Co.*, 104 AD2d 301 [1984]). In the instant matter, the Court finds that plaintiffs have not alleged the violation of a legal duty independent of the Contract to support a cause of action for negligence against defendant. Thus, the Third cause of action alleging negligence must be dismissed. Regarding the Second cause of action labeled "property damage," the Court finds that this amorphous cause of action is either duplicative of the First cause of action for breach of contract (see e.g. *Cornhusker Farms, Inc. v Hunts Point Coop. Mkt., Inc.*, 2 AD3d 201 [2003]), or an impermissible cause of action sounding in negligence, which similarly fails to state a tort independent of the parties' contractual obligations (see CPLR 3013; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]; *Trans-Continental Credit & Collection Corp. v Foti*, 270 AD2d 250 [2000]; *Riffat v Continental Ins. Co.*, *supra*). Accordingly, the Second and Third causes of action must be dismissed.

Next, the Fourth cause of action for unjust enrichment must be dismissed on the ground that plaintiffs have alleged a valid and enforceable written contract exists between the parties, thereby precluding recovery on a theory of unjust enrichment (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]; *Cornhusker Farms, Inc. v Hunts Point Coop. Mkt., Inc.*, 2 AD3d 201, *supra*).

Plaintiffs' Fifth cause of action seeks dismissal of the two Mechanic's Liens filed by defendants, to wit: (1) Notice of Mechanic's Lien filed on March 13, 2012, in the amount of \$58,815.49; and (2) Notice of Mechanic's Lien filed on March 13, 2012, in the amount of \$8,800.00. Plaintiffs allege that the liens are in excess of the agreed-upon Contract amount, and are "willfully exaggerated." Lien Law §§ 39 and 39-a govern willfully exaggerated liens. However, such a claim may only be properly interposed in an action or proceeding to foreclose a mechanic's lien (see Lien Law §§ 39; 39-a; *Joe Smith, Inc. v Otis-Charles Corp.*, 304 NY 684 [1952]; *Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392 [2006]; *Mel-Stu Constr. Corp. v Melwood Constr. Corp.*, 101 AD2d 809 [1984]). Therefore, this cause of action may not be maintained herein.

With respect to the Sixth cause of action, a claim based on negligent misrepresentation requires proof that a declarant had a duty to use reasonable

care to impart correct information due to a special relationship existing between the parties, that the information was false, and that the other party reasonably relied on the information (see *Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487 [2004]; *Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792 [2002]; *Grammer v Turits*, 271 AD2d 644 [2000]). In this action, plaintiffs have failed to allege a special relationship of the parties independent from their contractual relationship to support a cause of action for negligent misrepresentation (see *Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913 [2011]). As such, it must be dismissed.

Regarding the Eighth cause of action for fraud, the essential elements of this claim are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, *supra*; *Orlando v Kukielka*, 40 AD3d 829 [2007]; *Ross v DeLorenzo*, 28 AD3d 631 [2006]). A fraud claim does not lie where the only fraud alleged arises from the breach of a contract. A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud (*Selinger Enters., Inc. v Cassuto*, 50 AD3d 766 [2008]). Here, plaintiffs' fraud allegations concern defendants' alleged inability to meet their contractual obligations (see *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896 [2010]). "General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support [a] claim" of fraud (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, *supra*; see *Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.*, *supra*; *Marlowe v Ferrari of Long Is., Inc.*, 61 AD3d 645 [2009]). Plaintiffs' complaint failed to allege any material misrepresentation that was not part of the Contract with plaintiffs (see *Lee v Matarrese*, 17 AD3d 539 [2005]). Further, mere conclusory language, without specific and detailed allegations establishing material misrepresentations of fact, is insufficient to state a cause of action to recover damages for fraud (see CPLR 3016 [b]; *Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678 [2005]).

Regarding the Seventh cause of action sounding in violation of General Business Law § 349, the Court finds that plaintiffs' complaint recites only conduct on the part of defendants relative to the private dispute between these parties regarding the subject Contract, and fails to present allegations of any scheme in dealing with the general public. The Court finds that this is essentially

a “private” contract dispute over the renovations to plaintiffs’ home which is unique to these parties, not conduct which affects the consuming public at large (see *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20 [1995]; *Breen Belgium BVBA v International Foreign Currency, Inc.*, 37 AD3d 633 [2007]; *Zawahir v Berkshire Life Ins. Co.*, 22 AD3d 841 [2005]; *Teller v Bill Hayes, Ltd.*, 213 AD2d 141 [1995]). Plaintiffs have not met the threshold requirement of charging conduct that has a broad impact on consumers at large so as to state a cause of action for deceptive acts or practices under General Business Law § 349 (see *New York University v Continental Ins. Co.*, 87 NY2d 308, *supra*).

Moreover, the Ninth cause of action alleging breach of the covenant of good faith and fair dealing cannot survive as an independent cause of action. Implicit in every contract is a covenant of good faith and fair dealing (see *Dalton v Educational Testing Servs.*, 87 NY2d 384 [1995]; *Van Valkenburgh, Nooger & Neville v Hayden Publ. Co.*, 30 NY2d 34 [1972], *cert denied* 409 US 875 [1972]). Allegations that a defendant acted in bad faith and thus violated the implicit contractual duties of good faith and fair dealing are not sufficient to state a violation of a duty independent of the contract (see *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, *supra*; *Scavo v Allstate Ins. Co.*, 238 AD2d 571 [1997]). In view of the foregoing, the Court finds that the Ninth cause of action alleging breach of the duty of good faith and fair dealing is duplicative of the First cause of action for breach of contract (see *Grazioli v Encompass Ins. Co.*, 40 AD3d 696 [2007]), and is, therefore, dismissed.

The Tenth cause of action must also be dismissed. An award of attorney’s fees is inappropriate in the absence of a valid claim for punitive damages or a statutory or contractual basis therefor (see *Naja v Pennsylvania General Ins. Co.*, 144 AD2d 213 [1988]; *Samovar of Russia Jewelry Antique Corp. v Generali, General Ins. Co.*, 102 AD2d 279 [1984]; see also *Hunt v Sharp*, 85 NY2d 883 [1995] [holding that under the “American rule,” to which New York adheres, the prevailing litigant ordinarily cannot collect its reasonable counsel fees from its unsuccessful opponents]). Plaintiffs have failed to plead a basis for an award of counsel fees in this matter, and a review of the parties’ Contract reveals that no such language exists therein. Accordingly, plaintiffs’ Tenth cause of action for an award of attorney’s fees of “at least \$6,000” must fail.

Finally, with respect to that branch of defendants’ application seeking to dismiss plaintiffs’ complaint as asserted against Distler individually, the Court

notes that the Contract was between plaintiffs and the corporate defendant. In addition, the complaint fails to allege an independent tort or conduct on the part of Distler in his individual capacity which would hold him personally liable (see *Maranga v McDonald & T. Corp.*, 8 AD3d 351 [2004]; *Gordon v Teramo & Co.*, 308 AD2d 432 [2003]; *Westminster Constr. Co. v Sherman*, 160 AD2d 867 [1990]). Moreover, in order to pierce the corporate veil, a showing must be made that: (1) the owner exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiffs which resulted in plaintiffs' injury (*TNS Holdings Inc. v MKI Sec. Corp.*, 92 NY2d 335 [1998]; *Matter of Goldman v Chapman*, 44 AD3d 938 [2007]). In this matter, plaintiffs have pleaded neither of the foregoing elements.

Therefore, upon favorably viewing the facts alleged as amplified and supplemented by plaintiffs' opposing submission (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiffs "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether they can ultimately establish the truth of their allegations before the trier of fact, the Court finds that plaintiffs have only sufficiently pleaded the elements of a cause of action for breach of contract against the corporate defendant.

Accordingly, defendants' motion to dismiss is **GRANTED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: April 29, 2013

  
\_\_\_\_\_  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION