

FCRC Modular, LLC v Skanska Modular LLC
2016 NY Slip Op 31494(U)
August 4, 2016
Supreme Court, New York County
Docket Number: 652721/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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FCRC MODULAR, LLC and FC MODULAR, LLC
(f/k/a FC+SKANSKA MODULAR, LLC)

Plaintiff,

-against-

SKANSKA MODULAR LLC and RICHARD KENNEDY,

Defendants.

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SKANSKA MODULAR LLC and RICHARD KENNEDY,

Third-Party Plaintiffs,

-against-

FOREST CITY RATNER COMPANIES, LLC, FOREST
CITY ENTERPRISES, INC., JOHN DOES 1-10, and
JANE DOE,

Third-Party Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action arising from the breach of an LLC Agreement, plaintiffs FCRC Modular, LLC (“FCRC Modular”) and FC Modular, LLC (“the Company”) and third-party defendants Forest City Ratner Companies, and Forest City Enterprises, Inc. move to dismiss Skanska Modular LLC (“Skanska Modular”) and Richard Kennedy’s counterclaims, third-party complaint, and certain affirmative defenses (motion seq. 002).

DECISION/ORDER

Index No. 652721/2014
Motion Seq. 002 and 003

In a separate motion, Skanska Modular and Kennedy move for an order holding non-parties Berlin Rosen Ltd. and Greenland US Holding, Inc. a/k/a Greenland Group Co., Greenland Company USA, and Greenland US in civil contempt of court based on their failure properly to respond to a *subpoena duces tecum* (motion seq. 003). The two motions are consolidated for disposition.

Background

This action arises out of a dispute over the delayed construction of a high-rise residential building (“the B2 tower”) using a new modular construction technology. This new technology involves the fabrication of modules at a factory to be later erected and stacked together to form a completed building. The B2 tower is part of a development project adjacent to the Barclays Center in the area formerly known as Atlantic Yards.

FC Modular, formerly known as FC+Skanska Modular, LLC, was the company (“the Company”) hired to fabricate the modules for the B2 tower. The Company’s two original members were FCRC Modular and Skanska Modular, pursuant to an LLC Agreement dated October 31, 2012 (“the LLC Agreement”). As alleged, the board of the Company consisted of three directors appointed by FCRC Modular (“the FCRC Modular Directors”) and three directors appointed by Skanska Modular.

The planning for the B2 tower construction dates back to 2011. That year, Forest City Ratner Companies, LLC (“Forest City”), the developer of the B2 tower, began searching for a partner to establish a modular factory business to supply modules for the B2 tower. Skanska USA Building, Inc. (“Skanska USA”) is a company that responded to Forest City’s solicitation for a business partner.

During their discussions, Skanska USA and Forest City entered into a confidentiality agreement dated January 6, 2012 (“the Confidentiality Agreement”) to protect certain confidential information shared by Forest City. A few days later, on January 9, 2012, Forest City transmitted a four-page document entitled “Opportunity Brief – NYC Modular Factory” to Skanska USA. The Opportunity Brief stated that “Forest City is committed to building the first residential building at Atlantic Yards by utilizing the [modular] solution developed during the two year R&D effort,” and that Forest City was “seeking an additional partner to establish and grow a viable, cost competitive modular factory business . . . using innovative Intellectual Property and Modern Methods of Construction.”

After several months of negotiations with Forest City, Skanska USA signed a construction management agreement dated October 31, 2012 (“the CM Agreement”), with Forest City’s affiliate, Atlantic Yards B2 Owner, LLC (“B2 Owner”). Under the CM Agreement, Skanska USA agreed to fabricate, deliver, and erect the modules, and perform construction management services for the B2 tower. Skanska USA then hired the Company, as a subcontractor, to supply modules for a fixed price of \$31,450,087, pursuant to a purchase order (“the Purchase Order”).

To fulfill its obligations under the Purchase Order, the Company negotiated and signed a lease agreement for a factory site, took steps to outfit a factory where the modules would be constructed, and hired workers through a collective bargaining agreement.

Skanska Modular served as manager of the Company and undertook responsibility for training the workers at the factory. As alleged in the complaint, Richard Kennedy served as

the Company's president and director, and maintained two other roles as Skanska Modular's president and Skanska USA's co-chief operating officer.

Despite the parties' expectations, progress on the B2 tower was slower than anticipated. On August 8, 2014, Skanska USA sent a notice of termination to B2 Owner, which identified several breaches of the CM Agreement by B2 Owner. On the same date, Kennedy allegedly issued a notice to hold a board meeting of the Company on August 19, 2014, to discuss whether the Company should lay off its employees working at the factory. A Company board meeting eventually took place by phone on August 25, 2014, but Kennedy allegedly did not seek the board's advice on the issue of whether to lay off employees and issue the appropriate layoff notices required under the federal and state WARN Acts.

The next day, August 26, 2014, Skanska USA directed all subcontractors and suppliers, including the Company, to stop work on the B2 tower. Plaintiffs allege that Kennedy – acting as the Company's president – informed the FCRC Modular Directors that the Company would stop work on the Purchase Order and that the Company's union employees would be immediately furloughed as a result of Skanska USA's stop work notice.

Plaintiffs assert that Kennedy's decision to furlough the Company's workers violated the LLC Agreement because this action was a major decision that required board approval. After multiple attempts between the parties to resolve their disagreements over the Company, Skanska Modular ultimately sold its membership interest in the Company to FCRC Modular on November 17, 2014.

The dispute between the various parties involved in the construction of the B2 tower has precipitated three actions presently before the Court.¹ In this action, Plaintiffs assert two causes of action for: (1) breach of contract against Skanska Modular; and (2) tortious interference with contract against Kennedy.

In the first cause of action, Plaintiffs allege that Skanska Modular breached the LLC Agreement “by stopping work, issuing the Furlough Notices to Factory workers, and shutting down the Factory without approval from the Board.” Plaintiffs allege that they suffered damages in the form of shut down costs, start-up costs, increased labor costs, and costs associated with buying Skanska Modular’s membership interest. Plaintiffs further seek damages for the payments they made to settle the claims of factory workers who alleged that the Company breached their collective bargaining agreement by furloughing them. In the second cause of action, Plaintiffs assert that Kennedy knowingly induced Skanska Modular to stop work, issue furlough notices to the Company’s factory workers, and shut down the Company’s factory, in violation of the LLC Agreement.

In the amended answer, Skanska Modular and Kennedy assert nineteen affirmative defenses. In addition, they assert eight counterclaims and third-party claims sounding in breach of contract, fraud, promissory estoppel, contractual indemnification, and libel per se.

In the current motion, Plaintiffs and third-party defendants Forest City and Forest City Enterprises, Inc. (“Enterprises”) move to dismiss Skanska Modular and Kennedy’s counterclaims and third-party claims based on failure to state a claim and documentary

¹ The two other actions are *Skanska USA Building, Inc. v. Atlantic Yards B2 Owner, et al.*, Index No. 652680/2014 and *Atlantic Yards B2 Owner, LLC v. Skanska USA Building, Inc.*, Index No. 652681/2014.

evidence. In addition, they contend that Skanska Modular fails to state any claims against Forest City and Enterprises because they are not actual or de facto parties to the LLC Agreement, and that Skanska Modular failed to make sufficient allegations to pierce the corporate veil to reach Forest City and Enterprises. Further, Plaintiffs move to dismiss Skanska Modular and Kennedy's affirmative defenses as conclusory.

Discussion

Plaintiffs and Third-Party Defendants' Motion to Dismiss

I. Breach of Contract, Breach of Implied Covenant of Good Faith, Frustration (First and Fifth Counterclaims and Third-Party Claims)

Skanska Modular asserts a first counterclaim against FCRC Modular and a first third party claim against Forest City and John Doe for breach of contract, breach of implied covenant of good faith and fair dealing, and frustration of purpose.²

In Skanska Modular's counterclaim for breach of contract, Skanska Modular alleges that FCRC Modular breached the LLC Agreement by failing to provide the Company with a sufficient capital contribution, factory, and labor pool, and by providing defective and deficient intellectual property ("IP"). Skanska Modular claims that these breaches prevented the Company from performing its obligations under the Purchase Order.

FCRC Modular argues that this counterclaim should be dismissed because the LLC Agreement did not contain any provision requiring it to provide a sufficient capital

² Skanska Modular alleges that John Does 1-10 are "affiliates of and/or are related persons and entities to FCRC Modular, Forest City and Enterprises, all of which are responsible for the claims pled herein, individually, jointly, and severally, with FCRC Modular."

contribution, factory, or labor pool, or any provision warranting the quality of the IP that it was required to contribute to the Company.

Section 4.1 of the LLC Agreement set forth seven items that FCRC Modular was required to provide to the Company as a capital contribution. Three of these items pertain to FCRC Modular's contribution with respect to IP, factory, and labor pool. First, the LLC Agreement required FCRC Modular to contribute "all right, title and interest in and to the High-Rise Modular IP." Second, the LLC Agreement required FCRC Modular to contribute a commitment that "the Company and Brooklyn Navy Development Corporation enter into the Factory Lease in substantially the form set forth in the exhibit attached hereto as Exhibit A and otherwise on terms reasonably acceptable to Skanska."

Third, FCRC Modular was contractually required to contribute a commitment to use commercially reasonable efforts to cause "the Company and the Building and Construction Trades Council of New York, Modular Division . . . [to] enter into the Union Agreements, in accordance with the criteria set forth in the exhibit attached hereto as Exhibit B and otherwise on terms reasonably acceptable to Skanska."

Contrary to Skanska Modular's argument, there is no provision in the LLC Agreement that required FCRC Modular to make a sufficient capital contribution or to provide a sufficient factory, labor pool, or IP. The LLC Agreement specified only that FCRC Modular was required to contribute the transfer of the High-Rise Modular IP, and to negotiate a factory lease and collective bargaining agreement on terms set forth in the LLC Agreement. Skanska Modular does not allege that FCRC Modular failed to contribute these items, or that FCRC Modular's total capital contribution did not have a "fair market value equal to the amount of

Initial Development Costs” (\$9,725,000) as required by the LLC Agreement. LLC Agreement §§ 4.1(a)(i) and 1.1. Skanska Modular therefore fails to plead any breach of the LLC Agreement, and the breach of contract counterclaim against FCRC Modular is dismissed.³

Skanska Modular also asserts a breach of contract counterclaim based on statements made in the Opportunity Brief that Forest City provided to Skanska USA during their negotiations concerning the B2 project. Skanska Modular asserts that it may plead a breach of contract counterclaim based on statements that appeared in the Opportunity Brief because those statements were incorporated into the LLC Agreement through Section 2.11 of the CM Agreement. This argument is meritless because the Opportunity Brief is not a contract or agreement containing any binding obligations or promises, but simply a business proposal or brochure.

Moreover, the statements made in the Opportunity Brief were not incorporated into the CM Agreement. Although Section 2.11 of the CM Agreement states that Skanska USA “may rely upon and use in the performance of any obligations under this Agreement, information supplied to it by or on behalf of Owner and its Affiliates, providing information applicable to the Work, the B2 Project, or the Site,” the CM Agreement goes on to state that it “constitutes the entire agreement between the Parties with respect to the matters contained herein and all prior contracts or arrangements between them with respect to such matters are superseded.”

³ And, contrary to Skanska Modular’s assertion, the inclusion of the defined terms “Exclusive IP” and “Modular Innovations” in the LLC Agreement did not impose any contractual requirement that the capital contributions be of any particular qualitative level of sufficiency or workability.

Because the CM Agreement contained this merger clause, any purported promises or agreements made in the Opportunity Brief could not have been binding on FCRC Modular.

For the reasons stated above, I grant FCRC Modular's motion to dismiss Skanska Modular's counterclaim for breach of contract in its entirety.⁴ In addition, I dismiss Skanska Modular's third-party claim against Forest City and John Doe. Based on Skanska Modular's failure to allege any breach of the LLC Agreement, there is no basis to hold Forest City or John Doe liable for breach of the LLC Agreement, as they are non-parties to the contract.

Next, Skanska Modular asserts a near-identical breach of contract claim as its fifth counterclaim against FCRC Modular and fifth third-party claim against Forest City, Enterprises, and John Doe. However, in these claims, Skanska Modular seeks a different form of damages, lost profits and the diminished value of its interest in the Company. As discussed above, Skanska Modular fails to plead any breach of the LLC Agreement, and therefore the fifth counterclaim and fifth third-party claims are dismissed.

Skanska Modular also alleges that FCRC Modular frustrated the purpose of the LLC Agreement. To state a claim under the doctrine of commercial frustration, a party must allege that he or she seeks to be excused from future performance of a contract where "a party's principal purpose is substantially frustrated." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2006).⁵ Because Skanska Modular does not seek to be excused from any

⁴ This dismissal includes Skanska Modular's allegations that: (a) FCRC Modular's actions constituted "willful misconduct, fraud, gross negligence, and/or bad faith"; and (b) FCRC Modular breached covenants in the LLC Agreement. Skanska Modular describes the first allegation as part of its breach of contract claim, which is addressed above. Skanska Modular also failed to specify any express covenants that were breached.

⁵ The parties agree that Delaware substantive law applies to claims arising from the LLC Agreement.

future performance under the LLC Agreement, I dismiss the claim for frustration of purpose asserted against FCRC Modular, as well as the third-party claim against Forest City and John Does. *Id.*

The remaining allegation in the first counterclaim and third-party claim is that FCRC Modular breached the implied covenant of good faith and fair dealing by failing to provide a sufficient capital contribution, factory, and labor pool and by providing defective IP. Under Delaware law, the implied covenant of good faith and fair dealing inheres in every contract, and requires “a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.” *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (internal citation omitted); *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

I dismiss Skanska Modular’s breach of implied covenant of good faith and fair dealing claim because the LLC Agreement contains specific provisions governing the capital contribution, the IP, the factory, and the labor pool. “[W]here the subject at issue is expressly covered by the contract . . . the implied duty to perform in good faith does not come into play.” *Dave Greytak Enterprises, Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992); *NACCO Indus., Inc. v. Applicia Inc.*, 997 A.2d 1, 20 (Del. Ch. 2009).

Accordingly, I grant the motion to dismiss Skanska Modular’s first and fifth counterclaim against FCRC Modular, and first and fifth third-party claims against Forest City and John Does in their entirety.

II. Anticipatory Repudiation
(Second Counterclaim and Third-Party Claims)

Under Delaware law, a repudiation of a contract is “an outright refusal by a party to perform a contract or its conditions entitling the other contracting party to treat the contract as rescinded.” *CitiSteel USA, Inc. v. Connell Ltd. Partnership*, 758 A.2d 928, 931 (Del. 2000) (internal citation omitted). “A party repudiates a contract when it takes an action that constitutes a ‘significant and substantial alteration of both the present and the reasonably anticipated future relations created by [the] agreement.’” *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014 (Del. Ch. 2004) (quoting *Bali v. Christiana Care Health Servs., No. C.A. 16433*, 1998 WL 685380, at *1 (Del. Ch. Sept. 22, 1998)).

In the second counterclaim and third-party claim, Skanska Modular alleges that FCRC Modular, Forest City, Enterprises, John Doe and their affiliates repudiated their obligations under the LLC Agreement by deciding that the Company would not receive the contract for constructing two additional towers (the B3 and B4 buildings), which would be built using conventional construction methods. Skanska Modular alleges that this repudiation occurred when Forest City announced to the media that the B3 building would be constructed conventionally and not using modular technology.

Section 3.1(b) of the LLC Agreement provides that, upon the satisfaction of certain conditions “after the completion of construction of the B2 Modules and delivery of the B2 Contract,” the Company shall enter into a contract with an FCRC Modular affiliate, or a subcontract with Skanska USA, to fabricate, deliver, or sell modules for the B3 property. This provision specified several conditions under which the Company would enter into a contract for the B3 building, such as the approval of the Company’s board, as well as satisfaction of

certain leasing targets for the B2 property and financing targets for the B3 property. Section 3.1(c) contains similar provisions for the B4 contract.

Here, Skanska Modular fails to state a repudiation claim against FCRC Modular, Forest City, Enterprises, and John Doe because none of these entities were bound by the provisions governing the B3 and B4 contracts. Sections 3.1(b) and (c) are provisions that require the Company to enter into a contract for the B3 and B4 buildings upon satisfaction of certain conditions; they are not provisions that bind FCRC Modular, Forest City, Enterprises, or John Doe. Because Skanska Modular does not plead any act of repudiation on the part of the Company, the actual entity contractually bound by the provisions related to the B3 and B4 building, I grant FCRC Modular, Forest City, Enterprises, and John Doe's motion to dismiss the second counterclaim and third-party claims for repudiation.

III. Fraudulent and Negligent Misrepresentation (Third and Fourth Counterclaims and Third-Party Claims)

Under Delaware law, to state a claim for fraud, the "plaintiff must plead facts supporting an inference that: (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance." *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006) (citation omitted). Under Court of Chancery Rule 9(b), a complaint alleging fraud must state "the circumstances constituting fraud . . . with particularity."

“A claim for negligent misrepresentation requires: (1) a particular duty to provide accurate information, based on the plaintiff's pecuniary interest in that information; (2) the supplying of false information; (3) failure to exercise reasonable care in obtaining or communicating information; and (4) a pecuniary loss caused by justifiable reliance on the false information.” *Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc.*, 2012 WL 6632681, at *17 (Del. Ch. 2012).

Skanska Modular asserts a third and fourth counterclaim against FCRC Modular and a third and fourth third-party claim against Forest City and its affiliates for fraudulent and negligent misrepresentation. In these claims, Skanska Modular alleges that Forest City and its affiliates intentionally or negligently made false representations in the Opportunity Brief to induce it to enter into the LLC Agreement.⁶

More specifically, Skanska Modular alleges that Forest City and its affiliates misrepresented that: (a) Forest City possessed a modular solution with a built in pipeline of projects in the modular business; (b) the modular design would be cost effective and capable of producing modules that could stack to form a finished building; (c) the project would be the first building constructed using modular technology and Forest City would provide a factory, lease, union agreement, IP, factory operations expertise and a management team; and (d) that Forest City furnished reliable and accurate information about pricing, productivity, and scheduling concerning the B2 project.

⁶ Skanska Modular further alleges that Forest City's misrepresentations induced Skanska USA to enter into the CM Agreement. However, this allegation is dismissed because Skanska USA is not a party to this action.

FCRC Modular and Forest City argue that Skanska Modular's claims for fraudulent and negligent misrepresentation claims should be dismissed because they are barred by the merger clause in the LLC Agreement, and by the terms of the Confidentiality Agreement.

At the outset, I dismiss the third and fourth counterclaim against FCRC Modular. Skanska Modular does not specifically plead any misrepresentations made by FCRC Modular. It simply states that representations were made by "affiliates" of Forest City. Under Delaware's pleading rules, this allegation is not sufficiently specific to state a fraud claim against FCRC Modular.

Further, under Delaware law, "sophisticated parties to negotiated commercial contracts may not reasonably rely on information that they contractually agreed did not form a part of the basis for their decision to contract." *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 142 (Del. Ch. 2003). In order for a merger clause to bar a fraud claim, the "integration clause must contain 'language that ... can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract.'" *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059 (Del. Ch. 2006) (quoting *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004)).

If parties to a contract "fail to include unambiguous anti-reliance language, they will not be able to escape responsibility for their own fraudulent representations made outside of the agreement's four corners." *Abry Partners V, L.P.*, 891 A.2d at 1059. In other words, the "presence of a standard integration clause alone, which does not contain explicit anti-reliance representations and which is not accompanied by other contractual provisions demonstrating

with clarity that the plaintiff had agreed that it was not relying on facts outside the contract, will not suffice to bar fraud claims.” *Kronenberg*, 872 A.2d at 593.

Here, the merger clause in the LLC Agreement states: “[t]his Agreement and the schedules and exhibits hereto, together with all other contracts and agreements which either are referred to herein or bear even date herewith, contain all of the understandings and agreements of whatsoever kind and nature existing between the Members with respect to the subject matter hereof and thereof and supersede all prior agreements . . . including that certain Confidentiality Agreement between FC and Skanska, dated January 6, 2012.”⁷ LLC Agreement § 19.6.

The CM Agreement also contains a merger clause that states: “[t]his Agreement constitutes the entire agreement between the Parties with respect to the matters contained herein and all prior contracts or arrangements between them with respect to such matters are superseded. Any oral or written representation, warranty, course of dealing or trade usage not contained or referenced herein will not be binding on the Parties.” CM Agreement § 17.12. Because the CM Agreement is Exhibit B to the LLC Agreement, the terms of the CM Agreement were incorporated into the LLC Agreement. *See* LLC Agreement § 19.6.

The CM Agreement and the LLC Agreement are standard integration clauses that do not contain any express anti-reliance representations. Thus, neither clause precludes Skanska Modular’s reliance on representations outside of the agreements – such as those made in the Opportunity Brief – as these clauses lacked “a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract’s four

⁷ I do not address FCRC Modular and Skanska Modular’s arguments related to the Confidentiality Agreement because that agreement was superceded by the LLC Agreement.

corners in deciding to sign the contract.” *Kronenberg*, 872 A.2d at 593; *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 860 (Del. Ch. 2016).⁸ Under Delaware law, standard integration clauses, like those at issue here, do not “operate as a bar to fraud claims but rather simply . . . limit the scope of the parties’ contractual obligations to those set forth in the written agreement.” *Kronenberg*, 872 A.2d at 592.

However, I find that Skanska Modular fails to state a claim for fraudulent or negligent misrepresentation because it did not plead these claims with specificity. To satisfy the Delaware Court of Chancery Rule 9(b), a plaintiff asserting a fraud claim must allege: “(1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations.” *Abry Partners*, 891 A.2d at 1050. Skanska Modular does not allege the time, place, and specific contents of the false representations, or the identity of the person making the alleged representations. In addition, Skanska Modular fails to allege that Forest City or its affiliates knew that the alleged misrepresentations were false. *Hauspie v. Stonington Partners, Inc.*, 945 A.2d 584, 588 (Del. 2008). Skanska Modular also does not allege the existence of any special relationship between the parties to sustain the negligent misrepresentation claim. *Envo, Inc. v.*

⁸ Skanska Modular’s argument that it is entitled to rely on representations made in the Opportunity Brief – based on Section 2.11 of the CM Agreement – is without merit. Section 2.11 entitled “Owner Information” states that “Contractor [Skanska USA] may rely upon and use in the performance of any obligations under this Agreement, information supplied to it by or on behalf of Owner [B2 Owner] and its Affiliates, providing information applicable to the Work, the B2 Project, or the Site.” This provision permits Skanska USA to rely on information supplied by B2 Owner and its affiliates in the performance of its own obligations under the CM Agreement. It does not address whether Skanska Modular may rely on Forest City or FCRC Modular’s representations regarding their obligations under the CM Agreement or LLC Agreement.

Walters, 2009 WL 5173807 at *6 (Del. Ch. 2009); *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *9 (Del. Ch. 2015).

Accordingly, I grant FCRC Modular, Forest City, and its affiliates' motion to dismiss Skanska Modular's third and fourth counterclaim and third-party claims for fraudulent and negligent misrepresentation.

IV. Promissory Estoppel (Sixth Counterclaim and Third-Party Claims)

"In order to establish a claim for promissory estoppel, a plaintiff must show by clear and convincing evidence that: (i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise." *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000).

Skanska Modular asserts a sixth counterclaim against FCRC Modular and a sixth third-party claim against Forest City, Enterprises, and John Doe for promissory estoppel. Specifically, Skanska Modular alleges that it relied on promises that FCRC Modular, Forest City, Enterprises, and John Doe made in the Opportunity Brief concerning the contributions relating to capital, IP, factory, and labor pool that would be made to the Company, and commitments for the B3 and B4 contracts. Skanska Modular contends that FCRC Modular, Forest City, Enterprises, and John Doe should be estopped from violating their promises or from interpreting the LLC Agreement in a manner that is inconsistent with the Opportunity Brief.

The LLC Agreement specifically addresses FCRC Modular's contractual obligations to contribute capital, IP, a factory lease, and labor pool, and commitments for the B3 and B4 buildings, which are the same issues raised by Skanska Modular's promissory estoppel claim. Under Delaware law, courts "do not apply the doctrine of promissory estoppel when there is an existing contract that governs the issue before the Court." *Alltrista Plastics, LLC v. Rockline Industries, Inc.*, 2013 WL 5210255 at *9 (Del. Super. 2013); *Siga Technologies, Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 348 (Del. 2013). Accordingly, I grant FCRC Modular, Forest City, Enterprises, and John Doe's motion to dismiss Skanska Modular's sixth counterclaim and third-party claims for promissory estoppel.

V. Contractual Indemnification
(Seventh Counterclaim and Third-Party Claims)

In the complaint, Plaintiffs seek to recover payments they made to settle the claims of the trade unions ("the BCTC Modular Affiliates") that represented the factory workers that were furloughed. Plaintiffs allege that they paid a total of \$1.5 million dollars, plus health insurance expenses, to settle the claims of the BCTC Modular Affiliates.

In the seventh counterclaim and third-party claim, Skanska Modular alleges that FCRC Modular and Forest City are contractually required to indemnify it for any liability related to the BCTC Modular Affiliates' claims, including the settlement payments. Specifically, Skanska Modular contends that FCRC Modular and Forest City must indemnify it because FCRC Modular breached the LLC Agreement by failing to negotiate a collective bargaining agreement that would permit the Company to furlough workers.

Under Section 16.1 of the LLC Agreement, FCRC Modular agreed to "indemnify the other Member [Skanska Modular] . . . against all Losses caused by or resulting or arising from,

or otherwise with respect to any (a) inaccuracy in, any breach of, or any failure to perform or comply with, any of such Member's representations, warranties and covenants contained in this Agreement."

FCRC Modular and Forest City contend that the indemnification claim against them should be dismissed because Skanska Modular fails to allege any breach of the LLC Agreement relating to FCRC Modular's obligation to negotiate a collective bargaining agreement. Specifically, they claim that the LLC Agreement contains no requirement that FCRC Modular negotiate a provision in the collective bargaining agreement that would allow the Company to furlough workers.

Sections 4.1(a)(i)(E) and 15.1(c)(ii) are the provisions in the LLC Agreement that govern FCRC Modular's obligation to negotiate a collective bargaining agreement for the Company. Under these provisions, FCRC Modular was required to make a capital contribution to the Company that included a commitment to use commercially reasonable efforts to cause the Company and the BCTC Modular Affiliates to "negotiate and execute . . . Union Agreements meeting the criteria set forth in the exhibit attached hereto as Exhibit B and otherwise on terms reasonably acceptable to Skanska." LLC Agreement § 15.1(c)(ii).

Pursuant to Exhibit B of the LLC Agreement, any union or collective bargaining agreement entered into between the Company and the BCTC Modular Affiliates was required to meet six criteria. In particular, the criteria required the union agreement to: (1) provide for a term no less than three years; (2) provide for certain health and retirement benefits; (3) address the importance of attendance and cross-training; (4) incorporate team-based approaches; (5)

provide for a certain wage and benefit package; and (6) otherwise be reasonably acceptable to Skanska USA and B2 Owner.

Skanska Modular fails to allege a breach of any of the provisions that govern the substance of the collective bargaining agreement. While the LLC Agreement contained six criteria that a collective bargaining agreement must meet, there is no contractual provision that required FCRC Modular to negotiate an agreement that permitted the Company to furlough workers. While Skanska Modular contends that the LLC Agreement contemplated that the Company may undergo periods of inactivity as it contained the defined term “Inactivity Period” – a mere reference to the Company’s potential inactivity does not translate into an express contractual requirement that the collective bargaining agreement contain a clause that permits the Company to furlough workers.⁹

Accordingly, I grant FCRC Modular and Forest City’s motion to dismiss Skanska Modular’s seventh counterclaim and third-party claim for contractual indemnification.

VI. Libel (Eighth Third-Party Claims)

In the eighth third-party claim, Kennedy alleges that Forest City and Jane Doe authorized the publication of a press release to several prominent construction trade publications, which contained false and defamatory statements designed to embarrass him and injure his professional reputation.¹⁰ The alleged defamatory press release authorized by Forest

⁹ Furthermore, the Opportunity Brief did not contain any contractual provisions concerning the content of the collective bargaining agreement. As discussed above, the Opportunity Brief was not a contract between the parties.

¹⁰ Although Skanska Modular also labels the libel claim as an eighth counterclaim, Skanska Modular does not assert any allegations against either plaintiff.

City and Jane Doe stated that the complaint in this action “states a claim for tortious interference with contract against Kennedy because he knowingly, wrongfully, intentionally, maliciously, in bad faith and without reasonable justification or excuse induced Skanska Modular to breach the LLC Agreement.”

Forest City and Jane Doe contend that the statement at issue here is protected as a fair and true report of a judicial proceeding under Section 74 of the Civil Rights Law. On the other hand, Kennedy argues that the press release is not privileged because Forest City and Jane Doe maliciously commenced this action to defame him.

Under New York law, it is well settled that “[s]tatements made in the course of judicial proceedings are protected by absolute privilege provided that they are material and pertinent to the issue to be resolved in the proceeding.” *Reszka v. Collins*, 136 A.D.3d 1299, 1300 (4th Dep’t 2016) (citing to *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 365 (2007)).

In contrast, out-of-court statements that report on judicial proceedings are governed by Section 74 of the Civil Rights Law, and are privileged to the extent that they represent a fair and true report of what occurred in the proceeding. *GS Plasticos Limitada v. Bureau Veritas*, 84 A.D.3d 518, 519 (1st Dep’t 2011); *Martin v. Daily News, L.P.*, 121 A.D.3d 90, 101 (1st Dep’t 2014). Specifically, Section 74 of the Civil Rights Law states that an action for libel “cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding.”

Press releases that “essentially summarize or restate the allegations of the complaint” are ordinarily afforded protection under Section 74. *McRedmond v. Sutton Place Rest. & Bar*, 48 A.D.3d 258, 259 (1st Dep’t 2008); *Lacher v. Engel*, 33 A.D.3d 10, 17 (1st Dep’t 2006).

However, under the *Williams* exception enunciated by the Court of Appeals, a report on a judicial proceeding is unprotected by Section 74 where a party has maliciously commenced an action in order to disseminate “false and defamatory charges, and to then circulate a press release or other communication based thereon and escape liability by invoking the statute.” *Williams v. Williams*, 23 N.Y.2d 592, 599 (1969); *Halcyon Jets, Inc. v. Jet One Group, Inc.*, 69 A.D.3d 534, 534 (1st Dep’t 2010).

The press release at issue here simply restates the allegations in the complaint, and is therefore protected by Section 74 as a fair and true report of a judicial proceeding. Although Kennedy alleges that the commencement of this action against him was “a malicious act, and brought solely for the purposes of later defaming him by disseminating defamatory information to members of the industry in which he does business” – this boilerplate allegation is not supported by a single factual allegation. As such, it is conclusory and insufficient to sustain a defamation claim under the *Williams* exception. *Cf. Halcyon Jets, Inc.*, 69 A.D.3d at 534; (finding that plaintiff sufficiently pled factual issues as to whether the defendant intended to use a federal action as a device to protect a report on a judicial proceeding and to disseminate defamatory information).

Accordingly, Forest City and Jane Doe’s motion to dismiss Kennedy’s eighth third-party claim for libel is granted.

VII. Affirmative Defenses

“On a motion to dismiss affirmative defenses pursuant to CPLR § 3211(b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law.” 534 *E. 11th St. Hous. Dev. Fund Corp. v. Hendrick*, 90 A.D.3d 541, 541 (1st Dep’t 2011). “In

deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed.” *Id.* “A defense should not be stricken where there are questions of fact requiring trial.” *Id.*

Plaintiffs move to dismiss Skanska Modular and Kennedy’s affirmative defenses. In the amended answer, Skanska Modular and Kennedy assert nineteen affirmative defenses of mootness, repudiation, lack of consideration, waiver, equitable estoppel, condition precedent, failure to state a claim, statute of frauds, res judicata, laches, existence of the LLC Agreement, payment, negligence or gross negligence, frustration, and failure to mitigate.

Plaintiffs only demonstrate that the eleventh affirmative defense for statute of frauds is without merit because all the contracts at issue here are in writing. Therefore, this claim is dismissed, and the remainder of Plaintiffs’ motion to dismiss the affirmative defenses is denied.

Skanska Modular and Richard Kennedy’s Motion for Contempt

Skanska Modular and Kennedy move for an order: (a) holding non-parties Berlin Rosen Ltd. (“Berlin Rose”) and Greenland US Holding, Inc., Greenland Company USA, and Greenland US (collectively, “Greenland”) in civil contempt based on their failure to respond to a *subpoena duces tecum*; (b) requiring Berlin Rosen and Greenland to produce documents responsive to the subpoenas; (c) awarding attorney’s fees and costs and a \$250 statutory penalty against Berlin Rose and Greenland; and (d) holding Berlin Rose and Greenland jointly and severally liable for attorney’s fees and costs.

The subpoena served on Greenland sought documents concerning Skanska Modular’s second through sixth counterclaims regarding the decision to build the B3 and B4 buildings

using conventional construction methods. In accordance with my decision to dismiss the second through sixth counterclaims regarding the B3 and B4 buildings, Skanska Modular and Kennedy's motion for contempt against Greenland is now moot.

Skanska Modular and Kennedy further seek to enforce their subpoena against Berlin Rosen. The subpoena seeks documents relating to Kennedy's libel claim against Forest City and Jane Doe. In accordance with my decision to dismiss the eighth counterclaim for libel, Skanska Modular and Kennedy's motion for contempt against Berlin Rosen is denied as moot.

In accordance with the foregoing, it is

ORDERED that plaintiffs FCRC Modular, LLC and FC Modular, LLC and third-party defendants Forest City Ratner Companies, Forest City Enterprises, Inc., John Does, and Jane Doe's motion to dismiss defendants Skanska Modular LLC and Richard Kennedy's counterclaims and third-party complaint (motion seq. no. 002) is granted in its entirety; and it is further

ORDERED that plaintiffs FCRC Modular, LLC and FC Modular, LLC's motion to dismiss the affirmative defenses (motion seq. no. 002) is granted only with respect to the eleventh affirmative defense of statute of frauds, and otherwise denied; and it is further

ORDERED that Skanska Modular LLC and Richard Kennedy's motion to hold non-parties Greenland US Holding, Inc. a/k/a Greenland Group Co., Greenland Company USA, and Greenland US in civil contempt of court is denied as moot; and it is further

ORDERED that Skanska Modular LLC and Richard Kennedy's motion to hold non-party Berlin Rosen Ltd. in civil contempt is denied as moot; and it is further

ORDERED that counsel are directed to appear for a compliance conference at 60 Centre Street, Room 208 on October 19, 2016 at 2:15pm.

This constitutes the decision and order of the Court.

DATE : 8/4/16


SALIANN SCARPULLA, JSC