Consumer Protection Restoration LLC v Hickory House Tenants Corp.
2018 NY Slip Op 34610(U)
December 13, 2018
Supreme Court, Rockland County
Docket Number: Index No. 031285/2018
Judge: Paul I. Marx
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. PAUL I. MARX, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

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CONSUMER PROTECTION RESTORATION LLC and PRESTIGE REALTY GROUP INC.,

Plaintiff,

-against-

HICKORY HOUSE TENANTS CORP. and NATIONAL BILLING AND FUNDING LLC,

Defendants.

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Index No. 031285/2018

DECISION AND ORDER

Motion Date: Sept. 19, 2018
Motion Sequence # 2

The following papers numbered 1 through 23 were read on the joint motion of Plaintiffs Consumer Protection Restoration LLC ("CPR") and Prestige Realty Group Inc. ("Prestige") and Defendant National Billing and Funding LLC ("NBF") to dismiss the counterclaims and cross claim, respectively, brought against them by Defendant Hickory House Tenants Corp.:

Notice of Motion to Dismiss all Counterclaims and Crossclaims 1
Affirmation of Alexander M. Levy, Esq./Exhibits 1-5 2
Affidavit of Wetzer Jeannot/Exhibits A-X 3
Memorandum of Law in Support of Motion to Dismiss 4
Affidavit of Laurence Holland/Exhibits A-H 5
Memorandum of Law in Opposition 6
Affidavit of Susan M. Smith in Opposition/Exhibits A-S 7
Affidavit of Marc Fishman 8
Affirmation of Wayne A. Gavioli, Esq./Exhibits A-H 9
Memorandum of Law in Reply 10
Affidavit of Doris Ford in Support of Motion to Dismiss Crossclaims/Exhibits 1-15 11
Affidavit of Glorian Powell in Support of Motion to Dismiss Crossclaims 12
Affirmation of Stella Goldstein, Esq./Exhibits 1-6 13
Affidavit of Wendy Lozier in Support of Motion to Dismiss Crossclaims 14
Sur-Reply Affirmation of Wayne A. Gavioli, Esq./Exhibits A-B/Memorandum of Law in Opposition/Supplemental Affidavit of Susan M. Smith/Exhibits A-P/Supplemental Affidavit of Laurence Holland/Exhibit A/Supplemental Affidavit of Merline Hardy/Supplemental Affidavit of Dalkeith Darling/ Supplemental Affidavit of Sindya Payen-Bernard 15-21
Memorandum of Law in Response to HH's Supplemental Response and in Further Support Of Plaintiffs' and NBF's Joint Motion to Dismiss all Counterclaims and Crossclaims/Affidavit of Wetzer Jeannot/Exhibit 1-5 22-23

BACKGROUND

The instant action arises from a fire which occurred at a co-operative housing complex owned by Defendant Hickory House, located on Main Street in Spring Valley, New York (the "Premises"). The fire occurred on March 11, 2017, resulting in the complete destruction of Building A and smoke and water damage to the basement of Building B in the complex.

Plaintiffs allege that on March 11, 2017, Hickory House separately contracted with CPR to perform hazardous demolition and mitigation services and with Prestige to perform demolition and construction services at the Premises. Plaintiffs allege that they performed the services from March 11, 2017 through January 19, 2018, when Hickory House demanded that they cease performing any work. Plaintiffs allege that despite their demand for payment, Hickory House failed to pay. CPR and Prestige each filed a mechanics' lien against Hickory House with the Rockland County Clerk and served Hickory House with notice of the liens. CPR seeks a judgment in the sum of $1,547,253.16 plus attorneys' fees and costs. Prestige seeks a judgment in the sum of $3,694,746.83 plus attorneys' fees and costs.

On March 6, 2018, CPR and Prestige commenced this action against Hickory House to foreclose on their mechanics' liens and for breach of contract and unjust enrichment. Plaintiffs did not allege any claims against NBF, Hickory House's mortgagee, which Plaintiffs assert is named pursuant to § 44-2 of the New York Lien Law. Plaintiffs amended their Complaint to add a cause of action for anticipatory repudiation against Hickory House.

Hickory House filed its Answer to the Amended Complaint on April 18, 2018, asserting affirmative defenses and alleging Counterclaims and Cross Claims. Hickory House filed a second Answer to the Amended Complaint on April 24, 2018, after Plaintiffs' counsel sought clarification of the claims asserted.

On May 14, 2018, Movants (collectively, "Movants") filed the instant motion to dismiss the counterclaims and cross claims alleged in Hickory House's Answer to the Amended Complaint filed on April 24, 2018. On June 27, 2018, Hickory House submitted a further amended Answer with its opposition papers ("Answer"). In their reply, Movants urged the Court to reject the Answer, but addressed the claims alleged in the new pleading. In addition, Movants asserted for the first time that Hickory House did not have standing to bring its claims because the board which authorized their filing was not properly constituted.

By Decision and Order dated August 2018, the Court allowed Hickory House's Answer and directed the parties to submit supplemental papers addressing the arguments raised in Movant's reply papers. The return date of the motion was adjourned to September 12, 2018.

Hickory House alleges the following counterclaims against Plaintiffs in its Answer filed June 27, 2018: (1) willful exaggeration of lien amounts based upon the total fair and reasonable value of the work, labor and services performed by CPR and Prestige Realty being less than $750,000.00; (2) fraud in the inducement against CPR; (3) deceptive business practices against CPR pursuant to GBL § 359; (4) negligence against CPR and Prestige Realty in connection with the work they performed in the twelve units in Building B; (5) negligence against CPR and Prestige Realty in connection with their placement of a trailer over the water drain located in the parking lot alongside Building B, thereby blocking the drain and causing water to seep into the basement of Building B; (6) tortious interference with contract against CPR and Prestige Realty in connection with Hickory House's mortgage previously held by Capital One; and (7) declaratory judgment that (a) the construction contracts with Plaintiffs are unenforceable due to missing essential terms and lacking a meeting of the minds, and (b) the assignment of Hickory House's insurance claims is null and void.

Hickory House alleges the following cross claim[1] against NBF in its Answer filed June 27, 2018: declaratory judgment that (a) NBF, CPR and Prestige Realty are each jointly and severally liable for any judgment Hickory House obtains against CPR or Prestige Realty, (b) NBF is not entitled to hold the insurance proceeds payable under Hickory House's insurance policy, or such proceeds shall be applied to pay off Hickory House's mortgage with the balance of said funds being released to Hickory House, (c) NBF shall not charge Hickory House the default interest rate, because NBF, acting through its alter egos, CPR and Prestige Realty, caused Hickory House's default, and (d) the pay-off amount of the mortgage shall be the amount which Hickory House owed to Capital One on January 8, 2018, less any reduction in principal to which Hickory House is entitled.

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[1] Although Hickory House alleged one "cross claim", it seeks several different forms of relief against NBF.

DISCUSSION

Standing

Movants jointly seek dismissal of Hickory House's counterclaims and cross claim, contending that the Board which brought these claims was not properly constituted and lacks standing to assert claims on behalf of Hickory House. Movants cite *TJI Realty, Inc. v Harris*, 250 AD2d 596, 597 [2nd Dept 1998] (Litigation brought by the president of a corporation may not "be maintained…if it is contrary to the duly-authorized directors of the board."); *Gorbrook Assoc. Inc. v Silverstein*, 40 Misc 3d 425, 436 [Nassau Dist Ct 2013] (the "decision to institute litigation [also] rests within the discretion of the board of directors."); and *Schillinger & Albert, Inc. v Myral Hats, Inc.*, 55 Misc 2d 178, 179 [N.Y. Civ Ct 1967].

Hickory House contends that litigation against Movants was authorized at a Board meeting held on March 5, 2018. All five board members were in attendance and voted unanimously in favor of pursuing any and all causes of action Hickory House might have against CPR, Prestige Realty and NBF. Supplemental Affidavit of Susan M. Smith dated August 31, 2018 at ¶ 11; Supplemental Affidavit of Laurence Holland dated August 29, 2018 at ¶ 11; Supplemental Affidavit of Dalkeith Darling dated August 30, 2018 at ¶ 11; Supplemental Affidavit of Payen-Bernard dated August 31, 2018 at ¶ 11; and Supplemental Affidavit of Merline Hardy dated August 30, 2018 at ¶ 11.

The cases cited by Movants are not directly on point. Those cases involve a member of a board or officer of a corporation commencing litigation on behalf of the entity without the consent of the board. In this case, the litigation was authorized by the full Board in place at the time.

Movants contend further that the Board itself was not properly constituted in accordance with the Bylaws of Hickory House. Specifically, movants contend that Board President Susan Smith was not qualified to be on the Board because she was not in "good financial standing". The same claim is made regarding Board member Laurence Holland, who signed the verification of Hickory House's Answer. Apparently, both Board members made late payments of their maintenance charges on more than one occasion in 2017. When they submitted their requests to be considered for candidacy to the Board in October, 2017, their applications were rejected by the then Board because the making of late payments did not comply with Hickory House's policy that payments be made by the tenth of each month to be timely and for a shareholder to be considered in good financial standing. Affidavit of Doris Ford dated July 9, 2018, Exhibit 11 and 12, Correspondence from Board to Holland and Smith. Movants also contend that the special meeting held on November 17, 2017 and the election of a new Board at that meeting were invalid.

Hickory House contends that Movants do not have standing to challenge the validity of the Board election held on November 17, 2017, because neither of them is a shareholder of Hickory House. *Matter of Weinstein (Sokol)*, 203 Misc 975, 978 [Sup Ct, Queens County 1953] ("none of the petitioners has any stock ownership in Clearview Gardens Fifth and Sixth Corporations. Therefore, in regard to the latter, there is no party aggrieved who could properly challenge the election under the provisions of section 25 of the General Corporation Law.").

Hickory House relies upon BCL § 619, which provides for judicial review by the Supreme Court of petitions by any shareholder aggrieved by an election.[2] The former Board did not submit a petition, nor did any shareholder, challenging the election of new Board members on November 17, 2017.

Hickory House contends further that the November 17, 2017 meeting was properly called in accordance with BCL § 603. In July, 2017, a group of shareholders (30% of all shareholders) submitted a petition to the Board calling for a Special Shareholders Meeting to discuss whether to remove three Board members and elect replacements.

According to Hickory House, the former Board did not hold an Annual Shareholder's Meeting for the years 2014 through 2016. As a result, Hickory House contends that the members of the Board to whom they made their request for a special meeting were holdovers or had been appointed and all of their seats were available.

On September 13, 2017, Susan Smith wrote to the Board, renewing the request for a Special Shareholder's Meeting to be called for November 17, 2017. Smith enclosed another copy of the July 2017 petition requesting a Special Shareholder's Meeting.

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[2] Such actions are governed by a four month statute of limitations. *Springut v Don & Rob Restaurant of America, Inc.*, 57 AD2d 302, 304-05 [4th Dept 1977] ("We conclude that the four month statute limitation of CPLR 217 applies to the review of the election of the Board of Directors of respondent corporation and that the proceeding to review such election was not timely commenced.").

The Board did not call a Special Shareholder's Meeting, as requested. Instead, the Board sent notice to the shareholders stating that the Annual Shareholders Meeting would be held on October 2, 2017, and that there were no seats up for election. On October 2nd, the Board convened the meeting but declined to hold it because attendees were videotaping the meeting. A quorum of shareholders was present at the October 2nd meeting and they remained after the Board left. A motion was made and seconded at the meeting and the shareholders voted to hold a meeting on November 17, 2017, with the purpose to remove the entire Board.

Following the October 2nd meeting, the Board sent out a notice that the meeting was adjourned to October 30, 2017. The notice stated that there were two seats available on the Board.

Hickory House asserts that no election of Board members took place at the October 30th meeting.

On November 17, 2017, shareholders representing 7,025 shares attended a Special Shareholders' Meeting (5,177 shares in person and 1,848 shares by proxy).

Movants argued in their initial Reply that the November 17, 2017 meeting was a "sham" because it was not called by the then Board President, Doris Ford, or the then Board Secretary, Cleveland Cooke, or by a majority of the Board. Reply Memorandum of Law at 6. Movants argued in their Memorandum of Law in Response to HH's Supplemental Response that the November meeting was not held in accordance with BCL § 603, as Hickory House contends, because BCL § 603 provides that, as applicable here, if, thirteen months after the last annual meeting, a sufficient number of directors has not been elected, the Board shall call a special meeting to elect directors. If no such meeting is called within two weeks of the end of the thirteen-month period, 10% of shareholders may demand a special meeting to elect directors. Applying that timeline here, Movants assert that the earliest a special meeting could have been demanded pursuant to BCL § 603 was December 8, 2017, because the time-period ran from the date set for the October 2016[3] annual meeting, for which there was no quorum. Movants further assert that the demands made to the Hickory House Board in July and September 2017 were premature and thus the holding of the November 2017 meeting did not comply with the timeline under BCL § 603. Movants contend

[3] Hickory House has scheduled its annual meeting in October of each year for the past five years.

that the provisions of the By-Laws govern and, in fact, the BCL only applies where the By-Laws are silent.

Article II, Section 2 of Hickory House's By-Laws, entitled Special Meetings, provides as follows:

> Special meetings of shareholders, other than those the calling of which is regulated by statute, may be called at any time by the president or secretary or by a majority of the Board of Directors. *It shall also be the duty of the secretary to call such meetings whenever requested in writing so to do by shareholders owning at least twenty-five per cent of the outstanding shares of the Corporation.* The secretary shall cause a notice of such special meeting stating the time, place and object thereof and the officer or other person or persons by whom the meeting is called, to be delivered personally or mailed as provided in Section 1 of this Article to each shareholder of record of the Corporation entitled to vote at such meeting not less than ten nor more than forty days before such meeting. No business other than that stated in such notice shall be transacted at such special meeting unless the holders of all the outstanding shares of the Corporation be present there in person or by proxy. (Emphasis added).

Pursuant to Article II, Section 2, the Secretary of Hickory House was required to send notice of any special meeting requested to be held by at least 25% of the outstanding shares. More than the 25% of shareholders required by Article II, Section 2 of Hickory House's By-Laws requested in writing in July 2017 and again in September 2017 for a special shareholder meeting to be called. The Secretary did not honor either request. The By-Laws did not state who may send the notice if the Secretary fails to send it. As Movants assert, the BCL comes into play when by-laws are silent. Under BCL § 603, any shareholder which signed a demand for a special meeting may give notice of the meeting if the Secretary fails to give notice.

Three of the shareholders who signed the Petition requesting a special meeting sent out notice to all shareholders of the Special Shareholders' Meeting to be held on November 17, 2017, after the Secretary failed to act upon the second request to call such meeting. The November 17, 2017 meeting was held, as noticed, and more than 50% of the shares (in person and by proxy) attended and voted Susan Smith, Laurence Holland, Dalkeith Darling, Sindya Bernard-Payen and Merline Hardy onto the Board (the "Smith Board").

The November 17, 2017 meeting was called and held by more than 25% of shareholders in accordance with Article II, Section 2 of the By-Laws. Thus, the Smith Board was properly elected. The former Board members formally resigned in January 2018. The duly elected Smith Board met in March 2018 and properly authorized the filing of the claims against Movants in this litigation.

Accordingly, Movants' argument that Hickory House lacks standing to assert the counterclaims and cross claim set forth in the Answer is rejected. The Court turns now to consideration of Movants' request to dismiss those claims.

Willful Exaggeration of Lien

Plaintiffs move to dismiss Hickory House's claim alleging willful exaggeration of their mechanic's liens, contending that the claim "is largely based on the fact that Plaintiffs filed one set of liens in October 2017, and another set in January 2018". Plaintiffs assert that the October 2017 liens have expired and the January 2018 liens cured the defects in the October liens. Plaintiffs state that they have filed a Release and Discharge of the October liens. Plaintiffs assert that the filing of two sets of liens does not constitute exaggeration where one set of liens expired and the other set simply corrected the earlier liens which expired and were admittedly defective.

Plaintiffs contend that Hickory House's claim that the amounts in the January liens are willfully exaggerated must be dismissed because Hickory House has not challenged the itemized statements of the work they performed.[4] Hickory House may seek to challenge the validity and sufficiency of the itemized statements in this action.

Hickory House contends that its claim is based on the fact that Plaintiffs' January 2018 liens total over $5 million dollars for a project that was estimated to cost $3 million. Prestige's lien is for $3,694,746.83 and CPR's lien is for $1,547,253.16. Hickory House asserts that the work on the project has barely started and that the value of the work performed is far less than the amount sought in the liens. Hickory House alleged that the work performed "consists of demolishing one wing of Building A, gutting eleven units, renovating one of the gutted units and installing sheet rock in another, and pouring a concrete slab over the pre-existing foundation of the demolished wing of Building A". Hickory House's Answer dated June 27, 2018 [NYSCEF Doc 89] at ¶ 89. Hickory House alleged that "[t]he total fair and reasonable value of the work, labor and services

[4] Hickory House filed a separate action which was pending before Judge Eisenpress to compel Plaintiffs to submit itemized statements of the work they performed in support of their mechanic's liens.

performed by CPR and Prestige Realty is less than $750,000.00." *Id.* at ¶ 90. Hickory House has adequately alleged a claim for willful exaggeration based upon the work allegedly performed by Plaintiffs and the amount sought in their liens.[5]

Generally, courts have found that claims alleging willful exaggeration of a lien are not subject to summary disposition. "[T]he validity of the lien plainly turns on a dispute as to whether [Plaintiffs] ha[ve] completed the work required by the contract, and, accordingly, must await trial of the foreclosure action". *Aaron v Great Bay Contracting*, 290 AD2d 326, 326, [1st Dept 2002]; *see also Executive Towers at Lido v Metro Constr. Servs.*, 303 AD2d 545, 545 [2003] ("claims under Lien Law §§ 39 and 39–a are not appropriate for summary resolution at this stage of the case"); *Washington 1993 Inc. v Reles*, 255 AD2d 745 [1998] (whether contractor deliberately and intentionally exaggerated the lien amount is question of fact to be resolved at trial); *Scarano Architect, PLLC v 6322 Holding Corp.*, 35 Misc 3d 1228(A) [Sup Ct, Kings County 2012] ("[T]he question of whether the plaintiff herein willfully or fraudulently exaggerated the subject lien must be determined at trial of the foreclosure action and may not be determined summarily"). Dismissal of the claim at this stage is not warranted.

Accordingly, Plaintiffs motion to dismiss Hickory House's counterclaim for willful exaggeration of lien amount is denied.

Fraud in the Inducement

Plaintiffs move to dismiss Hickory House's claim for fraud in the inducement against CPR, which is based upon Hickory House's allegation that CPR knowingly "misrepresented to Hickory House that the only way to deal with the discovery of asbestos in the joint compound alleged[ly] found on the sheet rock in Hickory House's buildings was to remove the sheet rock." Answer at ¶ 99. Hickory House further alleged that as a result, CPR induced Hickory House to authorize asbestos remediation work on Building B which was not covered by insurance and has caused Hickory House to incur unnecessary costs and the loss of common charges from Building B units which CPR has rendered uninhabitable. Plaintiffs contend that Hickory House's claim is not

[5] The bulk of the claimed charges included in the itemized statements submitted by Plaintiffs is for asbestos remediation in Building B. The purported contracts entered into with Plaintiffs did not specify the "Damages" for which Hickory House contracted to have Plaintiffs repair. However, the "Damages" concerned damage to Building A and [some damage to the lower level of Building B] caused by the fire which occurred at Hickory House's premises on March 11, 2017.

actionable because it alleges fraudulent inducement into the construction contract with CPR based upon actions which occurred after the contract was signed. Plaintiffs also contend that the claim was not plead with the requisite specificity, as required by CPLR §3016(b).

Hickory House responds that it has alleged in its Answer that it was fraudulently induced by a representative of CPR at a Hickory House shareholder meeting on April 27, 2017 to authorize asbestos remediation in Building B. Hickory House asserts that its claim is not based upon the construction contract which it entered into with CPR. Rather, its claim is based upon being induced into authorizing additional work at Building B, which was not covered by the contract or even contemplated when the contract was entered into with CPR. Hickory House asserts that it adequately alleged in paragraphs 38-43 of its Answer the factual basis for its claim and the damages it has sustained from gutted units that have not been restored.

"'The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages'." *Fromowitz v W. Park Associates*, 106 AD3d 950 [2nd Dept 2013] (quoting *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898; *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559; *Circle Assoc., L.P. v Starlight Props., Inc.*, 98 AD3d 596, 598; *Whitehead v Town House Equities, Ltd.*, 8 AD3d 367, 368). "To plead a claim for fraud in the inducement or fraudulent concealment, [the party] must allege facts to support the claim that it justifiably relied on the alleged misrepresentations." *ACA Financial Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015].

Plaintiffs have misconstrued Hickory House's fraudulent inducement claim, which is separate from its construction agreement with CPR to repair the fire damage to Building A and smoke and water damage to the lower portion of Building B. Hickory House has adequately alleged the elements of its fraudulent inducement claim. Specifically, Hickory House alleged specific representations which CPR knowingly made allegedly with knowledge of their falsity and with the intent that Hickory House would rely upon them to authorize CPR to conduct asbestos remediation in Building B. Further, Hickory House justifiably relied upon CPR's representation about how to remediate asbestos in Building B and was damaged by CPR's action in gutting eleven units and restoring only one unit, thereby causing Hickory House to lose common charges on the ten units which are uninhabitable.

Accordingly, Plaintiff's motion to dismiss Hickory House's fraudulent inducement claim is denied.

Deceptive Business Practices

Plaintiffs move to dismiss Hickory House's claim for deceptive business practices against CPR, contending that Hickory House's allegations are based on a private contract and do not have a broad impact on consumers at large, as required under GBL § 349.

"To successfully assert a claim under General Business Law § 349 (h), 'a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice'." *North State Autobahn v Progressive Ins. Group Co.*, 102 AD3d 5, 11 [2nd Dept 2012] (quoting *City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]; *see Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 [2012]; *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]).

The Court of Appeals holds that "as a threshold matter, [a party] claiming the benefit of section 349—whether individuals or entities such as the plaintiffs now before us—must charge conduct of the defendant that is consumer-oriented." *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 27 [1995]. The acts complained of cannot be "unique to these two parties, nor … private in nature or a "'single shot transaction' … the acts they complain of [must be] consumer-oriented in the sense that they potentially affect similarly situated consumers." *Id.* at 26-27.

"[C]onduct has been held to be sufficiently consumer-oriented to satisfy the statute where it involved 'an extensive marketing scheme' (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d at 344), where it involved the 'multi-media dissemination of information to the public' (*Karlin v IVF Am.*, 93 NY2d at 293), and where it constituted a standard or routine practice that was 'consumer-oriented in the sense that [it] potentially affect[ed] similarly situated consumers' (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 27; *see Wilner v Allstate Ins. Co.*, 71 AD3d 155, 164 [2010]; *Elacqua v Physicians' Reciprocal Insurers*, 52 AD3d 886, 888 [2008]). Simply put, '[the] defendant's acts or practices must have a broad impact on consumers at large'" (*New York Univ. v Continental Ins. Co.*, 87 NY2d at 320; *see Oswego*

Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d at 25; *Canario v Gunn*, 300 AD2d 332, 333 [2002]; *see also Genesco Entertainment, a Div. of Lymutt Indus., Inc. v Koch*, 593 F Supp at 752)." *North State Autobahn, supra* at 12.

Hickory House has not alleged a claim which falls within the ambit of GBL § 349. Hickory House's allegations are based upon a specific representation that was unique to the parties. Hickory House alleged that CPR contracted "to provide insurance claim handling services and renovation and construction services to consumers whose property has been damaged as a result of some form of calamity." Answer at ¶ 107. Hickory House alleged that "CPR mislead Hickory House as to the alternatives available to it after the alleged discovery of asbestos in the spackle compound on the sheet rock in some areas of Hickory House's buildings." Answer at ¶ 108. Hickory House further alleged that "CPR mislead Hickory into believing its insurance would cover the cost of asbestos abatement for all of Hickory House's building[s]." *Id.* at ¶ 109. Hickory House has not alleged acts that are consumer-oriented in the sense that they potentially affect similarly situated consumers. Hickory House attempts to base its claim upon the fact that CPR's contract is "a standard form document that CPR undoubtedly uses with all of its customers". That alone is not sufficient to state a claim under GBL § 349. Hickory House cannot enlarge the scope of its claim in its supplemental Memorandum of Law based upon allegations that were not made in the Answer. The claim, as alleged, does not fall within GBL § 349.

Accordingly, Plaintiff's motion to dismiss Hickory House's counterclaim for deceptive business practices under GBL §349 is granted.

Negligence Claims

Plaintiffs move to dismiss Hickory House's counterclaims alleging negligence in connection with the work Plaintiffs performed in the twelve units in Building B and their placement of a trailer over the water drain located in the parking lot alongside Building B, which blocked the drain and caused water to seep into the basement of Building B. Plaintiffs contend that "[d]ocumentary evidence utterly refutes [these] claims ...". Reply Memorandum at 23. The documentary evidence Plaintiffs provide consists of a "Permit Update" identified as being for BP2017-0071, which Plaintiffs' counsel identifies as "a copy of the Permit Update listing inspections that were performed by the Village of Spring Valley with respect to Permit BP2017-

0071 in August and September of 2017." Affidavit of Stella Goldstein, Esq. at ¶ 10 (referencing the "Permit Update" attached as Exhibit 6).

Plaintiffs submission of a Permit Update which does not on its face even identify that it was created by the Village of Spring Valley or that it relates to work performed at Hickory House does not establish that Hickory House's negligence claims must be dismissed. In fact, the Permit Update is meaningless without additional documentation that ties it to Hickory House. Furthermore, the Permit Update is inconclusive, as it appears to simply document inspections of stages of the work being performed in Building B.

Accordingly, Plaintiffs' motion to dismiss Hickory House's negligence counterclaims is denied.

Tortious Interference with Contract

Plaintiffs move to dismiss Hickory House's counterclaim alleging tortious interference with Hickory House's mortgage, which was previously held by Capital One and is now held by NBF. Plaintiffs contend that Hickory House has not alleged an essential element of a cause of action for tortious interference with contract that Plaintiffs have procured breach by a third party. Plaintiffs set out the elements of the claim as requiring "the existence of a valid contract between [Hickory House] and a third party, [Plaintiffs'] knowledge of that contract ... and intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996].

Hickory House contends that it has properly alleged a cause of action for tortious interference with contract. Relying upon *Hersh v Cohen*, 131 AD3d 1117, 1119 [2nd Dept 2015], which set forth the elements of a cause of action for tortious interference with contract to include inducing a third party to breach "or otherwise render performance impossible". As stated in *Hersh*, "[t]he elements of tortious interference with a contract are: '(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff'." (quoting *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; *see Pacific Carlton Dev. Corp. v 752 Pac., LLC*, 62 AD3d 677, 679 [2009]; *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 476 [2009]).

The Restatement (Second) of Torts sets forth the rule of law as "[o]ne who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." *See generally*, Restatement [Second] of Torts § 766 (1979) (cited in *Kronos v AVX Corp.*, 81 NY2d 90, 94 [1993]). As further explained in the commentary to that section, "[t]he phrase 'otherwise causing' refers to the situations in which A leaves B no choice, as, for example, when A imprisons or commits such a battery upon B that he cannot perform his contract with C, or when A destroys the goods that B is about to deliver to C. This is also the case when performance by B of his contract with C necessarily depends upon the prior performance by A of his contract with B and A fails to perform in order to disable B from performing for C." As the example illustrates, a claim for tortious interference with contract may lie where the actor causes a party to breach its contract with a third party. The breach need not be by the third party. "The rule stated in this Section applies to any intentional causation whether by inducement or otherwise. The essential thing is the intent to cause the result." *Id.*

Hickory House's Answer sufficiently sets forth a cause of action based upon tortious interference with contract, in pertinent part, through its allegations that Plaintiffs intentionally caused Hickory House to breach its mortgage by not performing under Plaintiffs' contracts with Hickory House to complete construction of Building A and filing mechanic's liens against Hickory House, which led its mortgagee to find Hickory House in default.

Accordingly, Plaintiffs' motion to dismiss Hickory House's counterclaim of tortious interference with contract is denied.

Counterclaim and Cross Claim for Declaratory Judgment

Movants move to dismiss Hickory House's counterclaim and cross claim seeking a declaratory judgment that (a) the construction contracts with Plaintiffs are unenforceable due to missing essential terms and lacking a meeting of the minds, and (b) the assignment of Hickory House's insurance claims is null and void. Plaintiffs contend that Hickory House lacks standing to assert these claims. For the reasons stated above, Hickory House has standing.

Accordingly, Plaintiffs motion to dismiss Hickory House's counterclaim and cross claim seeking declaratory judgment is denied.

SUMMARY

It is hereby

ORDERED, that Plaintiffs' motion to dismiss Hickory House's counterclaim for willful exaggeration of lien amount is denied; and it is further

ORDERED, that Plaintiffs' motion to dismiss Hickory House's counterclaim for fraudulent inducement claim is denied; and it is further

ORDERED, that Plaintiff's motion to dismiss Hickory House's counterclaim for deceptive business practices under GBL §349 is granted; and it is further

ORDERED, that Plaintiffs' motion to dismiss Hickory House's negligence counterclaims is denied; and it is further

ORDERED, that Plaintiffs' motion to dismiss Hickory House's counterclaim of tortious interference with contract is denied; and it is further

ORDERED, that Plaintiffs motion to dismiss Hickory House's counterclaim and cross claim seeking declaratory judgment is denied.

The foregoing constitutes the Decision and Order of the court.

Dated: 12/13, 2018
New City, New York

ENTER

HON. PAUL I. MARX, J.S.C.