

Punchlist Plus LLC v Roma

2023 NY Slip Op 32780(U)

August 10, 2023

Supreme Court, New York County

Docket Number: Index No. 155042/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

PUNCHLIST PLUS LLC

Plaintiff,

- v -

FRANK ROMA,

Defendant.

-----X

INDEX NO. 155042/2022
MOTION DATE 01/23/2023
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL

Upon the foregoing documents, and after oral argument, which took place on May 16, 2023, where Adam Eisen, Esq. appeared on behalf of Plaintiff Punchlist Plus LLC (“Plaintiff”) and Daniel P. Rabinowitz, Esq., appeared on behalf of Defendant Frank Roma (“Defendant”), Defendant’s motion to dismiss Plaintiff’s Verified Complaint pursuant to CPLR 3211(a)(7) is granted in part and denied in part, and Plaintiff’s cross-motion to amend the Complaint is granted.

I. Background

This action arises out of alleged damages suffered by Plaintiff by virtue of fraudulent omissions made by Defendant in his role as President of Pinnacle Demolition and Environmental Services, Inc. (“Pinnacle”). Plaintiff initiated this action via Summons and Complaint dated June 15, 2022 (NYSCEF Doc. 1). Plaintiff alleges that on or around February 4, 2021, Defendant, through Pinnacle, entered into a contract (the “Contract”) with Plaintiff for Plaintiff to provide general construction labor services, *inter alia*, at a construction project located at 16 East 16th Street, New York, New York 10003 (the “Property”) (NYSCEF Doc. 1 at ¶7). Plaintiff further

states, upon information and belief, that on or about August 24, 2020, a Chapter 11 bankruptcy proceeding was commenced on behalf of Pinnacle which was pending at the time of Defendant's engagement with Plaintiff and continued throughout Plaintiff's work (NYSCEF Doc. 1 at ¶8-9). Plaintiff alleges that despite fully performing its obligations under the terms of the Contract with Defendant, because of Pinnacle's bankruptcy proceeding an outstanding balance of \$65,174.00 remains due (NYSCEF Doc. 1 at ¶¶ 11-12, 14). Moreover, Plaintiff alleges that Defendant, through Pinnacle, had no intention to compensate fully Plaintiff for its work (NYSCEF Doc. 1 at ¶13).

Plaintiff asserts three causes of action against Defendant including (1) fraudulent concealment; (2) fraudulent inducement, and (3) in the alternative, breach of agreement (NYSCEF Doc. 1 at ¶¶ 15-48).

Defendant made the instant motion to dismiss on January 23, 2023 (NYSCEF Doc. 12). Defendant moves to dismiss Plaintiff's Verified Complaint, pursuant to CPLR 3211(a)(7) for failure to state a cause of action (NYSCEF Doc. 13). Defendant asserts that Plaintiff's first cause of action for fraudulent concealment and second cause of action for fraudulent inducement should be dismissed because Defendant did not have a duty to disclose Pinnacle's bankruptcy (NYSCEF Doc. 29 at ¶¶ 3-19). Defendant argues that Plaintiff's breach of contract claim should also be dismissed because Plaintiff failed to plead facts sufficient to pierce the corporate veil (NYSCEF Doc. 29 at ¶¶ 20-24). Lastly, Defendant asserts that Plaintiff should not be granted leave to amend the Complaint because the proposed amendments are insufficient to establish liability as a matter of law (NYSCEF Doc. 29 at ¶¶ 25-32).

In opposition to Defendant's motion to dismiss, Plaintiff argues that Defendant's failure to disclose Pinnacle's bankruptcy proceeding and its intention to have Plaintiff continue work

without any intent to compensate Plaintiff, violates the covenant of good faith and fair dealing (NYSCEF Doc. 27 at 7). Plaintiff further contends that Defendant had a duty to disclose under the “Special Facts Doctrine” because Defendant had superior knowledge of essential facts which render the transaction inherently unfair (NYSCEF Doc. 27 at 8). Relating to its second cause of action for fraudulent inducement, Plaintiff contends its allegations are sufficient to support a claim that Defendant possessed superior knowledge material to Pinnacle’s prior business dealings and withheld such information to induce Plaintiff into entering and continuing to perform its duties under the contract (NYSCEF Doc. 27 at 9). Regarding its third cause of action for breach of agreement based on alter-ego liability, Plaintiff argues its allegations that (1) Pinnacle was not properly capitalized since it had declared bankruptcy; (2) Pinnacle had no intention of compensating Plaintiff in connection with the Contract; and (3) Defendant was engaging in transactions with other parties while Pinnacle was severely undercapitalized and unable to pay its debts, are sufficient to satisfy their pleading obligations (NYSCEF Doc. 27 at 9-10). Plaintiff argues that it satisfied the pleading obligations to pierce the corporate veil by alleging that Defendant was the president, director and sole officer and member of Pinnacle, an undercapitalized company, and committed fraud or wrongdoing by engaging in a business transaction without disclosing Pinnacle’s bankruptcy proceeding (NYSCEF Doc. 27 at 10-11).

On February 24, 2023, Plaintiff crossed-moved to amend the Complaint (NYSCEF Doc. 28), contending that even if Defendant’s motion to dismiss is granted, Plaintiff should be granted leave to file an amended complaint, or the dismissal should be without prejudice to refiling (NYSCEF Doc. 28 at 11-12).

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II. Discussion

A. Standard

Under CPLR 3211(a)(7), “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ...the pleading fails to state a cause of action....” In considering a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, “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]). “[T]he sole criterion is whether the pleading states a cause of action, and therefore if from its four corners factual allegations are discerned which if taken together can manifest any cause of action, a motion for dismissal must fail” (*Kusher v King* 126 AD2d 446, 467 [1st Dept 1987]).

B. Plaintiff’s Fraudulent Inducement Claim

“The essential elements of an action for fraudulent inducement are the representation of a material existing fact, falsity, scienter, deception and injury” (*Century 21, Inc. F.W. Woolworth, Co.* 181 AD2d 620, 625 [1st Dept 1992]). The Court agrees with Defendant that Plaintiff is a sophisticated party with a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they are assuming (*HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 195 [1st Dept 2012]). The Court further agrees that Pinnacle’s bankruptcy was not within the peculiar knowledge of Defendant as it was publicly available. As such, the special facts doctrine does not apply. *See Northern Group Inc. v Merrill Lynch, Pierce, Fenner & Smith Inc.* 135 AD3d 414 [1st Dept 2016] (holding that “[d]efendants had no special duty to disclose pursuant to the special facts doctrine, since the information was not peculiarly within their knowledge and was not such that it could not have been discovered by plaintiffs through the exercise of ordinary diligence).

However, in addition to its claims regarding Pinnacle's bankruptcy proceeding, Plaintiff also asserts that Defendant:

“concealed the true fraudulent purpose of the Engagement which was to deceive PLP into believing that it was contracting with a credible, credit-worthy, properly capitalized, liquid, and functioning company, and to use PLP's work at the Project as a mechanism to collect funds from the Project owner without using same to pay PLP.”

(NYSCEF Doc. 1 at ¶ 20). The Appellate Division, First Department has held that a person “who fraudulently makes a misrepresentation of intention for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable for the harm caused by other's justifiable reliance upon the misrepresentation” (*HSH Nordbank AG* at 195). A party's intentions regarding a business transaction are undoubtably within that party's peculiar knowledge. In light of the foregoing, the Court finds that Plaintiff's allegation that Defendant misrepresented the purpose of its contract with Plaintiff by failing to disclose its alleged intention to “deceive” is sufficient to state a cause of action for fraudulent inducement.

C. Plaintiff's Fraudulent Concealment Claim

“To state a claim for fraudulent concealment, a plaintiff must allege: (1) that the defendant had a duty to disclose certain material information but failed to do so; (2) that the defendant then made a material misrepresentation of fact; (3) that said misrepresentation was made intentionally in order to defraud or mislead; (4) that the plaintiff reasonably relied on said misrepresentation; and (5) that the plaintiff suffered damage as a result” (*Oxbow Calcining USA Inc. v American Indus. Partners* 96 AD3d 646, 650 [1st Dept 2012]).

Defendant contends that, as a sophisticated party, Plaintiff could not have justifiably relied upon Defendants' failure to disclose the bankruptcy, given the public information available (NYSCEF Doc. 29 at ¶14). Defendant asserts that because information regarding

Pinnacle's bankruptcy proceeding was readily available to Plaintiff, Defendant had no duty to disclose that information to Plaintiff (NYSCEF Doc. 29 at ¶15). Plaintiff claims that "[t]he only allegedly concealed information that...Roma should have disclosed to it was ... Pinnacle's bankruptcy proceeding" (NYSCEF Doc. 29 ¶8). However, as discussed above in relation to Plaintiff's claim of fraudulent inducement, Plaintiff's complaint also alleges that Defendant deliberately concealed the true fraudulent purpose of its contract with Plaintiff to induce Plaintiff to enter the contract (NYSCEF Doc. 1 at ¶¶ 20-21). Plaintiff alleged that Defendant had a duty to disclose "its intent to use the Bankruptcy Proceeding as a vehicle to not pay PLP for the work it performed" (NYSCEF Doc. 1 at 17), that Defendant "led [Plaintiff] to believe that it was negotiating with a financially stable company that was not otherwise involved in a bankruptcy proceeding" (NYSCEF Doc. 1 at 30), that Defendant "deliberately omitted the fraudulent purpose of the Engagement" (NYSCEF Doc. 1 at 21), and that Plaintiff "relied to its detriment on Roma's misrepresentations and/or false promise" (NYSCEF Doc. 1 at 37). Therefore, the Court finds that Plaintiff has sufficiently pled its cause of action for Fraudulent Concealment.

D. Plaintiff's Breach of Contract Claim

Plaintiff's breach of contract claim seeks to pierce the corporate veil on the basis of alter-ego liability (NYSCEF Doc. 27 at 9). "Generally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Courtland St. Recovery Corp. v Bonderman* 31 NY3d 30, 47 [2018]). The Court of Appeals has held that at the pleading stage a Plaintiff must "adequately allege the existence of a corporate obligation and that defendant exercised complete

domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice” (*Bonderman* at 47-48).

Plaintiff contends that it adequately pled a cause of action for breach of contract based on the theory of alter-ego liability by alleging that “[d]omination of Pinnacle by Roma is unquestionable” (NYSCEF Doc. 27 at 10) because Defendant was the President, sole officer, sole member, and director of Pinnacle (NYSCEF Doc. 27 at 10), that “Pinnacle was not properly capitalized since it had declared bankruptcy... that the company had no intention of compensating PLP in connection with the Contract; and... that he was engaging in transactions with other parties when his company was severely undercapitalized and unable to pay its debts” (NYSCEF Doc. 27 at 9-10). However, Plaintiff failed to plead that Defendant had complete domination of Pinnacle. While Plaintiff claims that complete domination was alleged in paragraphs 6, 17, and 21 of the Complaint, paragraphs 6 and 17 of the Complaint only allege that Defendant is the “sole owner, sole director and sole officer of Pinnacle” (NYSCEF Doc. 1 at ¶¶ 6, 17). Even if, *arguendo*, such an allegation was sufficient to constitute “complete domination” of the corporate structure, Plaintiff’s Complaint fails to claim that Defendant’s domination of the corporation was used to commit the alleged fraud or wrongdoing. Accordingly, because Plaintiffs failed to plead facts sufficient to support the second prong required to impose alter-ego liability, Defendant’s motion to dismiss Plaintiff’s breach of contract claim is granted.

E. Plaintiff’s Cross-Motion for Leave to Amend the Complaint

Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinsky v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit

(*Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]). Delay alone is not sufficient to deny leave to amend (*Johnson v Montefiore Medical Center*, 203 AD3d 462 [1st Dept 2022]).

Defendant has not claimed that any prejudice or surprise would result from the granting of Plaintiff's motion for leave to amend the Complaint. Further, because the matter at bar has only been pending since June 15, 2022, the parties have not yet engaged in any discovery, and the allegations arise from the same transaction that formed the basis of this action, the Court finds that granting leave would not result in a prejudice or surprise to Defendant.

Defendant argues that Plaintiff should not be granted leave to amend the Complaint because Plaintiff's proposed amendments are insufficient to establish liability as a matter of law (NYSCEF Doc. 29 at ¶¶ 25-32). While plaintiff cites case law in support of the contention that leave to amend a complaint should be denied where there is no merit to the new causes of action being asserted, such cases are inapplicable to the case at bar since Plaintiff's Proposed Amended Complaint (NYSCEF Doc. 24) does not assert any new causes of action. Because Defendant has failed to show that he would be substantially prejudiced by Plaintiff's proposed amendment, or that any of Plaintiff's proposed amendments are patently devoid of merit, Defendant's motion for leave to amend the Complaint is granted.

Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss Plaintiff's first cause of action for fraudulent concealment and second cause of action for fraudulent inducement are denied; and it is further

ORDERED that Defendant's motion to dismiss Plaintiff's third cause of action for breach of contract is granted; and it is further

ORDERED that Defendant's cross-motion for leave to amend the Complaint is granted; and it is further

ORDERED that counsel are directed to appear for an in-person compliance conference on August 30, 2023 at 9:30 a.m. in Room 442, 60 Centre Street, New York, New York. If the parties agree to a proposed compliance conference order prior to the date of the conference, the parties are directed to submit the proposed order via e-mail to SFC-Part33-Clerk@nycourts.gov.

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

8/10/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE