

North Star Contr. Corp. v MTA Capital Constr. Co.

2013 NY Slip Op 33582(U)

April 18, 2013

Supreme Court, New York County

Docket Number: 150326/2011

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 150326/2011
NORTH STAR CONTRACTING CORP.
vs.
MTA CAPITAL CONSTRUCTION
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 4/18/13

Rec 2, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED (checked) NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED (checked) 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: IAS PART 61

-----x
NORTH STAR CONTRACTING CORP.,

Plaintiff,

Index No. 150326/2011
Motion Seq. 001

-against-

MTA CAPITAL CONSTRUCTION COMPANY,
Defendant.

-----x
HON. ANIL C. SINGH, J.S.C.:

Defendant MTA Construction Company (Defendant) moves for an order, pursuant to CPLR 3211, dismissing plaintiff North Star Contracting Corp.'s (Plaintiff) complaint. Plaintiff cross-moves to consolidate this action with *North Star Contracting Corp. v Judlau Contracting, Inc.* (Index Number 602730/2009), currently pending in Supreme Court, New York County.

I. STATEMENT OF FACTS

This action arises out of a construction project known as the Contract A-36006-South Ferry Terminal Finishes & System 7th Avenue/Broadway Line "A" Division (Project). Defendant served as a construction manager on the Project. Plaintiff was a subcontractor to Defendant's general contractor, Judlau Contracting, Inc., (Judlau) with regard to the track work.

The tracks which were to be installed, as designed by the New York City Transit Authority (NYCT), incorporated a novel vibration dampening system that required the track's rails to be fastened onto specially designed Low Vibration Track Blocks (LVT

Blocks) that are designed, manufactured and supplied by non-party Permanent Way Corporation (PWC). Three specific types of blocks were required for use in the Project, Type A blocks, Type GR blocks and DXO blocks. PWC is the patent holder and exclusive manufacturer and vendor of LVT Blocks. LVT Blocks had never been used in a track crossover switch project anywhere in the United States, prior to Defendant's designation of their use in this Project.

NYCT's plans and specifications required that Plaintiff use PWC's LVT Blocks. On October 24, 2006, Plaintiff entered into an agreement (Purchase Order) with PWC whereby all blocks purchased were in accordance with plans and specifications for the Project. Plaintiff alleges that, on numerous occasions, Defendant represented that PWC's LVT Blocks were suitable for their intended purpose, and of the highest quality and the best technology available. PWC's design provided that all LVT Blocks were manufactured with threaded inserts cast into the blocks (Concrete Inserts) in locations specified by PWC to receive fasteners to attach the rails to the LVT Blocks.

On or about October 15, 2007, Plaintiff procured the Type A LVT Blocks and began installation, but learned that the Concrete Inserts had been incorrectly positioned during manufacturing by PWC. Subsequent investigation and discussion led to Defendant instructing Plaintiff to remove and replace the defective blocks.

Plaintiff alleges that PWC's delivery of defective blocks caused extensive delays and extra work associated with replacing the defective blocks. Plaintiff claims that these setbacks resulted in direct economic losses.

Additionally, Plaintiff alleges that Defendant specifically represented that it had reviewed PWC's design and manufacturing process for Type GR and DXO Blocks and that they were satisfactory. Thereafter, Plaintiff obtained and began installation of the DXO blocks, until May 8, 2008, when cracks began to develop at the edges of the blocks when PWC-specified bolts were tightened into the Concrete Inserts. Defendant issued a directive requiring PWC to replace all the defective DXO blocks. Replacement blocks were delivered in Fall of 2008, causing an approximately five-month delay.

Plaintiff filed this suit asserting causes of action against Defendant for negligent misrepresentation, tortious interference with a contract and unjust enrichment. Defendant moves to dismiss the complaint. Plaintiff additionally cross-moves to consolidate this action with another lawsuit brought by it against Judlau, currently pending in Supreme Court, New York County.

II. ANALYSIS

A. Standard for Motion to Dismiss

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 within any cognizable legal theory'" (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint, liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (see *Leon*, 84 NY2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

B. Negligent Misrepresentation Claims

To state a cause of action for negligent misrepresentation, the plaintiff must allege "'(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information'" (*Gomez-Jimenez v New York Law School*, ___NY3d___, 2012 WL 6620602 *3, 2012 NY App Div LEXIS 8745 *9 [1st Dept 2012], quoting *Mandarin Trading Co. v Wildenstein*, 16 NY3d 173, 180 [2011]). Further, to state a cause of action for negligent misrepresentation based on the existence of the functional equivalent of privity, three conditions must be satisfied:

the defendant must have been aware that its representations were to be used for a particular purpose or

purposes; the defendant must have intended that the other party rely on the representations for such purpose or purposes; and there must have been some conduct on the part of the defendant linking it to the other party which evinces the defendant's understanding of that party's reliance

(*Beck v Studio Kenji, Ltd.*, 90 AD3d 462, 462-463 [1st Dept 2011]; see also *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]; see also *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 [1989]).

Defendant contends that there was no special relationship between the parties, nor was there any privity of contract.

In opposition, Plaintiff alleges that their relationship was the functional equivalent of privity. Plaintiff has alleged that Defendant made numerous representations as to the quality of PWC's LVT Blocks and that the blocks were suitable for use in the Project. Further, Plaintiff contends that once the first problems with the LVT blocks was discovered, Defendant made further representations that the blocks had been remedied and were satisfactory. By the very nature of Plaintiff's contractual obligations to purchase and use LVT Blocks manufactured by PWC, Defendant was aware of Plaintiff's reliance upon its representations that the blocks were suitable for use in the Project. Plaintiff has adequately pled facts that support a finding that a special relationship existed between the parties to support a claim for negligent misrepresentation.

Additionally, Defendant avers that Plaintiff fails to

demonstrate that it was entitled to rely upon statements Defendant made in regards to the LVT blocks. In response, Plaintiff states that, as Defendant was the construction manager, tasked with the responsibility of seeing to it that construction was undertaken in a timely and effective manner, and according to plan, Plaintiff was justified in relying upon Defendant's statements. Plaintiff alleges that if it had known that the Project was a prototype project, which was an exercise in research and development, it would have submitted a higher bid to cover the anticipated extra expenses associated with the typical trials and errors of a research and development project (and the delays associated therewith), or, at a bare minimum it would have included a line item for a contingency to account for any research and development delays.

"In order for a party to recover on [a claim for negligent misrepresentation], there must be a showing of either actual privity of contract between the parties or a relationship so close as to approach that of privity" (Solondz v. Barash, 225 A.D.2d 996, 998 [3d Dept., 1996] (internal quotation marks and citation omitted). "A 'special relationship' requires a closer degree of trust than an ordinary business relationship" (Id.).

Here, the complaint does not allege actual privity of contract between the parties. The complaint alleges that defendant entered into a contract (the "prime contract") with

Judlau Contracting, Inc. (Complaint, para. 6). Judlau is not a party to this action. The complaint alleges further that Judlau then entered into a contract (the "subcontract") with plaintiff (Complaint, para. 7).

Reading the complaint as liberally as required, the Court finds no support for plaintiff's contention that there was a "special relationship of trust and confidence" between plaintiff and defendant. Here, the plaintiff served as a construction manager on the project. However, plaintiff was a subcontractor to defendant's general contractor.

In short, the Court finds that the complaint alleges the existence of an ordinary business relationship between plaintiff and defendant. Plaintiff has not, therefore, pled sufficient facts to support a claim for negligent misrepresentation.

C. Tortious Interference Claims

The tort of interference with contractual relations, consists of four elements: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]).

Moreover, "a plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct"

(*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]; see also *Washington Ave. Assocs., Inc. v Euclid Equip., Inc.*, 229 AD2d 486, 487 [2d Dept 1996]). "Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation" (*Burrowes*, 25 AD3d at 373; see also *M.J. & K. Co., Inc. v Matthew Bender and Co., Inc.*, 220 AD2d 488, 490 [2d Dept 1995]).

Defendant avers that the alleged contract between Plaintiff and PWC was a purchase order (the Purchase Order), under the terms of which PWC agreed to make and sell to Plaintiff, and Plaintiff agreed to purchase from PWC, certain LVT blocks for the Project. Defendant further argues that Plaintiff has failed to allege that PWC would not have breached the Purchase Order outside of the purported inducement by Defendant.

In opposition, Plaintiff contends that the Purchase Order was a sufficient contract under which consequential damages would be foreseeable and recoverable. Plaintiff also asserts that it has specifically pled that Defendant reached a specific agreement with PWC, inducing PWC to avoid and otherwise deny responsibility to reimburse Plaintiff for the costs it incurred in replacing PWC's improperly designed and defective product, thereby causing PWC to breach its contract with Plaintiff. Moreover, Plaintiff alleges that PWC was alerted by Defendant to the fact that it

provided defective materials under its contract with Plaintiff, and by reaching a separate agreement with Defendant, PWC was induced into breaching its contract.

A plaintiff's claim for tortious interference with contract must contain allegations that the defendant "intentionally procured an actual breach by the contracting party" (*Levine v Yokell*, 258 AD2d 296, 296 [1st Dept 1999]). Plaintiff has not adequately shown that the actual breach of the terms of the Purchase Order was induced by Defendant. PWC breached the contract by failing to supply LVT Blocks "in accordance with plans and specifications for NYCT Contract A-36006 South Ferry Terminal Finishes & System 7th Avenue/Broadway Line 'A' Division" (complaint ¶ 12).

Plaintiff alleges that Defendant "induced PWC to avoid and otherwise deny responsibility to reimburse North Star for costs it incurred in replacing PWC's improperly designed and defective product, thereby causing PWC to breach its contract with North Star" (complaint ¶ 36). In support of this allegation, Plaintiff submits an uncertified printout of an email that states that a change order be issued to PWC to replace all of the defective blocks "free of charge to MTA-CCC," and that the sending back of the rubber boots and pads for those blocks, as well as the disposal of the defective blocks, occurred "free of charge to PWC." Plaintiff attempts to use this language to claim that

Defendant required Plaintiff to remove and replace the defective blocks free of charge to either Defendant or PWC. Plaintiff has not pled sufficient facts to support a claim for tortious interference, and Defendant's motion to dismiss this claim is granted.

D. Unjust Enrichment Claims


Plaintiff does not oppose this portion of Defendant's motion. Accordingly, Plaintiff's claim of unjust enrichment is dismissed.

For the above reasons, it is

ORDERED that the motion to dismiss is granted, and the complaint is dismissed in its entirety with prejudice; and it is further

ORDERED that the cross-motion to consolidate this action is denied as moot.

Dated: 4/18, 2013


Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE