

320 W. 115 Realty LLC v All Bldg. Constr. Corp.

2019 NY Slip Op 32926(U)

October 4, 2019

Supreme Court, New York County

Docket Number: 651613/2018

Judge: Saliann Scarpulla

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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: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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320 WEST 115 REALTY LLC,	INDEX NO. <u>651613/2018</u>
Plaintiff,	MOTION DATE <u>07/23/2019</u>
- v -	MOTION SEQ. NO. <u>002</u>
ALL BUILDING CONSTRUCTION CORP., EDWARD CAMPANELLA	DECISION + ORDER ON MOTION
Defendant.	
-----X	

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 30

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendants All Building Construction Corp. (“ABC”) and Edward Campanella (“Campanella,” collectively, “Defendants”) move to partially dismiss plaintiff 320 West 115 Realty LLC’s (“Plaintiff”) complaint pursuant to CPLR §§3211(a)(1) & (7), 3103, and 3106(b).

Background¹

This action arises out of a dispute over construction renovation work that was to be performed on two adjacent buildings (the “Project”), located at 318-320 West 115th Street, New York, New York (the “Property”). The complaint alleges that Plaintiff is the

¹ Unless otherwise specified, all facts are taken from the complaint and exhibits annexed to the complaint and will be accepted as true only for purposes of this motion to dismiss. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); see CPLR 3014.

former owner and developer of the Property, ABC is a New York corporation, and Campanella is ABC's owner and principal.

Plaintiff and ABC entered into an AIA standard form document A107-2007 agreement, dated November 14, 2014, whereby ABC agreed to perform general contracting management services to renovate the Property for a stipulated sum of \$3,313,933, which was to be substantially completed "on or about July 1, 2015."

In or around May 2015, Campanella allegedly informed Plaintiff that Defendants could not retain the subcontractors to complete the work at the price agreed to, and allegedly persuaded Plaintiff that Defendants could guarantee that the Project would be substantially completed "on or about November 26, 2015" for an additional \$819,525.35; in June 2015, Plaintiff and ABC entered into a separate AIA standard form document A107-2007 agreement – also dated November 14, 2014 – reflecting this subsequent agreement.²

Plaintiff alleges that ABC continuously breached the Agreements, including by: failing to complete the Project by the Substantial Completion Date because of ABC's defective work and unreasonable delays; deviating from approved construction plans and concealing any unauthorized work; failing to complete major construction tasks; providing defective work; and failing to pay subcontractors for work performed while falsely certifying to Plaintiff that the subcontractors were paid. Plaintiff also alleges that

² Hereinafter, these two agreements are collectively referred to as the "Agreements"; the stipulated sums are jointly referred to as the "Contract Sum"; and the November 26, 2015 substantial completion date is referred to as "Substantial Completion Date").

ABC failed to pay its subcontractors, as required by the Agreement and the New York State Lien Law (“Lien Law”), and instead used the funds for purposes unrelated to the Project, which substantially delayed the Project.

ABC allegedly defrauded Plaintiff by: misrepresenting and certifying lien waivers that it had paid the subcontractors for their work; fraudulently inflating the Contract Sum by certifying applications for payments that overstated completion costs and submitting false change orders for work already agreed to under the Agreements; and threatening to stop working on the Project and withholding delivery of construction services and materials that were already paid for by Plaintiff unless Plaintiff paid additional funds in excess of the Contract Sum.

ABC purportedly abandoned the Project and the Agreements on August 25, 2016. As a result, Plaintiff maintains that it was required to: retain new contractors at higher prices; secure a new permit from the New York City Department of Buildings; and incur additional costs to complete the Project, on interest on its construction loan, and to remediate ABC’s defective work.

Based on the foregoing, Plaintiff commenced this action asserting four causes of action for: (1) fraudulent inducement against Defendants; (2) breach of contract against ABC; (3) negligence against ABC; and (4) breach of the implied covenant of good faith and fair dealing against ABC. Defendants now move to dismiss the first, third, and fourth causes of action.

Discussion

On a motion to dismiss, “the pleading is to be afforded a liberal construction” – the Court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon*, 84 NY2d at 87-88 (citations omitted). “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (citation omitted).

Fraudulent Inducement – First Cause of Action

In support of its fraudulent inducement cause of action, Plaintiff alleges that “ABC[]’s myriad of breaches came so early and often that the only inference is that ABC[] intended to breach its Agreements from the start” Complaint ¶6. Plaintiff also alleges that Defendants knowingly misrepresented the Contract Sum in the Agreements at the time of contracting and that this misrepresentation induced Plaintiff to enter into the Agreements. Moreover, at a July 25, 2016 meeting, Campanella allegedly admitted to Plaintiff that the Agreements were “never ‘a firm number contract,’” Complaint ¶6, and that the Contract Sum “was never the ‘real number.’” Complaint ¶37.

Defendants argue that this cause of action must be dismissed, in part, because the complaint fails to allege a misrepresentation by Defendants that induced Plaintiff to enter into the Agreements, it is duplicative of the breach of contract cause of action, and Campanella cannot be held personally liable for acts done on behalf of ABC.

To state a cause of action for fraudulent inducement, the complaint must allege, with particularity, “that the defendant intentionally made a material misrepresentation of fact in order to defraud or mislead the plaintiff, and that the plaintiff reasonably relied on the misrepresentation and suffered damages as a result.” *Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 537 (1st Dept 2016), *affd*, 29 NY3d 137 (2017) (citations omitted); *see* CPLR 3016(b).

“To fulfill the element of misrepresentation of material fact, the party advancing the claim must allege a misrepresentation of present fact rather than of future intent.” *Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 (1st Dept 2017) (citation omitted). “General allegations of lack of intent to perform are insufficient; rather, facts must be alleged establishing that the adverse party, at the time of making the promissory representation, never intended to honor the promise.” *Id.* (citation omitted).

Here, Plaintiff alleges that Defendants lacked the intent to perform the Agreements, which is clearly a statement of future intent and is thus not actionable. *See Orix Credit All., Inc. v R.E. Hable Co.*, 256 AD2d 114, 115 (1st Dept 1998) (allegations that, when the parties “negotiated the contracts, [plaintiff] misrepresented the payments that would be due and expected defendants to rely on its false statements, while knowing from the outset that it intended to overcharge defendants” insufficient to allege misrepresentation of present fact collateral to the contract); *see also 627 Acquisition Co.*,

LLC v 627 Greenwich, LLC, 85 AD3d 645, 647 (1st Dept 2011); *Manas v VMS Assoc., LLC*, 53 AD3d 451, 453-54 (1st Dept 2008).³

Further, Campanella’s purported statement that the Contract Sum “was never the ‘real number’” is not a fact showing that Defendants knowingly misrepresented the Contract Sum to fraudulently induce Plaintiff into entering into the Agreements. Rather, a review of the Agreements supports Campanella’s statement. For example, the Agreements specifically provide for the possibility that the Contract Sum may increase or change under numerous scenarios.⁴ And, the Agreements each contain a “Project Budget,” which is comprised of an itemized price breakdown of the Project’s costs, and which bears the heading, “**Estimate Summary.**”(Emphasis supplied.)

To the extent that Plaintiff relies on ABC’s other allegedly fraudulent activity – including the allegations that ABC fraudulently inflated the Contract Sum by certifying applications for payments that overstated completion costs and submitting false change orders for work already agreed to under the Agreements – they are insufficient to support

³ The cases upon which Plaintiff relies are distinguishable. *Compare, e.g., Gosmile, Inc. v Levine*, 81 AD3d 77, 81 (1st Dept 2010) (misrepresenting that, at the time of contracting, defendant not currently in breach of prior agreement was a misrepresentation of present fact); *First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 292 (1st Dept 1999) (“allegations that defendants misrepresented various pertinent facts about the individual loans that plaintiff purchased under the [a]greement . . . so that [defendants] would appear to satisfy” warranties contained in the agreement constituted misrepresentation of present fact).

⁴ I note that, had the parties intended that the cost of the Project not exceed the Contract Sum under any circumstance, the Agreements provided an option for the Contract Sum to be comprised of the “Cost of the Work plus the Contractor’s Fee with Guaranteed Maximum Price,” which the parties did not elect.

the claim that Plaintiff was fraudulently induced to enter into the Agreements because this activity allegedly occurred *after* the parties had already entered into the Agreements.

At bottom, Plaintiff has failed to state sufficient facts to turn the breach of contract cause of action into a cause of action for fraudulent inducement, and this cause of action is therefore dismissed.

Negligence – Third Cause of Action

In support of the negligence cause of action, the complaint alleges that: ABC owed a duty to Plaintiff to exercise reasonable care and diligence in performing the contracted for work and services in a manner consistent with the learning, skill, and experience ordinarily exercised by those performing similar services; ABC breached this duty by failing to do so; and Plaintiff was directly and proximately damaged as a result of this breach in an amount no less than \$4,966,815.44.

Defendants argue that this cause of action should be dismissed, in part, because Plaintiff failed to allege a duty owed to it by ABC, independent of any contractual obligations. “A finding of negligence may be based only upon the breach of a duty. If, in connection with the acts complained of, the defendant owes no duty to the plaintiff, the action must fail.” *Darby v Cie. Natl. Air France*, 96 NY2d 343, 347 (2001), *op after certified question answered*, 13 Fed Appx 37 (2d Cir 2001). Absent allegations of “a breach of a duty independent of the contract,” causes of action “based on negligence or grossly negligent performance of a contract are not cognizable.” *Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 (1st Dept 2010) (citations and quotation marks omitted).

Plaintiff argues that ABC owed Plaintiff a duty pursuant to Lien Law Art. 3-A. Plaintiff avers that, as the Project owner, Plaintiff is a trust beneficiary of the funds that it paid to ABC, which ABC was then supposed to use to pay the subcontractors; ABC became a fiduciary of these funds and subsequently owed a duty to both the subcontractors and Plaintiff.

“Article 3–A of the Lien Law creates trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction.” *Aspro Mech. Contr., Inc. v Fleet Bank, N.A.*, 1 NY3d 324, 328 (2004) (Lien Law Art. 3-A’s “primary purpose . . . is to ensure that those who have directly expended labor and materials to improve real property . . . at the direction of the owner or a general contractor receive payment for the work actually performed.”) (citations and quotation marks omitted).

The funds allegedly paid by Plaintiff to ABC – which ABC was contractually obligated to apply to certain expenditures – constitute a “separate trust” of which ABC, as the contractor, is the trustee. *See* Lien Law § 70(2). The funds subject to this trust may generally only be applied to certain “expenditures arising out of the improvement of real property . . . and incurred in the performance of [a contractor’s] contract,” including for the “payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen.” Lien Law § 71(2).

Beneficiaries of the trust are those “having claims for payment of amounts for which the trustee is authorized to use trust assets as provided in [Lien Law § 71]”

Lien Law § 71(4). However, Plaintiff, as the Project owner, is not a beneficiary of the trust funds that it paid to ABC, its contractor, *see* Lien Law §71,⁵ and therefore Plaintiff may not rely upon Lien Law Art. 3-A to create a noncontractual duty between Plaintiff and ABC. In the absence of any duty, separate from the Agreements, owed by ABC to Plaintiff, the negligence cause of action must be dismissed. *See Pacnet Network Ltd.*, 78 AD3d at 479; *see also Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 390 (1987) (Allegations, including “that defendant failed to exercise ‘due care’ in designing the project, [are] merely a restatement . . . of the ‘implied’ contractual obligations asserted in the cause of action for breach of [construction] contract.” (citation omitted)).

Implied Covenant of Good Faith and Faith Dealing – Fourth Cause of Action

In support of the fourth cause of action for the breach of the implied covenant of good faith and fair dealing, Plaintiff alleges that ABC breached this covenant “by acting arbitrarily and unreasonably, and in bad faith and fraudulently, in carrying out its work and services for the Project,” Complaint ¶58, and seeks damages identical to those sought for its breach of contract cause of action.

This cause of action is dismissed as duplicative of Plaintiff’s breach of contract cause of action, for the reasons explained on the record on May 1, 2019. *See Amcan Holdings, Inc. v Can. Imperial Bank of Commerce*, 70 AD3d 423, 426 (1st Dept 2010).

In accordance with the foregoing, it is hereby

⁵ Although Plaintiff argues that it is the beneficiary of the funds that it paid to ABC, Plaintiff has failed to cite any binding authority to support its position.

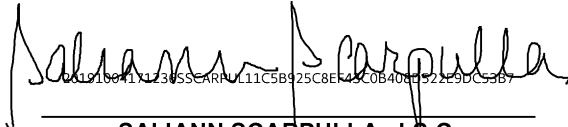
ORDERED that the motion by defendants All Building Construction Corp. and Edward Campanella to dismiss is granted and the first, third, and fourth causes of action of the complaint are dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within twenty 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a conference in Room 208, 60 Centre Street, New York, New York, on October 9, 2019 at 2:15 PM.

This constitutes the decision and order of the Court.

10/4/2019
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
				REFERENCE