Fulton Quality Foods LLC v Arcon Constr. Group Inc.
2014 NY Slip Op 31618(U)
June 20, 2014
Supreme Court, New York County
Docket Number: 654493/2012
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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FULTON QUALITY FOODS LLC,

Plaintiff,

-against-

ARCON CONSTRUCTION GROUP INC. and ATHENA ZIAS,

Defendants.

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Index No.: 654493/2012

Motion Sequence: 001

DECISION & ORDER

Hon Shlomo S. Hagler, J.S.C.:

Defendants Arcon Construction Group Inc. ("Arcon") and Athena Zias ("Zias") (collectively "defendants") move, pursuant to CPLR § 3211(a)(7), to dismiss plaintiff Fulton Quality Foods LLC's ("Fulton" or "plaintiff") second cause of action alleging that both defendants committed the tort of injurious falsehood by filing a mechanic's lien against the plaintiff and plaintiff's third cause of action against Zias personally, alleging that Zias failed to adequately supervise the construction work.[1] Plaintiff opposes the motion.

Factual Background

Fulton and Arcon entered into a contract on or about November 22, 2011 for Arcon to provide construction work for a restaurant for Fulton at 111 Fulton Street, New York, New York ("the Property") for a contract price of $765,785.00 ("the Contract") (Affidavit of Athena Zias in Support of Defendants' Motion to Dismiss the Complaint ["Zias Aff."], at ¶ 4 and Exhibit "B"). Arcon is a New York domestic corporation and Zias signed the

1. Although defendants' motion initially sought to have plaintiff's entire complaint dismissed, at oral argument it was established that the defendants were not moving to dismiss the complaint's first cause of action for breach of contract. (Transcript of April 29, 2013 Court Proceeding ["4/29/13 Transcript"] at p. 13, lines 17-22.)

Contract with Fulton as president of Arcon (Exhibit "B" to Zias Aff.). Arcon alleges that it completed its work under the Contract, as well as additional work ordered by Fulton, in a professional manner as of June 17, 2012, and that Fulton opened its restaurant a few weeks later (Zias Aff. at ¶ 5). Arcon claims that Fulton failed to pay $91,793.65 due for the work on the Contract and $28,000.00 for the additional work, for a total of $119,793.65 (Zias Aff. at ¶ 6). On or about November 15, 2012, Arcon filed a mechanic's lien, signed by Zias as president of Arcon, against the Property in the amount of $91,793.65, the amount Arcon claims was unpaid by Fulton under the Contract (Zias Aff. at ¶ 7 and Exhibit "D"). Thereafter, on or about November 26, 2012, Arcon filed a Summons and Complaint in the Supreme Court, New York County, under Index Number 158243/2012 against Fulton seeking damages for breach of contract (first cause of action), promissory/equitable estoppel (second cause of action), quantum meruit (third cause of action), account stated (fourth cause of action), unjust enrichment (fifth cause of action), and to foreclose on the filed mechanic's lien against both Fulton and 111 Fulton Street Investors, LLC, the owner of the Property (sixth cause of action) (Zias Aff. at ¶ 7 and Exhibit "C").

Fulton interposed an answer and counterclaims to Arcon's lawsuit, wherein Fulton denied that it owed Arcon any money and counterclaimed for breach of contract and wilful exaggeration of the mechanic's lien. In addition, Fulton filed this separate action alleging that Arcon breached its contract with Fulton (Fulton's first cause of action), that Fulton did not owe money to Arcon and therefore the mechanic's lien amounted to an injurious falsehood (Fulton's second cause of action). Additionally, plaintiff alleges that Zias herself was responsible for overseeing the construction, which she failed to do (Fulton's third cause of action). Defendants claim that Arcon did not breach its contract with Fulton, the bills Arcon submitted to Fulton were accurate and correct, Arcon's mechanic's lien against Fulton

was valid and enforceable, and that Zias had no obligation to personally supervise Arcon's work under the Contract with Fulton.

DISCUSSION

Standard of Review for CPLR § 3211 Motion to Dismiss

It is well settled that in determining a motion to dismiss pursuant to CPLR § 3211, the courts must liberally construe the pleadings, accept the facts as alleged to be true and interpret them in light most favorable to the non-movant. See, *Leon v. Martinez*, 84 NY2d 83 (1994). However, as stated in *SWR Assocs. v Bellport Beach Prop. Owners*, 129 AD2d 328 (2d Dept 1987):

> The rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom on a motion addressed to the sufficiency of the pleadings . . . does not apply to allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence.

(129 AD2d at 331 [citations omitted]; *see also Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]; *David v Hack*, 97 AD3d 437, 438 [1st Dept 2012].)

In this motion, therefore, this Court will liberally construe the pleadings, accept the facts as alleged to be true and interpret them in light most favorable to the non-movant but will not necessarily accept as true any bare legal conclusions or factual claims which are inherently incredible or flatly contradicted by documentary evidence.

Plaintiff's Second Cause of Action Against Both Arcon and Zias for Injurious Falsehood

In its second cause of action, plaintiff alleges that Arcon and Zias, by filing a false mechanic's lien, published an injurious falsehood against Fulton causing it damages.

An injurious falsehood is a statement that injures a person by leading other persons into action that is detrimental, as opposed to a statement that injures a party's reputation, which would fall under the torts of libel or slander (103 NY Jur Torts § 19 [2009]). The elements of a cause of action for injurious falsehood are (1) a false and misleading statement harmful to the interests of another, (2) uttered or published maliciously and with intent to harm another, or done recklessly and without regard to its consequences, and (3) a reasonably prudent person would or should anticipate that damage to another would naturally flow therefrom (*id.*). Furthermore, a cause of action for injurious falsehood exists "when one publishes false and disparaging statements about another's property under circumstances which would lead a reasonable person to anticipate that damage might flow therefrom" (*Cunningham v Hagedorn*, 72 AD2d 702, 704 [1st Dept 1979] *citing Lampert v Edelman*, 24 AD2d 562 [1st Dept 1965]). In addition, the injured party must plead with specificity that it suffered special damages as a result of the false and disparaging statement (*Rall v Hellman*, 284 AD2d 113, 114 [1st Dept 2001]; *DiSanto v Forsyth*, 258 AD2d 497, 498 [2d Dept 1999]; *Nyack Hospital v Empire Blue Cross and Blue Shield*, 253 AD2d 743, 744 [2d Dept 1998]).

Defendants argue that plaintiff's injurious falsehood claims must fail because that claim is based upon Arcon's filing of its mechanic's lien and that the exclusive legal remedy available to Fulton on that claim is for "wilful exaggeration" of a mechanic's lien pursuant to Lien Law § 39-a. In support of this argument, defendants cite the cases of *E-J Electric Installation Co. v Miller & Raved, Inc.* (51 AD2d 264 [1st Dept 1976]) and *Marjam Supply Co., Inc. v John J. Griffin Roofing, Inc.* (2009 NY Slip Op 32188[U] [Sup. Ct., Nassau County 2009, I. B. Warshawsky, J.]). Furthermore, defendants argue that Zias, as an officer

of the corporation, cannot be held personally liable for the filing of the mechanic's lien on behalf of Arcon, absent fraud.

Plaintiff argues that a claim for injurious falsehood can still be brought based on the wilful exaggeration of or an invalid mechanic's lien, relying upon the Second Department's decision in *J&D Evans Constr. Corp. v Iannucci* (84 AD3d 1171 [2d Dept 2011]), which held that a counterclaim sufficiently stated a claim for injurious falsehood where that counterclaim alleged that the filing of false or wilfully exaggerated mechanic's lien caused the defendant to lose a favorable mortgage refinancing. In this case, plaintiff alleges that as a result of the defendant filing a false mechanic's lien, the plaintiff suffered damages consisting of attorney's fees and other damages yet to be ascertained, should the plaintiff be found to be in violation of their lease agreement. Plaintiff also argues that Zias can be held personally liable for her filing of the allegedly false mechanic's lien. Plaintiff argues that *E-J Electric Installation Co. v Miller & Raved, Inc.* is distinguishable because that case involved a foreclosure of a mechanic's lien, whereas this action does not involve such a foreclosure.

This Court must follow the precedent established by the First Department, Appellate Division in *E-J Electric Installation Co. v Miller & Raved, Inc.*, which held that the exclusive remedy for false or wilful exaggeration of a mechanic's lien is Lien Law 39-a and any other claims may not be maintained.[2]

Even assuming, *arguendo*, that the Second Department's holding in *J&D Evans Constr. Corp. v Iannucci* allowing a claim for injurious falsehood on a false or wilfully

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2. In *E-J Electric Installation Co. v Miller & Raved, Inc.*, the additional claims, which the court held could not be maintained were negligence and breach of duty in filing an exaggerated claim, defamation, and abuse of process.

exaggerated mechanic's lien applies, plaintiff here has failed to either plead or present an affidavit in opposition which would demonstrate that plaintiff has suffered any actual special damages at this time. In order to establish a *prima facie* case for injurious falsehood, the plaintiff **must** plead with specificity that it incurred special damages as a result of the disparaging statement (*see Rall v. Hellman*, 284 AD2d at 114 [no allegation that plaintiff actually lost any money as a result of the falsehood]; *DiSanto v Forsyth*, 258 AD2d at 498 ["general allegations of lost sales from unidentified lost customers are insufficient" for special damages]; *Nyack Hospital v Empire Blue Cross and Blue Shield*, 253 AD2d at 744 ["plaintiff's general allegations of lost revenues and 'increased massive staff effort' did not satisfy the requirement of pleading special damages with particularity"]; *SWR Assocs. v Bellport Beach Prop. Owners*, 129 AD2d 328, 331 [2d Dept 1987] ["In an action to recover damages for injurious falsehood, special damages must be proved to be the direct and natural result of the falsehood"]).

Special damages consist of real out-of-pocket expenses that the plaintiff incurred as a result of the defendants' tortuous conduct. While attorney's fees "incurred in avoiding damage to plaintiff's reputation and business may be actionable under an injurious falsehood theory (*see Rall v Hellman*, 284 AD2d at 114), attorney's fees themselves do not satisfy the special damages requirement (*id.*; *BCRE 230 Riverside LLC, v Fuchs*, 59 AD3d 282, 283-284 [1st Dept 2009]). Plaintiff's claims that Arcon's "filing of a mechanic's lien **may** constitute a breach of [Fulton's] Lease Agreement (Plaintiff's Complaint at ¶ 12 [emphasis added]) and that Fulton's damages "**will** arise **should Fulton be found** to be in breach of [its] Lease Agreement by virtue of the filing of the Mechanic's Lien" (Plaintiff's Complaint at ¶ 12 [emphasis added]), fail to establish special damages because these claimed damages have not yet occurred at this time and it is mere speculation that they even will come to pass.

Thus, even liberally construing plaintiff's pleadings, accepting plaintiff's alleged facts as true and interpreting them in a light most favorable to the non-moving plaintiff, Fulton has failed allege the special damages required to sustain a claim for injurious falsehood. As a result, plaintiff's second cause of action for injurious falsehood must be dismissed.

Plaintiff's Third Cause of Action Against Zias for Failing to Properly and Adequately Supervise Arcon's Work at the Property

In its third cause of action, plaintiff claims that "Zias, as president and/or principal shareholder of Arcon had a duty to properly and adequately supervise the work of Arcon at the Property to insure that the work was performed properly, fully and/or timely." (Plaintiff's Complaint at ¶ 16).

The Contract clearly states that supervision of Arcon's work is to be performed by someone with experience in the field. Nowhere does the Contract state that any particular individual is responsible to supervise the work, let alone Zias herself, and plaintiff has not pointed to any such provision in the Contract. In its complaint, plaintiff has alleged that "Zias personally supervised and/or participated in the construction work performed by Arcon at the Premises" (Plaintiff's Complaint at ¶ 17). Even accepting this alleged fact as true, it would only apply to Zias' duty under the Contract and would only constitute a claim for breach of contract, which is plaintiff's first cause of action and which has not been challenged on this motion.

Plaintiff's claim that there is a common law requirement that the owner of the company supervise the construction is unsubstantiated and unavailing. Under plaintiff's argument, every breach of contract claim would thereby result in a claim for personal liability for every company owner and corporate officer. Such a result would be a vast overbroadening of liability for breach of contract.

The cases cited by plaintiff to support its argument that "[b]y undertaking such activities, Zias was under a duty implied by law to perform same in a non-negligent manner" (Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss at bottom of page 11), *Glanzer v Shepard*, 233 NY 236, 239-240 (1992) and *West Side Corp. v PPG Industries, Inc.*, 225 AD2d 459 (1st Dept 1996) are inapplicable as they dealt with a duty in the absence of an existing contract between the parties. In *Glanzer v Shepard*, plaintiff purchaser entered into a contract with a seller to purchase beans, the weight of which was to be certified by defendants who were engaged in the business as public weighers. The sellers engaged the defendant to act as the certifying weighers. When it was discovered that the weight certified by the defendant was significantly less than the actual weight, plaintiff purchaser sued the defendant public weigher even though there was no contract between them. In that case, the Court of Appeals held that the defendant, as a public weigher engaged in "a common calling," owed a duty to the purchaser to certify a correct weight. Similarly, in *West Side Corp. v PPG Industries, Inc.*, the First Department stated that a defendant who undertakes to perform inspections of the plaintiff's property **in the absence of a legal duty to do so (e.g., in the absence of a contract)**, becomes subject to a duty to perform the inspections in a careful and non-negligent manner (225 AD2d at 460).

A case which is more directly on point, factually and legally, is *Westminster Constr. Co. v Sherman*, 160 AD2d 867 (2d Dept 1990), where, in a third-party complaint, homeowners sued the respondent, both individually and as principal officer of the construction company which performed construction work on the homeowners' premises, alleging he "supervised the construction [at the premises] in a negligent and careless manner" (160 AD2d at 867-868). The Supreme Court granted respondent's motion to

dismiss the third-party complaint for failure to state a cause of action (*id.* at 868) and the Appellate Division affirmed. The appellate court stated that:

> The gravamen of two of the three causes of action set forth in the third-party complaint is that the work that was performed under the contract was performed in a less than skillful and workmanlike manner. This states a cause of action to recover damages for breach of contract, not negligence. . . . Since the respondent, individually, cannot under the circumstances of this case, be held liable for a breach of contract between his corporation and another, those causes of action were properly dismissed.

(160 AD2d at 868 [citations omitted].) (*See also Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 [1987] ["It is a well-established principal 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]; *Wiernik v Kurth*, 59 AD3d 535, 537 [2d Dept 2009]; *O'Dell v Ginsburg*, 253 AD2d 544, 544-545 [2d Dept 1998]; *Merritt v Hooshang Constr. Inc.*, 216 AD2d 542, 543-544 [2d Dept 1995]; *431 Conklin Corp. v Rice*, 181 AD2d 716, 717-718 [2d Dept 1992].)

As a result, defendant Zias' motion to dismiss plaintiff's third cause of action to hold Zias personally liable to properly and adequately supervise the work of Arcon at the Property is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion by defendants to dismiss the second and third causes of action of the complaint is granted to the extent of dismissing the second and third causes of action of the complaint of plaintiff Fulton Quality Foods LLC against defendants Arcon Construction Group and Athena Zias.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: June 20, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.