SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART 58
Justice

---X

FRANK ANTERI,

Plaintiff,

- v -

ARTISAN CONSTRUCTION PARTNERS LLC, WINTHROP MANAGEMENT L.P.

Defendant.

INDEX NO. 652607/2017

MOTION DATE 7/27/2017

MOTION SEQ. NO. 002

DECISION AND ORDER

---X

The following e-filed documents, listed by NYSCEF document number 23, 24, 25, 26, 27, 28, 32, 33, 34, 35, 36

were read on this application to/for DISMISSAL

Upon the foregoing documents, it is

Plaintiff brought an action against two companies for the alleged failure to pay wages. Defendant Winthrop answered and asserted five counterclaims (1) fraudulent inducement; (2) fraudulent misrepresentation; (3) negligent misrepresentation; (4) tortious interference with business relationships; and (5) breach of contract. Plaintiff brought the instant motion seeking to dismiss the counterclaims pursuant to CPLR 3211(a)(7) and CPLR 3016(b).

Plaintiff argues that the fraud/misrepresentation counterclaims should be dismissed because they are not particularized and are vague. Further, because of Winthrop's experience, there was not justifiable reliance and because damages were not properly pled. Additionally, these counterclaims should be dismissed because they are duplicative of the breach of contract

claim. Finally, with respect to the negligent misrepresentation claim, since no "special relationship" existed, it should also be dismissed.

Plaintiff also argues that the tortious interference claim should be dismissed as the complaint failed to state what relationship was interfered with and how. As for the fifth counterclaim, plaintiff argues that it should be dismissed because, the agreement was one of employer/employee and the employer cannot maintain a cause of action against an employee for poor performance.

When deciding a motion to dismiss pursuant to CPLR §3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Associates, P.C. v. Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept 2002]. Under CPLR § 3211(a)(7), the court "accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 A.D.3d 192, 199 (1st Dept 2013) (quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001])).

A claim rooted in fraud must be pleaded with the requisite particularity (CPLR 3016(b)). The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]). "The purpose

of section 3016 (b)'s pleading requirement is to inform a defendant with respect to the incidents complained of," thus, "[w]e have cautioned that section 3016 (b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008] [internal quotation marks and citation omitted]). What is "[c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action," and although under CPLR 3016 (b) "the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud" (*id.* at 492). "Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*id.*). On a CPLR 3211 motion to dismiss, a court may consider affidavits to remedy pleading problems (*Leon v Martinez*, 84 NY2d 83, 88 [1994])" (*Sargiss v Magarelli*, 12 NY3d 527, 530–31 [2009]). Here, to the extent that the first three causes of action did not satisfy the particularity requirement, the affidavit of George Mullen, the vice president of Winthrop, remedied the pleading.

To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273 [1st Dept 2005]). Similarly, in a claim for fraudulent misrepresentation, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Here, the counterclaim alleges that plaintiff knowingly and with the

intention of inducing defendant into hiring plaintiff, made false statements relating to bidding and the completion of the Marcus Avenue project. Giving the counterclaims the benefit of every inference, counterclaimant has made sufficiently alleged these causes of action. Although plaintiff argues that Winthrop's property management experience and control of the finances should preclude reliance on any alleged misrepresentation, whether reliance is justified in this matter is a question of fact and should not be determined at this juncture.

Plaintiff also argues that these counterclaims should be dismissed as duplicative of the breach of contract claim. However, a fraudulent inducement claim will not be dismissed as duplicative of a breach of contract claim if plaintiff pleads "a breach of duty distinct from, or in addition to, the breach of contract" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]). In *GoSmile* the Court wrote: "[T]his Court, as well as the Court of Appeals, has held that a misrepresentation of present fact, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty" (*id.* at 81 *citing Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]). Here, counterclaimant alleges two distinct misrepresentations, one a misrepresentation of a present fact (that the contract had already been bought out), and two, a misrepresentation relating to the future completion. As counterclaimant has properly alleged a present misrepresentation, it has properly alleged a separate duty.

Plaintiff further argues that negligent misrepresentation should be dismissed based upon a lack of a special relationship. A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship 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 (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144

[2007]). The Court of Appeals has "recognized that not all representations made by a seller of goods or provider of services will give rise to a duty to speak with care (*see, International Prods. Co., supra,* at 338). Rather, liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" *Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). Hence "a claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given" (*Hudson Riv. Club v Consol. Edison Co. of New York, Inc.*, 275 AD2d 218, 220 [1st Dept 2000]). Here, although plaintiff states that the parties had a "privity-like relationship," the facts alleged in the Complaint and in counterclaim, simply discuss a meeting that occurred on December 21, 2016, where the parties allegedly discussed the completion of project and where plaintiff allegedly made misrepresentations to defendant. There are no facts pled that give rise to any special relationship or even any contact between these two parties, prior to this meeting and thus, this cause of action is dismissed.

Similarly, the cause of action for tortious interference with business relations is dismissed. To prevail on a claim for tortious interference with business relations in New York, a party must prove (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]). However, to be

liable under this cause of action, there must have been activities or wrongful conduct directed towards the third party (*Carvel Corp. v Noonan*, 3 NY3d 182 [2004] *citing G.K.A. Beverage Corp. v Honickman*, 55 F3d 762, 768 [2d Cir 1995] [claim dismissed because alleged conduct was not directed at plaintiff's customers]; *Fonar Corp. v Magnetic Resonance Plus, Inc.*, 957 F Supp 477, 482 [SD NY 1997] ["(U)nder New York law, in order for a party to make out a claim for tortious interference with prospective economic advantage, the defendant must . . . direct some activities towards the third party . . ."]; *Piccoli A/S v Calvin Klein Jeans-wear Co.*, 19 F Supp 2d 157, 167-168 [SD NY 1998] [claim must fail because "defendants' alleged conduct concededly was not directed towards any third party with whom Piccoli had an existing or prospective business relationship]). Here, although some of the alleged misrepresentations may ultimately impact a third party, none of plaintiff's alleged "activities" were directed at anyone other than Winthrop[1] and this cause of action is dismissed.

Finally, the motion seeking the dismissal of the breach of contract counterclaim is denied. Contrary to plaintiff's understanding and his own cause of action against defendant, reading the counterclaim broadly, it does not allege an employer/employee relationship. In fact, the counterclaim alleges that while payments were to be made to plaintiff, they were done on behalf of Artisan, a former employer of plaintiff. Giving the counterclaim every inference, that plaintiff was not a direct employee of Winthrop but someone working on the project through Artisan, counterclaimant has stated a counterclaim for breach of contract, in that the parties entered into

---

[1] Additionally, the affidavit of George Mullen states that Winthrop and Northwell had a contract. The cause of action for tortious interference with business relations may only be brought where no contractual relationship exists between the one bringing the complaint and the third party (*see generally Carvel Corp. v Noonan*, 3 NY3d 182 [2004]). In the instant where a contract exists, the appropriate cause of action is tortious interference with contract, which requires the defendant's intentional procuring of a breach (*Foster v Churchill*, 87 NY2d 744, 749–50 [1996]).

an agreement whereupon plaintiff would complete the project for certain price and did not do so despite performance by Winthrop. To the extent that plaintiff argues that he was not afforded the opportunity to complete the contract or that he did not make a promise but made an estimate, these are defenses that may be raised but do not necessitate dismissal of the counterclaim. The allegations seeking attorneys fees and punitive damages are dismissed as the counterclaim does not allege any basis for either. Accordingly, it is therefore

ORDERED, that the motion seeking dismissal of the counterclaims is granted only to the extent of dismissing the counterclaims for negligent misrepresentation, tortious interference with business relations, attorneys fees and punitive damages, and is otherwise denied.

Plaintiff to file an answer to the remaining counterclaims within 20 days of this order.

This constitutes the decision and order of the Court.

12/12/2017
DATE

DAVID BENJAMIN COHEN, J.S.C.
HON. DAVID B. COHEN
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE