Nagan Constr., Inc. v Monsignor McClancy Mem. High Sch.
2012 NY Slip Op 33618(U)
July 19, 2012
Sup Ct, Queens County
Docket Number: 009543 2011
Judge: Marguerite A. Grays

ORIGINAL

Short Form Order

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 PROT AUTHORITY OF NEW YORK AND NEW JERSEY.

Defendant(s).

Index Number: 009543 2011

Motion Date: May 22, 2012

Motion Cal. Number: 11

Motion Seq. No.: 4

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The following papers numbered 1 to 11 read on this motion by defendant Lovett Silverman Construction Consultants Inc. for an order (1) dismissing all claims on the grounds of failure to state a cause of action pursuant to CPLR 3211(a)(7); (2) dismissing the fraud and prima facie tort claims on the grounds of failure to plead in detail the circumstances constituting the wrong, pursuant to CPLR 3016(b) and 3013; and (3) dismissing all claims against this defendant on the grounds of res judicata, pursuant to CPLR 3211(a)(5).

	Papers Numbered
Notice of Motion- Affirmations- Affidavit-Exhibits	1-6
Opposing Affirmation.- Affidavit-Exhibits.....	7-9
Reply Affirmation.....	10-11
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. (Lovett-Silverman), 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, 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, 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, and thereafter served Lovett-Silverman with a supplemental summons and amended verified complaint, dated November 30, 2011.

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction (see CPLR 3026; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), and the court must accord the plaintiff "the benefit of every possible favorable inference," accept the facts alleged in the complaint as true, and "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88). Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action (see *Kuzmin v Nevsky*, 74 AD3d 896, 898, 903 NYS2d 96 [2010]; *Hartman v Morganstern*, 28 AD3d 423, 424 [2006]).

Here, plaintiffs' eighth cause of action, entitled " Fraud and prima facie tort against Lovett", alleges that Lovett-Silverman "prepared or participated in the preparation of the cost breakdown and estimated work for the Completion Contract that established the cost of the work to complete the remaining Contract work"; that "Lovett knew that work items were duplicated and overpriced"; and that "Defendant Lovett prepared the completion breakdown for the Completion Contract in a knowingly deceptive and exaggerated and improper way, where the various items of work were intentionally and purposely duplicated and the stated costs were knowingly exaggerated. Such items of work that were duplicated and overpriced are detailed in the attached "Appendix A".

"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]).

The purpose of this pleading requirement "is to inform a defendant of the complained-of incidents" *(Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; see *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491[2008]). However, courts have recognized that, in certain circumstances, it may be "almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of [an adverse] party" *(Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]; see *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d at 491-492). Under such circumstances, the heightened pleading requirements of CPLR 3016 (b) may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, "are sufficient to permit a reasonable inference of the alleged conduct" including the adverse party's knowledge of, or participation in, the fraudulent scheme *(Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d at 492; see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d at 559; *Polonetsky v Better Homes Depot*, 97 NY2d at 55; *High Tides, LLC v DeMichele*, 88 AD3d 954, 956-958 [2011]; *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 99 [2003]; *125 Assoc. v Cralin Trading Assoc.*, 196 AD2d 630, 630-631 [1993]; *Elsky v KM Ins. Brokers*, 139 AD2d 691, 691 [1988]; *National Westminster Bank v Weksel*, 124 AD2d 144, 149, 511 NYS2d 626 [1987]).

Assuming the truth of the plaintiff's allegations, as required on a motion to dismiss pursuant to CPLR 3211 (a) (7) (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Sokol v Leader*, 74 AD3d 1180 [2010]), plaintiffs have failed to state a cognizable cause of action sounding in fraud. The complaint is devoid of any allegations of specific misrepresentations or omissions made by defendant Lovett-Silverman, and the conclusory allegation of fraud attributed to this defendant is insufficient to satisfy the pleading requirement of CPLR 3016 (b) (see *High Tides, LLC v DeMichele*, 88 AD3d at 958 [2011]; *Scomello v Caronia*, 232 AD2d 625, 625 [1996]; *Sforza v Health Ins. Plan of Greater N.Y.*, 210 AD2d 214, 215 [1994]; see also *Lakeville Pace Mech. v Elmar Realty* Corp., 276 AD2d 673, 676 [2000]; *Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220, 222 [1994]). Furthermore, the material factual allegations in the complaint, do not give rise to a reasonable inference that the defendant Lovett-Silverman participated in, or had actual knowledge of any of the fraud alleged in the complaint. In opposition, plaintiffs' assertions and self-serving documentary evidence is insufficient to permit a reasonable inference that Lovett-Silverman engaged in fraud or participated in a fraudulent scheme.

Plaintiffs' allegations are also insufficient to state a claim for prima facie tort. Prima

facie tort affords a remedy for "'the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful'" (*ATI, Inc. v Ruder & Finn,* 42 NY2d 454, 458 [1977]). The requisite elements of a cause of action sounding in prima facie tort are: "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]; see *Curiano v Suozzi*, 63 NY2d 113, 117-118 [1984]; *Smith v Meridian Tech., Inc.*, 86 AD3d 557, 558-559 [2011]; *Del Vecchio v Nelson*, 300 AD2d 277, 278 [2002]; *Levy v Coates*, 286 AD2d 424 [2001]).

It is well settled that "there is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act," that is, "unless defendant acts from 'disinterested malevolence' " (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983], quoting *American Bank & Trust Co. v Federal Reserve Bank of Atlanta*, 256 US 350, 358 1921]). For purposes of a cause of action to recover damages for prima facie tort, " 'the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another' " (*Burns Jackson Miller Summit & Spitzer v Lindner,* 59 NY2d at 333, quoting *Beardsley v Kilmer*, 236 NY 80, 90 [1923]). Thus, " '[a] claim of prima facie tort does not lie where the defendant's action has any motive other than a desire to injure the plaintiff' " (*Weaver v Putnam Hosp. Ctr.*, 142 AD2d 641, 641-642 [1988], quoting *Global Casting Indus. v Daley-Hodkin Corp.*, 105 Misc 2d 517, 522 [1980]). A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages (see, *Freihofer v Hearst Corp., supra; Curiano v Suozzi*, supra, at 117; *ATI, Inc. v Ruder & Finn, supra* at 458).

Here, plaintiffs do not allege a specific intention to cause harm and do not allege that Lovett-Silverman acted solely based on disinterested malevolence when it prepared or participated in the cost breakdown. Furthermore, the complaint fails to allege that the plaintiffs sustained special damages as a result of defendant's alleged prima facie fraud. Rather, plaintiffs merely allege that Lovett-Silverman duplicated and/or exaggerated the costs in the completion breakdown for the completion contract. Plaintiffs' allegations are clearly insufficient to state a claim for prima facie tort.

Lastly the courts have held that "the doctrine of res judicata, or claim preclusion, provides that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive in any subsequent action of the issues of fact and questions of law necessarily decided in the first action. Under New York's

transactional approach to res judicata issues, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981], citing *Matter of Reilly v Reid*, 45 NY2d 24, 29-30 [1978]; see also *Burch v Trustees of Freeholders & Commonalty of Town of Southampton*, 47 AD3d 654 [2008]). Further, a claim will be barred by the prior adjudication of a different claim arising out of the same "factual grouping" even if the claims "involve materially different elements of proof" (*O'Brien v City of Syracuse*, 54 NY2d at 358), and even if the claims " 'would call for different measures of liability or different kinds of relief' " (*Smith v Russell Sage Coll.*, 54 NY2d 185, 192 [1981]). Stated otherwise, res judicata "bars not only claims that were actually litigated [to conclusion on the merits] but also claims that could have been litigated [in the prior action] if they arose from the same transaction or series of transactions" (*Marinelli Assoc. v Helmsley-Noyes Co.*, 265 AD2d 1, 5 [2000]).

Here, the court in the *Travelers* action, in granting summary judgment in favor of the surety, necessarily determined that the payments made by the surety were made in good faith and reasonable as to the amount paid. Lovett-Silverman was retained by Travelers to assist it in obtaining bids to complete the remaining work at the School, and therefore was in privity with the surety. Plaintiffs in the *Travelers* action had a full and fair opportunity to raise their objections to Travelers' payments, including the reasonableness of the payments and are now precluded from relitigating this claim with respect to Lovett-Silverman.

Accordingly, defendant Lovett-Silverman's motion for an order dismissing the complaint against it pursuant to CPLR 3211(a)(5) (7) and 3016(b), is granted.

Date: JUL 19 2012

MARGUERITE A. GRAYS
J.S.C

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