

**Metropolitan Bridge & Scaffolds Corp. v New York
City Hous. Auth.**

2020 NY Slip Op 30822(U)

March 18, 2020

Supreme Court, New York County

Docket Number: 653507/2013

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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METROPOLITAN BRIDGE & SCAFFOLDS CORP.,	INDEX NO.	<u>653507/2013</u>
Plaintiff,	MOTION DATE	<u>10/05/2018</u>
- v -	MOTION SEQ. NO.	<u>016</u>
NEW YORK CITY HOUSING AUTHORITY,		
Defendant.	DECISION + ORDER ON MOTION	

-----X

NEW YORK CITY HOUSING AUTHORITY		Third-Party
Plaintiff,		Index No. 595656/2015
-against-		
LIBERTY ARCHITECTURAL PRODUCTS CO., INC., G&M EQUIPMENT LEASING LLC, DIMITRIOS SPANOS, RALPH CIAIO, GINA CIAIO, MARY SPANOS		
Defendant.		

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 016) 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 603, 604, 606, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 654, 655, 656

were read on this motion for PARTIAL SUMMARY JUDGMENT.

This matter comes before the Court on Plaintiff and Third-Party Defendants' Liberty Architectural Products Co., Inc., G&M Equipment Leasing LLC, Dimitrios Spanos, Ralph Ciaio, Fina Ciaio and Mary Spanos' (Third-Party Defendants) motion for partial summary judgment dismissing Defendant and Third-Party Plaintiff New York City Housing Authority's (NYCHA) claims for fraudulent inducement, aiding and abetting fraud, conspiracy to defraud, and acting in

concert to defraud pursuant to CPLR 3212. NYCHA opposes. For the following reasons, the motion is denied.

I. Background

On October 9, 2013, Plaintiff Metropolitan Bridge & Scaffolding Corporation (“Metropolitan”) commenced this suit seeking payment for work performed for NYCHA, including weekly maintenance costs and repair costs for equipment damaged by Hurricane Sandy. At the core of Metropolitan’s complaint are three separate contracts from 2009, 2010, and 2011, under which Metropolitan agreed to supply sidewalk sheds and related items to NYCHA in connection with various public housing developments located in Brooklyn and Staten Island. Metropolitan complains work was performed pursuant to the contracts and NYCHA failed to pay.

NYCHA’s Third-Party Complaint attacks the validity of these contracts and the payments made pursuant to them. Specifically, NYCHA contends that Third-Party Defendant Mark Cersosimo¹ and Metropolitan fraudulently induced NYCHA into awarding the 2009, 2010, and 2011 contracts and that the remaining Third-Party Defendants conspired, as well as aided and abetted, this alleged fraud.

A. Sale of Metropolitan

Metropolitan was formed by Third-Party Defendants Dimitrios Spanos and Ralph Ciaio in September 2003. From 2003 through 2009, Metropolitan entered into contracts with NYCHA and the New York School Construction Authority (“SCA”) to install sidewalk bridges.

The parties dispute Metropolitan’s ownership and control. Third-Party Defendants assert that Cersosimo purchased Metropolitan from Dimitrios Spanos and Ralph Ciaio in February

¹ Mark Cersosimo died after this action was commenced.
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Motion No. 016

2009. *NYSCEF 643, ¶6*. NYCHA counters that the sale of Metropolitan to Cersosimo was a sham, designed to conceal Dimitrios Spanos and Ralph Ciaio’s de facto ownership of Metropolitan so that the two men could continue entering into contracts with public agencies despite their criminal records. *NYSCEF 57 ¶¶ 2, 69; NYSCEF 643, ¶¶ 13, 17*. Notably, Spanos and Ciaio were arrested on June 22, 2009 for bribing a public servant in connection with their company, Third-Party Defendant Liberty Architectural Products Co., Inc.’s use of non-union workers on an SCA project. *NYSCEF 57 ¶50, NYSCEF 643 ¶17*. They later pled guilty on November 30, 2009. *NYSCEF 57, ¶¶37-38, NYSCEF 643 ¶¶ 17, 49*.

In April 2014, Cersosimo allegedly sold his stock in Metropolitan to Third-Party Defendants Gina Ciaio and Mary Spanos – the spouses of Dimitrios Spanos and Ralph Ciaio – and owners of Metropolitan’s subcontractor, G&M Equipment Leasing LLC (“G&M”). *NYSCEF 643, ¶69*.

B. NYCHA Contracts and Metropolitan’s Representations About Dimitrios Spanos and Ralph Ciaio

After the February 2009 sale to Cersosimo, Metropolitan won a bid for a NYCHA sidewalk shed project. In connection with the bid, Metropolitan submitted a so-called VENDEX document on June 16, 2009, certifying that no former principal of Metropolitan had been convicted of or investigated in connection with a crime. (*NYSCEF 57 ¶¶ 29-30, NYSCEF 643 ¶¶ 22, 25*). This representation was repeated by Metropolitan in “Certification of No Change” documents submitted to NYCHA on September 11, 2009, September 30, 2010, and October 8, 2010, notwithstanding Dimitrios Spanos and Ralph Ciaio’s arrest and conviction. *NYSCEF 57 ¶ 35, NYSCEF 643 ¶¶ 22, 25, 40*.

Metropolitan again won contracts with NYCHA in 2010 and 2011. Third-Party Defendants represent that Cersosimo, who made the representations, did not know that Spanos and Ciaio had been charged or convicted of a crime. *NYSCEF 595* at 4.

In addition to the representations made in the VENDEX submission and the “Certifications of No Change,” Metropolitan also informed NYCHA in a December 16, 2010 letter that “since February 18, 2009, Liberty Architectural Products and its principals, Dimitrios Spanos and Ralph Ciaio, have no involvement in any of the [NYCHA] Projects and will not have any involvement in the future.” *NYSCEF 57* ¶ 52. Nonetheless, Spanos and Ciaio attended contract project meetings with NYCHA as “consultants” and worked as “Project Administrators” on the 2009, 2010, and 2011 contracts. *NYSCEF 643*, ¶¶ 12, 59, 60, 62, 68, 71-76. Notably, Metropolitan subcontracted work under the 2010 contract to G&M, which was owned by Spanos and Ciaio’s wives – defendants Mary Spanos and Gina Ciaio. *NYSCEF 643* ¶ 46.

C. NYCHA stops remitting payment and renews contracts

In May 2012, NYCHA stopped making payments to Metropolitan. *NYSCEF 552*, ¶ 16. In mid-October 2012 - once NYCHA had failed to make payment to Metropolitan for sidewalk bridging rentals for seven (7) months - Metropolitan and NYCHA attended a meeting where NYCHA agreed to make immediate payment of 50% of outstanding requisitions. *Id.* ¶ 17. On December 19, 2012, Metropolitan sent to NYCHA a letter stating that NYCHA had failed to honor its agreement to make payments to Metropolitan. *Id.* ¶ 18. At this time, NYCHA owed approximately one million dollars to Metropolitan for work duly performed. *Id.* ¶ 19.

At a September 2013 meeting, NYCHA's Martha Brazoban reportedly requested that Metropolitan extend its three contracts by a one-year period, and asked Cersosimo to send to NYCHA formal extension requests. *Id.* ¶ 20. At Ms. Brazoban's requests, on September 26,

2013, Metropolitan requested an approval for a one-year extension of time in connection with the 2009, 2010 and 2011 Contracts and, on September 27, 2013, NYCHA approved the one-year extension of time in connection with the 2009, 2010, 2011 Contract. *Id.* ¶ 20, 21.

On December 3, 2014, Metropolitan emailed a formal Contract Extension Proposal in connection with the 2011 Contract to NYCHA. NYSCEF 550, ¶ 13;

D. NYCHA's Third-Party Complaint and the Instant Motion

On September 9, 2015, NYCHA commenced this third-party action, asserting seven claims for relief: (1) violations of the New York State False Claims Act; (2) conspiracy to violate the New York State False Claims Act; (3) fraud and fraudulent inducement; (4) conspiracy to defraud; (5) acting in concert to defraud; (6) aiding and abetting fraud; and, (7) unjust enrichment.

A motion to dismiss was filed by Third-Party Defendants which was denied by Order dated August 25, 2016 (NYSCEF 318). Plaintiff and the Third-Party Defendants now seek dismissal of four of NYCHA's claims – fraudulent inducement, conspiracy to defraud, acting in concert to defraud, and aiding and abetting fraud, “except that part, if any, relating to certified payrolls.” NYSCEF 595, at 16.)

II. Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851,853 (1985).

In deciding a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party and may not decide credibility issues. *Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep't 1990). Because summary judgment is a drastic remedy depriving a party of its day in court, it should not be granted where there is any doubt as to the existence of a triable issue of fact. *Chemical Bank v. West 95th Street Development Corp.*, 161 A.D.2d 218 (1st Dep't 1990).

Third Cause of Action: Fraudulent Inducement

NYCHA's third claim alleges that it was fraudulently induced to enter into the 2009, 2010, and 2011 contracts by Metropolitan and Cersosimo's misrepresentations regarding Dimitrios Spanos and Ralph Ciaio's criminal records, their anticipated involvement with the project and the purported arms-length sale of the company.

To succeed on a claim for fraud under New York law, NYCHA must demonstrate that Metropolitan and/or Cersosimo made a material misrepresentation of a fact, with knowledge of its falsity, with an intent to induce reliance, that NYCHA justifiably relied on the statements and, as a result, sustained damages. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 558 (2009).

Third-Party Defendants argue that the fraud claim fails as a matter of law because NYCHA cannot show it reasonably relied on misrepresentations made in Metropolitan's Vendex submissions concerning the criminal convictions of Spanos and Ciaio. In connection with Cersosimo and Metropolitan's Vendex submission, Cersosimo made additional representations to NYCHA including that Spanos and Ciaio had not been involved with Metropolitan since February 2009 and would not be involved in NYCHA projects going forward. (NYSCEF 558).

Metropolitan also represented that it did not share space, staff, equipment or expenses with any other entities. (NYSCEF 554)

Here, NYCHA has successfully identified issues of material fact which require denial of Defendants motion for partial summary judgment. Specifically, it is unclear what role Demetrious and Ralph played with Metropolitan between 2009 and 2014. While it is conceded that sale paperwork was executed in February 2009 for Mark Cerosimo to purchase Metropolitan it is contested that this sale was illegitimate. NYSCEF 563 ¶¶6-7. There is a factual dispute as to whether the company, despite the purported sale, was still being controlled and run by Demetrious and Ralph. (*Id* ¶11). Indeed, at Mr. Ciaio's deposition, he testified that he was involved in Metropolitan's affairs on multiple occasions between February 2009 and May 2012. His involvement included: 1) helping Metropolitan secure a loan in March 2009 (NYSCEF 616 at 191:7-16); 2) assisting Metropolitan with its collection efforts from February 2009 through June 2009 (*Id* at 248:4-8); 3) making hiring and compensation decisions and, alongside Demetrious Spanos, supervising at least one employee (NYSCEF 623 at 23-24) and, most significantly, 4) on March 16, 2009 and May 15, 2009 Mr. Ciaio signed financial agreements as Metropolitan's president. (NYSCEF 633). Adding to the factual issues is Metropolitan's response to interrogatories listing Demetrious and Ralph as "Project Administrators" for the Contracts and Ralph as an individual who maintained Metropolitan's records. (NYSCEF 635).

While it is undisputed that only Metropolitan and NYCHA entered into the 2009 contract, it remains unclear what role, if any, the individually named defendants played in securing this contract as well as subsequently fulfilling it.

As for Metropolitan's representation that it did not share space, staff, equipment or expenses with any other entities, that, too, is called into question by NYCHA. Evidence has

been offered that raises a material question of fact as to whether Metropolitan shared the expense of renting spaces and staff with Third Party Defendant G&M. G&M is a company owned by Gina Ciaio and Mary Spanos with which Demetrious and Ralph were affiliated. Evidence was also offered in connection with these motions that show Metropolitan leased office space from Dimaste Roofing & Restoration Corp., a company owned by Demetrious Spanos. (NYSCEF 628)

NYCHA's position is that, while it concedes it performed an investigation into Metropolitan through which it learned that the former owners of Metropolitan had been convicted of a crime, it nevertheless awarded Metropolitan the contract because NYCHA took comfort in the representation that Metropolitan was sold in an arms-length transaction and, therefore, Spano and Ciaio were no longer controlling the company or would otherwise be involved in the fulfillment of the contract.

In order to assess whether Metropolitan fraudulently induced NYCHA to award the contract, it must first be determined whether the statements and representations made to NYCHA by Metropolitan were, in fact, misrepresentations. That is a disputed question of fact. It also remains to be seen whether the individually named defendants played roles within Metropolitan sufficient to pierce the corporate veil. *Joseph Kali Corp. v A. Goldner, Inc.*, 49 A.D.3d 397, 398 (1st Dep't 2008 ("Even though the motive may be to prevent fraud or achieve equity, '[t]hose seeking to pierce a corporate veil ... bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.'")).

Finally, Metropolitan argues NYCHA waived its right to seek rescission of the contract because it allowed Metropolitan to continue to work on the project and continued to extend its

contract instead of rescinding it. In the first instance, NYCHA does not seek rescission of the contract but rather seeks a forfeiture of monies paid to Metropolitan. Rescission is an equitable remedy and forfeiture is a legal one. NYCHA argues it was prevented from making an informed decision before awarding the contracts. Therefore, it contends, the harsh remedy of forfeiture of all amounts paid under the contracts is warranted. Support for this notion is found in *Christ Gatzonis Electrical Contractor v. New York City School Construction Auth.*, 297 A.D.2d 272 (2d Dep't 2002) where contracts procured through fraudulent and collusive bidding were held to be void as against public policy, and where work was done pursuant to such illegal municipal contracts, the municipality was able to recover from the vendor all amounts paid under such contracts.

Therefore, because material issues of fact abound, Plaintiff and Third-Party Defendants' motion for partial summary judgment as to the third cause of action, for fraudulent inducement, is denied.

Fourth, Fifth and Sixth Causes of Action: Conspiracy, Acting in Concert and Aiding and Abetting

Next, Plaintiff and Third-Party Defendants argue that the claims for conspiracy, acting in concert and aiding and abetting must fail as they did not make any representations to NYCHA in their individual capacity nor did they enter into a contract, as individuals or corporations, with NYCHA. NYCHA's theory of liability against Mrs. Spano and Mrs. Ciaio is that they knowingly aided and conspired with Metropolitan to carry out the alleged fraudulent scheme through their own company, G&M Equipment Leasing. As against the remaining third-party Defendants, NYCHA alleges they all worked together to ensure Demetrious and Ralph were personally paid from the contract despite assurances to NYCHA that they would not be involved with the project. Recognizing that these three claims rise and fall with the third cause of action,

Defendants continue to argue there is no predicate fraud. As discussed above, the Court has already found NYCHA's claim for fraudulent inducement must be resolved by a fact finder at trial. Moreover, as Plaintiff and Third-Party Defendants concede, there is an element of the third cause of action which they do not seek to dismiss. Therefore, regardless of what this Court found on the issue of NYCHA's claims for fraudulent concealment, it would have no impact on NYCHA's claims for fraud based on payroll records. (*NYSCEF 57*; *NYSCEF 595*, 16). And, therefore, under all circumstances, there would remain claims against Defendants which could also support the fourth through sixth causes of action.

That notwithstanding, the evidence submitted with this motion indicates that nearly all of the sidewalk equipment used by Metropolitan at NYCHA developments had a connection to Demetrious, Ralph and Liberty. First, Liberty, an entity owned by Spanos and Ciaio, leased sidewalk shed equipment to Metropolitan. (*NYSCEF 626*). Later, Liberty "passed on" its sidewalk shed equipment to G&M, an entity owned by Spanos and Ciaio's wives. (*NYSCEF 627*; *NYSCEF 616* at 223-25). Then G&M leased the equipment to Metropolitan at a price nearly equal to the price NYCHA agreed to pay Metropolitan. (*NYSCEF 580*). Issues of material fact remain as to whether these acts and actors intentionally assisted and/or allowed NYCHA's payments to Metropolitan under the Contracts to end up with Spanos and Ciaio (through entities owned by them or their wives).

Significantly, in addition to the above issues which need to be resolved, NYCHA complains it has not yet taken Gina Ciaio's deposition nor does it have responses to all of its discovery demands propounded on Metropolitan, responses which may lead to relevant evidence about Movants' assistance in the fraud.

In sum, NYCHA has sufficiently demonstrated the existence of material issues of fact warranting the denial of Plaintiff and Third-Party Defendants' motion for partial summary judgment.

It is therefore:

ORDERED that Plaintiff and Third-Party Defendants' motion for partial summary judgment is Denied; it is further

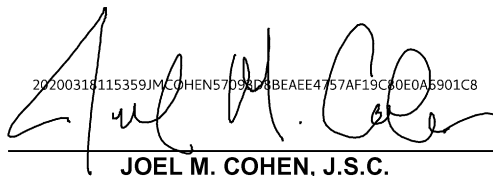
ORDERED that the parties are to appear for a Status Conference on June 16, 2020 at 9:30 a.m.; and it is further

ORDERED that Plaintiff is to serve this Order with Notice of Entry within 5 days from the date of this Order.

This constitutes the decision and order of the Court.

3/18/2020

DATE


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JOEL M. COHEN, 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