Nagan Constr., Inc. v Monsignor McCalncy Mem. High Sch.
2012 NY Slip Op 33617(U)
August 7, 2012
Sup Ct, Queens County
Docket Number: 9543/2011
Judge: Marguerite A. Grays
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Short Form Order

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

NAGAN CONSTRUCTION, INC., and CONAIR CORPORATION,

Plaintiff(s)

-against-

MONSIGNOR McCLANCY MEMORIAL HIGH SCHOOL, JOHN CIARDULLO ASSOCIATES, P.C., LIZARDOS ENGINEERING ASSOCIATES, P.C., KENSTAR CONSTRUCTION CORP., LOVETT SILVERMAN CONSTRUCTION CONSULTANTS, INC., and THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY.

Index Number 9543 /2011

Motion Date May 22, 2012

Motion Cal. Number 12

Motion Seq. No. 3

2012 AUG 27 PM 2:27

QUEENS COUNTY CLERK FILED

The following papers numbered 1 to 13 read on this motion by defendant Lizardos Engineering Associates, P.C. for an order dismissing the amended verified complaint, pursuant to CPLR 3211(a)(7), 3016(b) and 215(3).

	Papers Numbered
Notice of Motion- Affirmation- Affidavit-Exhibits.....	1-4
Opposing Affirmation.-Exhibits.....	5-7
Opposing Affirmation-Exhibits.....	8-10
Opposing Affidavit-Exhibits.....	11-13
Reply Affirmation-Exhibits.....	
Memorandum of Law.....	
Memorandum of Law.....	
Reply Memorandum of Law.....	

Upon the foregoing papers this motion is determined as follows:

Plaintiffs Nagan Construction Inc. (Nagan) and Conair Corporation (Conair) formed a joint venture (Joint Venture) and entered into a construction contract, dated June 30, 2005, with Monsignor McClancy Memorial High School(School) to perform noise abatement work at the school, for the sum of $7.2 million dollars. Travelers Casualty and Surety Company of America (Travelers) issued a performance and payment bond in connection with said construction project on June 16, 2005. The Joint Venture, and others, each executed an indemnity agreement in favor of Travelers dated June 16, 2002, and Conair and others also executed an indemnity agreement in favor of Travelers dated March 14, 2006.

The School, in a letter dated October 29, 2007 terminated the Joint Venture's right to proceed due to its default under the contract, and made a demand on the surety Travelers to complete the contract pursuant to its performance bonds. Travelers, with the consent of the School, initially attempted to use the Joint Venture to complete the project, but these efforts were not successful. After Travelers had solicited bids from other contractors, the School advised Travelers that it had retained Lizardos Engineering Associates, P.C. (Lizardos) to conduct an evaluation of the quality of the work performed by the Joint Venture.

In December 2007, Travelers retained Lovett-Silverman Construction Consultants Inc., a surety and construction claim consultant to assist it in obtaining bids to complete the remaining work on the project. With the exception of "life/safety" work, construction was stopped pending the receipt of the Lizardos report. The Lizardos report was issued in October 2008 and revised in November 2008. In June 2009, the School and Kenstar Construction Corp. (Kenstar) entered into a tender agreement whereby Travelers tendered Kenstar as the completion contractor. Kenstar furnished its own surety bonds, and Travelers funded the $1,954,544.72 shortfall between the remaining contract balance and Kenstar's completion price.

On March 21, 2008, Travelers commenced an action entitled *Travelers Casualty and Surety Company of America v Stransky*, Index No. 7359/08, for reimbursement pursuant to the two indemnity agreements. Nagan and Conair were named defendants in that action. The court, in an order dated October 12, 2010, and a judgment entered on December 28, 2010, granted Traveler's motion for summary judgment against the defendants in its favor in the sum of $2,536,775.70. A stipulation of settlement was entered into by the parties on January 24, 2011, which expressly reserved the defendants' right to appeal the court's order and judgment, and a satisfaction of judgment was filed with the court. The court therein, in an order dated January 19, 2012, denied the defendants' motion to renew Traveler's motion for summary judgment which resulted in the order of October 1, 2010, on the grounds that the filing of the satisfaction of judgment extinguished the judgment and rendered the renewal motion academic. Said defendants' appealed the order of October 12, 2010 and judgment of December 28, 2010, and the Appellate Division, Second Department,

affirmed the Supreme Court's order and judgment (*Travelers Casualty and Surety Company of America v Stransky*, 93 AD3d 781 [2012]).

Nagan and Conair commenced the within action by filing a summons with notice on April 18, 2011. On June 13, 2011, Lizardos served a notice of appearance and a demand for a complaint. Plaintiffs thereafter served a verified complaint, and Lizardos served a pre-answer motion to dismiss the complaint. Plaintiffs, in response to said motion served an amended verified complaint, and Lizardos withdrew the its prior motion, without prejudice. The parties in a stipulation dated December 1, 2011, agreed to extend Lizardos time to respond to the amended verified complaint until February 1, 2012. Lizardos served the within pre-answer motion to dismiss the complaint on January 31, 2012.

On a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. Of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.* 70 AD3d 928 [2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703[2010]). The test to be applied is whether the complaint "gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*Moore v Johnson*, 147 AD2d 621, 621, 538 NYS2d 28 [1989], quoting *Pace v Perk*, 81 AD2d 444, 449 [1981]; see *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], affirmed, 66 NY2d 946 [1985]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633[1976]). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v Midtown Development, L.P.*, 32 AD3d 294 [2006] [internal citations omitted]).

Plaintiffs' in the fifth cause of action of the amended complaint, entitled " Negligence, negligent misrepresentation and/or fraud against Lizardos" allege, in pertinent part, as follows:

"100. Lizardos owed Nagan/Coniar a duty to perform Lizardos' work to a minimum standard of care and duty of care without harm to others. "

" 101. Lizardos negligently, intentionally and or with disregard to the true facts, misrepresented Project conditions that are specifically set forth in the Nagan/Conair's 'Response to Lizardos Report' dated on or about November 18, 2008, incorporated herein in full."

" 102. Because such actions were also willful;, the class of potential plaintiffs or parties damaged by Lizardos' actions is greater than otherwise would be limited to the party that hired them to 'find' any such deficiencies, when in fact no deficiencies existed or otherwise were de minimis [sic] to an engineer acting properly in the scope of his or her professional duty."

"103. Lizardos breached its duty as an engineer owed to Nagan/Conair and directly and proximately caused Nagan/Conair to incur damages in an amount to be determined at trial."

"104. By such negligent, reckless and/or willful action, Lizardos had improperly interfered with the Contract existing between Nagan/Conair and Owner".

The elements of a cause of action for negligence are (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) injury proximately resulting from the breach (see *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm (*532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280, 289 [2001]).

Plaintiffs in their amended complaint allege that the construction contract was terminated by the School's architect, acting on behalf of the School, pursuant to a letter, on October 29, 2007. Plaintiffs allege that the School, at the direction of the Port Authority, had commissioned a report to "find construction deficiencies" and that said report was issued by Lizardos in October 2008 and revised in November 2008. Plaintiffs, however, do not allege that they had a contractual relationship with Lizardos. Nor do plaintiffs allege that Lizardos engaged in conduct linking it to plaintiffs in such a way as to create a relationship between the two that sufficiently approached privity (see *Securities Investor Protection Corp. v BDO*

Seidman, LLP, 95 NY2d 702, 711 [2001]). Plaintiffs' allegations, thus, are insufficient to state a cause of action against Lizardos, as it owed no duty of care to plaintiffs (see generally *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) either privity of contract between the plaintiff and the defendant or a relationship "so close as to approach that of privity", imposing a duty on the defendant to impart correct information to the plaintiff, (2) that the information was incorrect; and (3) reasonable reliance on the information (*Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 372-373 [2010]; *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007], *rearg. den.*, 8 NY3d 939 [2007]; *Parrott v Coopers & Lybrand*, 95 NY2d 479, 484 [2000]; *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). Plaintiffs' allegations are insufficient to state a claim for fraudulent misrepresentation, as they do not allege that they had a contractual relationship with Lizardos, or that they had a relationship that sufficiently approached privity.

Plaintiffs' allegations are insufficient to state a claim for fraud. "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2010]; see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421[1996]). Where a cause of action is based on a misrepresentation or fraud,"the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]; see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Mere conclusory language, without specific and detailed allegations establishing material misrepresentations of fact, is insufficient to state a cause of action to recover damages for fraud (*see Heffez v L & G Gen. Constr. Inc.*, 56 AD2d 526 [2008]; *Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678 [2005]). Here, plaintiffs do not allege that Lizardos made any misrepresentation or false statement for the purpose of inducing the plaintiffs to rely upon it, and that they relied on any such misrepresentations to their detriment. In addition, the conclusory allegation of fraud attributed to this defendant is insufficient to satisfy the pleading requirement of CPLR 3016 (b).

The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of the third party's breach of that contract, and (4) damages (see *Foster v Churchill*, 87 NY2d 744, 749-750 [1996]; *Chung v Wang*, 79 AD3d 693, 694-695 [2010]; *R.U.M.C. Realty Corp. v JCF Assoc., LLC*, 51 AD3d 993, 994-995 [2008], citing *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

Plaintiffs in their complaint allege that their contract with the School was terminated by the School on October 29, 2007. Plaintiffs now claim, in opposition to the within motion, that portions of the contract survived its termination. However, it is undisputed that the School terminated the construction contract on October 29, 2007, and did not permit plaintiffs' to perform any further work at the site. In addition, although the surety gave plaintiffs' an opportunity to complete the project, the surety terminated the plaintiffs in the Spring 2008. As the Lizardos report was issued nearly a year after the construction contract was terminated, there was no contract in existence that was capable of being interfered with in October or November 2008. The amended complaint, thus, does not state a claim against Lizardos for tortious interference with contract.

To the extent that plaintiffs', in opposition, now assert that the performance bond was tortiously interfered with, this claim was not set forth in the amended complaint. In addition, plaintiffs' claim that Travelers' breached its performance bond was previously rejected by the court in the *Travelers* action, and may not be relitgated in this action.

Finally, as these tort claims against Lizardos merely allege economic loss, and not personal injury or property damages, they must be dismissed (see *532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 291-292 [2001]; *Cedar & Wash. Assoc., LLC v Bovis Lend Lease LMB, Inc.*, 95 AD3d 448 [2012]; *Roundabout Theatre Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272, 272-273 [2003]).

Plaintiffs' seventh cause of action against Lizardos for "trade libel" is based upon statements made in the 2008 report. A one-year statute of limitations applies to a claim sounding in defamation (see CPLR 215 [3]; *Ullmannglass v Oneida, Ltd.*, 86 AD3d 827, 828 [2011]; *Ramsay v Mary Imogene Bassett Hosp.*, 113 AD2d 149, 151,[1985], lv dismissed 67 NY2d 608 [1967]), and starts to run on the date of publication, so "the fact that the libel may not have been discovered until later matters not" (*Fleischer v Institute for Research in Hypnosis*, 57 AD2d 535 [1977] ; *Casa de Meadows Inc. (Cayman Islands) v Zaman*, 76 AD3d 917, 920 [2010]). Here, the Lizardos' report was published in October and November 2008. As plaintiffs' commenced this action by filing a summons with notice on April 18, 2011, the one year statute of limitations for defamations bars the seventh cause of action for trade libel.

In view of the foregoing, defendant Lizardos' motion for to dismiss plaintiffs' fifth and seventh causes of action, pursuant to CPLR 3211(a)(7), 3016(b) and 215(3), is granted, and the complaint is dismissed as to this defendant.

Dated: AUG 07 2012

MARGUERITE A. GRAYS
J.S.C.

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QUEENS COUNTY CLERK
FILED