

New York State Urban Dev. Corp. v Livetiles Corp.

2023 NY Slip Op 33770(U)

October 20, 2023

Supreme Court, New York County

Docket Number: Index No. 453238/2022

Judge: Louis L. Nock

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

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

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NEW YORK STATE URBAN DEVELOPMENT
CORPORATION d/b/a EMPIRE STATE DEVELOPMENT,

Plaintiff,

- v -

LIVETILES CORP.,

Defendant.

-----X

INDEX NO. 453238/2022

MOTION DATE 04/25/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40 were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, the plaintiff’s motion for summary judgment is granted to the limited extent of dismissing certain of defendant’s affirmative defenses and is otherwise denied.

Background

Plaintiff, an agency of the State of New York, entered into a Grant Disbursement Agreement (“GDA”) with defendant, an Australian company, pursuant to which plaintiff would provide defendant with up to \$3,500,000 in grants to establish a facility in Rochester, New York (GDA [NYSCEF Doc. No. 14]). Receipt and retention of the grant money was contingent on defendant employing a certain number of full-time employees at its Rochester location (GDA § 2 & Exh. C to GDA [titled “Employment Goals & Recapture Terms”]). Failure to maintain the minimum number of full-time employees on staff would allow plaintiff to recapture a percentage of the grant money, determined by when the shortfall took place relative to the grant

disbursement (GDA Exh. C). The GDA contains a “Integration/Modification” clause, which provides that the GDA “contains the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior oral or written agreements or statements relating to such subject matter” (GDA § 17). Finally, there is a “No Waiver” clause, which provides that absent a signed writing regarding a waiver of plaintiff’s rights under the agreement, “there shall be no estoppel against [plaintiff] and the other parties’ alleged detrimental reliance shall be deemed to be unreasonable” (GDA § 16).

Plaintiff brings this action for breach of contract, alleging that defendant received a payment of \$1,000,000 through the grant program, but failed to maintain the required staffing levels at its Rochester location and must therefore return the funds pursuant to the GDA. Defendant, in response, states that plaintiff either willfully or negligently misrepresented facts about the Rochester area’s suitability for defendant’s business.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted], *lv denied* 24 NY3d 917 [2015]).

Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

Here, plaintiff has established prima facie entitlement to its claim for breach of the GDA by submission of the GDA and its amendments, the wire transfer information showing that defendant received funds from plaintiff (wire transfer [NYSCEF Doc. No. 15]), defendant's employment report showing that it was employing below the minimum required by the GDA (2021 Annual Report of Employment [NYSCEF Doc. No. 19]), and the affidavit of its Senior Vice President for Regional Economic Development, Vincent Esposito (NYSCEF Doc. No. 9), who attests to the parties' course of dealing (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). In response, defendant does not contest these facts. Rather, defendant raises defenses of fraudulent or negligent misrepresentation, as well as equitable estoppel, which are pled as the third and fourth affirmative defenses in the answer, as well as the subject of defendant's counterclaims. As an initial matter, the court grants so much of the motion as seeks dismissal of the first, second, and fifth through eleventh affirmative defenses, as defendant failed to raise them in opposition to the motion (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017] ["By his silence in his opposition brief, defendant concedes, as plaintiff argues, that the second, third, and sixth affirmative defenses should be dismissed"]).

“Generally, in a claim for fraudulent misrepresentation, a plaintiff 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” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). For a claim of fraudulent concealment, a plaintiff must allege the same elements, and further “that the defendant had a duty to disclose material information and that it failed to do so” (*Gomez-Jimenez v New York Law School*, 103 AD3d 13, 18 [1st Dept 2012], *lv denied* 20 NY3d 1093 [2013]).

Defendant’s amended verified answer¹ states that in the lead-up to the parties entering into the GDA, Esposito specifically made the following representations about Rochester: “there were thousands of talented University of Rochester graduates looking for tech jobs in Rochester,” Rochester was a “great environment for tech,” with companies such as Kodak and Paychex either already present or soon to be opening offices in the Rochester innovation zone, and that “eight additional tech companies had confirmed plans to open offices in the Rochester innovation zone” (amended verified answer [NYSCEF Doc. No. 6] ¶¶ 29, 31-32). Similar representations were allegedly made at other points during the negotiating process (*id.*, ¶¶ 35, 39, 41). Those representations, defendant claims, were, at minimum, made with reckless disregard as to their truthfulness for the purpose of causing defendant to establish its new facility in Rochester rather than in one of the other cities that defendant was considering. Allegedly, only after defendant entered into a ground lease and began establishing its facility did it find out that Esposito’s statements did not reflect actual economic conditions in Rochester, causing defendant to be unable to maintain the required workforce numbers.

¹ “A “verified pleading” may be utilized as an affidavit whenever the latter is required” (CPLR 105[u]).

Plaintiff's argument that the GDA's "No Waiver" and "Integration/Modification" clauses (§§ 16, 17) bar defendant's reliance on Esposito's representations is without merit.² "[A] buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]). Here, the "No Waiver" and "Integration/Modification" clauses are too general to serve as a bar to defendant's counterclaims. Neither one of them mentions the specific aspect of Rochester's economic suitability for defendant's business. Thus, the First Department's criterion for specificity of disclaimer (*Basis Yield Alpha Fund, supra*) has not been met by plaintiff.³

Neither is the First Department's criterion for facts coming within a waiving party's knowledge (*Basis Yield Alpha Fund, supra*) met by plaintiff. Plaintiff does not explain how defendant could possibly have independently verified the plaintiff's statement (as alleged in the amended verified answer at 7) that eight other companies were planning on establishing a presence in Rochester. Knowledge of the economic conditions in Rochester was peculiarly within plaintiff's knowledge as between the two parties. Defendant "had no reason to inquire

² As regards the Integration/Modification clause (§ 17), the court does not read it as an attempted bar to an assertion of reliance, at all. Rather, as with any integration clause, its purpose is to preclude any attempt to enforce any antecedent *agreements* because the GDA "*supersedes* all prior oral or written agreements" (emphasis added). The addition of the words "or statements" within the context of contractual integration (§ 17), must be reasonably understood to be the scrivener's alternative expression (albeit redundant) of the word "agreements." Agreements can be superseded; not reliance on factual representations. For reliance to be waived, one must turn to the "No Waiver" clause (§ 16), which purports to bar estoppel on account of "detrimental reliance" absent a writing allowing the assertion of such estoppel. However, because plaintiff has imprecisely viewed the Integration/Modification clause in the same manner as the No Waiver clause – focusing specifically on reliance – the court's textual discussion regarding reliance references both clauses.

³ Plaintiff's reliance on *Pate v BNY Mellon-Alcentra Mezzanine III, LP* (163 AD3d 429 [1st Dept 2018]) is unavailing. In *Pate*, the plaintiff sought to premise a cause of action on a prior term sheet, and the parties' final agreement explicitly barred reliance on any prior term sheets (*id.*, at 429-30).

into these matters, and could not readily have investigated them independently,” based upon plaintiff’s extensive presentation as set forth in the counterclaims (*id.*, at 145). Defendant adequately sets forth that the economic conditions present in Rochester were peculiarly within plaintiff’s knowledge (*see, KS Trade LLC v International Gemological Inst., Inc.*, 190 AD3d 556, 558 [1st Dept 2021]).

Having found that neither clause precludes the assertion of a detrimental reliance defense, a reasonable inference of defendant’s justifiable reliance on Esposito’s representations may be drawn from his evident desire to secure defendant’s establishment of a facility in Rochester as well as his repeated reassurances that defendant could trust in his representations as to economic conditions even after defendant’s representatives expressed concern over empty office buildings, during a tour of the innovation zone (amended verified answer [NYSCEF Doc. No. 6] ¶¶ 38, 39). At a minimum, issues of fact exist as to plaintiff’s knowledge and the degree to which it may have overstated facts in order to secure defendant’s presence in Rochester.

Finally, plaintiff argues that Esposito’s representations were merely nonactionable statements of opinion. However, statements of present fact as to economic conditions relevant to a transaction are not mere opinion (*International Bus. Machines Corp. v GlobalFoundries U.S. Inc.*, 204 AD3d 441, 442 [1st Dept 2022] [statements as to defendant’s business plan and financial commitment]). *Crossland Sav., F.S.B. v SOI Dev. Corp.* (166 AD2d 495, 495 [2d Dept 1990]), cited by plaintiff, is not to the contrary, as there, the misrepresentation was plainly regarding future performance rather than present fact.

Turning to the counterclaim for negligent misrepresentation, such a claim requires proof “(1) [of] the existence of a special or privity-like relationship imposing a duty on [plaintiff] to impart correct information to [defendant]; (2) that the information was incorrect; and (3)

reasonable reliance on the information” (*J.A.O. Acquisition Corp. v. Stavitsky*, 8 NY3d 144, 148, *rearg denied* 8 NY3d 939 [2007]). “A special relationship may be established by persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified” (*Mandarin Trading Ltd., supra*, at 180). Here, defendant sufficiently establishes all three elements. Plaintiff’s argument that Esposito had no special expertise regarding defendant’s operational requirements misses the point; defendant argues that Esposito and plaintiff had specialized expertise in the economic conditions of Rochester. There are, at minimum, issues of fact regarding the accuracy of the information relied by Esposito, and as set forth above, defendant can show reasonable reliance.

Finally,⁴ plaintiff challenges the fourth affirmative defense of equitable estoppel, that there is a “general rule barring the assertion of waiver and estoppel against a governmental entity” (*Safway Steel Products, Div. of Figge Intl., Inc. v Craft Architectural Metals Corp.*, 183 AD2d 452 [1st Dept 1992]). Estoppel may be justified, however, where the party invoking it makes “a showing of fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon” (*Concerned Port Residents Committee v Incorporated Village of Sands Point*, 291 AD2d 494, 495 [2d Dept 2002]). As set forth above, the same issues of fact that preclude dismissal of the fraud and negligent misrepresentation claims also preclude dismissal of this affirmative defense at this time.

⁴ The first counterclaim for declaratory judgment relies on the second and third counterclaims for its existence, and, therefore, may continue.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted to the extent of dismissing the first, second, and fifth through eleventh affirmative defenses, and is otherwise denied; and it is further

ORDERED that said defenses are severed and dismissed; and it is further

ORDERED that the parties shall appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York on November 8, 2023, at 2:15 PM.

This constitutes the decision and order of the court.

ENTER:



<u>10/20/2023</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE