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| Trinchese Constr., Inc v Malta |
| 2021 NY Slip Op 31786(U) |
| May 20, 2021 |
| Supreme Court, New York County |
| Docket Number: 160397/2017 |
| Judge: Verna Saunders |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS **PART** IAS MOTION 36
Justice
-----X
INDEX NO. 160397/2017
TRINCHESE CONSTRUCTION, INC,
Plaintiff, **MOTION SEQ. NO.** 002

- v -

ROBERT MALTA and 202 EIGHTH AVENUE LLC,
Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 75, 76, 77, 78, 79, 80, 83

were read on this motion to/for DISMISS.

This action stems from allegations that, in June 2016, plaintiff Trinchese Construction Inc., a home improving contracting company, was allegedly retained by Robert Malta (“Malta”), the owner of the premises located at 202 Eighth Avenue, New York, NY 10011 (“the premises”), via his authorized agent and property manager, Raul Escarza (“Escarza”), to reconstruct fire-damaged property. After the execution of the agreement, Malta allegedly transferred the premises to defendant 202 Eighth Avenue, LLC (“202 Eighth Avenue”), of which he is a managing agent. In November 2017, plaintiff commenced this action seeking to recover monies allegedly owed for services rendered. (NYSCEF Doc. No. 1, *summons and complaint*).

By decision and order dated April 9, 2019 (“the April 2019 Order”), this court, among other things, granted plaintiff leave to amend its complaint; dismissed all claims against Escarza; and dismissed the unjust enrichment and *quantum meruit* claims against Malta. Plaintiff’s causes of action for breach of contract and account stated against Malta, as well as, its claims for unjust enrichment and *quantum meruit* against 202 Eighth Avenue remained. (NYSCEF Doc. No. 65, *April 2019 Order*). Following the April 2019 Order, defendants filed an “Amended Answer with Counterclaims and Third-Party Complaint,” asserting breach of contract; fraudulent inducement; and deceptive business practices against plaintiff. In the same document, defendants asserted these same claims against American Emergency Services, Inc. (“AES”) and Luigi Trinchese (“Trinchese”) as “third-party claims.” (NYSCEF Doc. No. 63, “*Amended Answer with Counterclaims & Third-Party Complaint*”).

In 2017, AES commenced a civil court action against Malta and 202 Eighth Avenue, which is currently pending in the Civil Court of the City of New York and styled *American Emergency Services, Inc. v Robert Malta et. al.*, Index No. CV-02644/2017 (“the civil court action”), alleging that Malta also executed a written agreement with AES “to make emergency and temporary repairs to and upon the subject property” for which no payment was made. It asserted claims based on breach of contract; *quantum meruit*; and account stated, to recover the sum of \$24,605.48. (NYSCEF Doc. No. 67 ¶ 1-18, *civil court summons and complaint*). In the civil court action, defendants interposed an “Answer with Counterclaims and Third-Party

Complaint,” attempting to assert “third-party claims” against plaintiff and its principal, Luigi Trinchese (“Trinchese”), which are identical to counterclaims and “third-party claims” alleged here.

Plaintiff now moves, pursuant to CPLR 3211(a)(1), (4), (7); CPLR 1007; and CPLR 3211(b), for an order dismissing defendants’ purported counterclaims and third-party complaint; awarding sanctions as against defendants and their attorney pursuant to 22 NYCRR 130-1.1; and seeking costs and attorney’s fees. In the alternative, plaintiff seeks a hearing to determine whether Escarza and Malta submitted perjurious affidavits to this court and the civil court and whether their attorney has engaged in frivolous conduct. (NYSCEF Doc. No. 60, *notice of motion*).

Plaintiff contends, *inter alia*, that the counterclaims asserted against it should be dismissed as duplicative insofar as identical claims were interposed against them in the civil court action. Additionally, plaintiff maintains that the first counterclaim based on a breach of an oral agreement is barred by the parol evidence rule and must be dismissed pursuant to CPLR 3211(a)(7) and (1). It further contends that defendants cannot sustain its counterclaim based on fraudulent inducement because a cause of action based on fraud cannot be sustained when, as here, the only fraud charged relates to an alleged breach of contract. The counterclaim based on deceptive business practices must also be dismissed, avers plaintiff, because General Business Law § 349 “is addressed to practices which have a broader impact on consumers at large, and private contract disputes, such as the one at bar, do not fall within the ambit of the statute.” (NYSCEF Doc. No. 61, *Aboulafia’s affirmation*).

Defendants oppose the motion and cross-move, pursuant to CPLR 602, to consolidate the above captioned action with the civil court action and for sanctions against plaintiff’s counsel. (NYSCEF Doc. No. 74, *notice of cross-motion*). Defendants maintain that Trinchese showed up immediately at the scene of the fire and made oral representations about conducting repairs, that these representations were different from what was contained in the writing and that defendants did not believe that the documents they signed were binding contracts. (NYSCEF Doc. No. 76 ¶ 7, *Kapin’s affirmation*; 75, *Malta’s affidavit*). Defendants claim the parol evidence rule is inapplicable given the allegation that plaintiff fraudulently induced Escarza into signing the written agreement. Defendants further maintain that there is a viable fraudulent inducement claim because the misrepresentation of the agreement is collateral to the defendants’ breach of contract claim. They also avow that the allegations asserted against plaintiff fall within the purview of General Business Law § 349. (NYSCEF Doc. No. 76).

Here, as an initial matter, although defendants filed a document entitled “Amended Answer with Counterclaims and Third-Party Complaint,” the court’s records do not reflect that a third-party action was properly commenced as against AES and Trinchese and defendants’ attempt to assert “third-party” claims against AES and Trinchese in its answer is defective. (*see* CPLR 1007). Thus, all claims asserted against AES and Trinchese are dismissed as improper.

Further, this court agrees that defendants’ counterclaims against plaintiff in this action are duplicative of the “third-party” claims asserted against them in the civil court action. However, since it appears that these claims were also improperly asserted against plaintiff in civil court, the

court will address the merits of the claims here. (*see* CPLR 3211[a][4] [“A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires”].)

Here, defendants do not argue that the terms of the written agreement were ambiguous. Thus, since the breach of contract counterclaim is based solely on a prior oral agreement between Trinchese and Escarza about work to be performed by TCI, it is superseded by the written agreement between the parties and is hereby dismissed. (*see Volpe v Interpublic Group of Co., Inc.*, 2013 NY Slip Op 31784[U], *13-14 [Sup Ct, NY County 2013], *affd* 118 AD3d 482 [1st Dept 2014].) This determination is further supported by the language of the agreement which states, in pertinent part, that the written agreement:

“constitutes the entire agreement between the parties and supersede all prior agreements and understandings, oral and written. No representation, promise, or inducement has been made by either party that is not embodied in this agreement and its schedules and attachments, and neither party shall be bound by, or be liable for, any alleged representation, warranty, promise, inducement or statement of intention not written in this agreement or its schedules and attachments.” (NYSCEF Doc. No. 64 ¶ 15, *agreement*).

The fraudulent inducement counterclaim against plaintiff is also dismissed. “To plead a claim for common-law fraudulent inducement, a plaintiff must assert the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury.” (*Braddock v Braddock*, 60 AD3d 84, 86 [1st Dept 2009], citing *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 348 [1999].) Assuming, *arguendo*, that defendants have properly pleaded that plaintiff knowingly made a misrepresentation to defendants prior to the signing of the written contract, the merger clause negates the existence of a justifiable reliance on said promises. (*see Guzovskiy v Weingarten*, 2019 NY Slip Op 30656[U], *11 [Sup Ct, NY County 2019].) Moreover, it is a well-settled principle that a mere representation of an intention to perform under the contract is insufficient to allege fraud. (*see Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 324 [1st Dept 2004]; *Smart Egg Pictures, S.A. v New Line Cinema Corp.*, 213 AD2d 302, 303 [1st Dept 1995].)

Lastly, “[t]o state a claim under [General Business Law] § 349, a plaintiff must allege [1] that the challenged act or practice was consumer-oriented; [2] that it was misleading in a material way; and [3] that the plaintiff suffered injury as a result of the deceptive act.” (*KS Trade LLC v Intl. Gemological Inst., Inc.*, 190 AD3d 556, 556 [1st Dept 2021] [internal quotation marks and citation omitted].) However, “[p]rivate contract disputes unique to the parties . . . would not fall within the ambit of the statute.” (*NY Univ. v Cont. Ins. Co.*, 87 NY2d 308, 320 [1995] [internal quotation marks and citation omitted].) The facts here, involving a private contract, do not rise to the level of consumer-oriented conduct aimed at the public at large. (*see Nadler v Samadi*, 188 AD3d 537, 538 [1st Dept 2020]; *116 Waverly Place LLC v Spruce 116 Waverly LLC*, 179 AD3d 511, 512 [1st Dept 2020].) Thus, the counterclaim for deceptive practices claim against plaintiff is dismissed.

Turning to the cross-motion, although the allegations in the above-captioned action and the civil court action both stem from similar allegations regarding repairs allegedly performed at the premises, and despite defendants' assertion that both AES and TCI are interrelated, the cross-motion is denied insofar as the actions concern different plaintiffs and contracts. (See *McGinty v Structure-Tone*, 140 AD3d 465, 466 [1st Dept 2016].) All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion is granted to the extent that all counterclaims asserted against it are dismissed; and it is further

ORDERED that all "third-party" claims asserted by defendants against American Emergency Services, Inc. and Luigi Trinchese in its answer (NYSCEF Doc. No. 56) are dismissed as improper; and it is further

ORDERED that defendants' cross-motion seeking consolidation of this action with the matter captioned *American Emergency Services, Inc. v Robert Malta et. al.*, Index No. CV-02644/2017, is denied; and it is further

ORDERED that, within thirty (30) days from entry of this order, counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties, as well as, on the Clerk of the Court (60 Centre Street, Room 141 B), who shall mark their records accordingly; and it is further

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptmanh); and it is further

This constitutes the decision and order of this court.

May 20, 2021



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE