

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

BENHAM CONSTRUCTORS, LLC f/k/a)	
LEIDOS CONSTRUCTORS, LLC,)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-16-732-D
)	
SAULSBURY INDUSTRIES, INC,)	
)	
Defendant.)	

ORDER

Before the Court is Defendant Saulsbury Industries, Inc.’s Motion to Dismiss Plaintiff’s Fraudulent Misrepresentation Claim [Doc. No. 32], filed pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6). Defendant seeks partial dismissal of the Second Amended Complaint, asserting that Plaintiff has failed to plead fraud with particularity and is improperly attempting to recast its contract claim as a fraud claim. Plaintiff has filed a response to the Motion, and Defendant has replied. Thus, the Motion is ripe for decision.

Plaintiff Benham Constructors, LLC brings this diversity action as the prime contractor on a construction project in Corpus Christi, Texas, claiming that Defendant breached the parties’ written subcontract agreement through unsatisfactory and untimely performance of its work on the project, and caused Plaintiff to incur damages in excess of \$8,000,000. As a separate claim, Plaintiff asserts that Defendant fraudulently induced Plaintiff to execute a particular written change order (#18 out of 26 change orders) by falsely representing that Defendant could and would accelerate its subcontract work and

meet certain deadlines. *See* Second Am. Compl. [Doc. No. 27], ¶¶ 23-29. Plaintiff claims Defendant's fraudulent conduct caused additional damages of \$1,413,200, which is the amount Plaintiff agreed to pay under Change Order #18.

Defendant moves to dismiss only Plaintiff's fraud claim, arguing that 1) Plaintiff has failed to meet the heightened pleading standard for fraud, and 2) Plaintiff simply claims that Defendant failed to perform contractual obligations under Change Order #18 and the claim should be treated as one for breach of contract.

Standard of Decision

“To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The question to be decided is “whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed.” *Lane v. Simon*, 495 F.3d 1182, 1186 (10th Cir. 2007) (internal quotation omitted).

Allegations of fraud are governed by the heightened pleading requirements of Rule 9(b), which provides:

In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Fed. R. Civ. P. 9(b). “At a minimum, Rule 9(b) requires that a plaintiff set forth the ‘who, what, when, where and how’ of the alleged fraud, and must set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.” *United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702, 726-27 (10th Cir. 2006) (internal quotations omitted); *see Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 522 (10th Cir. 2010); *Tal v. Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2006). To determine if factual allegations satisfy Rule 9(b), the Court reviews only the text of a complaint; matters outside the pleading may not be considered unless permitted by Rule 12(b)(6). *See Toone*, 716 F.3d at 521; *Sikkenga*, 472 F.3d at 726; *Tal*, 453 F.3d at 1264 & n.24. The Court “accept[s] as true all well-pleaded facts, as distinguished from conclusory allegations, and view[s] those facts in the light most favorable to the non-moving party.” *Sikkenga*, 472 F.3d at 726.

Discussion

In Count II of the Second Amended Complaint, Plaintiff asserts a fraud claim based on the following allegations: During the construction project, the parties negotiated and executed Change Order #18, by which Defendant “agreed to increase its manpower, add a second shift, and make other modifications to its performance in order to accelerate the Subcontract Work and achieve certain schedule milestones” and Plaintiff “agreed to pay [Defendant] the sum of \$1,413,200.” *See* Second Am. Compl. [Doc. No. 27], ¶¶ 24-25. “Prior to and at the time [Defendant] executed Change Order #18, [Defendant] knew that it could not – or would not – accelerate the Subcontract Work and achieve certain schedule

milestones. Nevertheless, [Defendant] represented to [Plaintiff] that it could and would do so to induce [Plaintiff] to execute Change Order #18 and pay more than \$1.4 million to [Defendant].” *Id.* ¶ 26. Further, Defendant’s “representations to [Plaintiff] were false and material;” Plaintiff “reasonably and actually relied upon [Defendant’s] false and material misrepresentations to its detriment by, among other things, executing Change Order #18 and paying \$1,413,200 to [Defendant];” and “[a]s a direct and proximate result of [Defendant’s] actions, [Plaintiff] incurred damages in the amount of \$1,413,200.” *Id.* ¶¶ 27-29.

Setting aside the issue of whether Plaintiff can simultaneously assert contract and tort claims under the circumstances, the question presented is whether the Second Amended Complaint adequately states a claim of fraud in the manner required by Rule 9(b) and Rule 12(b)(6).¹

As summarized by the Oklahoma Supreme Court, a common law claim of fraud requires proof of the following essential elements: “1) a false material misrepresentation, 2) made as a positive assertion which is either known to be false or is made recklessly without knowledge of the truth, 3) with the intention that it be acted upon, and 4) which is relied on by the other party to his (or her) own detriment.” *Bowman v. Presley*, 212 P.3d 1210, 1218 (Okla. 2009) (footnotes omitted). The inadequacy of Plaintiff’s fraud claim asserted in the Second Amended Complaint is obvious when examined under the Rule 9(b)

¹ The parties assume in their arguments that Oklahoma law applies, without addressing any choice of law issue. Absent any basis in the record to disagree with the parties, the Court makes the same assumption.

standard. Plaintiff does not describe the alleged false representation in sufficient detail to know its contents, does not identify who made it, and provides no basis to know when, where, or how it was made.

Plaintiff attempts through argument in its brief to supply the missing information by providing a copy of Change Order #18, which is central to its claim and may be considered. *See Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009); *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-85 (10th Cir. 1997). Plaintiff points to the representative of Defendant who signed the change order as the person making the representations, the location of the project as the place where the representations were made, and the substance of Defendant's obligations under the change order to supply the content of the representations.² None of these factual allegations are included in the Second Amended Complaint nor, if they were, would they be sufficient to satisfy the requirements of Rule 9(b).³

Tacitly recognizing the insufficiency of its pleading, Plaintiff alternatively argues that it should be allowed to further amend its pleading to add factual allegations to support a fraud claim. *See Pl.'s Resp. Br. [Doc. No. 35] at 2-4.* Plaintiff has not filed a motion

² As stated in Plaintiff's pleading, Change Order #18 amended the scope of Defendant's work under the subcontract by requiring Defendant to implement a second shift, provide additional workers, and make other changes to accelerate the work. *See Pl.'s Ex. 1 [Doc. No. 35-1].* Plaintiff in its brief identifies these requirements as Defendant's representations. *See Pl.'s Resp. Br. [Doc. No. 35] at 5.*

³ Moreover, using the language of Changer Order #18 to support Plaintiff's fraud claim seems inconsistent with Plaintiff's additional argument that Defendant's tortious conduct was separate from its alleged breach of the subcontract. *See Pl.'s Resp. Br. [Doc. No. 35] at 2-4.*

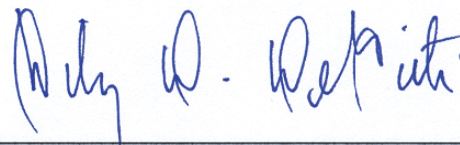
to amend as required by Fed. R. Civ. P. 15(a)(2) or obtained Defendant's consent to an amendment. Plaintiff also has not complied with LCvR15.1; no proposed pleading is presented, and Plaintiff does not address the deadline established by the Scheduling Order. Therefore, the Court declines to entertain Plaintiff's informal request to amend its pleading, but will dismiss the fraud claim without prejudice to a future filing.

Conclusion

For these reasons, the Court finds that Defendant is entitled to the dismissal of Plaintiff's fraudulent misrepresentation claim for failure to state a plausible claim of fraud.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss Plaintiff's Fraudulent Misrepresentation Claim [Doc. No. 32] is GRANTED. Count II of the Second Amended Complaint is dismissed without prejudice to a future motion by Plaintiff to further amend its pleading, if appropriate.

IT IS SO ORDERED this 18th day of July, 2017.



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE