

Aurora Contrs., Inc. v Bunting Architectural Metals

2024 NY Slip Op 34802(U)

July 30, 2024

Supreme Court, Suffok County

Docket Number: Index No. 200234/2022

Judge: James Hudson

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This opinion is uncorrected and not selected for official publication.

INDEX NO.: 200234/2022

**Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVI
Memorandum Decision**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

RETURN DATE: 4/4/24
SUBMIT DATE: 6/19/24
Mot. Seq. #: **002 - MD**

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AURORA CONTRACTORS, INC.,

Plaintiff,

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Uniondale, NY 11553

-against-

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BUNTING ARCHITECTURAL METALS and
JOSHUA BUNTING d/b/a BUNTING
ARCHITECTURAL METALS,

Defendants.

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Attorneys for Non-Party Sunbelt Rentals
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In this action, plaintiff Aurora Contractors, Inc. (“Aurora”) seeks monetary damages in excess of \$2,000,000 from defendants Bunting Architectural Metals and Joshua Bunting (“Bunting”) for Bunting’s alleged failure to perform their contractual duties and failing to pay their suppliers and/or subcontractors in connection with a project. The record reveals that Aurora entered into a prime construction contract with the owner of the premises called Belmont Parking Structure located at 2150 Hempstead Turnpike, Elmont, New York. Aurora then entered into a subcontract with Bunting whereby Bunting agreed to furnish labor, materials and equipment necessary to install architectural metal, including, but not

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limited to wall panels and a roof system at the premises. This action was commenced on September 9th, 2022 after Bunting allegedly breached the contract.

Bunting served an answer asserting general denials and eight counterclaims. Bunting now moves pursuant to CPLR 3025 (b) seeking leave to amend the answer and add two counterclaims for fraud and negligent misrepresentation.

Pursuant to CPLR 3025 (b), motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit (see *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499-500, 901 NYS2d 522 [1st Dept 2010]). Bunting's motion to amend the answer is denied as such amendments are palpably insufficient and patently devoid of merit and are duplicative of Bunting's breach of contract counterclaim.

In support, Bunting contends that the gravamen of its fraud and negligent misrepresentation counterclaims is based upon Aurora's false representations that were collateral to the subcontract. These representations, that Aurora would reimburse Bunting for overtime work when it had no intention to do so, served as an inducement for Bunting to perform such work so that Aurora could manufacture a claim against Bunting. In addition, Bunting claims that these facts are not duplicative of the breach of subcontract counterclaim, which seeks damages solely upon Aurora's failure to comply with the subcontract. Bunting also states that the damages in the counterclaims are different and seek recovery of punitive damages and exemplary damages. Therefore, Bunting contends that it has made a more than sufficient showing that the counterclaims are not duplicative of the contract counterclaim and have merit.

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In opposition, Aurora contends that the damages sought for the new counterclaims have already been accounted for in Bunting's demand for damages in the amount of \$4,876,818.65. Aurora refers to Bunting's change order log which include CORs 25-1 and 27-1, in the amounts of \$168,508.24 and \$187,462.38, respectively, which Bunting states is outstanding. CORs 25-1 and 27-1 are alleged to have been signed by Aurora in the proposed counterclaim for fraud and not paid. Bunting relies on the identical circumstances to support both its proposed counterclaim for fraud and its existing counterclaim for breach of contract and does not allege that the misrepresentation resulted in any additional damages independent of the damages allegedly incurred by Aurora's breach of contract.

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" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421, 646 NYS2d 76 [1996]). Furthermore, where a cause of action is based in fraud, "the circumstances constituting the wrong shall be stated in detail" (see CPLR 3016 [b]).

The elements required to be set forth in a viable fraud action are: a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury (*Pope v Saget*, 29 AD3d 437, 817 NYS2d 1 [1st Dept 2006]) A fraud-based cause of action is duplicative of a breach of contract claim when the only fraud alleged is that the

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defendant was not sincere when it promised to perform under the contract (*First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291, 690 NYS2d 17 [1st Dept 1999]; *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436, 529 NYS2d 777 [1st Dept 1988]). A fraud-based cause of action can only lie “where the plaintiff pleads a breach of a duty separate from the breach of contract” (*Manas v VMS Assoc., LLC*, 53 AD3d 451, 453, 863 NYS2d 4 [1st Dept 2008]).

Moreover, even where a plaintiff pleads a breach of duty which is collateral to the contract, a fraud cause of action must be dismissed if the damages alleged would also be recoverable under the breach of contract cause of action (*Mandarin Trading Ltd. v Wildenstein*, 16 N.Y.3d 173, 178, 919 NYS2d 465 [2011]).

Applying these principles, Bunting’s claim of fraud arises from the very allegations that underlie the breach of subcontract claim -- that the plaintiff was insincere about the nature of the contractual arrangement for the future and had no intention of paying overtime. There was no misrepresentation made as an inducement to perform overtime and at the time that plaintiff agreed to pay overtime in March, the agreement was not false or known to be false by the plaintiff. Inasmuch as the proposed counterclaim is palpably insufficient, Bunting is not entitled to punitive damages or exemplary damages. In any event, one month later, Aurora decided not to pay any amount to Bunting and subsequently commenced this action. Therefore, Bunting’s motion to amend the answer to add a fraud counterclaim is denied as palpably insufficient.

It is well settled that “[a] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on

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the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information” (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, 831 NYS2d 364 [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” (*Kimmell v Schaefer*, 89 NY2d 257, 263, 652 NYS2d 715 [1996]).

In support, Bunting claims that its relationship with Aurora satisfies the pleading requirement. Bunting relies upon *Remediation Capital Funding LLC v Noto* (147 AD3d 469, 46 NYS3d 606 [1st Dept 2017]) and *A.N. Frieda Diamonds, Inc. v Kaminski*, 122 AD3d 517, 998 NYS2d 6 [1st Dept 2014]). Bunting also contends that claims for negligent misrepresentation turn on the nature of the relationship between the parties, which include privity of contact or a relationship very close to that, citing *164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 771 NYS2d 16 [1st Dept 2004]).

In opposition, Aurora states that the negligent misrepresentation counterclaim fails as it does not allege any facts that would give rise to a duty outside the relevant agreement. Aurora cites *Michael Davis Constr. v 129 Parsonage Lane* (194 AD3d 805, 808, 149 NYS3d 118 [2d Dept 2021]). Aurora notes that Bunting alleges conclusory statements that the parties had a special relationship and/or privity such that a duty was imposed on Aurora.

Here, as a contractor and subcontractor, the parties may have contractual privity, however, this privity does not create a special relationship between them (see *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389-390, 521 NYS2d 653 [1987]).

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A conventional business relationship does not create a fiduciary relationship in the absence of additional factors, none of which have been alleged here (see *Feigen v Advance Capital Management Corp.*, 150 AD2d 281, 283, 541 NYS2d 797 [1st Dept 1989]). Liability for negligent misrepresentation has been imposed only on those 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 (see *Kimmell v Schaefer*, 89 NY2d 257, 652 NYS2d 715 [1996]). Moreover, the allegations of negligence in the proposed counterclaim merely parallel the breach of subcontract claim. Therefore, the proposed counterclaim is palpably insufficient and without merit. The Court has reviewed the remainder of the arguments and find them to be without merit.

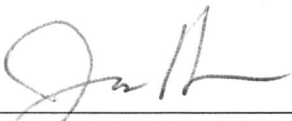
Accordingly, it is

ORDERED that the Defendants' motion (Mot. Seq. 002) seeking leave to amend the answer to add two counterclaims is denied; and it is further

ORDERED that Plaintiff's counsel is directed to e-file a copy of the subcontract prior to the next virtual conference to be held with the undersigned on August 28th, 2024 at 11:30 a.m. via Microsoft Teams; and it is further

ORDERED that counsel are directed to be prepared to discuss any outstanding discovery.

Dated: July 30th, 2024
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court