

Borough Constr. Group, LLC. v Red Hook 160 LLC

2020 NY Slip Op 31666(U)

June 1, 2020

Supreme Court, Kings County

Docket Number: 500308/19

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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BOROUGH CONSTRUCTION GROUP, LLC.,
Plaintiff, Decision and order

- against - Index No. 500308/19

RED HOOK 160 LLC, PHILADELPHIA INDEMNITY
INSURANCE COMPANY, ACREFI MORTGAGE
LENDING, LLC, TRI STATE LUMBER, AF SUPPLY
CORP, UNITED RENTALS (NORTH AMERICA), INC.,
WORLDWIDE PLUMBING SUPPLY, INC., CASTLE
MASONRY, INC., WOODBURY CONSTRUCTION, INC.,
GO GREENER PLUMBING, INC., PREMIUM BUILDING
MATERIALS, INC., UNIVERSAL MARBLE AND GRANITE
OF QUEENS AND TPG CONTRACTING, CORP.,
Defendants, June 1, 2020

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Red Hook 160 LLC,
Third Party Plaintiff,

- against -

BOROUGH EQUITIES LLC, MICHAEL BAUER &
EMANUEL KANARIS, :
Third-Party Defendants,

-----X
UNITED RENTALS (NORTH AMERICA) INC.,
Third Party Plaintiff,

- against -

ATLANTIC SPECIALTY INSURANCE COMPANY,
a/k/a ATLANTIC SPECIALTY INSURANCE INC.,
D/b/a ASIC INSURANCE,
Third-Party Defendants,

-----X
PRESENT: HON. LEON RUCHELSMAN

The plaintiff/third party defendant Borough Construction
Group LLC has moved seeking to dismiss various amended
counterclaims filed by Red Hook 160 LLC. Red Hook 160 LLC has

opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in prior decisions Borough Construction Group LLC entered into a contract with Red Hook 160 LLC concerning the construction and renovation of a project located at 160 Imlay Street in Kings County. Borough Construction sued for alleging it is owed over two and a half million dollars. Red Hook 160 LLC asserted various amended counterclaims and Borough Construction has now moved seeking to dismiss three of those counterclaims. Specifically, Borough Construction seeks to dismiss the counterclaims of a breach of good faith and fair dealing, fraud and conversion. Red Hook 160 LLC has opposed the motion.

Conclusions of Law

It is well settled that when claims have been dismissed pursuant to CPLR §3211(a) the court must be satisfied there are sufficient grounds to support the amended pleadings presented (Travelers Insurance Company v. Ferco Inc., 122 AD2d 718, 511 NYS2d 594 [1st Dept., 1986]). Thus, the court will treat the motion to dismiss the amended pleadings as motions to accept them since the end result requires analysis of the amended pleadings.

Concerning the amended counterclaim of fraud, the court has already held that allegations of fraud alleged did not induce any

reliance or were not collateral to the breach of contract claim and therefore was duplicative.

Some of the fraud claims presented in the amended counterclaims are substantially similar to those already dismissed and the arguments in opposition to the motion to dismiss are really motions to reargue the earlier denial. Others are genuinely new and expanded allegations. More searching analysis is necessary to evaluate the motion to dismiss and the amended claims based on fraud.

First, the amended counterclaims allege fraud by Borough for falsely representing labor being performed to induce further payments (see, Amended Counterclaim and Third Party Complaint, ¶¶55-64). The court already summarily held those allegations do not establish fraud because they were not misrepresentations that induced any reliance. Red Hook 160 argues, based on Kosowsky v. Willard Mountain Inc., 90 AD3d 1127, 934 NYS2d 545 [3rd Dept., 2011] that representations intended to deceive the true amount owed is a fraud that is distinct from a breach of contract. In that case a landlord sued a tenant for rents that were contractually tied to earnings and that by intentionally misrepresenting the earnings the tenant naturally misrepresented the amount of rent owed. In U.S. National Bank Association v. BFPRU I, LLC, 230 F.Supp3d 253 [S.D.N.Y. 2017] the court explained that fraud claims are not duplicative of contract claims

where a party makes misrepresentations of present facts or conceals existing facts after the parties have already entered into the contract. Thus, statements concealing performance under the contract would not be fraudulent, since that is merely a breach of contract, however, statements affirmatively misrepresenting performance is distinct from any breach and can establish fraud (The Jordan (Bermuda) Investment Company Ltd., v. Hunter Green Investments Ltd., 2003 WL 1751780 [S.D.N.Y. 2003], *see, also, Minnie Rose LLC v. Yu*, 169 F.Supp3d 504 [S.D.N.Y. 2016]). Further, in Val Tech Holdings Inc., v. Wilson Manifolds Inc., 119 AD3d 1327, 990 NYS2d 379 [4th Dept., 2014] the court held that a viable counterclaim for fraud was presented where the “defendant, alleges that, after the contract was made, plaintiff repeatedly misrepresented or concealed existing facts concerning plaintiff's performance thereunder. The fraud counterclaim thus alleges wrongful conduct and injurious consequences independent of those underlying the breach of contract counterclaim” (*id*, *see, also, Eagle Comtronics Inc., v. Pico Products Inc.*, 256 AD2d 1202, 682 NYS2d 505 [4th Dept., 1998]).

In the Amended Counterclaim and Third Party Complaint Red Hook 160 LLC has alleged that Borough intentionally prepared false manpower logs in which to receive payments from Red Hook 160 that were not warranted (*see, Amended Counterclaim and Third Party Complaint*, ¶¶55-64). While those allegations will further

be explored during discovery, those misrepresentations are distinct from the contractual obligations to perform and therefore are collateral and can thus support an independent fraud claim. Borough seeks to distinguish the above line of cases by noting that in Kosowsky (supra) a fiduciary relationship existed between the parties which is absent in this case (Reply Affirmation, Footnote 3). However, clearly, that truism was not a determining factor in deciding fraud may exist in all the cases cited above. In any event, whether a special relationship exists between the parties is only relevant to support the existence of a legal duty owed besides any contractual duty (see, Torok v. Moore's Flatwork & Founds LLC, 106 AD3d 1421, 966 NYS2d 572 [3rd Dept., 2013]). That scenario does not exist in this case. Therefore, the motion seeking to dismiss the fraud claims based upon paragraphs 55 to 64 of the Amended Counterclaim and Third Party Complaint is denied.

The next allegation of fraud concerns representations that a temporary certificate of occupancy would be obtained while Borough had no interest or ability to obtain such certificate (see, Amended Counterclaim and Third Party Complaint, ¶¶65-74). However, it is well settled that the failure to fulfill promises to perform acts in the future is not fraud (Venables v. Sagona, 85 AD3d 904, 925 NYS2d 578 [2d Dept., 2011]). Rather, such an allegation is a breach of contract (see, Gould v. Community

Health Plan of Suffolk Inc., 99 AD2d 479, 470 NYS2d 415 [2d Dept., 1984]). The case cited by Red Hook 160 LLC, BML Properties Ltd., v. China Construction America Inc., 174 AD3d 419, 101 NYS3d 597 [1st Dept., 2019], does not demand a contrary result. In that case the misrepresentation concerned the present status of the project not promises to perform in the future. Indeed, in the prior motion Red Hook 160 LLC also cited to GoSmile Inc., v. Levine, 81 AD3d 77, 915 NYS2d 521 [1st Dept., 2010] which held that "a misrepresentation of future intent to perform under the contract" is not actionable as fraud.

An examination of the Counterclaim reveals that although it is labeled "false representations concerning then-current status of the project" (see, Amended Counterclaim and Third Party Complaint, ¶¶64(b)), the actual allegations all refer to future promises. Thus, paragraph 65 alleges Borough promised the temporary certificate of occupancy "would be obtained" by a certain date (id). Again, in paragraph 68 it is alleged Borough promised the temporary certificate "would be achieved on time" (id). Again, in paragraph 71 it is alleged Borough promised that Cores D and E "would be substantially completed" by a date certain (id). These allegations are failures to keep promises regarding future acts and cannot form the basis of any fraud claims. Thus, the motion seeking to dismiss that portion of the counterclaim is granted.

The next set of facts supporting a claim of fraud are allegations that Borough sabotaged the work site by purposefully damaging it (see, Amended Counterclaim and Third Party Complaint, ¶¶75-81). Generally, sabotage does not constitute fraud because it is not a misrepresentation and no reliance flows from such acts (see, Burstyn v. Horl, 1985 WL 260 [S.D.N.Y. 1985]). In Aktas v. JMC Development Co., Inc., 2010 WL 2520980 [N.D.N.Y. 2010] cited by Red Hook 160 LLC the court held that allegations a party failed to disclose the full extent of inspections and affirmatively misrepresented the results of the inspections and further concealed dangerous and defective conditions and intentionally sabotaged work done on the site to prolong the construction period and receive further payments could constitute fraud and therefore denied a motion to dismiss the fraud claims. However, in a subsequent decision in the same case (871 F.Supp2d 1 [N.D.N.Y. 2012]) the court refined the role that sabotage could play in establishing a fraud claim. In the subsequent decision the court noted that sabotage could only support an independent fraud claim "if the defendant breached a legal duty existing independently of the contractual relations between the parties" (id). Since there were no such duties existing between the parties the court dismissed the fraud based on sabotage claim. Likewise, in this case, there are no duties that flow between the parties independent of the contract (Crabtree v. Tristar

Automotive Group Inc., 776 F.Supp 155 [S.D.N.Y. 1991]).

Therefore, the motion seeking to dismiss the claims based upon sabotage which comprise paragraphs 75-81 of the Amended Counterclaim and Third Party Complaint is granted.

Next, the Amended Counterclaim and Third Party Complaint (¶¶82-91) alleges fraud by Borough actively concealing defective work performed. Paragraph 84 alleges that Borough concealed defective work it performed "through repeated misrepresentations and omissions" however, no such examples of any misrepresentations are provided at all. It is well settled that an allegation based upon 'information and belief' is "not sufficient to establish the necessary quantum of proof to sustain allegations of fraud" (see, Weinberg v. Kaminsky, 166 AD3d 428, 88 NYS3d 16 [1st Dept., 2018]). Thus, paragraphs 86 and 87 which are only based upon 'information and belief' are insufficient to establish any fraud claims. Moreover, allegations of over-billing or double-billing are breach of contract claims, not fraud claims (Delta Dallas Omega Corp., v. Wair Associates, 189 AD2d 701, 592 NYS2d 718 [1st Dept., 1993]). Consequently, the motion seeking to dismiss the fraud claims based upon paragraphs 82 to 91 of the Amended Counterclaim and Third Party Complaint is granted.

The next allegation of fraud regarding self performing on the part of Borough was extensively dealt with in the prior order

and any amendment which essentially seeks to reargue that determination is denied. Red Hook 160 LLC has not sufficiently demonstrated how the promises of self performance were collateral to the contract that any fraud claims may be viable. Therefore, the motion seeking to dismiss paragraphs 92 to 115 of the Amended Counterclaim and Third Party Complaint is granted.

The remaining allegations of stealing construction materials and deleting computer files are not misrepresentations that induced any reliance and therefore they cannot support any fraud claims and the motion seeking to dismiss all the allegations contained in paragraphs 116 to 122 is granted.

Therefore, the only fraud claim that remains a counterclaim are the allegations contained within paragraphs 55 to 64 of the Amended Counterclaim and Third Party Complaint.

Next, in the prior decision the court concluded that Red Hook 160 LLC failed to provide any basis to conclude that Bauer and Kanaris exercised complete domination over the corporation and abused the privilege of doing business in the corporate form. The court noted the counterclaim stated in conclusory fashion that "as the sole members and managers of Borough, Mr. Bauer and Mr. Kanaris exercise complete control and domination over Borough and personally directed and benefitted from the various fraudulent conduct alleged herein" (see, Original Counterclaim and Third Party Complaint, ¶10). The Amended Counterclaim and

Third Party Complaint does not supplement the above deficiency. As the Court of Appeals observed, at the pleading stage "a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in 'bad faith' while representing the corporation" (East Hampton Union Free School District v. Sandpebble Builders Inc., 16 NY3d 775, 919 NYS2d 496 [2011]). Rather, the plaintiff must allege facts demonstrating such dominion over the corporation and that "through such domination, abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against the plaintiff such that a court in equity will intervene" (Oliveri Construction Corp., v. WN weaver Street LLC, 144 AD3d 765, 41 NYS3d 59 [2d Dept., 2016]). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to [corporate or] LLC formalities, inadequate capitalization, commingling of assets, and the personal use of [corporate or] LLC funds" (see, Grammas v. Lockwood Associates LLC, 95 AD3d 1073, 944 NYS2d 623 [2d Dept., 2012]). Thus, mere conclusory statements that the individual dominated the corporation are insufficient to defeat a motion to dismiss (AHA Sales Inc., v. Creative Bath Products Inc., 58 AD3d 6, 867 NYS2d 169 [2d Dept., 2008]).

Paragraph 132 of the Amended Counterclaim states that "Mr.

Bauer and Mr. Kanaris abused both entities for the purpose of perpetrating fraud and conversion against Red Hook 160 for their own personal gain" (id). Paragraph 134 lists four activities that Bauer and Kanaris engaged in, namely that they directed employees to steal construction supplies for their own benefit, directed employees to falsify records, directed subcontractors to ignore noncompliant work and made material false representations and omissions. First, paragraphs 55 to 64 that further elaborate on these schemes does not mention Mr. Bauer at all. Thus, there is no basis upon which to find Mr. Bauer personally liable for any of the alleged wrongs. Paragraph 116 does allege that Mr. Bauer directed subcontractors to steal materials for his own use and the use of Mr. Kanaris, however, as noted, that did not establish any fraud and that does not demonstrate a sufficient basis upon which to pierce the corporate veil. Moreover, while the activities alleged can surely constitute wrongs there has been no evidence presented delineating the specific way in which the corporate form had been breached. Therefore, the motion seeking to dismiss the personal claims against Bauer and Kanaris is granted.

Turning to the motion to dismiss the counterclaim of a breach of implied covenant of good faith and fair dealing, it is well settled that cause of action is premised upon parties to a contract exercising good faith while performing the terms of an


agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). The counterclaim adequately pleads this cause of action. Therefore, the motion seeking to dismiss this counterclaim is denied.

Lastly, Borough has moved seeking to dismiss the counterclaim of conversion. It is well settled that to establish a claim for conversion the plaintiff must show the legal right to an identifiable item or items and that the defendant has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). Clearly, the allegations support the existence of claims based upon conversion and consequently, the motion seeking to dismiss the conversion counterclaim is denied.

So ordered.

ENTER:

DATED: June 1, 2020
Brooklyn, NY



Hon. Leon Ruchelsman
JSC