

Chua v Trim-Line Hitech Constr. Corp.
2020 NY Slip Op 34067(U)
December 10, 2020
Supreme Court, New York County
Docket Number: 156384/2019
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

WILFRED CHUA and RODRIGO BALAJADIA, Individually
and on behalf of others similarly situated,

Plaintiffs,

INDEX NO. 156384/2019

MOTION DATE 02/07/2020

MOTION SEQ. NO. 002 004

- v -

TRIM-LINE HITECH CONSTRUCTION CORP., TLH
CONSTRUCTION CORP., MEGA CONTRACTING GROUP,
LLC, EE CRUZ CO., INC., RMSK CONTRACTING CORP.,
KISKA CONSTRUCTION, INC., FORTE CONSTRUCTION
CORP., LASHAY'S CONSTRUCTION & DEVELOPMENT
CO. INC., L.K. COMSTOCK & CO., INC., RAILWORKS
CORP., JOHN P. PICONE, INC., J. KOKOLAKIS
CONTRACTING, INC., STALCO CONSTRUCTION,
INC., MAKRO GENERAL CONTRACTORS, INC., and T.A.
AHERN CONTRACTORS CORP., MPCC CORP.,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

J. KOKOLAKIS CONTRACTING, INC.

Plaintiff,

Third-Party
Index No. 595779/2019

-against-

TRISTAN ANGELES

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71,
72, 96, 97, 98, 99, 100, 105, 106, 107, 125

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 135, 136, 137, 138,
140, 143

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, it is

ORDERED that in motion seq. 002, the motion of third-party defendant to dismiss the third-party complaint is granted and the third-party complaint is dismissed without prejudice; and it is further

ORDERED that in motion seq. 004, the motion of plaintiffs to amend the complaint is granted and plaintiffs are directed to serve the amended complaint by NYSCEF and to file a copy of the amended complaint with the County Clerk's Office; and it is further

ORDERED that defendants are directed to serve their answer to the amended complaint within thirty (30) days of service of this order with notice of entry; and it is further

ORDERED that counsel are directed to submit to 59nyef@nycourts.gov and NYSCEF a proposed discovery compliance conference order and a competing proposed discovery compliance conference order on February 5, 2021..

DECISION

In this action, the named plaintiffs seek to certification of a class of workers hired by defendants Trim-Line Hitech Construction Corp. and TLH Construction Corp. (together, Hitech), a subcontractor working for defendants-prime contractors on various publicly funded projects, who, they

alleged, were not paid full lawful wages, overtime and benefits that they earned.

In motion sequence 002, third-party defendant Tristan Angeles (Angeles), president of Hitech, moves to dismiss the third-party complaint brought by defendant-third-party plaintiff J. Kokolakis Contracting, Inc. (JKC), a prime contractor that hired Hitech as subcontractor on a publicly funded construction project.

In motion sequence 004, plaintiffs Wilfred Chuo (Chuo) and Rodrigo Balajadia (Balajadia) (together, plaintiffs) move to amend the complaint, to add Joseph Eugenio (Eugenio) as plaintiff and class representative to the putative class.

For the reasons stated below, the motion to dismiss the third-party complaint shall be granted without prejudice and the motion to amend the complaint shall also be granted.

Factual allegations

Chuo and Balajadia were sheet metal workers hired by Hitech to perform construction-related work on certain publicly financed projects in New York City (see New York Supreme Court Electronic Filing [NYSCEF] Doc. No. 1, summons and complaint, ¶¶ 1, 4).

Hitech had been hired as the subcontractor by defendants-prime contractors, each of which had previously entered into agreements with various government entities to perform the

particular construction-related projects (see NYSCEF Doc No. 1, ¶¶ 2, 33). The projects, which Hitech oversaw, included subway rehabilitation projects, ventilation work for the Midtown Tunnel, work at SUNY College at Old Westbury, and work involving the Clinton Housing Development Corporation (see NYSCEF Doc No. 1, ¶¶ 1-3).

The public-works contracts entered into by defendants-prime contractors incorporated by reference New York State Labor Law § 220, which provides that public-works projects, laborers, workers, and mechanics shall be paid not less than the "prevailing rate of wages," as well as supplemental benefits (see NYSCEF Doc No. ¶¶ 1, 33-37). Annexed to these contracts is the schedule of prevailing wages and supplemental benefits to be paid to all workers (see NYSCEF Doc No. 1, ¶ 37). These same provisions were incorporated in contracts signed by defendants-prime contractors with their subcontractor Hitech (see NYSCEF Doc No. 1, ¶ 34).

Chua and Balajadia, on behalf of themselves and putative plaintiffs who also in the construction trades and hired by Hitech for these projects, commenced this action in June 2019. They allege that Hitech paid plaintiffs and other members of the putative class less than the prevailing rates of wages and supplements, and that defendants-prime contractors failed to

ensure that Hitech paid plaintiffs the prevailing rate of wages and supplements (see NYSCEF Doc No. 1, ¶¶ 40, 41).

The complaint asserts one cause of action alleging breach of contract against Hitech, one cause of action for breach of contract with the particular government agency against each defendant-prime contractor, which in turn hired plaintiffs, which prime contractor was hired by such agency, and causes of action against Hitech claiming breach of New York Labor Law § 655 and 12 NYCRR § 142-3.2 [overtime compensation], and breaches of Labor Law §§ 190, 198, and 198 (i-a), [timely payment of statutorily and contractually required prevailing wages, supplemental benefits, and overtime compensation] (see NYSCEF Doc No. 1, ¶¶ 128-130).

Defendant-third party plaintiff JKC, commenced a third-party action against Tristan Angeles (Angeles), president of Hitech, in August 2019, alleging misrepresentations and fraud (see NYSCEF Doc No. 56, third-party complaint by JKC, ¶¶ 8-9). The third-party complaint alleges that JKC executed subcontracts with Hitech pertaining to the project known as SUNY College at Old Westbury, and that JKC and Hitech had entered into a settlement agreement wherein "[Hitech] and Angeles represented and warranted that [Hitech] paid wages and supplements to its employees as is required by law" (NYSCEF Doc No. 56, ¶¶ 5-7). JKC has no duty to plaintiffs, and denies any liability for the

allegations of damage in the main action, but if Hitech is found not to have paid the wages and supplements to its employees as required by the terms of the subcontracts, then third-party defendant Angeles "made material misrepresentations and defrauded JKC in order to induce JKC to enter into the Agreement and otherwise release payment to [Hitech] and Angeles" (NYSCEF Doc No. 56, ¶ 8).

Motion Seq. 002

Third-party defendant Angeles moves to dismiss the third-party complaint based on documentary evidence and failure to state a cause of action (see NYSCEF Doc No. 70, brief of Angeles's counsel at 6). In particular, Angeles points out that the subcontract between Hitech and JKC explicitly provides that "[t]he prime contractor is responsible for any underpayment of prevailing wages or supplements by its subcontractors" (see NYSCEF Doc No. 70 at 4, quoting NYSCEF Doc No. 69, subcontract between JKC and Hitech, dated February 26, 2013 at 35).

He also points out that he signed the subcontract solely as president of Hitech, and did not additionally sign in his personal capacity (see NYSCEF Doc No. 70 at 6, citing Salzman Sign Co. v Beck, 10 NY2d 63, 67 [1961] ["where individual responsibility is demanded the nearly universal practice is that the officer signs twice—once as an officer and again as an individual"]). JKC has provided no evidence that Angeles

intended to be bound individually (see NYSCEF Doc No. 70 at 6, citing J.N.K. Machine Corp. v TBW, Ltd., 155 AD3d 1611, 1613-1614 [4th Dept 2017]). Further, the doctrine of piercing the corporate veil, which allows a party to hold an officer of a corporation personally liable for the acts of the corporation, has not been pleaded (see NYSCEF Doc No. 70 at 7, citing among others, AHA Sales, Inc. v Creative Bath Prods., Inc., 58 AD3d 6, 24 [2d Dept 2008]; Millenium Constr., LLC v Loupolover. 44 AD3d 1016, 1017 [2d Dept 2007]). JKC has not alleged that Angeles, as president of Hitech, exercised complete dominion over the corporation and "abused the privilege of doing business in the corporate form" (NYSCEF Doc No. 70 at 7, quoting Matter of Morris v New York State Dept. of Taxation & Fin.,, 82 NY2d 135, 142 [1993]; Love v Rebecca Dev., Inc., 56 AD3d 733, 733 [2d Dept 2008]; East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 66 AD3d 122, 126 [2d Dept 2009]). There are also no alleged facts to show that Angeles exerted such control over Hitech that he became its alter ego (see NYSCEF Doc No. 70 at 8-9).

In addition, a claim of fraud is not sufficiently alleged when the only fraud alleged relates to a breach of contract (see NYSCEF Doc No. 70 at 8, citing Springut Law PC v Bates Tech Inc., 157 AD3d 645, 646 [1st Dept 2018]). JKC must allege that Hitech knowingly made a material misrepresentation of an

existing fact, with the intent of inducing JKC's reliance, JKC's justifiable reliance, and damages (see NYSCEF Doc No. 70 at 8, citing *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]). JKC has not alleged that Angeles or Hitech misrepresented an existing fact with knowledge of its falsity, and because JKC assumed the risk and agreed as the contractor to be responsible for any underpayment of prevailing wages or supplements by Hitech, there is no allegation that JKC relied on the alleged misrepresentation (see NYSCEF Doc No. 70 at 8).

JKC opposition

In opposition, JKC asserts that in August 2017, near the end of the project known as SUNY College at Old Westbury, it executed a settlement agreement with Hitech that included among other clauses, Hitech's warranty that:

"[a]ll subcontractors and/or suppliers of labor, materials or other service or commodity, who contributed directly or indirectly to [Hitech]'s fulfillment of its obligations related to the Project have been paid in full or otherwise have been satisfied, and that there are no outstanding claims, demands, fines, penalties, actions or the like between [Hitech] and such subcontractors, suppliers or laborers"

(NYSCEF Doc No. 96, brief by JKC's counsel in opposition at 2, quoting NYSCEF Doc No. 99, settlement agreement, dated August 10, 2017, ¶ 6 [B]). The settlement agreement required Hitech and Angeles to "transmit certified payroll records" to JKC as

well as the completed New York State Labor Law, Section 220-a Subcontractor's Certifications (NYSCEF Doc No. 96, brief by JKC's counsel in opposition at 3, citing NYSCEF Doc No. 99, settlement agreement, ¶¶ 4 [C]; 4 [E])). Each week, Angeles as Hitech president, had signed the payroll records with a statement that "all persons employed on said project have been paid the full weekly wages earned" (NYSCEF Doc No. 96, brief of JKC's counsel in opposition at 3, citing NYSCEF Doc No. 99, settlement agreement, exhibit B, payroll records). Angeles also signed the subcontractor's certifications stating that Hitech would "pay the applicable prevailing wages and..pay or provide the supplements specified" (Doc No. 96 at 3, citing NYSCEF Doc No. 99, settlement agreement, exhibit D, subcontractor's certification).

JKC argues that there is no need to pierce the corporate veil in order to find Angeles personally liable for making a fraudulent misrepresentation (see NYSCEF Doc No. 96 at 4). In support, JKS quotes North Shore Architectural Stone, Inc. v American Artisan Constr., Inc. (153 AD3d 1420 [2d Dept 2017]), to argue that a corporate officer who participates in the commission of a tort may be held individually liable, "regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced" (NYSCEF Doc No. 96 at 5,

quoting 153 AD3d at 1421 [internal quotation marks and citation omitted]). JKC points out that in North Shore, the Second Department reversed the motion court's dismissal of the claim alleging fraud as asserted against the corporation's president, finding that the complaint adequately alleged that the president had participated in the act comprising the alleged fraud by knowingly misrepresenting the facts with the intent of inducing the plaintiff's detrimental reliance (see NYSCEF Doc No. 96 at 5). JKC further asserts that the cases cited by Angeles requiring piercing of the corporate veil are inapplicable because none of them involved an underlying fraud claim (see NYSCEF Doc No. 96 at 6, citing Salzman Sign Co. v Beck, 10 NY2d 63; Morris v State Dept. of Taxation & Fin., 82 NY2d 135; Love v Rebecca Dev., Inc., 56 AD3d 733; East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 66 AD3d 122).

JKC's third-party complaint alleges that Angeles misrepresented "presently known facts," in particular that Hitech had paid its employees' wages and supplements as required by law, so as to induce JKC to enter the settlement agreement (see NYSCEF Doc No. 96 at 8). JKC points to paragraph 6 (B) of the settlement agreement, Hitech's warranty that all workers on the Old Westbury project were paid in full (see NYSCEF Doc No. 96 at 8-9, citing NYSCEF Doc No. 99, settlement agreement, ¶ 6 [B]). By providing certified payroll records relating to

periods prior to the date of the settlement agreement, and by signing and transmitting the payroll records, Angeles certified under penalty of perjury, that all persons employed on the project were "paid the full weekly wages earned" (see NYSCEF Doc No. 96 at 8, quoting NYSCEF Doc No. 99, settlement agreement, exhibit B). Therefore, JKC argues, if plaintiffs prove that Hitech failed to pay the wages and supplements as contractually and legally required, Angeles would have intentionally falsely certified the payroll records prior to entering the settlement agreement with Hitech (see NYSCEF Doc No. 96 at 9).

It is well settled that "a cause of action [alleging] fraud may be maintained where a [party] pleads a breach of a separate duty from, or in addition to, a breach of contract" (NYSCEF Doc No. 96 at 7, quoting J&D Evans Constr. Corp. v Iannucci, 84 AD3d 1171, 1172 [2d Dept 2011], internal quotation marks and citation omitted). JKC contends that the knowing misrepresentation of present facts that he knew to be false at the time he communicated them to JCK, made with intent to induce the signing of an agreement, is not duplicative of a breach of contract claim and alleges a claim of fraud (see NYSCEF Doc No. 96 at 1-2, 8, citing Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954, 956 [1986]). On such grounds, JKS argues, Angeles cannot escape liability on the basis that there is a

separate claim against Hitech for breach of contract (see NYSCEF Doc No. 96 at 1, 5).

A motion to dismiss is properly denied where the pleadings and exhibits reveal "factual allegations...which taken together manifest any cause of action cognizable at law" (NYSCEF Doc No. 96 at 4, quoting Polonetsky v Better Homes Depot, Inc., 97 NY2d 46, 54 [2001]). JKC contends that its third-party complaint "specifically alleges" that Angeles knowingly misrepresented that Hitech had paid the legally and contractually required wages and supplements to those employed on the construction project, in order to induce JKC into entering the settlement agreement and releasing funds to Hitech (see NYSCEF Doc No. 96 at 6).

Angeles Reply

In reply, Angeles argues that the third-party complaint is fatally deficient in several ways. In addition to the fact that the settlement agreement was signed only by Angeles in his official capacity as president of Hitech, and not individually, the allegations of fraudulent misrepresentation are pleaded without the necessary particularity (see NYSCEF Doc No. 106, brief of Angeles's counsel in reply at 1-2, quoting Kline v Taukpoint Realty Corp., 302 AD2d 433, 433 [2d Dept 2003] "[b]are allegations of fraud in a complaint without any allegations of the details constituting the wrong are not sufficient to sustain

a cause of action”)). The third-party complaint does not allege that Angeles knew at the time he signed the settlement agreement that Hitech had failed to pay all wages and supplements to its employees (see NYSCEF Doc No. 106 at 1, 3). Although JKC makes an argument in its Memorandum in Opposition to such facts, it submits no evidence, in the form of affidavits from a person with knowledge, that such was the case, and the memorandum of law is inadequate to cure defects in pleading (see M&E 73-75, LLC v Fusion LLC, (189 AD3d 1, 5 [1st Dept. 2020] [“To withstand dismissal, a plaintiff may submit opposing affidavits which can be considered to amplify the pleadings” (underlining supplied).) Furthermore, the third-party complaint does not plead that Angeles intentionally made fraudulent statements in order to induce JKC to enter in the settlement agreement (see NYSCEF Doc No. 106 at 1). Nor does it plead that JKC reasonably relied on Angeles’s alleged misrepresentations (see NYSCEF Doc No. 106 at 4).

Angeles argues that JKC attempts to “play both sides of the fence” in the third party complaint by denying that its owes any duty to plaintiffs and has no liability to them, but thereby conceding that all employees were paid in full and that Angeles made no misrepresentations (see NYSCEF Doc No. 106 at 3). Angeles argues, in addition, that the allegations of fraud that exist in the third-party complaint are contradicted by the

settlement agreement, and by the third-party complaint itself (see NYSCEF Doc No. 106 at 2).

JKC Sur-reply¹

JKC first reiterates its argument that its third-party complaint "clearly pleads the requisite elements for fraud" (see NYSCEF Doc No. 125, brief by JKC counsel in sur-reply at 1). The third-party complaint alleges that Angeles defrauded JKC by certifying that Hitech had paid all sums owed to its employees, and he knew this misrepresentation was false and was made to induce JKC to enter into the settlement agreement and release payment to Hitech (see NYSCEF Doc No. 125 at 1-2). It also alleges that JKC relied on Angeles's misrepresentations by executing the agreement, thus making Angeles liable for all damages JKC may suffer as a result (see NYSCEF (see NYSCEF Doc No. 125 at 1-2)).

JKC contends that the purpose of CPLR's 3016 (b) heightened pleading standard, "is to inform a defendant with respect to the incidents complained of and should not be confused with unassailable proof of fraud" (NYSCEF Doc 125 at 3, quoting Minico Ins. Agency, LLC v AJP Contr. Corp., 166 AD3d 605, 607-608 [2d Dept 2018] [internal quotation marks and citation

¹Although JKC did not seek permission to submit a sur-reply, the court exercises its discretion to consider its arguments (see Gross v Neiman, 147 A3d 505, 507 [1st Dept 2017]).

omitted)). It contends that the third-party complaint fully satisfies the CPLR 3106 (b) pleading standard (see NYSCEF Doc No. 125 at 3), by identifying the misrepresentation, namely Hitech's claim to having paid full wages and supplements to its workers, and specifying that the settlement agreement, executed by JKC and Hitech, is where the alleged misrepresentation arose (see NYSCEF Doc No. 125 at 4).

Finally, JKC argues that Angeles errs in arguing that the third-party complaint impermissibly pleads both that it has no liability to plaintiffs and seeks relief as against Angeles (see NYSCEF Doc No. 125 at 4-5). CPLR 3014 explicitly allows causes of action or defenses to be pleaded in the alternative (see NYSCEF Doc No. 125 at 4, citing Santander Bank, N.A. v Diamonds on Madison Inc., 2018 NY Slip Op 32239[U] [Sup Ct, New County 2018] at *11).

Motion Seq. 004

Plaintiffs seek to amend their complaint to add Joseph Eugenio as class representative (see NYSCEF Doc No. 136, brief of plaintiffs' attorney at 3). They have included a copy of their proposed amended complaint (see NYSCEF Doc No. 138, proposed amended complaint).

In New York, courts freely give leave to parties to supplement and amend pleadings, provided there is no prejudice to the nonmoving party (see NYSCEF Doc No. 136 at 3, citing MBIA

Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 499 [1st Dept 2010]; A.N. Frieda Diamonds, Inc. v Kaminski, 122 AD3d 517, 517 [1st Dept 2014]). Plaintiff need not establish the merits of the proposed new allegations but must show that the new allegations are not "palpably insufficient as a matter of law or totally devoid of merit" (see NYSCEF Doc No. 136 at 3-4, quoting Lucido v Mancuso, 49 AD3d 220, 225 [2d Dept 2008]). A party opposing the motion must overcome a presumption of the amended pleading's validity, by demonstrating that the facts alleged and relied upon in the moving papers are facially unreliable or insufficient (see NYSCEF Doc No. 136 at 3, citing Brennan v City of New York, 99 AD2d 445 [1st Dept 1984]; Goldstein v Brogan Cadillac Oldsmobile Corp., 90 AD3d 512, 514 [2d Dept 1982]).

Plaintiffs assert that the parties are engaged in pre-class certification discovery, and no documents have been produced or depositions taken, and therefore defendants will suffer no prejudice with the granting the amendment (see NYSCEF Doc No. 136 at 4).

Angeles argues in opposition that by seeking to add Joseph Eugenio as an additional plaintiff, Chuo and Balajadia are attempting to "save" their complaint, which otherwise has no legal or factual basis given that plaintiffs primarily worked on private projects, not public works projects subject to prevailing wage laws (see NYSCEF Doc No. 140, affidavit of

Angeles, ¶¶ 4-5). Eugenio "is not similarly situated with the current [p]laintiffs because he worked on public works projects," and therefore should not be joined as a class representative in this action (NYSCEF Doc No. 140, ¶¶ 6-7).

In reply, plaintiffs argue that Eugenio is a proper party because he worked on the majority of the public works projects covered in this lawsuit and claims that he, too, like plaintiffs and the putative class members, was not paid at the prevailing rate of wages and supplemental benefits for his work (see NYSCEF Doc No. 140, memorandum by Angeles's counsel in reply at 1-2). Plaintiffs contend that Angeles's argument that because Eugenio worked on more public works projects than did Chua and Balajadia, he is not similarly situated with plaintiffs for class certification, does not address the elements of CPLR 3025 (b) and has no bearing on whether the complaint should be allowed to be amended (see NYSCEF Doc No. 140 at 2).

Discussion

Motion Seq. # 002

When considering a motion to dismiss brought pursuant to CPLR 3211, the court must accept as true the facts alleged in the complaint as well as any reasonable inferences that may be gleaned from those facts (see Amaro v Gani Realty Corp., 60 AD3d 491, 492 [1st Dept 2009], citing Leon v Martinez, 84 NY2d 83, 87 [1994]). The court's analysis of the plaintiff's claims is

limited to the four corners of the pleading, the allegations of which are given a "liberal construction and accept[ed] as true" (Johnson v Proskauer Rose LLP, 129 AD3d 59, 67 [1st Dept 2015], citing Leon v Martinez, 84 NY2d at 87-88). The court determines only whether the complaint states a legally cognizable claim (see Skillgames, LLC v Brody, 1 AD3d 247, 250 [1st Dept 2003], citing Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]).

"Pursuant to CPLR 3211 (a) (7), a motion to dismiss for failure to state a cause of action lies if the pleading is defective on its face" (Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC, 149 AD3d 127, 135 [1st Dept 2017]). The motion "'test[s] the facial sufficiency of the pleading in two different ways'" (Jonns v Fischbarg, 2018 NY Slip Op 32353[U], **8 [Sup Ct, NY County 2018], quoting Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc., 115 AD3d 128, 134 [1st Dept 2014]). The first is where the plaintiff has not stated a cognizable claim, and the second is where the plaintiff has identified a cognizable cause of action but has not pleaded the material allegations necessary to establish it (see Jonns v Fischbarg, 2018 NY Slip Op 32353, **8, citing Basis Yield Alpha Fund [Master], 115 AD3d at 134). If from the pleadings' four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law," the motion to dismiss will be denied (Polonetsky v Better

Homes Depot, Inc., 97 NY2d at 54 [internal quotation marks and citation omitted]). Although the truth of the allegations of the complaint is presumed, the court is not obligated to accept as true, factual allegations that are "conclusory, inherently incredible or speculative" (Sonkin v Sonkin, 157 AD3d 414, 415 [1st Dept 2018]).

As an initial matter, the court finds that the third-party complaint, arguing that JKC has no liability to plaintiffs and also seeking relief as against Angeles, is entirely proper. CPLR 3014 explicitly allows causes of action or defenses to be pleaded in the alternative (see Two Queens, Inc. v Scoza, 296 AD2d 302, 303 [1st Dept 2002]).

Turning to the merits of Angeles's motion, the court is not persuaded that JKC must pierce Hitech's corporate veil in order to claim that Angeles is personally liable for fraud. Angeles did not refute JKC's argument that a corporate officer who participates in the commission of fraud may be held individually liable, "whether the officer acted on behalf of the corporation...and regardless of whether the corporate veil is pierced" (North Shore Architectural Stone, Inc. v American Artisan Constr., Inc., 153 AD3d at 1421). The court finds that JKC may seek to hold Angeles personally liable for any tortious actions regarding the settlement agreement.

A claim of fraud will be dismissed as redundant if it is deemed a restatement of a breach of contract claim (see Cronos Group Ltd. v XComIP, LLC, 156 AD3d 54, 64 [1st Dept 2017]; Fielman v Crown Point Cabinetry Corp., 2010 NY Slip Op 31958[U] at **9 [Sup Ct, New York County 2010]). However, where the complaint asserts an independent basis for a claim of fraud separate from a breach of contract, it will survive a motion to dismiss (see J.&D. Evans Contr. Corp. v Iannucci, 84 AD3d at 1172). JKC sufficiently argues that Angeles misrepresented presently known material facts, in particular that all wages and supplementals had been properly paid to Hitech's workers, and that JKC relied upon those claims in signing the settlement agreement and then releasing funds to Hitech. There is no merit in Angeles's argument that JKC "assumed the risk" by agreeing that, as the contractor, it would be responsible for any underpayment of prevailing wages or supplements by Hitech, as that ignores JKC's claim that it was defrauded.

Nonetheless, while the third-party complaint identifies circumstances that could be deemed a fraudulent misrepresentation, it has not pleaded all necessary material allegations with particularity in order to establish the cause of action (see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc., 115 AD3d at 134). To sufficiently maintain an action claiming fraudulent misrepresentation, the complaint must

allege a false representation of a material existing fact, made with knowledge of its falsity and made for the purpose of inducing the other party to rely upon it, reasonable reliance by the other party on the misrepresentation, and resulting injury (see Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 [1996]). Further, "the circumstances constituting the [fraud] shall be stated in detail" (CPLR 3016 [b]).

The third-party complaint is conclusory in its allegations. It does not explicitly allege that Angeles knowingly misrepresented, prior to the parties signing the settlement agreement, that Hitech had paid the public-works workers at the required prevailing wage scale. Nor does it explicitly allege that Angeles intended that JKC rely on the misrepresentations so as to induce it to sign the settlement agreement and release funds. On these bases, the complaint sounding in fraudulent misrepresentation is insufficiently pleaded.

For these reasons, Angeles's motion to dismiss the third-party complaint must be granted, without prejudice, to JKC moving to replead.

Motion Seq. # 004

Leave to amend the pleadings "shall be freely given, absent prejudice or surprise resulting directly from the delay" (see McCaskey, Davies & Assoc., Inc. v New York City Health & Hosps. Corp., 59 NY2d 755, 757 [1983], citing CPLR 3025 [b]). Leave

should be granted "unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit" (Bishop v Maurer, 83 AD3d 483, 485 [1st Dept 2011], quoting Smith-Hoy v AMC Prop. Evaluations, Inc., 52 AD3d 809, 811 [2d Dept 2008]). The standard applied on a motion to amend a pleading is "much less exacting" than that applied on a motion seeking summary judgment (see James v R. & G. Hacking Corp., 39 AD3d 385, 386 [1st Dept. 2007]). Prejudice, in this context, refers to when the party opposing the amendment has been hindered in the preparation of its case or prevented from taking some measure in support of its position (see Garrison v Wm. H. Clark Mun. Equip., 239 AD2d 742, 742-743 [3d Dept 1997]).

Upon review of the proposed amended complaint, this court finds only minor changes to the body of the document, including naming Eugenio as plaintiff and class representative. Although Angeles opposes the motion on the basis that Eugenio allegedly has a different work history from Chua and Balajadia, he makes no claim of prejudice should amendment be granted. His

opposition rests on mere assertions and conclusions and fails to show the proposed amendment patently lacks merit. Thus, because motions to amend are liberally granted unless "palpably insufficient" or without merit, the court grants plaintiffs' motion, finding no prejudice to Angeles.

12/10/2020
DATE

Debra A. James
DEBRA A. JAMES, 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