

319 W. 38th St. LLC v Northeast Interior
2019 NY Slip Op 33012(U)
October 4, 2019
Supreme Court, New York County
Docket Number: 650493/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY COMMERCIAL DIVISION

PRESENT: HON. ANDREA MASLEY PART 48

Justice

-----X

319 WEST 38TH STREET LLC,

Plaintiff,

- v -

NORTHEAST INTERIOR, et al.,

Defendants.

INDEX NO. 650493/2018

MOTION DATE 05/20/2019

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

-----X

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170

were read on this motion to/for DISMISS

Upon the foregoing documents, it is ordered that the motion is granted.

In motion sequence number (Motion) 005, plaintiff moves, by order to show cause pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the counterclaims of defendant Northeast Interiors Specialists LLC (Northeast).

According to its allegations in the complaint, plaintiff is a real estate developer and the owner of a property located at 319-321 West 38th Street (Property) on which three vacant buildings were situated (NYSCEF 132 [1/31/18 complaint]). Plaintiff engaged Northeast, a construction demolition business, by their February 26, 2015 proposal-contract and addendum agreement (Addendum) (together, Contract) (NYSCEF 142), to demolish the three buildings (*id.* at 1-2; NYSCEF 132, ¶ 12). Under the Contract, Northeast was to manage all aspects of the demolition project (Project) and was responsible for “[p]rovid[ing] all necessary permits” in compliance with New York City regulations and engaging an expediter to assist with the permits (NYSCEF 142 at 1-2).

In short, plaintiff asserts that defendants-engineers engaged to submit a permit application package to the New York City (NYC) Department of Buildings (DOB), and defendant-expediter engaged to perform related services, failed to comply with the necessary application procedures for the Property (*id.* ¶¶ 12-16). Specifically, the Property is located in the Garment Center Special District (GCSD) under NYC zoning regulations and is within a subdistrict designated as "Preservation Area P-2" (P-2 Area), requiring submission to DOB of an HPD1 application with a certification of compliance with anti-harassment measures (Certificate) pursuant to Zoning Resolution (ZR) 93-90 and 93-91 (*id.* ¶¶ 16-17; *see* ZR 93-90 [a] [1] [stating that "Anti-harassment area" "shall mean . . . Subdistrict A-2 of the Special Garment Center District," and applications for locations in Subdistrict A-2 must include a Certificate (emphasis omitted)]).

The engineers filed applications without a Certificate using HPD3 forms, not HPD1 forms; nevertheless, the DOB issued permits to demolish the three buildings to Northeast on October 15, 2015 and demolition began in December 2015 (*id.* ¶¶ 19, 24-25). After it was alerted to noncompliance with ZR 93-90 and 93-91, on December 21, 2015, the DOB served Stop Work Orders, revoked the permits, and the Project was halted (*id.* ¶ 25).

Northeast's Counterclaims Against Plaintiff

In its April 27, 2018 answer (NYSCEF 143), Northeast asserts the following counterclaims against plaintiff: (1) negligent misrepresentation (*id.* ¶¶ 75-102); and (2) "fraud/fraudulent concealment" (*id.* ¶¶ 103-113). Specifically, Northeast alleges, upon information and belief, that only plaintiff (as the owner), plaintiff's "agent or a contract vendee . . . may apply for" a Certificate, and the information necessary for that application is "exclusively in the possession and control of an owner" (*id.* ¶¶ 78-81; *see id.* ¶ 82 [referencing application information to be furnished by an individual familiar with the management/operation of the premises throughout the preceding 36-month inquiry period]). Also upon information and belief, Northeast alleges that plaintiff retained experienced zoning counsel in connection

with the purchase of the Property and "knew and/or should have known" that the Property's zoning required a Certificate as being within the GCSD (*id.* ¶¶ 83-85). Emails submitted by Northeast in opposition to this motion show that plaintiff was informed by an architect that the Property was in a P-2 Area (*see* NYSCEF 152-152).

Northeast further alleges that third parties, such as itself and its agents, "rely on the [NYC DOB] Building Information System database (BIS) for information on properties in [NYC]," that the BIS is capable of and should have identified the Property as located within the GCSD and P-2 Area but did not, and plaintiff "knew or should have known that the BIS did not accurately reflect the correct information regarding the Property" (NYSCEF 143, ¶¶ 86-94). Plaintiff further knew or should have known that Northeast and its agents would reasonably rely on the BIS information and, due to the privity and/or special relationship between plaintiff and Northeast, plaintiff owed Northeast a duty to provide the correct information (*id.* ¶¶ 95-96). In connection with its negligent misrepresentation claim, Northeast asserts that plaintiff, through its member, Jasmin Patel, "misrepresented and/or omitted" the material zoning information, knew or should have known that Northeast would rely on those "misrepresentations and/or omissions," and Northeast did reasonably rely on the same to its detriment; as the proximate result, Northeast lost the benefit of the Contract and other business opportunities (*id.* ¶¶ 97-101). Northeast alleges that it was harmed in an amount not less than \$500,000 (*id.* ¶ 102). The agreed-upon "Demolition Price" under the Contract is \$504,600 (NYSCEF 132 at 1).

As to its fraud/fraudulent concealment claim, Northeast alleges that plaintiff knew or should have known that it would be required to obtain a Certificate in connection with the Project and intentionally misrepresented to and/or concealed from Northeast material zoning information to "avoid the requirement" of obtaining the Certificate in order to to save money, receive a limited-time tax abatement, and commence the Project sooner (*id.* ¶¶ 104-108). Northeast alleges that plaintiff intended to misstate

and/or conceal the zoning information from Northeast or its agents to induce them to rely on the misrepresentations or concealment, Northeast reasonably and justifiably relied on the misrepresentations/concealment, and the "false and fraudulent statements and/or concealment directly caused" Northeast to suffer "losses in being unable to complete the project and its lost opportunity costs" "under the [Contract]" in an amount not less than \$500,000 (*id.* ¶¶ 109-113). In its prayer for relief, Northeast seeks, for both counterclaims, "judgment against Plaintiff . . . for all compensatory, punitive, nominal damages available in law, to be determined at trial but not less than \$500,000.00, or in the alternative for a finding of rescission in equity" (*id.* at 19-20).

Plaintiff now moves to dismiss Northeast's counterclaims under to CPLR 3211 (a) (1) and (a) (7).

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] [claimant] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Plaintiff argues that the counterclaims must be dismissed as the allegations do not establish conduct adequately extraneous or collateral to the Contract to support liability in tort. Plaintiff further argues that documentary evidence establishes that Northeast had actual knowledge that the Property was located in the GCSD, precluding Northeast from establishing the element of reliance for both counterclaims. Finally, plaintiff argues that the counterclaims fail to adequately state a cause of action.

Plaintiff's documentary submissions establish that Northeast was obligated, under the contract, to "[p]rovide all necessary permits," including DOB permits, and "[p]rovide expediting to obtain all necessary permits" in connection with the Project (NYSCEF 132 at 1-2). The Contract and Addendum further provide that "[a]ll permits . . . shall be obtained and shall be the sole responsibility of [Northeast]" and that all of Northeast's work "shall comply with all [NYC] and New York State laws, including, but not limited to the [NYC DOB] Code" (*id.* at 2, ¶¶ 2-3; *see id.* at 2 [requiring Northeast to perform its work "in compliance with the terms of the proposal"/Contract]).

Plaintiff's submissions also demonstrate that the Project applications and permits issued to Northeast identify the Property as being located in the GCSD zoning district (NYSCEF 133-141 [various applications and permits for the Project]; *e.g.* NYSCEF 133 at 4 [identifying the Property as within in the GCSD "District", zoned as "C6-4M," and "Special District" - "GC- Garment Center"]; *see also* NYSCEF 131, ¶¶ 6-14 [plaintiff's counsel's aff]). While Northeast knew or should have known that the Property was in the GCSD, the applications and work permits do not state that the Property is in a P-2 Area, the zone in which a Certificate is required. Nevertheless, the documents demonstrate that Northeast should have been aware that the BIS designation it alleges it relied on did not match that on the applications and permits.

In any event, the Contract is unambiguous in that it is the responsibility of Northeast, not plaintiff, to obtain all necessary permits and complete its work on the Project in compliance with the DOB Code and other applicable authority, including the ZR. Northeast does not allege that plaintiff made any affirmative statement regarding the Property's zoning status, what forms, applications, or permits would be required, or the accuracy of the BIS zoning information. In fact, Northeast does not allege that it had any communication with plaintiff regarding the zoning status, permit requirements, or the BIS system.

Thus, even accepting Northeast's allegations that plaintiff was aware that the Property was located in a P-2 Area and a Certificate was necessary to obtain lawful work permits but (a) "misrepresented

and/or omitted" the "material" zoning information" (alleged in connection with the negligent misrepresentation counterclaim) and/or (b) intentionally misrepresented to or concealed from Northeast the material zoning information (alleged in connection with the fraud/fraudulent concealment counterclaim), Northeast must adequately allege that plaintiff had a duty to disclose the zoning information.

"To state a cause of action for fraudulent misrepresentation, 'a [party] must allege a misrepresentation or a material omission of fact which was false and known to be false by [the other party], made for the purpose of inducing the [claimant] to rely upon it, justifiable reliance of the [claimant] on the misrepresentation or material omission, and injury'" (*Gomez-Jimenez v New York Law School*, 103 AD3d 13, 17-18 [1st Dept 2012], *lv denied* 20 NY3d 1093 [2013], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the [party] had a duty to disclose material information and that it failed to do so" (*Gomez-Jimenez*, 103 AD3d at 18, quoting *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). The factual allegations for each of those circumstances constituting the wrong shall be stated in detail (*see* CPLR 3016 [b]; *P.T. Bank Cent. Asia, N.Y. Branch*, 301 AD2d at 376). For the "fraud/fraudulent concealment" claim, then, Northeast must allege that plaintiff had a duty to disclose the zoning information but violated that duty in furtherance of an underlying fraud (*Nasaba Corp. v Harfred Realty Corp.*, 287 NY 290, 295 [1942] ["Concealment with intent to defraud of facts which one is duty-bound in honesty to disclose is of the same legal effect and significance as affirmative misrepresentations of fact."]).

"To state a cause of action for negligent misrepresentation, . . . the [party] must allege (1) the existence of a special or privity-like relationship imposing a duty on the [other party] to impart correct information to the [claimant]; (2) that the information was incorrect; and (3) reasonable reliance on the

information" (*Gomez-Jimenez*, 103 AD3d at 18 [internal quotation marks and citation omitted]). Like a fraudulent concealment claim, "[a] claim for negligent misrepresentation can only stand in the presence of a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another" (*United Safety of Am., Inc. v Consolidated Edison Co. of New York, Inc.*, 213 AD2d 283, 285-286 [1st Dept 1995], citing *Delcor Labs. v Cosmair, Inc.*, 169 AD2d 639 [1st Dept 1991], *lv dismissed* 78 NY2d 952 [1991]). "A simple arm's length business relationship is not enough" (*United Safety of Am., Inc.*, 213 AD2d at 286; see e.g. *Forker v Brown*, 10 Misc 161, 164 [NY Com Pl 1894], *affd* 159 NY 540 [1899] [finding a duty of honesty/ to disclose as to directors of a corporation bound by fiduciary duties]).

Thus, for each of the counterclaims, Northeast is required to allege at least a special or confidential relationship or a fiduciary-like duty to establish that plaintiff had a duty to disclose information and violated that duty. Northeast does not adequately allege any special relationship or fiduciary duty; rather, the only relationship that the parties had, according to Northeast's allegations, is the contractual business relationship arising from the Contract, which does not here suffice (e.g. *Sehera Food Services Inc. v Empire State Bldg. Co. L.L.C.*, 74 AD3d 542, 543 [1st Dept 2010] [stating that "[a] fiduciary relationship does not exist between parties engaged in an arm's length business transaction" absent a fiduciary relationship]; see also *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-20 [2005] [duty to disclose "is grounded in a higher level of trust than normally present . . . between those involved in arm's length business transactions" and court's should generally look to the parties' contract determine the nature of the parties' relationship]). Here, the Contract evinces no higher level of trust or any relationship other than the business relationship of developer and contractor, and there is no allegation from which the court can glean a special duty to disclose the publicly-available zoning information.

Accordingly, the court finds that the negligent misrepresentation claim must be dismissed.

Likewise, the fraud/fraudulent concealment claim must be dismissed. Absent an affirmative misrepresentation of fact, a fiduciary duty or other special relationship to disclose the zoning information, Northeast seems to attempt to allege, in bare conclusory statements, that the duty to disclose arose "under the special facts doctrine where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 [1st Dept. 2005]). The court finds that the special facts doctrine does here apply.

"A party is considered to have superior knowledge in a transaction when the material facts were peculiarly within the knowledge of one party and that information could not easily have been discovered by the other party through the exercise of ordinary intelligence" (*Campaign v Esterhay*, 61 Misc 3d 662, 664-665 [Sup Ct, NY County 2018], citing *Jana L.*, 22 AD3d at 278). "The doctrine generally applies to claims of fraud in sales transactions" (*Campaign*, 61 Misc 3d at 664-665, citing *Jana L.*, 22 AD3d at 277 n 2; see also *Campaign*, 61 Misc 3d at 665 n 1 [analyzing cases in which a fraudulent concealment claims relying on the special facts doctrine were sustained and finding "in each case there was some underlying transaction and that defendant had some active participation in the fraud by affirmatively withholding or omitting certain facts or information in conversations or in the transaction in furtherance of the underlying fraud"]).

Here, Northeast does not sufficiently allege an underlying fraud and does not allege any communications underlying the omission or the transaction. The only allegations remotely supporting an underlying fraud claim are Northeast's speculative and/or conclusory assertions that plaintiff concealed the zoning information to obtain a tax abatement, save money, and reduce time to complete the Project. Those assertions are not enough. Indeed, plaintiff hired Northeast, by Northeast's own proposal (executed as the Contract), to be responsible for obtaining all permits for the Project under the DOB regulations.

In any event, the zoning information is not "peculiarly within [plaintiffs] knowledge" as "that same information could have been discovered by [Northeast] through the exercise of ordinary intelligence" and due diligence (see *Hahn v Dewey & LeBoeuf Liquidation Tr.*, 143 AD3d 547, 548 [1st Dept 2016]).

Accordingly, it is

ORDERED that Motion Sequence Number 005 is granted and the first and second counterclaims in the answer of defendant Northeast Interiors Specialists LLC are dismissed under CPLR 3211 (a) (1) and (a) (7).

10, 4 /2019
DATE



ANDREA MASLEY, J.S.C.

HON. ANDREA MASLEY

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE