

Redhead Bldrs. LLC v Aran World Inc.
2019 NY Slip Op 31228(U)
April 24, 2019
Supreme Court, New York County
Docket Number: 653913/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 653913/2018

REDHEAD BUILDERS LLC D/B/A 5 ELEMENTS WEST

MOTION DATE 10/10/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

ARAN WORLD INC.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12

were read on this motion to/for DISMISS.

This is an action for breach of contract brought by Redhead Builders LLC d/b/a 5 Elements West (5 Elements) against Aran World Inc. (Aran World). The case arises from an alleged oral agreement between 5 Elements and Aran World pursuant to which 5 Elements agreed to provide consulting, design, and other services in connection with a subcontract on a real estate construction project. The first and second causes of action allege breach of contract and breach of contract under the third-party beneficiary doctrine. The remaining causes of action, which are pled in the alternative, allege fraud, promissory estoppel, money had and received, quantum meruit, and tortious interference with business relations.

FACTS RELEVANT TO THE MOTION

In 2015, 5 Elements was approached by a representative of Times Square Construction (**Times Square**) concerning an upcoming real estate development project (the **Project**) at 125 Greenwich Street, New York, New York (Complaint, ¶ 11). In September 2016, Times Square invited 5 Elements to submit a bid for a subcontract to provide, *inter alia*, kitchen, closet, and bathroom cabinetry work (*id.*). The construction manager on the Project was Times Square Joint Venture, which consisted of Times Square, the construction manager for interior construction and “fit out” work, and Plaza Construction (**Plaza**), the entity responsible for core and shell construction (*id.*). The CEO of 5 Elements had a long-standing relationship with the executives of Plaza and Times Square, and the companies have done business together in the past (*id.* ¶ 12).

5 Elements and Times Square engaged in detailed planning and negotiations and 5 Elements began formulating a proposal for the cabinetry work (*id.* ¶ 13). 5 Elements approached several suppliers of woodworking components, including Aran World, regarding the project (*id.* ¶ 14). 5 Elements requested pricing proposals from Aran World for the cabinetry work (*id.*). On December 6, 2016, Aran World provided 5 Elements with its initial pricing proposals (*id.* ¶ 17). Beginning in early 2017, 5 Elements held several meetings with Aran World to discuss the project (*id.* ¶ 18).

On September 26, 2017, representatives of 5 Elements and Aran World met with the Project developer, Bizzi Development (**Bizzi**) to review 5 Elements’ proposal (*id.* ¶ 21). At the meeting, the parties discussed Plaza’s requirement that all subcontractors put up a Payment and

Performance Bond (*id.* ¶ 22). 5 Elements was unwilling or unable to meet this bond requirement (*id.*). At a subsequent meeting on September 26, 2017, Aran World indicated that it would satisfy the bond requirement, on the condition that the contract be made in Aran World's name (*id.* ¶ 23). On September 27, 2017, Bizzi's owner and Vice President instructed 5 Elements to submit its best and final offer (**BAFO**) for the cabinetry work directly to him, and to copy all other project participants on the communication (*id.* ¶ 24). Later that day, 5 elements sent its BAFO to Bizzi, copying representatives of the Joint Venture and Bizzi.

The BAFO sent by 5 Elements stated a final price of \$6,700,000, which included \$345,450 for 5 Elements' costs and fees for consulting, planning, and other services (*id.* ¶ 29). The BAFO stated that Aran World was to hold contract directly for the purposes of bonding and financial interactions (*id.* ¶ 30). 5 Elements inquired with Aran World as to the status of Aran World's efforts to satisfy the bonding requirement and in subsequent conversations, Aran World indicated that it was working on addressing that issue (*id.* ¶¶ 36-27). On December 5, 2017, Aran World requested that 5 Elements reduce its compensation to make the bid more competitive (*id.* ¶ 46). 5 Elements agreed to reduce its compensation by \$50,000 if it was necessary to secure the contract (*id.*).

In December 2017, Aran World refused to permit a representative from 5 Elements to attend a meeting and visit of Aran World's factory in Italy (*id.* ¶ 40). Aran World indicated that a representative of Aran World's bank would be present at the factory meeting to inform Bizzi that Aran World would put up the bond and to ensure that the terms regarding the payment of the bond were clear (*id.* ¶ 43). At the factory meeting in Italy, Aran World presented a proposal to

provide Plaza with a letter of credit in lieu of a bond (*id.* ¶ 39). In December 2017, Plaza informed 5 Elements it was waiving the bond requirement and would accept a letter of credit from Aran World with an agreement to indemnify Plaza against any potential liability (*id.* ¶¶ 45-46).

On January 4, 2018, representatives of Aran World, 5 Elements, the Joint Venture, and Bizzi met at Plaza's offices. The parties agreed to a final contract award of \$7,242,000, including \$142,000 payable to Aran World to cover the cost of the letter of credit (*id.* ¶ 49). This agreement was memorialized in a final award sheet, which was circulated to the parties at the January 4, 2018 meeting. The final award sheet included a payment of \$354,450 to 5 Elements as contemplated in the BAFO (*id.* ¶ 50). At the meeting, Plaza's Senior Vice President confirmed with a representative of Aran World that Aran World was going to compensate 5 Elements based on the arrangement memorialized in the final award sheet (*id.* ¶ 51).

On January 23, 2018, 5 Elements inquired with Aran World as to the status of payment (*id.* ¶ 53). Aran World indicated that they had not yet received a contract and had not yet received any funds, and that they should revisit this issue at a future date (*id.*). On March 12, 2018, 5 Elements issued an invoice to Aran World for \$304,450, reflecting the agreed-upon fee as set forth in the BAFO, less the \$50,000 discount (*id.* ¶ 56). Aran World's CEO denied that any compensation was owed to 5 Elements, alleging that Aran World's representative who negotiated the arrangement with 5 Elements was a salesman with no authority to enter into a binding agreement on Aran World's behalf (*id.* ¶ 57). Aran World's CEO further stated that he personally secured the contract and submitted the bid directly to Bizzi (*id.*). Following Aran

World's refusal to remit payment, 5 Elements commenced the instant lawsuit by filing a summons and verified complaint on August 7, 2018. Aran World now moves to dismiss the complaint in its entirety.

DISCUSSION

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 [a] [7], the Court must accept every allegation in the complaint as true afford the pleadings a liberal construction (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court accords the plaintiff the benefit of every favorable inference in determining whether the facts alleged in the complaint fit within any cognizable legal theory (*id.* at 87-88). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

First Cause of Action: Breach of Contract

The first cause of action alleges breach of an oral contract. To state a claim for breach of contract, a plaintiff must allege (i) the existence of a valid contract, (ii) the plaintiff's performance, (iii) the defendant's breach, and (iv) resulting damages [*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-46 [1st Dept 2016]]. In the case of a purported oral agreement, the complaint must specifically allege that the plaintiff is relying on an oral agreement and set forth all of the relevant terms (*Bomser v. Moyle*, 89 A.D.2d 202, 205, 455 N.Y.S.2d 12, 14 [1st Dept 1982]).

Aran World argues that the agreement alleged in the complaint is based on a finder's fee and therefore must be reduced to writing under the General Obligations Law (General Obligations law § 5-701). The problem is that this is not a finder's fee case. The alleged agreement contemplated performance of consulting, design, planning, and other work in connection with the Project (Complaint, ¶ 60). The nature of the relationship of the parties in this case goes beyond merely making introductions and assisting Aran World in securing the contract. Therefore, this case does not fit within the "finder's fee" category of cases and the lack of a written contract is not necessarily fatal to the claim.

Nevertheless, to survive a motion to dismiss, a cause of action for breach of contract based on a purported oral agreement must allege the essential terms of the agreement and the specific provisions that were allegedly breached upon which liability is predicated (*Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). In this case, the complaint fails to set forth sufficient facts from which a meeting of the minds can be inferred from the BAFO. The complaint does not provide the salient terms of the purported agreement, including the details of the scope of work to be completed by 5 Elements, how and when 5 Elements was to be paid by Aran World, or any other essential terms. The allegations in the complaint regarding the existence of a valid and binding contract based on the BAFO between the parties are too vague and indefinite to support a cause of action for breach of contract. Accordingly, the first cause of action is dismissed without prejudice.

Second Cause of Action: Breach of Contract (Third-Party Beneficiary)

Aran World argues that there is no contract in this case and therefore 5 Elements cannot be a third-party beneficiary. Again, they argue that 5 Elements' claim is really that of a finder's fee for submitting the BAFO and locating this opportunity for Aran World. The argument is unavailing.

To invoke the rights of a third-party beneficiary in a cause of action for breach of contract, a plaintiff must establish: (i) a valid and binding contract between other parties that was (ii) intended for the benefit of the third party, and (iii) the intended benefit to the third party is sufficiently immediate to indicate that the contracting parties assumed a duty to compensate the third party should the benefit be lost (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 286 [2006]). Conclusory allegations regarding the terms of the alleged agreement are insufficient to support a third-party beneficiary claim (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). A plaintiff must, at a minimum, "plead the salient terms of a valid and binding contract . . . [to] show that the contract was intended for its immediate benefit" (*id.*).

In its opposition papers, 5 Elements alleges that it was an intended third-party beneficiary to the contract (*i.e.*, the final award sheet). The complaint alleges that the BAFO submitted by 5 Elements, which served as a basis for ongoing negotiations, specifically included payment to 5 Elements in the amount of \$354,450 for its consulting, design, and other services. The complaint further alleges that Aran World received a final award sheet, pursuant to which the project was formally awarded to Aran World. This final award sheet included a line item for payment to 5 Elements as contemplated in the BAFO. The complaint also alleges that Plaza's Senior Vice

President confirmed with a representative of Aran World at the close of the meeting at which the final award sheet was circulated that Aran World was going to compensate 5 Elements for its work.

5 Elements has alleged sufficient facts to support a cause of action for breach of contract as a third-party beneficiary. Accordingly, the motion to dismiss is denied with respect to the second cause of action.

Third Cause of Action: Fraud

5 Elements alleges that the various representations made by Aran World in connection with the parties' efforts to secure a contract give rise to a cause of action for fraud. The prima facie elements of a cause of action for fraud are (i) a material misrepresentation of fact, (ii) made by the defendant with knowledge of its falsity, (iii) with an intent to induce the plaintiff's reliance, (iv) justifiable reliance by the plaintiff, and (v) damages (*Schneiderman v Credit Suisse Securities (USA) LLC*, 31 NY3d 622, 638 [2018]). A cause of action for fraud must be pleaded with particularity (CPLR § 3016 [b]).

The complaint sets forth four examples of false statements allegedly made by Aran World concerning: (a) Aran World's willingness and ability to satisfy the bond requirement, (b) the reasons for pursuing a direct contract with the Joint Venture rather than working with 5 Elements, (c) the reasons for excluding personnel from 5 Elements from a meeting regarding the Project, and (d) Aran World's intention to compensate 5 Elements (Complaint, ¶ 69). The complaint alleges that these statements were knowingly false when made and were intended to

deceive 5 Elements in an effort to usurp them and cut them out of the contract (*id.* ¶ 69-72). To the extent that Aran World argues that 5 Elements' fraud claim must fail because there is no fiduciary relationship between the parties, this argument is unavailing. 5 Elements does not allege the omission or concealment of information, rather, they allege multiple affirmative misrepresentations. Therefore, a fiduciary relationship is not required to maintain the cause of action (*Robinson v Crawford*, 46 AD3d 252, 253 [2007]). 5 Elements has stated a cause of action for fraud and the motion to dismiss is denied with respect to the third cause of action.

Fourth Cause of Action: Promissory Estoppel

The complaint also seeks relief under a theory of Promissory Estoppel. The essential elements of a cause of action for promissory estoppel are (i) a sufficiently clear and unambiguous promise, (ii) reasonable reliance on the promise by the plaintiff, and (iii) injury resulting from the plaintiff's reliance (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017]). Here, the complaint alleges a promise made by Aran World to compensate 5 Elements for its consulting, design, and other work. This promise is sufficiently clear in the complaint, affording the complaint a liberal construction and according the allegations every favorable inference, based on the BAFO, the final award sheet, and the communications between the parties. The complaint alleges that 5 Elements reasonably relied on this promise based on the long-standing relationship between the parties (*id.* ¶ 75). The complaint further alleges damages of not less than \$354,450 as a direct result of 5 Elements' reliance on Aran World's promise, which 5 Elements incurred because Aran World was awarded the contract, not 5 Elements, and 5 Elements never received compensation for its work (*id.* ¶ 76).

The complaint sets forth sufficient factual allegations to state a cause for action for promissory estoppel. The motion to dismiss the fourth cause of action is denied.

Fifth Cause of Action: Money Had and Received

A cause of action for money had and received is quasi-contractual claim available to a plaintiff in the absence of a binding agreement between the parties (*Bd. Of Educ. Of Cold Spring Harbor Cent. School Dist. V Rettaliata*, 78 NY2d 128, 138 [1991]). To prevail under a theory of money had and received, a plaintiff must establish that (i) the defendant received money belonging to the plaintiff, (ii) the defendant benefited from receipt of the plaintiff's money, and (ii) the defendant should not, in good conscious, be permitted to retain the money (*id.*). In this case, the complaint alleges that Aran World received money that belonged to 5 Elements as designated in the BAFO, final award sheet, and prior communications between the parties, that they benefited from retaining this money, and that equity and conscious require that they not be permitted to retain it (*id.* ¶¶ 77-79). 5 Elements has sufficiently pleaded a cause of action for money had and received and the motion to dismiss is denied with respect to the fifth cause of action.

Sixth Cause of Action: Quantum Meruit

To prevail on a cause of action for quantum meruit, the proponent must establish: (i) the performance of services in good faith by the plaintiff, (ii) acceptance of those services by the defendant, (iii) with an expectation of compensation for the services, and (iv) the reasonable value of the services (*Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000]).

Here, 5 Elements alleges that it performed services in good faith, including introducing Aran World to representatives of the Joint Venture to help them secure the contract in connection with the Project, providing consulting and design services, meeting with the Project's developers to help secure a contract, providing documentation of Project requirements, and offering advice and counsel (Complaint, ¶ 81). 5 Elements further alleges that Aran World accepted these services knowing that 5 Elements expected to be compensated but has refused to remit payment to 5 Elements (*id.* ¶¶ 82-83). This allegation is bolstered by the complaint's account of an exchange between a representative of Aran World and Plaza's Senior Vice President at the January 4, 2018 meeting. The complaint states that, toward the close of the meeting, Plaza's Senior Vice President asked Aran World's representative, "you are going to compensate 5 Elements, right?" to which Aran World's representative responded, "yes, of course" (*id.* ¶ 51). 5 Elements alleges that they are entitled to the reasonable value of the services provided, not less than \$354,450 (*id.* ¶ 84). 5 Elements has stated a cause of action for quantum meruit and the motion to dismiss is denied with respect to the sixth cause of action.

Seventh Cause of Action: Tortious Interference with Business Relations

To state a claim for tortious interference with business relations, a plaintiff must establish: (a) the existence of a business relationship with a third party, (b) that the defendant, with knowledge of the business relationship, acted to intentionally interfere with it, (c) that the defendant acted solely out of malice or employed improper means that amount to a crime or independent tort, and (d) the defendant's interference resulted in injury to the business relationship with the third party (*Amaranth LLC v JP Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]). In the specific context of interference with precontractual or prospective business relations, a plaintiff

must establish that, but for the intentional and wrongful acts of the defendant, a third party would have entered into a contract with the plaintiff (*WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 257 [1st Dept 1992]). The requirements to plead a cause of action for interference with precontractual relations are more demanding than interference with an existing contract (*Gertler v Goodgold*, 107 AD2d 481, 490 [1st Dept 1985]).

Here, the complaint alleges that 5 Elements was injured as a result of the Joint Venture's decision to award the contract to Aran World rather than 5 Elements, and that Aran World received the contract as result of its tortious or otherwise malicious actions, but fails to allege that Aran World's actions actually resulted in injury to 5 Elements' business relationships with the Joint Venture or any other third party. Rather, the complaint alleges monetary damages resulting from the Joint Venture's decision to contract directly with Aran World. Therefore, to the extent that the seventh cause of action alleges precontractual interference with prospective business relations, the complaint must allege that 5 Elements would have been awarded the contract but for Aran World's wrongful actions. The pleadings fail under this standard. The complaint does not allege that 5 Elements could have satisfied the bond requirement, which was purported to be a necessary precondition to being awarded the contract, or that it could have otherwise provided Plaza with a satisfactory alternative such as a letter of credit and indemnification agreement. As pleaded, this cause of action also appears to be duplicative of the contract-based claims in that the damages alleged are the same and this cause of action is based on the same operative facts. Accordingly, the seventh cause of action is dismissed without prejudice.

It is therefore,

ORDERED, that the motion to dismiss is granted in part to the extent that the first cause of action for breach of contract and the sixth cause of action for tortious interference with business relations are dismissed without prejudice and is otherwise denied; and it is further

ORDERED, that a preliminary conference is scheduled forthwith.



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4/24/2019

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE