

**Ambassador Constr. Co., Inc. v Dejl Sys., Inc.**

2011 NY Slip Op 33145(U)

December 1, 2011

Supreme Court, New York County

Docket Number: 109146/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

AMBASSADOR CONSTRUCTION CO., INC.,

INDEX No. 109146/11

Plaintiffs,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No, 001

DEJIL SYSTEMS, INC. et al.,

MOTION CAL No. \_\_\_\_\_

Defendants.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1+2

Answering Affidavits- Exhibits \_\_\_\_\_

3+4

Replying Affidavits \_\_\_\_\_

5+6

CROSS-MOTION: \_\_\_\_\_ YES  NO

**FILED**

DEC 07 2011

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/1/11

Donna M. Mills  
**DONNA M. MILLS, J.S.C.**

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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AMBASSADOR CONSTRUCTION CO., INC.,

INDEX NO.  
109146/11

Plaintiff,

- against -

DE JIL SYSTEMS, INC., JOANNE DIORIO and  
BRUCE SMITH,

DECISION/ORDER

**FILED**

Defendants.  
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DEC 07 2011

DONNA M. MILLS, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Moving Defendants, Joanne Di Iorio and Bruce Smith seek an order pursuant to CPLR §§ 3211(a)(1) and (7) and CPLR §§ 3013 and 3016(b) dismissing the complaint against them. Plaintiff, Ambassador Construction Co. Inc., opposes the motion.

BACKGROUND

On or about October 27, 2010 plaintiff, as a general contractor, and defendant De Jil Systems, Inc., ("De Jil") as its subcontractor, entered into a written agreement, wherein and whereby De Jil agreed to furnish cabinets, doors, frames, woodwork, millwork and other items and to perform the work labor and services to install such items at the Polish Mission. Plaintiff commenced this action against De Jil for breach of contract and the Moving Defendants for fraud in the inducement. While Di Iorio and Smith are executive officers of De Jil, it is undisputed that the Moving Defendants were not parties to the subject agreement.

Moving Defendants' allege that plaintiff's fourth cause of action for fraud in the inducement is not maintainable because a breach of contractual obligations does not give rise to fraud claims. Moving Defendants also allege that the complaint does not satisfy the pleading requirements of the CPLR because it does not contain sufficient factual allegations to sustain any contention of justifiable reliance on the alleged

misrepresentations. The relevant portions of the allegations in the complaint comprising the purported fraud claims are as follows:

19. On August 10, 2010 Defendant De Jil sent plaintiff a proposal to provide the material and work for the project. Said proposal was made by Bruce Smith on behalf of De Jil. On or about September 17, 2010. Prior thereto, De Jil received a bid form which contained instructions to bidders and which notified bidders that among other things that labor to be performed would be "Union Labor".

20. When defendants were invited to bid the job they knew that the subject building's management required contractors and subcontractors to be union contractors. The agreement provides that all work must be in accordance with the rules and standards of the building involved. Said building rules required Union labor. Defendants knew of this requirement long before it executed the agreement herein. At the time defendants were negotiating the aforesaid agreement De Jil was in default of payments to its union. As a result of the payment default to its Union, De Jil was unable to perform the required work at the subject building. Defendants Diorio and Smith knew this to be the case and deliberately withheld its union payment default in order to induce plaintiff to award De Jil the aforesaid subcontract for the project. Defendant's withholding of De Jil's Union payment default was a deliberate deceitful material misrepresentation, known to be false and deceitful by defendants. Plaintiff relied upon the false and deceitful representations of Defendants that De Jil. Had Defendants not withheld its Union payment default and had plaintiff known of De Jil's Union payment default it would not have awarded the aforesaid subcontract to De Jil.

## APPLICABLE LAW & DISCUSSION

A fraud-based cause of action is duplicative of a breach of contract claim "when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract" (First Bank of the Ams. v. Motor Car Funding, 257 A.D.2d 287, 291, [1<sup>st</sup> Dept 1999]). A fraud-based cause of action may lie, however, where the plaintiff pleads a breach of a duty separate from a breach of the contract ( *id.*). Thus, where the plaintiff pleads that it was induced to enter into a contract based on the defendant's promise to perform and that the defendant, at the time it made the promise, had a preconceived and undisclosed intention of not performing the contract, such a promise constitutes a representation of present fact collateral to the terms of the contract and is actionable in fraud (Deerfield Communications Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 956 [1986]; see First Bank of the Ams., *supra* ).

Here, plaintiff does allege with respect to the cause of action for fraudulent inducement that "[a]t the time [d]efendants made the [alleged] representations [regarding the ability to perform the contract], [Moving] Defendants did not intend to perform the contract in conformity with their promises. However, these allegations are not sufficient. Rather, because they are merely "[g]eneral allegations that defendant[s] entered into a contract while lacking the intent to perform it [,the allegations] are insufficient to support [the fraud-based] claim[s]" ( New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 318, [1995] ). Thus, the causes of action for fraudulent inducement must be dismissed.

Additionally, the fraud-based cause of action must be dismissed for another, independent reason. Causes of action for breach of contract and fraud based on the breach of a duty separate from the breach of the contract are designed to provide remedies for different species of damages: the damages recoverable for a breach of contract are meant "to place the nonbreaching party in as good a position as it would have been had the contract been performed" ( Brushton-Moira Cent. School Dist. v. Thomas

Assoc., 91 N.Y.2d 256, 261, [1998]); the damages recoverable for being fraudulently induced to enter a contract are meant to "indemnify for the loss suffered through that inducement" (Deerfield Communications Corp., 68 N.Y.2d at 956, , e.g., damages for foregone opportunities ( see Coppola v. Applied Elec. Corp., 288 A.D.2d 41, [1<sup>st</sup> Dept 2001]). Here, plaintiff did not allege that it sustained any damages that would not be recoverable under its breach of contract cause of action. Thus, the fraud-based cause of action is duplicative of the breach of contract cause of action.

Accordingly, it is

ORDERED that the motion of Moving Defendants Joanne Di Iorio and Bruce Smith to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

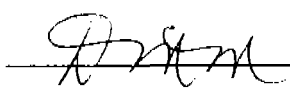
ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141 B) and the Clerk of the Trial Support Office (Room 158) who are directed to mark the court's records to reflect the change in the caption herein.

Dated: 12/1/11

**FILED**  
DEC 07 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:  
  
J.S.C.  
DONNA M. MILLS, J.S.C.