

Primer Constr. Corp. v Empire City Subway Co., Ltd.
2017 NY Slip Op 31909(U)
September 6, 2017
Supreme Court, New York County
Docket Number: 652203/2016
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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PRIMER CONSTRUCTION CORP.,

Plaintiff,

-against-

Index No. 652203/2016
Motion Seq. No. 002
Motion Date: 12/13/2016

EMPIRE CITY SUBWAY COMPANY, LTD. and
VERIZON-NEW YORK, INC., d/b/a VERIZON
COMMUNICATIONS,

Defendants.

-----X

BRANSTEN, J.:

This action is brought by Plaintiff Primer Construction Corp. (“Primer”), a general contractor focusing on capital municipal work with New York City and its agencies, against Defendant Verizon-New York, Inc., d/b/a Verizon Communications (“Verizon”), a private utility company that owns and/or operates surface and subsurface utility facilities within New York City, and Defendant Empire City Subway Company, Ltd. (“Empire City”), a wholly owned subsidiary of Verizon. Plaintiff commenced this action against Defendants to recover its cost for construction. Defendants now seek dismissal of the Amended Complaint, pursuant to CPLR §§ 3211(a)(1) and (a)(7). For the reasons that follow, Defendants’ motion is denied.

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I. Background¹

On a date unknown to Plaintiff, Defendants Empire City and/or Verizon entered into an agreement with non-party New York City Department of Design and Construction (“DDC”), whereby Defendants agreed to cooperate with and compensate the contractors working on DDC projects for moving, protecting, and securing Defendants’ existing utility facilities that impact DDC’s work (the “DDC/Verizon Agreement”). (Am. Compl. ¶ 7).

On or about June 20, 2014, Plaintiff Primer entered into an agreement with DDC for the construction of a culvert underneath 147th Avenue, between 235th Street and 232nd Street in Queens (the “DDC Project”). (*Id.* ¶ 10). Plaintiff’s work on the DDC Project interfered with an underground network of utility lines owned by Defendants, requiring Plaintiff to move, protect, or secure those facilities. (*Id.* ¶¶ 12-13).

On or about October 29, 2014, Defendants prepared specifications, details, and methods for a plan for Plaintiff to place the utility lines above the culverts, which Plaintiff estimated would cost Defendants \$936,775.91. (*Id.* ¶ 14). Defendants rejected the estimate as too costly, and countered with a new plan to place the utility lines *below* the culvert on or about February 24, 2015, which Plaintiff estimated would cost \$375,000. (*Id.* ¶¶ 17-19). Based on these estimates, Plaintiff entered into an agreement

¹ The facts cited in this section are drawn from the Amended Complaint, unless otherwise noted.

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with Defendants to perform the “interference work” on the utility lines for a “lump sum” of \$375,000 (the “Interference Agreement”). (*Id.* ¶ 20).

However, Plaintiff alleges Defendants knew that this method was impossible at the lower price due to the specifications of their utility lines; Defendants allegedly induced Plaintiff to agree to the lower amount by withholding this information. (*Id.* ¶¶ 24-26). Plaintiff further alleges the methods proposed by Defendants were “purposely out of compliance” with city construction regulations. (*Id.* ¶¶ 30-31).

Plaintiff alleges soon after work began, it became clear that the interference work could not be completed as originally agreed. (*Id.* ¶ 22). For the period of one year, over which Defendants refused to provide alternative methods for project completion, Plaintiff continued to perform interference work as detailed in the Interference Agreement. (*Id.* ¶¶ 38-39). Plaintiff alleges for the completed interference work, Defendants owe Plaintiff a total of \$1,300,000. (*Id.* ¶¶ 64, 65, 75, 81).

Plaintiff initiated this action on May 25, 2016 by filing a Complaint. The Court granted Defendants’ motion to dismiss the Complaint without prejudice on October 20, 2016, finding that (a) the complaint failed to plead fraud with the requisite level of particularity under CPLR § 3016, and (b) *quantum meruit* was improperly pled where the parties’ relationship was governed by contract. (Decision and Order on Motion to Dismiss the Complaint).

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Plaintiff filed an Amended Complaint on November 10, 2016, asserting three causes of action against Defendants: (1) fraudulent misrepresentation/ fraudulent inducement; (2) breach of contract; and (3) *quantum meruit*.

Pursuant to CPLR §§ 3211(a)(1) and (a)(7), Defendants now move to dismiss the three causes of action asserted against them in Plaintiff's Amended Complaint.

II. Legal Standard

In considering a motion to dismiss for failure to state a claim pursuant to CPLR § 3211(a)(7), all factual allegations must be accepted as true, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *See Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). While factual allegations contained in a complaint are accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Matter of Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

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Where a motion to dismiss is based on documentary evidence pursuant to CPLR § 3211(a)(1), the claim will be dismissed “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002); *see also Leon*, 84 N.Y.2d at 87-88. In considering such a motion, the court is required to determine “whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dep’t 2001).

III. Discussion

Defendants seek dismissal of each of the Amended Complaint’s three counts. The Court will address the arguments with respect to each count.

As an initial matter, the governing Interference Agreement contains a binding arbitration provision. The Court will address the issue of the arbitration provision first.

A. The Arbitration Clause

The governing Interference Agreement contains a binding arbitration clause, which states that “[a]ny and all disputes arising out of this Agreement or a breach thereof shall be submitted to arbitration in accordance with Section U.” (Cifuentes Affirm. Ex. A, Attach. 1 ¶ 8). The Interference Agreement also contains a binding written modification clause, which states that the agreement “shall not be modified or rescinded, except by a writing signed by a duly authorized representative of both parties.”

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(Cifuentes Affirm. Ex. A ¶ 4). Defendants did not address the Arbitration Clause in its Answer or motion to dismiss. In addition, both parties have orally expressed their willingness to waive the right to arbitration.

“Like contract rights generally, a right to arbitration may be modified, waived or abandoned.” *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66 (2007) (citing *Sherrill v. Grayco Builders, Inc.*, 64 N.Y.2d 261, 272 (1985)). When a plaintiff chooses to take the course of litigation, the party has waived the right to submit the question to arbitration. See *Matter of City of Yonkers v. Cassidy*, 44 N.Y.2d 784, 785 (1978).

“[W]here the defendant’s participation in the lawsuit manifests an affirmative acceptance of the judicial forum . . . his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory.” *Stark*, 9 N.Y. 3d at 66–67. (citing *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 405 (1974)). Although there is a written modification provision at issue, “a party to a written agreement may orally waive enforcement of one of its terms despite a provision to the contrary.” *Taylor v. Blaylock & Partners, L.P.*, 240 A.D.2d 289, 290 (1st Dep’t 1997). Therefore, an oral waiver of the arbitration clause is enforceable.

Plaintiff has waived the right to arbitration by choosing to litigate the dispute in this Court. Defendants have waived the right to arbitration by participating in the instant litigation. Since both parties have mutually waived the right to arbitration, this Court has proper subject matter jurisdiction to hear the claims in this matter.

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B. Claims Against Defendants

1. Fraud

Defendants seek dismissal of Plaintiff's fraudulent inducement claim on the basis that it fails to allege fraud with the requisite particularity under CPLR § 3211(a)(7) and CPLR § 3016(b). First, Defendants argue Plaintiff's Amended Complaint fails to identify a material misrepresentation of fact with the requisite detail. (Defs.' Memo In Supp. at 2, 8-9). Second, Defendants argue Plaintiff fails to properly plead Defendant's knowledge of falsity and intent to induce reliance. (*Id.* at 2, 7-8). Third, Defendants argue Plaintiff fails to allege sufficient facts supporting justifiable reliance. (*Id.* at 2, 9-10).

Alternatively, Defendants seek dismissal of Plaintiff's fraudulent inducement claim on the basis that it is premised on false allegations pursuant to CPLR § 3211(a)(1). (Defs.' Memo In Supp. at 2-3, 10-11).

To plead a claim for fraud under New York law, Plaintiff must allege: (a) a material misrepresentation of a fact, (b) knowledge of its falsity, (c) an intent to induce reliance, (d) justifiable reliance by the plaintiff, and (e) damages. *See Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). Each element must be pleaded with the requisite particularity under CPLR § 3016(b). *Id.* CPLR § 3016(b) states: "[w]here a cause of action or defense is based upon misrepresentation [or] fraud . . . the circumstances constituting the wrong shall be stated in detail." CPLR § 3016(b).

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Firm factual pleadings are necessary to support a “reasonable inference” that allegations of fraud are true. *Eurycleia Partners*, 12 N.Y.3d at 559.

For the following reasons, the Court concludes the Amended Complaint pleads a claim for fraudulent misrepresentation with sufficient particularity under CPLR § 3016(b). The Court also concludes Defendants fail to meet the CPLR § 3211 (a)(1) standard for false allegations argument.

a. Misrepresentation

Defendants argue Plaintiff fails to plead a material misrepresentation of fact with the requisite particularity. (Defs.’ Memo in Supp. at 2, 8-9). Defendants argue other than the assertion that Defendants purportedly misrepresented the New Plan, Plaintiff fails to provide any detail explaining when Plaintiff was misled, how it was misled, which individuals made the allegedly false representations, and how or why this statement is fraudulent. (*Id.* at 8).

Plaintiff responds the Amended Complaint clearly explains why the statement is fraudulent, and delineates the supporting details and circumstances surrounding the false representations. (Pl.’s Memo in Opp. at 4).

To meet CPLR § 3016(b)’s particularity requirement, the plaintiff must allege “specific facts with respect to the time, place, or manner” of the defendant’s purported misrepresentations. *Riverbay Corp. v. Thyssenkrupp N. Elevator Corp.*, 116 A.D.3d 487, 488 (1st Dep’t 2014).

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According to the Amended Complaint, “Empire City and/or Verizon prepared an alternative plan with specifications, details and methods for the protection and relocation of the utility lines at the Project where the utility lines would be placed underneath the culverts (the “New Plan”), received by Primer on or about February 24, 2015.” (Am. Compl. ¶ 17). The Amended Complaint alleges that the New Plan contained misrepresentations because “the details and methods proposed by Empire City and/or Verizon in the New Plan were woefully inadequate, deficient, incorrect, and impossible to implement.” (*Id.* ¶ 57).

Specifically, the Amended Complaint alleges the New Plan contains two misrepresentations. First, the Amended Complaint alleges in creating this New Plan, “Empire City and/or Verizon, as an owner of the utilities lines, knew or should have known the utilities lines’ dimensions and the requirements for the protection and relocation thereof, and that placing them under the culverts was not feasible.” (*Id.* ¶ 24). Second, the Amended Complaint alleges that through the New Plan, Defendants falsely represented that “the New Plan would eliminate the cost associated with raising the road and related work.” (*Id.* ¶¶ 18, 21). These allegations sufficiently allege “the time, place, or manner” of the defendant’s purported misrepresentations. *Riverbay Corp.*, 116 A.D.3d at 488.

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b. Knowledge and Intent to Induce

Defendants argue Plaintiff fails to properly plead Defendant's knowledge of falsity and intent to induce reliance, and instead relies on vague and conclusory "knew or should have known" allegations. (Defs.' Memo In Supp. at 2, 7-8).

Plaintiff responds that the Amended Complaint sets forth the basis of Defendants' knowledge with detail. Plaintiff alleges Defendants knew or should have known that placing the cables under the culverts was impossible because Defendants actually own the cables. Thus, Plaintiff argues the information regarding the dimensions and requirements for protecting and relocating of the cables was readily available to Defendants. Plaintiff further argues the Amended Complaint illustrates that Defendants actually did review such information and relied on records to create the New Plan. (Pl.'s Memo in Opp. at 5).

Pure conclusory "knew or should have known" allegations are insufficient to meet the knowledge of falsity element under CPLR § 3016(b). *See Nat'l Westminster Bank v. Weksel*, 124 A.D.2d 144, 144-48 (1st Dep't 1987). Nevertheless, CPLR § 3016(b) is satisfied when "the facts suffice to permit a 'reasonable inference' of the alleged misconduct" and that in making such determination, "less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud." *Eurycleia Partners*, 12 N.Y. 3d at 559; *see also Bernstein v. Kelso & Co.*, 231 A.D.2d 314, 322 (1st

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Dep't 1997) (holding that fraud claim survived motion to dismiss where complaint's allegations created "inference of intent to deceive plaintiff").

Based on Plaintiff's allegations, an inference of the Defendants' knowledge of falsity can be drawn and thus Plaintiff adequately pleads knowledge of falsity at this stage. (Am. Compl. ¶¶ 51, 59). In addition, the Amended Complaint's allegation that the misrepresentations were made with the intent to obtain an unreasonably low contract price, in context, is sufficient to plead intent to induce reliance. (Am. Compl. ¶ 27).

c. Justifiable Reliance and Damages

Defendants argue Plaintiff cannot have justifiably relied on information provided by Defendants because Plaintiff immediately realized the plan to go under the culvert was impossible. (Defs.' Memo in Supp. at 2, 9-10). Plaintiff responds it could not have discovered the "impossibility" of Defendants' plan until it began performing under the already-agreed-upon New Plan. (Pl.'s Memo in Opp. at 5-6).

Although CPLR § 3016(b) requires the circumstances constituting the wrong to be stated in detail, it does not require "unassailable proof" at the pleading stage. *Eurycleia Partners*, 12 N.Y. 3d at 559. The Amended Complaint alleges that in reliance on the New Plan's alleged misrepresentations, Plaintiff agreed to reduce its asking price on the contract from \$900,000 to \$375,000. (Am. Compl. ¶¶ 19, 26). The Amended Complaint further alleges that it was impossible for Plaintiff to verify the feasibility of Defendants' plan regarding the cables placement prior to performance. (*Id.* at ¶58). These allegations

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are sufficient to plead justifiable reliance with specificity at this stage. *See Eurycleia Partners*, 12 N.Y.3d at 559. Finally, Plaintiff alleges that its reliance on Defendants' misrepresentations led to damages of \$1.3 million, meeting the final element of fraud. (Am. Compl. ¶¶ 64, 65, 75, 81).

d. Dismissal Based on Documentary Evidence

Defendants argue Plaintiff's fraudulent inducement claim should be dismissed pursuant to CPLR §3211(a)(1), because it is premised on false allegations. (Defs.' Memo In Supp. at 2-3, 10-11).

Defendants provide two emails dated February 25, 2014 and March 2015, which demonstrate Plaintiff's \$936,775.91 proposal to place the lines over the culvert was submitted after Defendants' February 24, 2015 plan, which provided for the utility lines to be placed under the culvert. (*Id.* at 10-11) Defendants argue that the emails demonstrate Plaintiff's \$936,775.91 proposal was in response to the February 24, 2015 plan. (*Id.*). Thus Defendants argue that the negotiation of the lump sum price was not fraud but simply arms-length bargaining (*Id.* at 11).

Plaintiff denies this allegation, and argues that the documents submitted by Defendants provide no proof that the \$936,775.97 proposal was a response to Defendant's February 24, 2015 plan. (Pl.'s Memo in Opp. at 7).

On a motion to dismiss, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary

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evidence” are not presumed to be true. *Mark Hampton, Inc. v. Bergreen*, 173 A.D.2d 220, 220 (1st Dep’t 1991) (internal quotation omitted). “[S]uch motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen*, 98 N.Y.2d at 326.

The emails Defendants provide do not conclusively prove the \$936,775.97 proposal was a response to Defendant’s February 24, 2015 plan. More importantly, even if the Court took Defendants’ allegation as true, the allegation still would not defeat Plaintiff’s fraudulent inducement claim. Plaintiff alleges Defendants knew the plan of going under the culvert was impossible at the lower price due to the specifications of their utility lines; Defendants allegedly induced Plaintiff to agree to the lower amount by withholding this knowledge. (Am. Compl. ¶¶ 24-27). Even if Plaintiff’s \$936,775.97 proposal was a response to Defendant’s plan to place the utility lines under the culvert, Defendants could still have induced Plaintiff to agree to a lower amount by withholding the knowledge that the plan to go under the culvert was impossible at that price. Accordingly, Defendants fail to meet the CPLR § 3211(a)(1) standard.

Based on the foregoing analysis, the Amended Complaint sufficiently pleads a fraud claim. Accordingly, Defendants’ motion to dismiss Count One is denied.

2. Breach of Contract

Defendants argue that Plaintiff’s breach of contract claim demanding \$1.3 million on a “time and materials” basis should be dismissed under CPLR § 3211(a)(1) because it

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is barred by the express terms of Section U of the Interference Agreement. Defendants argue that Section U limits Plaintiff to a “lump sum” payment of \$375,000, and the only exception allowing for additional payments on a “time and materials” basis is inapplicable in this situation. (Defs.’ Memo In Supp. at 11-13).

Where a motion to dismiss is based on documentary evidence under CPLR § 3211(a)(1), the claim will be dismissed “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen*, 98 N.Y.2d at 326.

Here, Defendants point to two provisions of the contract allegedly capping Plaintiff’s fees at \$375,000. First, Attachment 2 to Section U of the Interference Agreement provides Plaintiff agreed to provide “all necessary utility interference work” regarding Defendants’ utility lines for the lump sum of \$375,000, to be provided in four separate payments throughout the course of the interference work. (Cifuentes Affirm. Ex. A, Attach. 2). Second, Attachment 1 provides that “extra interference work caused by the City issuing change orders and/or requested by Empire City or Verizon in writing anywhere within one block of the stated contract limits . . . shall be paid on a time and material basis in accordance with the City Contract.” (*Id.*, Attach. 1).

According to these provisions, the only way for Plaintiff to obtain “time and materials” pay is if either the City or Defendants issue a written “change work order” permitting the additional payments for work. To that end, Plaintiff presents a letter dated

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January 11, 2017, sent by DDC to Plaintiffs, in which the City states that it received a series of proposed changes from Plaintiff regarding its interference work, and “did not take any objections to the proposed changes”. (Robotham Affirm. Ex. G).

While this letter does not appear to constitute an explicit “change-work order,” it nevertheless raises an issue of fact as to whether Plaintiff had the required permission to alter the scope of its work, such that it would become entitled to additional “time and materials” pay under the Interference Agreement. As such, the contract provisions cited by Defendants fail to conclusively establish the defense that Plaintiff is not entitled to “time and materials pay” under the contract. *See Goshen*, 98 N.Y.2d at 326 (citing CPLR § 3211(a)(1)).

Accordingly, Defendants’ motion to dismiss Count Two is denied.

3. Quantum Meruit

Defendants argue Plaintiff’s claim for *quantum meruit* is barred because the parties’ relationship is governed by a written contract. (Defs.’ Memo in Supp. at 13-14).

In general, “a valid and enforceable written agreement governing the parties dispute [] precludes recovery in quasi contract for events arising out of the same subject matter. *MG W. 100 LLC v. St. Michael's Protestant Episcopal Church*, 127 A.D.3d 624, 626 (1st Dep’t 2015). However, where a contract exists, *quantum meruit* may be pled in the alternative “where there is a bona fide dispute as to the existence of a contract”.

Joseph Sternberg, Inc. v. Walber 36th St. Assoc., 187 A.D.2d 225, 228 (1st Dep’t 1993).

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Here, because Plaintiff's claim for fraudulent inducement survives the instant motion to dismiss, Plaintiff has raised a "bona fide" dispute as to the validity of the governing contract such that *quantum meruit* may be pled in the alternative.

Accordingly, Defendants' motion to dismiss the Amended Complaint's claim for *quantum meruit* is denied.

IV. Conclusion

Therefore, for the reasons stated herein, Defendants' motion to dismiss is denied in its entirety;

Defendants are directed to file an Answer within 20 days from the date of Entry of this Decision; and

All parties are to appear for a Preliminary Conference on November 14, 2017 at 10:00 a.m.

Dated: New York, New York
September 6, 2017

ENTER


Hon. Eileen Bransten, J.S.C.