

**3-G Servs. Ltd. v SAP V/Atlans 845 WEA Assoc. NF
LLC**

2014 NY Slip Op 30838(U)

March 25, 2014

Supreme Court, New York County

Docket Number: 650583/13

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN
Justice

PART 11

3-G SERVICES LIMITED,

Plaintiff,

INDEX NO. :650583/13

- v -

MOTION DATE 2/6/14

SAP V/ATLAND 845 WEA ASSOCIATES NF LLC,
et al.

MOTION SEQ. NO.: 001

Defendants.

The following papers, numbered 1 to _____ were read on this motion to dismiss _____

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Defendant Richard Jacobsen (“Jacobsen”) moves to dismiss the complaint against him for failure to state a cause of action against him. Plaintiff opposes the motion, which is denied for the reasons below.

This action arises out of a construction project at a building located at 845 West Avenue, New York, NY (“the Building”). The Building is owned by defendant SAP V/Atlans 845 WEA Associates NF, LLC (“SAP”). SAP retained B&B Construction, Inc. (“B&B”) as the general contractor on the project. Jacobsen is the sole officer and director of B&B.

The gravamen of this action is that although plaintiff performed its obligations under the purchase order with B&B, B&B failed to fully pay it for its work resulting in a balance due and

owing of \$74,468.03. The complaint contains causes of action against B&B and/or SAP for foreclosure of a mechanics lien, breach of contract, unjust enrichment and quantum meruit. At issue on this motion is the fifth cause of action for fraud against Jacobsen. That cause of action alleges that pursuant to the construction contract between B&B and SAP, “B&B submitted progress payment applications and certifications that were signed and submitted by Jacobsen or by B&B employees with Jacobsen’s knowledge” (Complaint, ¶ 50). It is further alleged that the certifications “represented that B&B’s subcontractors and suppliers had been paid for B&B’s work which previous applications were issued and payment received from SAP [and that such representations] were false and made with knowledge that SAP would rely on such representation, with intent to thereby induce SAP ...to pay B&B the full amount of the payment application” (*Id.*). It is further alleged that B&B’s subcontractor and suppliers, including plaintiff had not been paid and that the SAP relied on the false representations without which it would have withheld sufficient amounts to pay plaintiff’s claims. The cause of action seeks \$74,468.03, which is the same amount sought in connection with the breach of contract claims against B&B and SAP.

Jacobsen moves to dismiss the fraud claim against him for failure to state a cause of action, arguing that the claim does not meet the heightened pleading requirements for fraud set forth in CPLR 3016(b). In particular, Jacobsen argues that in the absence of any allegation that Jacobsen made any misrepresentations to plaintiff, or that Jacobsen intended to induce plaintiff to rely upon said misrepresentation. In other words, Jacobsen argues as the only fraud alleged was made in certifications provided to SAP, as opposed to plaintiff, the claim against him must be dismissed.

In opposition, plaintiff argues that complaint is sufficient to state a cause of action, noting that it has been held that misrepresentations made to, and relied upon by a third party, which causes detriment to a plaintiff are sufficient to provide a basis for a fraud claim. See *e.g. Desser v. Shatz*, 182 AD2d 478, 479-480 (1st Dept 1992)(finding that plaintiff has sufficiently alleged a fraudulent misrepresentation claim, writing that reliance by a third party “to the clear detriment of plaintiff is manifest, and it is of no moment, in this context, that the false representations was not made directly to plaintiffs).

In reply, Jacobsen cites case law holding that a cause of action for fraud is not stated where the alleged misrepresentations are made to a third party, and not the party seeking recovery. See e.g. Briarpatch Limited, L.P. v. Frankfurt Garbus Klein & Selz, 13 AD3d 296 (1st Dept 2004); Garlick v. Carmel, 141 AD2d 501 (2d Dept 1988); Aviation Capital Partners, LLC v. Gaz Realty Inc., 2013 WL 1723679 (Sup Ct NY Co.)(J, Kornreich).

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be interpreted liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). However, “[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b).” Euryclei Partners, L.P. v. Seward & Kissel, L.P., 12 NY3d 553, 559 (2009). CPLR 3016 (b) requires that claims for fraud set forth “the circumstances constituting the wrong...in detail.” Thus, “[a]lthough there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege basic facts to establish the elements of the cause of action.” Euryclei Partners, L.P. v. Seward & Kissel, L.P., 12 NY3d at 559.

To plead a viable cause of action for fraud, it must be alleged that the defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendant when made, for the purpose of inducing reliance, justifiable reliance on the alleged misrepresentation or omission by the victim of the fraud, and injury. Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996).

Here, the court finds that the complaint is sufficient to state a cause of action for fraud, based on false representations were made to a third party. Although a plaintiff alleging fraud must generally show that it reasonably relied upon a misrepresentation made by the defendant to its detriment, under the so-called third-party reliance doctrine, a fraud claim is stated when a false misrepresentation is made to a third party resulting in an injury to plaintiff. See Desser v. Shatz, 182 AD2d at 479-480; Buxton Mfg. Co., Inc. v. Valiant Moving & Storage, Inc., 239 AD2d 452 (2d Dept 1997); Rice v. Manley, 66 NY 82, 87 (1876); Bruff v. Mali, 36 NY 200 (1867). In Buxton supra, a case remarkably similar to the instant one, the Appellate Division, Second Department upheld a fraud cause of action based on allegations that defendant made false

representations in a "progress payment certification" stating that all subcontractors had been paid, resulting in detriment to plaintiff since defendant failed to pay plaintiff for all its work.


Furthermore, while there is recent Appellate Division precedent to the contrary, those cases do not specifically address or reject the third-party reliance doctrine. See e.g. Briarpatch Limited, L.P. v. Frankfurt Garbus Klein & Selz, 13 AD3d at 297; Garlick v. Carmel, 141 AD2d at 502. Under these circumstances, and based on the allegations in the complaint that plaintiff was injured as a result of misrepresentations made by Jacobsen, the motion to dismiss the fifth cause of action is denied.

Accordingly, it is

ORDERED that the motion to dismiss by defendant Richard Jacobsen is denied; and it is further

ORDERED that the parties shall appear for a previously scheduled compliance conference in Part 11, room 351, on March 13, 2014, at 9:30 am.

Dated: March 25 2014



J.S.C.
HON. JOAN A. MADDEN
J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION