

Adelhardt Constr. Corp. v Citicorp N. Am. , Inc.

2019 NY Slip Op 31774(U)

June 17, 2019

Supreme Court, New York County

Docket Number: 655186/2018

Judge: Jennifer G. Schechter

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ADELHARDT CONSTRUCTION CORP.,

Index No.: 655186/2018

Plaintiff,

DECISION & ORDER

-against-

CITICORP NORTH AMERICA, INC., CITIGROUP
TECHNOLOGY, INC., and CITIBANK, N.A.,

Defendants.

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JENNIFER G. SCHECTER, J.:

Defendants Citicorp North America, Inc., Citigroup Technology, Inc., and Citibank, N.A. (collectively, Citibank) move, pursuant to CPLR 3211, to dismiss the amended complaint (the AC). Plaintiff Adelhardt Construction Corp. (ACC) opposes the motion. The motion is granted in part.

Factual Background & Procedural History

The facts are drawn from the AC (Dkt. 7) and are assumed to be true unless conclusory or refuted by documentary evidence.

ACC, a construction company, seeks payment from Citibank of invoices totaling approximately \$4.7 million. ACC filed the AC on October 25, 2018, asserting claims for breach of contract, unjust enrichment, and quantum merit. The details of the specific invoices and the underlying construction work are not at issue here. Rather, this motion only concerns the legal implications of the parties' criminal guilty pleas related to the construction work ACC performed for Citibank. Citibank claims these crimes are an absolute defense to its obligation to pay ACC.

To explain, ACC provided construction services to Citibank for approximately 60 years. The work at issue is governed by written agreements, the first of which was executed in 2010. Problems arose in January 2012, when non-party John Cassisi became the “Director of Global Construction for Citi Realty Services” and was put in charge of Citibank’s relationship with ACC. Cassisi allegedly caused Citibank to “systematically” withhold payment from ACC for construction services that had already been performed and invoiced. He demanded that ACC perform additional work, including on his personal residence, before ACC would be paid. At the time, Citibank allegedly owed millions of dollars to ACC. ACC did not report Cassisi to his superiors at Citibank or to the police. Cassisi and his colleague, Arthur Fazio, falsified business records to conceal their actions. Their scheme was nonetheless discovered, and they were arrested in late 2014 and charged with, among other things, commercial bribery. They both pleaded guilty to crimes (AC ¶¶ 29-30; *see* Dkt. 17).¹

In December 2015, ACC and its CEO David Adelhardt pleaded guilty to falsifying business records in violation of New York State Penal Law § 175.10 (*see* Dkts. 15, 16). As part of the plea ACC agreed to make “restitution to Citibank in the amount of [\$442,000 and the District Attorney of New York County (DA) agreed] that said restitution [could] be made by deducting that amount from monies duly owed [ACC] for legitimate construction services supplied to Citibank for which payment has not been

¹ “On October 6, 2015, Cassisi pleaded guilty to money laundering and commercial bribery, and entered into a plea agreement where he admitted that he had accepted gifts from Citibank’s contractors, including cash and extravagant hunting trips totaling approximately \$500,000. As part of the plea, in addition to the two to six-year prison sentence, Cassisi was required to forfeit

received” (Dkt. 15 ¶ 4). As part of the pleas ACC and Adelhardt “admitted that between January 1, 2012 and December 31, 2014” Adelhardt caused ACC’s records to be falsified “to wit, one or more purchase orders, which were created in furtherance of a scheme whereby benefits were requested by and bestowed upon Cassisi with the expectation that Cassisi would use his position at Citibank to, *inter alia*, cause [ACC] to continue as a Citibank vendor” (Dkts. 15, 16 Attachment A ¶ 3). Neither Adelhardt nor ACC (unlike Cassisi) admitted to engaging in commercial bribery (*compare* Dkts. 15 & 16 at 3, *with* Dkt. 17 at 3).

Due to ACC’s involvement with Cassisi’s criminal conduct, Citibank refused to pay ACC for the work that it had performed. ACC commenced this action in October 2018. Citibank now moves to dismiss the AC. It argues that ACC’s breach-of-contract and quasi contract claims are barred by ACC’s criminal conduct and that the quasi contract claims are, in any event, barred because a written agreement, the existence of which is admitted, governs.

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC*

\$500,000” (AC ¶ 29). Fazio pleaded guilty to falsifying business records (*id.* ¶ 30).

v Brody, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If the defendant moves for dismissal based on documentary evidence, the motion will succeed only if “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 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

The seminal case governing when commercial bribery may be raised as an absolute defense to non-payment of a previously performed contract is *McConnell v Commonwealth Pictures Corp.* (7 NY2d 465 [1960]). *McConnell* begins with the premise, grounded in public policy, “that a party to an illegal contract cannot ask a court of law to help . . . carry out [an] illegal object” and if the “money plaintiff sues for was the fruit of an admitted crime . . . no court should be required to serve as paymaster of the wages of crime” (*id.* at 469). The Court of Appeals, however, was concerned that this rule could be used unjustly to allow a party to accept the fruits of a contract and then attempt to escape responsibility for payment based on “any small illegality in the performance of an otherwise lawful contract,” resulting in a “windfall” (*id.* at 471). The Court therefore emphasized that it is “not every minor wrongdoing . . . that will insulate the other party from liability for work done or good furnished. There must at least be a direct connection between the illegal transaction and the obligation sued upon” (*id.*).

Additionally, the Court held that the qualitative nature of the illegality must be sufficiently severe to warrant forfeiture, announcing that “a party will be denied recovery even on a contract valid on its face, if it appears that [it] has resorted to gravely immoral

and illegal conduct in accomplishing its performance (*id.*). The “and” is critical. The Court of Appeals later explained that the “gravely immoral” prong is satisfied only when the illegality is inherently wrong, and not “merely *malum prohibitum*” by statute (*Benjamin v Koeppele*, 85 NY2d 549, 553 [1995], citing *Lloyd Capital Corp. v Pat Henchar, Inc.*, 80 NY2d 124, 127 [1992]; see *Castellotti v Free*, 138 AD3d 198, 206 [1st Dept 2016] [collecting cases]). These requirements exist to prevent parties from attempting to use “the illegality defense as a ‘sword’ for personal gain rather than a ‘shield’ for the public good” (*Chirra v Bommarreddy*, 22 AD3d 223, 224 [1st Dept 2005]).

Citibank contends that ACC engaged in commercial bribery and that such illegal conduct definitively bars this action. It has not met its burden of demonstrating that dismissal is mandated by CPLR 3211(a)(1) or (7) based on illegality. In the AC, ACC pleads that it performed millions of dollars worth of work for Citibank before it engaged in any illegal conduct. ACC further alleges that Cassisi, acting as Citibank’s agent, threatened to stiff ACC unless it performed additional work for him. ACC plausibly claims that it was extorted. While Citibank contends that ACC should have reported Cassisi to his superiors or called the police, it is understandable, under the facts pleaded, why rational commercial actors may not necessarily follow those aspirational courses of action. It is conceivable, under the facts alleged, that ACC was concerned that calling the police on Citibank would have a negative impact on a business relationship spanning more than half a century under circumstances where it was allegedly already owed millions of dollars that were unpaid.

Even considering the admissions in ACC's plea agreement--in which the DA expressly contemplated that ACC may be owed money for "legitimate construction services"--and analyzing them along with the wrongs admitted by Citibank's own employee, it is far from clear that ACC should be wholesale barred from any and all compensation for the entirety of the work it performed over years under the contracts. The issue is not whether ACC would be able to assert duress (and in fact it has no interest in invoking a doctrine that would allow it to avoid performing the contract), but rather, whether Citibank established that ACC's conduct was sufficiently immoral to allow it to be entirely free of any payment obligation despite having obtained the benefit of ACC's work. Here, Citibank did not conclusively establish as a matter of law (as it is required to do on a 3211 motion) that ACC's conduct was "gravely immoral" so as to completely bar damages.

To be sure, ACC is not alleged to have bribed anyone to procure the initial contracts. ACC had been working with Citibank for more than half a century, long before Cassisi came into the picture in 2012. Nor is there any allegation that ACC ever provided substandard services but was given leeway because of bribes. The notion that ACC needed to bribe Citibank to procure work seems less likely than the need to get paid on millions of dollars of outstanding invoices and maintaining its decades-long relationship with Citibank (AC ¶¶ 26-28). Citibank, which employed wrongdoers involved in the transactions, cannot take the moral high ground and escape paying for all services without any further inquiry.

Significantly, this case does not implicate concerns about public harm or the integrity of publicly-bid contracts, which would more readily justify automatic forfeiture even if inequitable (*compare FCI Grp., Inc. v City of New York*, 54 AD3d 171, 172-73 [1st Dept 2008]; *Michael R. Gianatasio, PE, P.C. v City of New York*, 53 Misc 3d 757, 769 [Sup Ct, NY County 2016], *affd* 159 AD3d 659 [1st Dept 2018]; *with Murray Walter, Inc. v Sarkisian Bros.*, 107 AD2d 173, 178 [3d Dept 1985] [distinguishing cases with federal antitrust violations implicating public harm and reiterating that courts should prevent “people from getting other people’s property for nothing when they purport to be buying it”], accord *Grape Solutions, Inc. v Majestic Wines, Inc.*, 2015 WL 2207528, at *4-5 [Sup Ct, NY County May 11, 2015] [violation of alcohol shipping law not a basis to refuse to pay for sale of wine]; *see also Charlebois v J.M. Weller Assocs., Inc.*, 72 NY2d 587, 595 [1988] [“the Charleboises have reaped the fruits of that contract by currently occupying the completed structures and operating their business from it; and they now seek to disaffirm that very contract and be forgiven \$600,000 in payments for services and work completed and delivered to them”]).

Here, there was a private wrong that Cassisi inflicted on his in pari delicto employer and plaintiff played a part (*see Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]).² Plaintiff pled guilty and admitted facts related to forging business records--not

² Citibank’s invocation of the adverse-interest exception (*see* Dkt. 30 at 12) is unavailing. While Cassisi was acting for his own personal benefit, he was also acting in a way that benefited Citibank by allowing it to retain ACC’s services without payment. Thus, the “narrow” exception to the presumption of imputation is inapplicable (*see Kirschner*, 15 NY3d at 446-47 [“To come within the exception, the agent must have *totally abandoned* his principal’s interests and be acting **entirely** for his own or another’s purposes. It cannot be invoked merely because he has a

necessarily a *malum in se* offense. On this record, moreover, the extent of the wrong is uncertain. ACC's forgery plea involved \$442,000 of restitution; yet, it claims to be owed over \$4 million for services accepted by Citibank. It is unclear that the bulk of the services provided bore any relationship to the forged documents. Additionally, Cassisi's bribe-receiving plea and his admission that he accepted money from "various contracting companies" does not have any preclusive or binding effect on plaintiff (Dkt. 17, Attachment A ¶ 4; *see Buechel v Bain*, 97 NY2d 295, 303 [2001]). In the end, based on the documentary evidence, the court is not convinced that ACC engaged in the requisite grossly immoral conduct so as to bar any recovery. If discovery reveals that ACC was complicit in Cassisi's wrongdoing in a manner involving far more moral turpitude than portrayed in the AC, it is possible that Citibank might be able to establish an illegality defense at summary judgment or trial. But on this motion to dismiss, there is insufficient documentary proof that the nature of ACC's illegal conduct was so gravely immoral to justify precluding its ability to recover the millions of dollars it claims to be owed for the construction work it performed for Citibank.

Finally, the admitted existence of a written agreement governing ACC's work bars its quantum meruit and unjust enrichment claims (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). That the contracts may be held unenforceable is not a basis to plead in the alternative. If the breach of contract claims are ultimately rejected based on illegality, then plaintiff's quantum meruit and unjust enrichment claims would likewise necessarily fail (*Komolov v Segal*, 144 AD3d 487, 488 [1st Dept 2016]

conflict of interest or because he is not acting **primarily** for his principal" [bold for emphasis]).

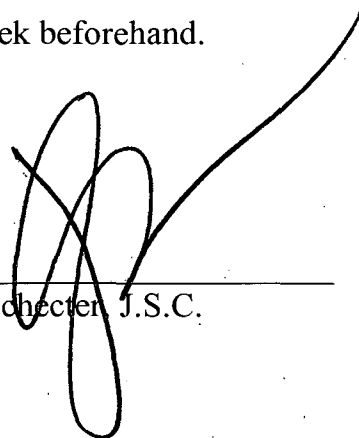
[quasi-contractual claims were duplicative of underlying, unenforceable contractual claims"]; *Zador v Millard Fillmore Hosp.*, 261 AD2d 876 [4th Dept 1999] [illegal contract precludes recovery based on quasi-contract or equity]; see *Gianatasio*, 53 Misc 3d at 774).

Accordingly, it is ORDERED that Citibank's motion to dismiss the AC is granted only to the extent that the quantum meruit and unjust enrichment claims (the fourth through ninth causes of action) are dismissed, and the motion is otherwise denied; and it is further

ORDERED that a preliminary conference will be held on July 19, 2019 at 12:00 p.m., and the parties shall file their joint letter at least one week beforehand.

Dated: June 17, 2019

ENTER:



Jennifer G. Schecter, J.S.C.