Solar Elec. Sys., Inc. v Skanska USA Bldg., Inc.
2017 NY Slip Op 30962(U)
May 5, 2017
Supreme Court, New York County
Docket Number: 653705/2016
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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SOLAR ELECTRIC SYSTEMS, INC.,

Plaintiff,

-against-

SKANSKA USA BUILDING, INC., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, ZURICH AMERICAN INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, and THE CONTINENTAL INSURANCE COMPANY,

Defendants.

SKANSKA USA BUILDING INC.,
Counterclaim-Plaintiff,

-against-

PETER BORDUCCI,
Additional Defendant on the Counterclaim.

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DECISION AND ORDER

Index No. 653705/2016

Mot. Seq. 001

HON. ANIL C. SINGH, J.:

Solar Electric Systems, Inc. ("Plaintiff") filed this action against Skanska USA Building, Inc. ("Skanska"), Fidelity and Deposit Company of Maryland ("F&D"), Zurich American Insurance Company ("Zurich"), Federal Insurance Company ("FIC"), Liberty Mutual Insurance Company ("Liberty"), and The

Continental Insurance Company ("Continental" and together with Skanska, F&D, Zurich, and Liberty, "defendants"), for breach of contract alleging damages due to electrical work done as part of a construction project at Beacon High School in New York City. Defendants counterclaim that Peter Borducci ("Borducci"), acting as President of Solar, made false statements and misrepresentations to Skanska which Skanska alleges it justifiably relied upon to its detriment and subsequently overpaid Solar.

Plaintiff moves to dismiss defendants' Fourth Counterclaim as part of defendants' Amended Answer ("Answer") for failure to state a cause of action and for failure to plead fraud in detail pursuant to CPLR §§ 3211(a)(7) and 3016(b) (mot. seq. 001). Defendants oppose.

Facts

On or about June 20, 2012, Skanska entered into an agreement with the New York City School Construction Authority to "furnish certain labor, materials and equipment" for a project to renovate a school building at Beacon High School (the "project"), located in New York, New York. Complaint ("Compl.") ¶9. One month before the start of the initial project, on or about May 30, 2012, F&D, Zurich, FIC, Liberty and Continental issued a "Labor and Material Payment Bond" as co-sureties to Skanska. Id. ¶10. The bond guaranteed "prompt payment of all monies due to all

persons furnishing labor, materials and equipment in connection with the project." Id.

On or about August 21, 2012, Skanska subcontracted with Solar to perform electrical work for the project at an agreed upon price of $10,250,000. Id. ¶11. Solar claims that it performed additional work at an extra cost of $6,750,717.39. Id. ¶12. Solar asserts that it appropriately performed and completed all the necessary work required under the subcontract "except to the extent that it was frustrated, prevented, or impeded from doing so by Skanska," and therefore was entitled to receive payment in the amount of $16,933,278.30. Id. ¶13-14. Solar demanded payment for the work it had completed and alleges that Skanska breached its contractual obligations by only paying $11,236,386.24. Id. ¶14-15. Solar claims that it is entitled to damages in the amount of at least $5,696,892.14 which constitutes the unpaid balance remaining. Id. ¶16. Solar has also interposed a cause of actions against the guarantors of the bond payment for the same remaining amount owed on the work of the subcontract. Id. ¶24-27.

Defendants' counterclaim against Solar alleges that Borducci made certain sworn statements representing that Solar had paid its subcontractor and supplier, J.M. Electrical Corp. ("J.M.") and Crescent Electric Supply Company, Inc. of New York ("Crescent"). See Answer ¶18, 24. Defendants claim that Borducci knew or should have known that these statements were false and made these statements with

the requisite intent to induce Skanska to pay Solar. Subsequently, J.M. and Crescent filed liens on the project for non-payment, which allegedly duplicated amounts previously paid by Skanska to Solar. Id. ¶25-27.

Analysis

Legal Standard

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleadings four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

Whether the Breach of Contract Claim is Duplicative of the Fraud Claim

Plaintiff's motion to dismiss defendants' Fourth Counterclaim is granted. Solar alleges that Skanska's Fourth Counterclaim against Borducci personally for fraudulent representations about Solar paying its subcontractors is duplicative of the Third Counterclaim for breach of contract for Solar being required to pay its subcontractors and keep the project free of liens. See Answer ¶¶14-28; Plaintiff's Support. Br., p. 2-5.

"A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." Tesoro Petroleum Corp. v. Holbron Oil Co. Ltd., 108 A.D.2d 607, 607 (1st Dept 1985). "If the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract." Fairway Prime Estate Mgmt. v. First Am. Int'l Bank, 99 A.D.3d 554, 557 (1st Dept 2012). If a party has "breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations", then a separate fraud claim could be warranted. New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 316 (1995); see also Clark-Fitzpatrick, Inc. v. Long Island R. Co., 70 N.Y.2d 382, 389 (1987) ("It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring form circumstances extraneous to... the contract, although it may be connected with and dependent upon the contract"); OP

Solutions, Inc. v. Crowell & Moring, LLP, 72 A.D.3d 622 (1st Dept 2010). "Where a party is merely seeking to enforce its bargain, a tort claim will not lie." New York Univ., 87 N.Y.2d at 316.

Additionally, if a party seeks to enforce the promises of a contract in an action for breach of contract and is not "entirely independent of contractual relations between the parties", a separate fraud action will not stand. Channel Master Corp. v. Aluminum Limited Sales, Inc., 4 N.Y.2d 403, 408 (1958). Similarly, if there is "no factual basis for recovery other than defendants' failure to keep promises; damages sought thereunder would not be recoverable under a contract measure of damages." Stewart v. Maitland, 39 A.D.3d 319 (1st Dept. 2007). Where there is no collateral or extraneous allegation of fraud to the contract, the fraud claim must be dismissed as duplicative and redundant of the contract claim. Coppola v. Applied Electric Corp., 288 A.D.2d 41, 42 (1st Dept. 2001); Havell Capital Enhanced Mun. Income Fund, L.P. v. Citibank, N.A., 84 A.D.3d 588, 589 (1st Dept. 2011). See also J.E. Morgan Knitting Mills, Inc. v. Reeves Bros., Inc., 243 A.D.2d 422, 423 (1st Dept. 1997); Financial Structures Ltd. v. UBS AG, 77 A.D.3d 417 (1st Dept. 2010). Evidence of a claim that a party "misrepresented its intent to perform the contractual obligations at the time they were made" would also be dismissed as duplicative of a contract claim. Demetre v. HMS Holdings Corp., 127 A.D.3d 493 (1st Dept. 2015).

Here, it is without question that the underlying substance of both the breach of contract claim and the fraud claim is entirely of the same origination. Defendants allege in their Third Counterclaim that due to Solar's breaches of the subcontract, Skanska overpaid and was subject to project liens which were not indemnified by Solar. These obligations of Solar arise from the agreement between the parties. Borducci had no separate or independent duty to the defendants, and the alleged false statements are tied directly to the harm caused by the breach of contract. Additionally, defendants claim the exact same compensatory damages in both of the counterclaims, arising out of Solar failing to pay its subcontractors and suppliers. See Answer, ¶21, 28. There is no alleged independent basis outside of the contract between the parties that would give rise to a cognizable fraud claim as the alleged justifiable reliance and inducement springs directly from the contract itself.

Skanska's reliance on Walnut Housing that "a fraud claim is not duplicative of a breach of contract claim when the fraud claim is asserted against a different party" is misguided. See Defendants' Opp. Br., p. 6. In that case, the First Department held that not only was the fraud claim not duplicative of the breach of contract claim because the defendants were not signatories to the partnership or guaranty agreements, but principally because the "claims are based on different allegations." Walnut Housing Assoc 2003 L.P. v. MCAP Walnut Housing LLC, 136 A.D.3d 403, 405 (1st Dept. 2016). "In particular, the claims for breach of contract

and breach of fiduciary duty are based on allegations that defendants mismanaged funds on a mortgage loan... resulting in a mechanic's lien. The constructive fraud claim is based on allegations that the defendants misrepresented the intended use of certain loans in order to induce the limited partners to consent and approve... such loans... which defendants allegedly used to pay themselves." Id. The court specifically looked to the substance of what the claims originally arose out of, which contained completely different underlying facts and therefore two distinct causes of action.

Defendants also do not explicate with specificity the actual holding in Kosowsky v. Willard Mountain, Inc., 90 A.D.3d 1127 (3d Dept 2011). The Third Department explains in Kosowsky that Wilson, the president of the board of directors of Willard Mountain, Inc. (WMI) and of Willard Development, Inc. (WDI) was not a named party to the lease and therefore the fraud claim could not be duplicative as applied to him. Id. at 1129. However, the breach of contract claim was "sufficiently discrete" from the fraud cause of action because the contract claim involved WMI violating a non-assignment lease provision of the agreement, while the fraud claim involved "repeatedly misrepresented or concealed existing facts" that stemmed from an independent breached duty of candor by defendants. Id. The court found that "relative to WMI, a misrepresentation premised directly on the same

actions giving rise to a breach of contract does not give rise to a separate cause of action for fraud." Id.

In the case at bar, Skanska's claims are wholly distinguishable from that of Walnut Housing and Kosowsky. Even though Borducci is not a signatory to the subcontract, that alone is insufficient to manifest a separate fraud claim. Similar to WMI in Walnut Housing, the alleged misrepresentations by Borducci are "premised directly on the same actions giving rise to a breach of contract." Borducci did not allegedly induce Skanska in a different manner that is unrelated to the contract claim. Solar purportedly did not pay its subcontractors and suppliers, and also did not keep the project free of liens, which was contemplated by the parties and indeed covered under the contract.

Instead, Skanska's breach of contract and fraud claims are analogous to the claims in Triad Intern. Corp. v. Cameron Industries, Inc., 122 A.D.3d 531 (1st Dept 2014). In Triad, plaintiff brought a breach of contract claim against Cameron Industries and an additional fraud claim against Soheil Khayyam, president of Cameron Industries. See Triad Intern. Corp. v. Cameron Industries, Inc., 2013 WL 4780056, at *1 (Sup. Ct. N.Y. Cnty. Sept. 3, 2013). The contract claim was for purchases and shipment of fabrics while the fraud claims alleged that Khayyam issued checks that resulted in insufficient funds after the goods were shipped. Id. The First Department held that "plaintiff's fraud claim against Khayyam is

duplicative of its contract claim against [Cameron Industries] since plaintiff seeks the same compensatory damages for both claims." Triad, 122 A.D.3d at 531. Plaintiff's "purported fraud damages are actually contract damages. Plaintiff seeks to be placed in the same position that it would have been in had Cameron performed under the contract." Id. at 532.

Examining the Third and Fourth Counterclaims together, the sworn statements by Borducci are in connection with payments that Solar needed to make to Crescent and J.M., which the Third Counterclaim addresses for breach of contractual obligations. The damages sought by Skanska in the Third Counterclaim would make Skanska whole after enforcing a breach of contract. Therefore, a separate tort claim for fraud underlying the same issue is not justified here.

Since the fraud claim is duplicative of the contract claim, the 3016(b) motion need not be discussed here.

Accordingly, it is hereby

ORDERED that plaintiff's motion to dismiss defendants' Fourth Counterclaim is granted.

Date: May 5, 2017
New York, New York

Anil C. Singh