SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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CBH MEDICAL, P.C.,

Plaintiff,

- v -

MERIT SYSTEMS, LLC,JOHN JUZBASICH

Defendant.

INDEX NO. 151859/2021

MOTION DATE 10/03/2022

MOTION SEQ. NO. 001

DECISION AND ORDER – AMENDED AND RESTATED

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth on the record (10.03.22), Merit Systems, LLC (**Merit**) and John Juzbasich (Mr. Juzbasich, together with Merit, hereinafter, collectively, the **Defendants**)'s motion to dismiss CBH Medical, PC (**CBH**)'s complaint (**Complaint**) are granted to the extent of dismissing, without prejudice, the fraud (first) cause of action) and fraudulent inducement (second) cause of action because these causes of action are not stated with sufficient particularity pursuant to CPLR 3016 (b) (*cf. Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 491-492 [2008]).

The cause of action for professional malpractice (fourth cause of action) must also be dismissed because although project managers can be professionally certified, New York does not require project managers to have extensive formal education or hold professional certifications or licenses as a prerequisite to entering into the profession of project management, and project managers are

not otherwise governed by a State mandated disciplinary plan (*see, Chase Sci. Research, Inc. v NIA Group, Inc.*, 96 NY2d 20 [2001]).

The negligent misrepresentation (fifth cause of action must be dismissed because the relationship was arms-length and not the type of special relationship that could be the predicate for a negligent misrepresentation claim (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]).

The breach of contract (third cause of action is not dismissed because the well-pleaded Complaint alleges that (i) the parties entered into an agreement under which the Defendants were to provide a professionally prepared proposal response to the RFP (hereinafter defined) before July 2, 2020, (ii) the Plaintiff made the required down payment pursuant to the parties agreement, (iii) the Defendants breached the agreement by failing to provide the professionally prepared RFP that they agreed to provide on or before July 2, 2020, and that (iv) as a result of Defendants' breach, CBH was not interviewed or awarded the lucrative contract for the Riverside Regional Jail in Virginia (*VisionChina Media Inc. v. Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013]).

Dismissal of the prayer for consequential damages is inappropriate at this stage. It can not be said that lost profits from the contract were not in the contemplation of the parties at the time of contracting where the Plaintiff retained the Defendants for the specific purpose of preparing a proposal response to an RFP for a contractual bid that stated the value of the contract, particularly given the Defendants' alleged experience in preparing RFP responses to these types of regulated correctional facility contracts (*cf. Kenford Co., Inc. v Erie County*, 67 NY2d 257, 261 [1986]

[stating that "[there] must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made"]).

The Relevant Facts and Circumstances

CBH is a New York professional corporation that provides healthcare services to correctional institutions pursuant to publicly bid contracts a/k/a requests for proposals (NYSCEF Doc. No. 6, Complaint at ¶ 2).

On May 18, 2020, the Riverside Regional Jail Authority (the **Riverside Authority**) in Virginia issued Request for Proposal #875-20 (the **RFP**) soliciting proposals for the publicly bid contract for the provision of healthcare services to Riverside Regional Jail in Virginia. The RFP deadline was 11:00 AM on July 2, 2020 (*id.*, ¶ 8).

Merit is a Pennsylvania limited liability company which provides professional consulting and corporate advice and services (*id.*, ¶ 3). John Juzbasich, the CEO of Merit, holds a Master of Leadership Development from Penn State University and his undergraduate degree from Wharton School of Business, University of Pennsylvania. He had a career at IBM and a variety of high technology firms. Upon information and belief, Mr. Juzbasich holds a D.Ed. ABD Diploma in Education (all but dissertation) and a Project Management Professional (**PMP**) certification (*id.*, ¶ 4).

According to the well-pled Complaint, solely to induce CBH to hire him and his company, Mr. Juzbasich wooed CBH into entering an agreement by falsely representing the Defendants'

experience in preparing professional grade proposals to correctional facilities and by assuring CBH that he would work over the weekends, and do basically whatever it takes to meet the July 2, 2020, 11:00 a.m. deadline (the **Agreement;**(NYSCEF Doc. No. 6, exhibit A):s:

13. Defendant Juzbasich represented that he and his company, Defendant Merit Systems, had substantial experience writing professional grade proposals in response to requests for proposals from correctional facilities such as the RFP from Riverside Regional Jail.
14. The representation in the previous paragraph was false.
15. Defendant Juzbasich represented that he and his company, Defendant Merit Systems, had substantial experience delivering such proposals on short term or rush time projects.
16. The representation in the previous paragraph was false.
17. Defendant Juzbasich grossly misrepresented his abilities as a proposal writer.
18. Defendant Juzbasich grossly misrepresented his abilities as a project manager.
19. Defendant Juzbasich grossly misrepresented the quality of work he could prepare for Plaintiff.
20. Defendant Juzbasich represented that he and his company, Defendant Merit Systems, would complete the professional grade proposal before the July 2, 2020 deadline.
21. The representation in the previous paragraph was false.

(NYSCEF Doc. No. 6, ¶¶ 13-21).

Following a series of telephone calls, Mr. Juzbasich emailed Emir Umar his proposal that Merit would provide the RFP response to CBH for the RFP at a rate of $375/hour for 60 hours (*id.*, exhibit A). CBH agreed and wired $11,250 as a down payment to the Defendants pursuant to the terms of their email agreement (the **Agreement**).

According to CBH, the Defendants breached the Agreement by failing to appropriately resource the project, failing to manage their timing appropriately, failing to quality-check their work, failing to meet their deadlines, and ultimately failing to turn over a completed proposal to CBH.

Indeed, according to CBH, CBH had to drive to Defendants' office at midnight on July 2, 2020, print Defendants' sub-standard proposal, and assemble the package because they would have otherwise missed the submission deadline, which was due by 11:00 a.m. that morning (*id.*, ¶¶ 28-29, 36, 41).

According to CBH, (i) had the Defendants not misrepresented their experience and ability to timely deliver a professional timely response to the RFP, CBH would never have hired them, (ii) they would have been awarded the contract had the Defendants properly performed and (iii) CBH's reputation was otherwise damaged based on the product that CBH submitted:

> 44. Plaintiff was told that this poor proposal hurt Plaintiff's reputation, which had been very strong in the past, as evidenced by Plaintiff previously being awarded contracts bid on in Virginia.
> 45. Plaintiff was also told that, due to Plaintiff's strong reputation, had Plaintiff submitted even an average response to the RFP, Plaintiff would have been invited to oral presentations.
> 46. Upon information and belief, had Plaintiff been invited to oral presentations, Plaintiff would have been awarded the contract.

(NYSCEF Doc. No. 6, ¶¶ 44-46)

CBH sued by summons dated February 23, 2021, and filed the Complaint, dated June 3, 2021, alleging causes of action for (i) common law fraud (first cause of action), (ii) fraudulent inducement (second cause of action), (iii) breach of contract (third cause of action), (iv) professional malpractice (fourth cause of action), and (v) negligent misrepresentation (fifth cause of action).

Discussion

On a motion to dismiss, the Court must afford the pleading a liberal construction by accepting the facts alleged as true and afford the plaintiff the benefit of every possible favorable inference by determining only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

I. The Fraud Claims Must be Dismissed Without Prejudice

Fraud or misrepresentation must be alleged with particularity describing "the circumstances constituting the wrong in detail" (CPLR 3016 [b]; *Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 479–80 [1st Dept 2015]). New York has recognized certain circumstances where dismissal of a fraud claim is inappropriate even when some details of the fraud are not alleged:

> Although plaintiffs have not alleged specific details of each individual defendant's conduct, we have never required talismanic, unbending allegations. Simply put, sometimes such facts are unavailable prior to discovery. Lest we willfully ignore the obvious—or the strong suspicion of a fraud—we have always acknowledged that, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud.

(*Pludeman v N. Leasing Sys.*, Inc., 10 NY3d 486, 493 [2008] [internal citations and quotations omitted)]

Put another way, where the circumstances of the fraud may not be known absent discovery early dismissal of a fraud claim may be inappropriate. This is not however a case involving concealment or where discovery would otherwise amplify the alleged fraudulent conduct. In addition, dismissal of a fraud claim is mandated where the facts alleged in support of the claim are no different than those supporting a cause of action for breach of contract (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288 [1st Dept 2003]).

As discussed above, CBH's fraud allegations essentially fall into 2 categories. The first category relates to the fraudulent inducement claim – *i.e.*, that the Defendants fraudulently misrepresented their experience and ability to timely and professionally complete the proposal response to the RFP. The second relates to their actual performance failure. As to the first category, the complaint simply fails to satisfy CPLR 3016(b). Vague references to telephone calls without identifying what was said and when simply is not enough. Thus, the claim predicated on these allegations must be dismissed without prejudice. The second category based on the failure to perform as promised under the agreement can not ground a claim for fraud because this claim is duplicative of the breach of contract cause of action. Thus, the fraud claim premised on these allegations must be dismissed.

II. The Negligent Misrepresentation Claims Must Be Dismissed

In New York, "[a] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] [internal citations omitted]). To wit, "[m]erely charging a breach of a duty of due care, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987] [internal quotations omitted]). A duty of care that is separate and apart from a contractual duty "does not arise out of an ordinary arm's length business transaction between two parties" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 296 [1st Dept 2011]; *Emigrant Bank v UBS Real Estate Secs., Inc.*, 854 NYS2d 39, 42 [1st Dept 2008]). The Agreement was the product of a simple

arm's length transaction. Nothing suggests otherwise. Accordingly, the cause of action for negligent misrepresentation must be dismissed.

III. The Breach of Contract Claim is Not Dismissed

To state a claim for breach of contract, a plaintiff must allege the existence of a contract, the plaintiff's performance, the defendant's breach of a specific contract term, and damages caused by the breach (*VisionChina Media Inc. v. Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013]). The parties do not dispute the existence of a contract. Nor do they dispute that CBH performed under the contract by making a down payment to the Defendants. CBH alleges that the Defendants breached the Agreement by failing to deliver a professional timely response to the RFP by July 2, 2020, and that they were damaged on account of their unsuccessful contract bid and that their reputation was harmed. Thus, the breach of contract cause of action can not be dismissed.

IV. The Malpractice Claim Must Be Dismissed

The Defendants contend that project managers are not the kind of professional who are subject to malpractice claims because "professional malpractice claims are restricted to learned professionals such as physicians, architects, engineers, attorneys, and accountants" (NYSCEF Doc. No. 10, at 15). In their opposition papers, CBH argues that project managers are subject to malpractice claims because they can be certified, have code of conduct and are subject to discipline. (NYSCEF Doc. No. 22, at 15). New York courts do not appear to have addressed whether project managers can be subject to malpractice claims. However, *Leather v. US Trust Co. of New York*, 279 AD2d 311 (1st Dept 2001), *Chase Scientific Research, Inc. v. NIA Grp., Inc.*, 96 NY2d 20 (2001), and

Castle Oil Corp. v Thompson Pension Empl. Plans, Inc., 299 AD2d 513 (2d Dept 2002) are instructive.

In *Leather*, the plaintiff sued a financial planning company for, among other things, professional malpractice and alleged he was ill-advised such that "his pension plan had become fully funded and needed to be rolled over into an IRA in order to avoid excise taxes" (*Leather*, 279 AD2d at 311-12). The trial court dismissed (and the Appellate Division affirmed) the plaintiff's claim for professional malpractice because (i) it was duplicative of the breach of contract claim and (ii) financial planners were not engaged in a profession associated with long-term educational requirements leading to an advanced degree, licensure evidencing qualifications met before engaging in the occupation, and control of the occupation by adherence to standards of conduct and ethics.

In *Chase Scientific Research*, the plaintiff engaged insurance brokers to procure property insurance (*Chase Scientific Research*, 96 NY2d at 24). Subsequently, a storm damaged the plaintiff's property and the plaintiff filed a claim with the insurance carrier for the policy limit of $550,000 on claimed losses exceeding $1 million. The insurance carrier offered to cover only $50,000 worth of loss. The plaintiff sued the defendant insurance broker for, among other things, professional malpractice, alleging that the broker had not secured sufficient coverage for the property damage. The defendants moved to dismiss the complaint as time-barred pursuant to CPLR 214 (6)'s three-year statute of limitations for professional malpractice. The Supreme Court granted the defendant's motion to dismiss the professional malpractice complaint as time barred and the Appellate Division affirmed. The Court of Appeals reversed, holding that the defendants were not

professionals subject to the three-year professional malpractice statute of limitations because insurance brokers were unlike physicians, architects, engineers, lawyers, and accountants in that there were no similar pre-requisites to working as a professional insurance broker such as "extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards" (*id.*, at 29). In addition, the Court expressed concern over the difficulty in separating the groups of skilled professionals covered by the three-year malpractice statute of limitations from the groups of semi-professions that are not (*id.*).

Subsequently, in *Castle Oil Corp.*, the Appellate Division held that actuaries are also not subject to malpractice claims. In that case, the plaintiff hired the defendant actuarial company to write a report calculating the projected costs of increasing its benefits plan. The defendant delivered the report and the plaintiff paid the defendant in full. It was determined that the defendant's report was not correct – *i.e.,* the actual cost of increasing pension plan benefits was far higher than the costs anticipated in the actuarial report. The plaintiff sued and the defendant moved to dismiss the complaint as untimely because it was barred by the statute of limitations for malpractice claims. The Court disagreed:

> Unlike architects, engineers, lawyers, and accountants, who are required to be licensed to practice in their fields, actuaries are not required to be licensed in New York. Moreover, actuaries are not regulated by the State, or subject to a State-created disciplinary system. In addition, although the record indicates that actuaries must usually pass a series of examinations administered by the Casualty Actuarial Society or the Society of Actuaries, there is no formal educational criteria for entry into this field. Furthermore, while individuals are alternatively permitted to become actuaries through work experience, the required duration of this experience is not specified. Considering these factors, we conclude that actuaries are not professionals within the meaning of CPLR 214 (6).

(*Castle Oil Corp.*, 299 AD2d at 514 [internal citations omitted]).

Project managers are also not like architects, engineers or accountants. They are not required to be licensed to practice, they are not regulated by the State and they are not subject to a State-created disciplinary system. Thus, project managers are not the type of professionals that are subject to malpractice claims and this cause of action must be dismissed.

V. Damages for Lost Profits

Damages for lost profits are appropriate where there is a "showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made" (*cf. Kenford Co., Inc. v Erie County*, 67 NY2d 257, 261 [1986]). CBH supports its prayer for damages by alleging that it retained the Defendants to prepare a proposal response to the RFP for the express purpose of being awarded the government contract to provide health care services to the Riverside Regional Jail. It simply can not be said that lost profits were not in the contemplation of the parties when the very purpose of the agreement was to aid CBH in obtaining the contract and where the Defendants allegedly had substantial experience in preparing these types of proposal responses where they presumably would have a firm understanding of the contract amount and may well have understood the amount of profit contemplated under the government contract. Thus, the claim for consequential damages can not be dismissed at this stage.

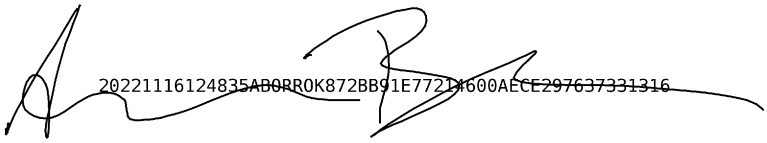
Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent of dismissing the causes of action for fraud, and fraudulent inducement, without prejudice; and it is further

ORDERED that the motion to dismiss the cause of action for negligent misrepresentation is granted; and it is further

ORDERED that the motion to dismiss the cause of action for professional malpractice is granted; and it is further

ORDERED that the motion to dismiss the cause of action for breach of contract is denied.



11/16/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE