SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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MADISON PARK DEVELOPMENT ASSOCIATES, LLC,

Plaintiff,

- against -

JUDITH FEBBRARO, GERALD MAGPILY, ELLEN ACKRISH, and JOHN DOE #1 through #10,

Defendants.

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Index No.: 650613/2014
Subm. Date: July 2, 2014
Mot. Seq. No.: 001

DECISION AND ORDER

For Plaintiff:
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For Defendants:
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Papers considered in review of this motion to dismiss:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1
Defendants' Memorandum of Law in Support	2
Plaintiff's Affirmation in Opposition	3
Plaintiff's Memorandum of Law in Opposition	4
Defendant's Reply Memorandum of Law in Support	5

Ellen M. Coin, A.J.S.C.:

Defendants Judith Febbraro, Gerald Magpily, and Ellen Ackrish make this pre-answer motion to dismiss the complaint brought by the sponsor and developer of their residential cooperative building, plaintiff Madison Park Development Associates, Inc. (Madison). Madison alleges that defendants, cooperative owners who reside in the building, made statements to public officials designed to injure Madison.

After the building was converted to a cooperative and after a certificate of occupancy was issued, Madison and the cooperative corporation, Madison Park Apartment Corporation (the

Corporation), entered into a settlement agreement (the Settlement) in November 2006, in which Madison agreed to fix leaks in the building exterior and address other construction issues. At that time, Madison owned and still owns an apartment in the building. The Settlement provided that in the event that Madison's apartment was sold before Madison completed the remediation, the proceeds of the sale would be held in escrow until it finished the work. The parties entered into an escrow agreement regarding the sale proceeds and other items to be held in escrow.

In January 2009, Madison and the Corporation entered into a modified settlement agreement (the Modified Settlement), in which Madison acknowledged that certain aspects of the work, called the "Exterior Work," were not completed, partly because Madison's architects had not inspected the premises and prepared construction plans, as Madison had requested. In the Modified Settlement, the Corporation agreed to Madison's request to have the Corporation's architects prepare the construction plans, inspect the premises, and give final approval of the work. Madison agreed to pay the architects' fees.

Madison says that it spent over $1.2 million performing its obligations pursuant to both agreements. On June 20, 2011, a partner in the architects' firm wrote the New York City Department of Buildings (the DOB) that he had made a final inspection of the work, that he certified that it conformed to the construction plans and New York City building codes and other rules and regulations, and that he was applying for a "Letter of Completion." The DOB sent the architect a letter headed "Letter of Completion," stating that the work related to the application was completed and was signed off in the Building Information System (BIS) on July 18, 2011.

A letter of completion is a "document issued by the department indicating that permitted work has been completed, including satisfactory final inspection in accordance with this code" (NY

City Construction Codes [Administrative Code of City of NY, tit 28, ch 1] § 28-101.5). Upon submission of a satisfactory report of final inspection, the DOB documents the sign-off of the project and issues a letter of completion (*id.*, § 28-116.4).

Madison alleges that it did not know about the architect's letter or the DOB letter at the time that they were written. Madison emphasizes that as of July 18, 2011, the Corporation's architects had certified to the DOB that the Exterior Work had been completed in conformance with the architects' plans and laws, rules, and regulations. Madison alleges that defendants led it to believe that the architects had not given final approval of the Exterior Work and instructed the architects not to inform Madison of that fact.

On February 2, 2012, counsel for the Corporation wrote to Madison's counsel. The letter refers to a previous conversation between the attorneys about Madison being in the process of selling its apartment and the Corporation demanding that the proceeds be placed in escrow because Madison had not finished fixing the leaks in the building's facade. The letter says that Madison's contractor did not do the work properly and in accordance with the architect's drawings and speaks of leaks emanating from air conditioning sleeves, flashing, water proofing, lintels, window sills, and other areas. The letter states that the Corporation "has no certificates of completion" and demands that Madison comply with its obligations under the Settlement.

On February 17, 2012, defendants wrote a letter to the Commissioner of the New York City Department of Housing Preservation (the HPD). At that time, defendants were members and vice-presidents on the Board of Directors of the Corporation. The letter was on the Corporation's letterhead, was signed by each defendant, and was copied to the Corporation, the New York attorney general, the Manhattan borough president, and other elected representatives. According to the letter,

the cooperative was built under the HPD's Cornerstone program in partnership with the New York City Housing Development Corporation (HDC) as housing for low- to moderate-income persons. The letter complains that since 2002, the building has been plagued with "major water leaking structural problems." The letter claims that Madison did not perform the repairs promised in the Settlement, did not respond to calls for assistance, and had no "certificates of completion" by the architects, as required by the Settlement. The repairs that Madison "actually performed exacerbated the problem and caused further damage to the property that [Madison] refused to address in good faith." The letter states that these actions have put the building in financial jeopardy, that the residents cannot afford these repairs on their own, and that raising maintenance costs would force many out of the building. The letter further states that if the agencies involved do not respond by May 15, 2012, "we are poised to take further action."

On March 2, 2012, the Corporation Board of Directors issued a note to the shareholders. The note stated that the Board mailed its own letter seeking political and community support in its effort to get Madison to fix the leaks. In violation of the Board's vote on this letter, three Board members (meaning these defendants) sent their own "unapproved version of the letter" on the Corporation's letterhead, implying that their letter was from the Board. This was a "misrepresentation of the" Corporation, which sent conflicting messages, made the Board appear divided, and weakened its position. The letter further states that the three Board members have been censured.

Madison alleges that it complied with all of its obligations under the agreements. On May 1, 2012, Madison's attorney asked the Corporation's attorney for the results of the water tests conducted after the time that Madison says it finished the work. The Corporation's attorney sent the results of the tests to Madison's attorney, stating that as far as the Corporation was concerned, the

issues remained the same as in the earlier letter. Neither side reveals the results of the water tests.

The Corporation sued Madison, claiming that the work had not been approved by the architects, that the construction was improper, and that Madison did not comply with the Settlement and Modified Settlement. The lawsuit ended in a settlement, the terms of which are confidential.

Madison says that the Corporation's lawsuit was filed despite the approval issued by the architect. Madison alleges that due to defendants' wrongful conduct, it "lost for a substantial period of time the substantial benefit that would be derived from the sale of the shares and proprietary lease allocable to [the apartment]" and incurred legal fees of over $50,000. Madison alleges that defendants, as recently as March 2014, caused their February 2012 letter to be republished in a publication issued by a homeowners' association. Madison brought the instant lawsuit following defendants' refusal to retract their false statements in the letter.

According to Madison, by writing their letter, defendants disseminated false and derogatory statements to government officials and political representatives. The letter falsely stated that Madison's construction of the building was defective, that its repairs were deficient, and that Madison failed to honor its contractual commitments under the Settlement. Madison further alleges that each defendant knew that the statements in the letter were false and made them with reckless disregard of their falsity, and that each defendant authorized the letter to be republished. Defendants allegedly engaged in a scheme to extract from Madison additional benefits beyond those provided in the Settlement and Modified Settlement. The amended complaint sounds in fraud, injurious falsehood, and tortious interference with contract and with business.

Defendants made their motion without including a copy of the complaint. This omission could lead to automatic denial of their motion (*see Alizio v Perpignano,* 225 AD2d 723, 724-725 [2d

Dept 1996]; *344 E. 72 Ltd. Partnership v Dragatt,* 188 AD2d 324, 324 [1st Dept 1992]). That will not happen in this case because after defendants made their motion, plaintiff served and filed an amended complaint and included it with its opposition to defendants' motion. Defendants submitted another memorandum of law and other papers arguing that the amended complaint should be dismissed. Plaintiff responded to defendants' additional papers. The merits of the amended complaint have been fully briefed, so the motion will be considered in light of that complaint.

Discussion

Defendants move to dismiss pursuant to CPLR 3211 (a) (1) and (7). In determining whether dismissal is warranted for failure to state a cause of action (CPLR 3211 [a] [7]), the court must accept the facts alleged as true and determine only whether they fit within any cognizable legal theory (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]). On a motion to dismiss based on documentary evidence (CPLR 3211 [a] [1], "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Beal Sav. Bank v Sommer,* 8 NY3d 318, 324 [2007] [internal quotation marks and citations omitted]), as when evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v Wolohojian,* 38 AD3d 301, 301 [1st Dept 2007]). Defendants also move to dismiss for failure to join the Corporation, allegedly a necessary party, (CPLR 3211 [a] [10]).

One of defendants' arguments for dismissal is that this action qualifies as a Strategic Lawsuit Against Public Participation (SLAPP) action pursuant to Civil Rights Law § 76-a. The legislature enacted Civil Rights Law § 76–a in order to protect citizens facing litigation arising from their public petitioning and participation (*600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 138 n 1 [1992]).

SLAPP suits "are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future" (*id.*). An action in which defendants are sued for making statements related to public petition and participation, as defined in Civil Rights Law § 76-a (1), will be dismissed, unless the plaintiff shows that the "action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law" (CPLR 3211 [g]). Thus, in derogation of the common law, a heightened standard of proof is imposed upon the plaintiff to avoid dismissal of an action involving public petition and participation (*Guerrero v Carva,* 10 AD3d 105, 116 [1st Dept 2004]). Being in derogation of the common law, the anti-SLAPP law is strictly construed (*id.* at 117; *Yeshiva Chofetz Chaim Radin, Inc. v Village of New Hempstead,* 98 F Supp 2d 347, 362 [SD NY 2000]).

"An 'action involving public petition and participation' is an action . . . that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission" (Civil Rights Law § 76-a [1] [a]). A public applicant or permittee is "any person who has applied for or obtained a permit, . . . license, or other . . . entitlement to act from any government body" (*id.*, [1] [b]).

Courts have held that for an action to be deemed a SLAPP action, the communication by the defendant to which the plaintiff objects must have directly challenged or commented on an application or permission (*Guerrero,* 10 AD3d at 117; *Bridge Capital Corp. v Ernst*, 61 AD3d 496, 496 [1st Dept 2009]; *Silvercorp Metals Inc. v Anthion Mgt. LLC*, 36 Misc 3d 660, 666 [Sup Ct, NY County 2012]; *Matter of Doo v Sie-En Yu,* 31 Misc 3d 1204[A], 2011 NY Slip Op 50494[U], *9 [Sup Ct, Queens County 2011]; *Foley v CBS Broadcasting, Inc.*, 28 Misc 3d 1227[A], 2006 NY Slip

Op 52712[U] [Sup Ct, NY County 2006]). The defendant must "identify ... the application or permit being challenged or commented on," and the defendant's communication must have been "substantially related to such application or permit" (*Guerrero*, 10 AD3d at 117).

Defendants contend that this is a SLAPP action, brought in order to punish and harass them for complaining about Madison's alleged failure to fix the leaks. Allegedly, Madison commenced this action because defendants wrote the February 2012 letter advising government officials and agencies that Madison did not perform the work that it was supposed to under the Settlement. Defendants say that Madison had a permit to perform maintenance at the building, and that their communication related directly to the granting and continuing effectiveness of that permit and future permits for work at that building.

Defendants are not entitled to the protection of the anti-SLAPP law. The letter to which Madison objects is not related to the continuation or granting of a permit. It does not ask that Madison be refused a permit or that a permit be revoked. At the time, Madison was not in the process of applying for a permit or the continuation of one. Registering an objection to Madison's construction work and its alleged failure to live up to the Settlement is not the same as objecting to a particular permit.

The complaint must nonetheless be dismissed as the factual allegations it contains do not support a single cause of action it asserts.

Fraudulent Misrepresentation

The first cause of action alleges that defendants fraudulently concealed the fact that the Corporation's architects had given the final approval of the Exterior Work. In the February 2012 letter, defendants fraudulently stated that the Exterior Work had not been completed in accordance

with the construction plans and building codes and that the final approval had not issued. Defendants caused counsel for the Corporation to write the other February 2012 letter to Madison's counsel, falsely stating that Madison's contractor had failed to perform the work in accordance with the drawings prepared by the architects. Defendants knew that the architects had certified the exact opposite. This letter reinforced Madison's belief that final approval of the Exterior work had not been given. Madison relied to its detriment on defendants and others to communicate the true facts regarding the final approval of the Exterior Work. As a result of the fraudulent assertions in both letters that Madison did not comply with its obligations in the agreements and the fraudulent concealment of the final approval of the Exterior work, Madison "was substantially delayed in its efforts to enforce its rights under the" agreements (amended complaint, ¶ 38).

To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation (*Swersky v Dreyer & Traub,* 219 AD2d 321, 326 [1st Dept 1996]). In addition to the foregoing elements, a cause of action for fraudulent concealment requires an allegation that the defendant had a duty to disclose material information and that it failed to do so (*Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13, 18 [1st Dept 2012]). A relationship where a party has a duty to disclose information to another party is a fiduciary relationship (*id.* at 18-19; *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]). Fraudulent omission also cannot be present unless there is a fiduciary duty placing upon one party a duty to disclose (*SNS Bank v Citibank,* 7 AD3d 352, 356 [1st Dept 2004]). The lack of any fiduciary relationship is fatal to Madison's

fraudulent concealment and fraudulent omission claims (*see Sehera Food Servs., Inc. v Empire State Bldg. Co., L.L.C.*, 74 AD3d 542, 543 [1st Dept 2010]; *Woods v 126 Riverside Dr. Corp.*, 64 AD3d 422, 423 [1st Dept 2009]).

The controversy about Madison's work on the building concerns water leaks, not whether Madison completed its obligations under the agreements, except to the extent that those obligations concerned leaks. The letters alleged that the building was still leaking after the time that the final approval and letter of completion issued. The allegations that defendants misrepresented facts about the final approval and the letter of completion are not separable from the allegations that defendants made about the leaks. Madison alleges that it performed all of its obligations under the agreements; however, it does not allege that the building did not leak or that the leaks were not its responsibility. Madison does not allege that defendants misrepresented facts when they claimed that the building was leaking.

Madison says that defendants fraudulently represented that the final approval had not issued, when in fact it had issued at the time that the February 2012 letters were written. In order for a false representation to be cognizable in the law as deceit, the plaintiff must have relied on it as an inducement to action or inaction (*Shea v Hambros PLC*, 244 AD2d 39, 46-47 [1st Dept 1998]). The plaintiff must also show that its reliance on the false misrepresentation was justified and reasonable (*Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498-499 [1st Dept 2011]; *320 Realty Mgt. Co. v 320 W. 76 Corp.*, 221 AD2d 174, 175 [1st Dept 1995]). Where a party has the means to discover the truth by the exercise of ordinary intelligence, and fails to do so, it cannot claim justifiable reliance on a defendant's misrepresentations (*Miller v Icon Group LLC*, 77 AD3d 586, 587-88 [1st Dept 2010]; *88 Blue Corp. v Reiss Plaza Assoc.*, 183 AD2d 662, 664 [1st Dept 1992]).

For instance, a claim for fraud will not lie where the party could have easily verified information through public records; in such a case reasonable reliance is lacking (*Wildenstein v 5H&Co, Inc.*, 97 AD3d 488, 490 [1st Dept 2012]).

Defendants contend that Madison could have easily discovered the final approval and letter of completion through DOB's files. Defendants produce a copy of the letter of completion, allegedly downloaded from the DOB files, and point out that Madison's copy of the letter of completion shows that it was downloaded from the DOB files on December 12, 2012, before this action began. Madison does not allege that it was somehow prevented from obtaining this information or deny defendants' statements. Madison also does not explain exactly how it relied on the alleged misrepresentation that the letter of completion and final approval had not issued. It does not state what action it took or refrained from taking because of the misrepresentation.

Further, defendants' letter of February 17, 2012 was not addressed to Madison, but to government agencies and officials. In general, a plaintiff cannot base fraud on reliance on misrepresentations that a defendant made to third parties (*Wildenstein,* 97 AD3d at 490; *Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297 [1st Dept 2004]). A plaintiff "cannot claim reliance on alleged misrepresentations of which it was unaware even by implication" (*Securities Inv. Protection Corp. v BDO Seidman,* 95 NY2d 702, 710 [2001]). Madison does not claim reliance or even awareness of the communications that defendants made to the third parties and it does not state when it became aware of those communications.

There are exceptions to the rule that the injured party must have relied on the fraudulent representations. Courts have recognized that fraud may exist when a false representation is made to a third party, the third party relies on the misrepresentation, and this reliance results in injury to

the plaintiff (*Prestige Bldr. & Mgt. LLC v Safeco Ins. Co. of Am.*, 896 F Supp 2d 198, 203 [ED NY 2012]; *Ruffing v Union Carbide Corp.*, 308 AD2d 526, 528 [2d Dept 2003]; *Buxton Mfg. Co. v Valiant Moving & Stor.*, 239 AD2d 452, 454 [2d Dept 1997]; *Desser v Schatz*, 182 AD2d 478, 479–80 [1st Dept 1992]; *3-G Servs. Ltd. v SAP V/Atland 845 WEA Assoc. NF LLC*, 2014 WL 1313368, 2014 NY Misc LEXIS 1518, *5, 2014 NY Slip Op 30838[U], *3 [Sup Ct, NY County 2014]).

Madison does not allege, except in vague terms, what harm it was caused by either letter or what wrongful benefits defendants sought to gain from the letters. The above allegations do not clearly state damage caused by fraud. A fraud claim must set forth "the circumstances constituting the wrong . . . in detail" (CPLR 3016 [b]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]) and here detail is lacking.

In a fraud action, a plaintiff may recover only the actual pecuniary loss sustained as a direct result of the wrong; this is known as the out-of-pocket rule (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). The damages are to compensate plaintiffs for what they lost because of the fraud, not for what they might have gained (*Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 15 NY3d 264, 271 [2010]; *L.K. Sta. Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 494 [1st Dept 2009]). Madison does not allege any out-of-pocket loss due to the fraudulent misrepresentations.

The second cause of action alleges aiding and abetting fraud, which cannot be sustained, as the cause of action for fraud is dismissed.

Tortious Interference with Contract and Business Relations

The third cause of action alleges that defendants intended to and did interfere with Madison's contracts with the Corporation. In a contract interference case, the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages (*Meghan Beard, Inc. v Fadina*, 82 AD3d 591, 592 [1st Dept 2011]). Madison states that the Corporation breached one or both of the contracts, but not what the breach was. The bare statement that a contract was breached is not enough to sustain the cause of action.

The fourth cause of action sounds in tortious interference with business relations. It alleges that each defendant using improper means, including falsehoods, tortiously interfered with Madison's business relations with the City of New York and its agencies. As a result, Madison and its members were unsuccessful in their efforts to be designated as developers of several real estate projects, which are named in the complaint. It is further alleged that defendants acted with the sole purpose of harming Madison.

To sufficiently plead tortious interference with business relations as opposed to tortious interference with a contract, the injured party must plead malice or improper means (*Shared Communications Servs. of ESR, Inc. v Goldman Sachs & Co.*, 23 AD3d 162, 163 [1st Dept 2005]). Fraudulent misrepresentation constitutes an improper means (*Krinos Foods, Inc. v Vintage Food Corp.*, 30 AD3d 332, 333 [1st Dept 2006]), but that claim is dismissed. Plaintiff also fails to plead malice as a motive for defendants' actions. The letters, including the Corporation letter critical of defendants, clearly state that defendants and the Corporation were worried about water leaking in the building. Therefore, malice is not shown.

Injurious Falsehood

The fifth cause of action alleges injurious falsehood. "The tort of . . . injurious falsehood consists of the knowing publication of false matter derogatory to the plaintiff's business of kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment" (*Waste Distillation Tech. v Blasland & Bouck Engrs.*, 136 AD2d 633, 634 [2d Dept 1988]). The elements of an injurious falsehood claim are (1) falsity of the alleged statement; (2) publication to a third person; (3) malice; and (4) special damages (*Biro v Conde Nast*, 883 F Supp 2d 441, 483 [SD NY 2012]; *see also Penn-Ohio Steel Corp. v Allis-Chalmers Mfg. Co.*, 7 AD2d 441 [1st Dept 1959]).

Defendants contend that the injurious falsehood claim is barred by the one-year statute of limitations (CPLR 215 [3]; *Riddell Sports Inc. v Brooks*, 872 F Supp 73, 80 [SD NY 1995]). Defendants' letter was mailed to third parties in February 2012. This action began in 2014, past the time limit. Madison contends that each publication of false material starts the statute of limitations running anew, and that the letter was republished in March 2014. A claim for injurious falsehood accrues when the falsehood is first published (*Nordco A.S. v Ledes*, 1999 WL 1243883, *2, 1999 US Dist LEXIS 19605, *6 [SD NY 1999]). Republication of the alleged falsehood by another does not cause the statute of limitations to run anew (*Clark v New York Tel. Co.*, 52 AD2d 1030 [4th Dept 1976], *affd* 41 NY2d 1069 [1977]; *see also Macy v New York World-Tel. Corp.*, 2 NY2d 416, 422 [1957] [the original publisher of a libel is not responsible for its subsequent publication by others]).

As the injurious falsehood claim is barred by the statute of limitations, the court need not discuss whether the claim otherwise states a cause of action. Also, the court need not determine whether the Corporation is a necessary party, since the complaint is dismissed.

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion to dismiss is granted and the amended complaint is dismissed, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: November 7, 2014

ENTER:

Ellen M. Coin, A.J.S.C.

HON. ELLEN M. COIN