

Kay Waterproofing Corp. v Mendia
2021 NY Slip Op 30605(U)
March 1, 2021
Supreme Court, New York County
Docket Number: 151324/2020
Judge: David Benjamin Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X

INDEX NO. 151324/2020

KAY WATERPROOFING CORPORATION,

Plaintiff,

MOTION SEQ. NO. 001

- v -

LUIS H. MENDIA,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 23, 24, 25

were read on this motion to/for DISMISS.

In this action by plaintiff Kay Waterproofing Corporation (“Kay”) sounding, inter alia, in malicious prosecution and abuse of process, defendant Luis H. Mendia (“Mendia”) moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action, for sanctions pursuant to 22 NYCRR 130-1.1, and for such other relief as this Court deems just and proper. Doc. 3. Kay opposes the motion and cross-moves, pursuant to CPLR 3025(b), to amend the complaint. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on December 3, 2019 in which Mendia, an employee of Bravo Contractors Groups, Inc. (“Bravo”) (Docs. 10, 24), allegedly staged a fall from a ladder while working for Kay at 333 Beach 32nd Street in Queens (“the premises”). Doc. 1 at pars. 3, 7. Mendia allegedly did so in an attempt to collect damages from Kay. Id. at par. 5. In January

2020, Mendia commenced a personal injury action against Kay, Seaview Towers Inc. (“STI”) and Seaview 2006 L.P. (“Seaview 2006”) in Supreme Court, Queens County under Index Number 700085/20 (“the Queens action”). Doc. 1 at par. 10; Doc. 6. In the Queens action, Mendia alleged that he was injured as a result of the negligence of Kay, STI, and Seaview 2006 which, he claimed, owned, leased, or controlled the premises. Doc. 6.

In February 2020, Kay commenced the captioned action against Mendia by filing a summons and verified complaint. Doc. 1. In its complaint, Kay alleged that, as a result of the lawsuit, its insurance premiums have increased and its ability to obtain liability coverage was impaired. *Id.* at par. 11. Kay asserted claims for malicious prosecution, abuse of process, breach of the covenant of good faith and fair dealing, interference with personal property, and fraud. Doc. 1.

Pursuant to a stipulation filed August 11, 2020, Kay allowed Mendia until September 10, 2020 to answer or otherwise respond to the complaint. Doc. 2.

On September 9, 2020, Mendia moved to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), for sanctions pursuant to 12 NYCRR 130-1.1, and for such other relief as this Court deems just and proper. Doc. 3. In support of the motion, Mendia argues that Kay failed to plead the necessary elements of its claims for malicious prosecution and abuse of process. Doc. 4. Mendia further asserts that Kay cannot maintain a claim against him for breach of the covenant of good faith and fair dealing since Kay was not his employer and because he was an at will employee with a contract of an indefinite duration. *Id.* Additionally, Mendia maintains that Kay’s claim of “interference with personal property” is not a recognized cause of action. *Id.* Further, he claims that Kay fails to meet the stringent pleading

requirements for a fraud claim. *Id.* Finally, Mendia argues that he is entitled to costs and sanctions based on Kay's frivolous claims. *Id.*

In its affirmation in opposition to the motion, Kay concedes that its malicious prosecution claim is premature and agrees to withdraw the same without prejudice. Doc. 15 at pars. 7-8. Kay also agrees to withdraw its abuse of process claim with prejudice. *Id.*, at pars. 9-10. It further asserts that its claims for the breach of good faith and fair dealing, interference with personal property, and fraud are sufficiently pleaded.

Kay cross-moves, pursuant to CPLR 3025(b), to add Bravo as an additional plaintiff, to claim that Mendia filed a fraudulent workers' compensation claim against Bravo, and to allege, in connection with its breach of the covenant of good faith and fair dealing, that Mendia was hired for a fixed duration of time. Docs. 14, 15, 17.¹ In support of the motion, Kay submits a proposed amended complaint asserting the following claims: breach of the covenant of good faith and fair dealing (first cause of action); interference with personal property (second cause of action); and fraud (third cause of action). Doc. 17.² Kay also discontinues its claims for malicious prosecution (without prejudice) and abuse of process (with prejudice). Doc. 15 at pars. 7-10.

In reply, Mendia represents that he takes no position with respect to Kay's cross motion. Doc. 23 at par. 3. However, he asserts that the amended complaint fails to adequately plead any of the three causes of action therein. Doc. 23.

¹ Curiously, Kay asserts that it is "herein exercising its right to amend its pleading without leave of court to allege that [Mendia's] employment agreement was for a fixed duration and hence subject to the covenant of good faith and fair dealing" (Doc. 15 at par. 17), as well "exercising its right to amend its pleading without leave of court to add as an additional named plaintiff Bravo" (Doc. 15 at par. 19), while simultaneously cross-moving for leave of this Court to amend its complaint.

² This Court notes that, although Kay seeks to amend its complaint to name Bravo as an additional plaintiff, the caption of the proposed amended complaint does not name Bravo as a plaintiff. Doc. 17.

LEGAL CONCLUSIONS

Kay's Cross Motion To Amend The Complaint

CPLR 3025 (a) provides that "[a] party may amend his [or her] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Here, Mendia has not yet answered, and Kay submitted its proposed amended complaint as an exhibit to its cross motion to amend while Mendia's motion to dismiss the initial complaint was still pending. Since Kay is entitled to amend its complaint as a matter of right (see CPLR 3025 [a]; *Miller v General Motors Corp.*, 99 AD2d 454, 454 [1st Dept 1984], *affd* 64 NY2d 1081 [1985]), its cross motion is granted.³

Mendia's Motion To Dismiss

CPLR 3211 (a) (7) provides:

"(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
7. the pleading fails to state a cause of action"

"In assessing the adequacy of a complaint under CPLR 3211 (a) (7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [internal quotation marks and citation omitted]). This Court need only "determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

³ Since it appears that the omission of Bravo from the caption of the amended complaint was inadvertent, as evidenced by the allegations by Bravo against Mendia therein, this Court, in its discretion, will add Bravo as an additional plaintiff in the caption. CPLR 2001.

Since Mendia elects to apply his request for dismissal to the amended complaint, which pleading supersedes the initial complaint (*see Plaza PH2001 LLC v. Plaza Residential Owner LP*, 98 A.D.3d 89, 99 [1st Dept 2012]), this Court considers his motion to be directed against the amended complaint (*See Estate of Tammy Colleen Feenin v Bombace Wine & Spirits, Inc.*, 188 AD3d 1001, 1003 [2d Dept 2020] [citation omitted]). Thus, this Court will only address the sufficiency of the three causes of action set forth in the amended complaint.

Breach Of Covenant Of Good Faith And Fair Dealing

"[A]ll contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). In order to plead a claim of breach of the implied covenant of good faith and fair dealing, "a party must allege (1) a specific implied contractual obligation, (2) a breach of that obligation by the defendant, and (3) resulting damage to the plaintiff" (*Kagan v HMC-New York, Inc.*, 94 AD3d 67, 77 [1st Dept 2012] [internal quotation marks and citations omitted]). "The implied covenant of good faith and fair dealing is breached when a party acts in a manner that would deprive the other party of the right to receive the benefits of their agreement" (*1357 Tarrytown Rd. Auto, LLC v Granice Properties, LLC*, 142 AD3d 976, 977 [2d Dept 2015]). The implied covenant of good faith and fair dealing will be enforced only to the extent it is consistent with the provisions of a contract (*Phoenix Capital Invs., LLC v Ellington Mgmt. Grp., LLC*, 51 AD3d 549, 550 [1st Dept 2008] [citations omitted]).

"[A]bsent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party" (*Sabetay v. Sterling Drug*, 69 NY2d 329, 333 [1987]; *see also, Goldman v. White Plains Ctr. for Nursing Care, LLC*, 11

NY3d 173 [2008]). Where one is employed at will, there is no implied covenant of good faith and fair dealing (*Sabetay v. Sterling Drug*, 69 NY2d at 335-336; *see also Lipsky v. Guardian Life Ins. Co.*, 268 AD2d 310 [1st Dept. 2000]).

In the amended complaint, Kay and Bravo claim that Mendia “contracted to work for [their] benefit”; that Mendia’s “contract of employment was based upon [Mendia] receiving payment for his services and for his providing such services in a competent and good faith manner for a fixed duration of time” (Doc. 17 at par. 14); that instead of performing the work he was obligated to by his contract, Mendia “purposely acted in bad faith by staging a phony accident and falsely alleging that said accident and subsequently alleged injuries were caused by [Kay’s and Bravo’s] negligence” (Id. at par. 15); that by “falsely claiming to have been injured, [Mendia] deprived [Kay and Bravo of] the benefits of [Mendia’s] bargained for services” (Id. at par. 16); and that, as a result, they sustained damages (Id. at par. 17). Thus, viewing the allegations in a light most favorable to Kay and Bravo, they have stated a claim against Mendia for breach of the covenant of good faith and fair dealing and the motion is denied to the extent it seeks dismissal of the first cause of action.

Interference With Personal Property

Although the amended complaint denominates Kay’s and Bravo’s second cause of action as one for “interference with personal property” it is, in effect, a claim of tortious interference with contract. Such a claim requires that a party plead the following four elements: “(1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach; and (4) damages”

(*C.H.A. Design Export (H.K.) Ltd. v Miller*, ___AD3d___, 2021 NY Slip Op 00789, *1 [1st Dept, February 9, 2021] [citations omitted]).

Here, Kay and Bravo allege that Mendia interfered with the contracts they had with their insurers and clients (Doc. 17 at par. 19); that Mendia knew about the contracts Kay and Bravo had (Id. at par. 20); that Mendia's staging of an accident and falsely claiming injuries was "an intentional, malicious and unjustified procurement" of the breach (Id. at par. 21); that Mendia knew of Kay's and Bravo's business relations with their insurers and intended to interfere with the same (Id. at pars. 22-23); and that, as a result of Mendia's actions, they sustained damages (Id. at pars. 25-26). Given these allegations, this Court finds that Kay and Bravo have adequately pleaded their second cause of action sounding in tortious interference with contract.

Fraud

To state a claim for fraud, one must allege a "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 76 [1996]). Fraud must be pleaded with sufficient particularity (CPLR 3016[b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]).

(*KS Trade LLC v Intl. Gemological Inst., Inc.*, ___AD3d___, 2021 NY Slip Op 00259, *1 [1st Dept, January 19, 2021]).

Kay and Bravo allege that Mendia "made a material misstatement of material fact when he [told them] that he had been injured on the job by accidentally falling from a ladder" (Id. at par. 28); that Mendia "knew at the time he made the statement that the statement was false and/or was made recklessly without regard to whether it was true or false" (Id. at par. 29); that Mendia "made this statement with the intent for [Kay and Bravo] to rely on it and cause them to report his injuries to their insurance company and to pay [Mendia] compensation for work performed at

the job” (Id., at par. 30); that Kay and Bravo “relied on [Mendia’s] representation of material fact and said reliance was justifiable” (Id. at par. 31); and that said representation caused them damages (Id. at par. 32).

Relying on *Manda Intl. Corp. v Yager*, 139 AD3d 594 (1st Dept 2016), Mendia correctly asserts that these allegations are insufficient to sustain a claim of fraud. Specifically, Kay and Bravo do not set forth the name of the co-worker who allegedly overheard Mendia state that he intended to fake an accident so he could collect compensation from their insurers; how they knew that Mendia pretended to fall from a ladder and/or jumped from a ladder; when Mendia told them he had fallen from a ladder; which representatives of Kay and Bravo were allegedly told that Mendia had fallen from a ladder; and what actions Kay and Bravo took in reliance on Mendia’s alleged misrepresentations. Thus, the third cause of action, sounding in fraud, must be dismissed.

Finally, this Court, in its discretion, declines to award sanctions against Kay and Bravo given that their allegations are not frivolous (See 22 NYCRR 130-1.1).

The parties’ remaining contentions are either without merit or need not be addressed in light of the foregoing findings.

Accordingly, it is hereby:

ORDERED that the cross motion by plaintiff Kay Waterproofing Corporation to amend the complaint is granted; and it is further

ORDERED that the caption is hereby amended to name Bravo Contractors Group, Inc. as an additional plaintiff; and it is further

ORDERED that the cause of action by plaintiff Kay Waterproofing Corporation sounding in malicious prosecution is discontinued without prejudice; and it is further

ORDERED that the cause of action by plaintiff Kay Waterproofing Corporation sounding in abuse of process is hereby discontinued with prejudice; and it is further

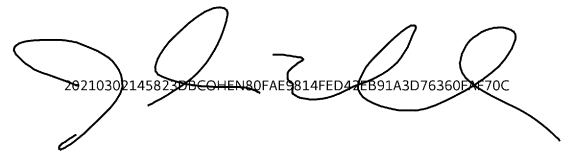
ORDERED that the branch of the motion by defendant Luis H. Medina seeking to dismiss the amended complaint is granted to the extent of dismissing the claim by plaintiffs Kay Waterproofing Corporation and Bravo Contractors Group, Inc. sounding in fraud and the Clerk is directed to enter judgment accordingly, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs Kay Waterproofing Corporation and Bravo Contractors Group, Inc., within 20 days after service of a copy of this order with notice of entry, shall serve defendant Luis H. Medina with an amended complaint setting forth the two remaining causes of action against him consistent with this Court's decision herein; and it is further

ORDERED that defendant Luis H. Medina shall serve an answer to the amended complaint within 20 days after service of said pleading; and it is further

ORDERED that the parties shall appear for a preliminary conference on May 10, 2021 at 2:30 p.m. unless they first complete a bar coded preliminary conference form (to be provided by the Part 58 Clerk) and return the same by e-mail to the Part 58 Clerk at SFC-Part59-Clerk@nycourts.gov at least 2 business days before the scheduled conference.

3/1/2021
DATE


202103021458230BECOHEN80FAE9814FED47CEB91A3D76360F670C
DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: