Perini Corp. v City of New York

2013 NY Slip Op 31879(U)

August 12, 2013

Sup Ct, New York County

Docket Number: 601720/03

Judge: Kathryn E. Freed

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SCANNED ON 8/13/2013
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 601720/2003
PERINI
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
DISMISS Cal # 69

INDEX NO. ________

MOTION DATE ________

MOTION SEQ. NO. ________

The following papers, numbered 1 to _____, were read on this motion to/for ________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ________ | **No(s).** ________

Answering Affidavits — Exhibits ________ | **No(s).** ________

Replying Affidavits ________ | **No(s).** ________

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

9

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
AUG 13 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8-12-13 ________, **J.S.C.**

AUG 12 2013

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. **CHECK ONE:** .... ☐ **CASE DISPOSED** ☑ **NON-FINAL DISPOSITION**

CHECK AS APPROPRIATE: ....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

ᵉCK IF APPROPRIATE: .... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**

☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

--X

PERINI CORPORATION,

Plaintiff,

-against-

CITY OF NEW YORK (Honeywell Street and Queens Boulevard Bridges)

Defendant.

--X

DECISION/ORDER
Index No. 601720/03
Seq. No 006

PRESENT
Hon. Kathryn E. Freed
J.S.C.

FILED
AUG 13 2013
COUNTY CLERK'S OFFICE
NEW YORK

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED..................	......1-3 (exs.4-40)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED...........	....
ANSWERING AFFIDAVITS..	........4 (exs.A-L)
REPLYING AFFIDAVITS..	........5............
OTHER...................(Memos of Law)...	.......6-7..........

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this contract dispute, plaintiff Perini Corporation (Perini) moves, pursuant to CPLR§ 3211 (a) (7) and §3212 (a) and (e), for an order dismissing defendant City of New York's (defendant or NYC) seventeenth and eighteenth affirmative defenses and first and second counterclaims.

After a review of the papers presented, all relevant statutes and caselaw, the Court **grants** the motion.

Factual and procedural background:

In 1999, Perini and the City entered into a contract for the reconstruction of the Honeywell

Street and Queens Boulevard Bridges which run over the Amtrak and Long Island Railroad train yard in Queens (the Project). The United States Department of Transportation (US DOT) provided the majority of funding for the project and, pursuant to US DOT guidelines, which have been adopted by New York State and NYC, companies that receive federal grants for a construction project must establish a program that is designed to award a percentage of the work on that project to Disadvantaged Business Enterprise (DBE) contractors. Plaintiff submitted a DBE plan for the Project and defendant accepted plaintiff's proposal for the Project conditioned on plaintiff's satisfaction of the DBE program requirements (Smollens aff., exhibit A).

In 2003, Perini commenced this breach of contract action against defendant demanding over $16 million in damages on the grounds that defendant failed to pay it an equitable adjustment for damages caused by certain work conditions and defendant's failure to apprise it of conditions that would affect or delay the work. In December 2008, a federal grand jury indicted two of plaintiff's former officers on charges of conspiracy, mail fraud, wire fraud, and money laundering in connection with federally funded contracts entered into by plaintiff between 1998 and 2000. The indictment, which was unsealed in March 2009, charges the officers with conspiring with other contractors to falsely represent, in proposals and other documents, that DBE subcontractors would perform work in satisfaction of the DBE requirements when, instead, Perini used non-DBE subcontractors or its own forces to perform the work.

Following the unsealing of the indictment, defendant moved to amend the answer to add the affirmative defenses of fraud in the inducement and fraud/illegality in the performance of the contract. It also sought to assert two counterclaims based on Perini's allegedly fraudulent conduct.

The 17th affirmative defense and first counterclaim, alleging fraud in the inducement, state that in order to induce the award of the contract, Perini circumvented the DBE requirements by entering into a conspiracy with several "DBE subcontractors" to falsely represent that the DBE subcontractors were performing work on the Project when they were not. The 18th affirmative defense and second counterclaim allege that Perini knowingly and falsely represented that it was making a good faith effort to comply with the DBE requirements.

In opposition to the motion to amend, Perini argued that: 1) the defendant waived its fraud claims when it entered into a Memorandum of Understanding (MOU) with Perini in May 2004 because, at that time, the defendant knew or should have known, that Perini had committed fraud; 2) the fraud claims were untimely because the alleged fraud accrued no later than 2002; 3) fraud cannot be predicated on promises of future performance; and 4) Perini's claims are barred by the equitable doctrine of laches because defendant knew about Perini's alleged involvement in the DBE fraud as early as 2002 (Smollens aff, exhibit D, ¶¶ 4, 16-21, 22-26, 33-39, 40-42).

In support of the amendment, defendant maintained that the fraud claims were timely because it had no knowledge that Perini was either the target of, or the subject of, a criminal investigation in connection with DBE fraud prior to entering into the MOU in May 2004 and that it had no knowledge of Perini's complicity in the allegedly fraudulent scheme until the indictment was unsealed in March 2009 (Smollens aff, exhibit E, ¶¶ 16-26).

Defendant also argued that the key issue underlying the fraud claims was not future performance, but rather, whether plaintiff deliberately misled defendant about "present facts"– that is, its alleged collusion with DBE subcontractors in a fronting scheme, which scheme was developed before Perini entered into the contract and which continued throughout Perini's performance under

the contract.

Lastly, defendant argued that it was not guilty of laches because Perini had failed to show that the delay in amending the answer was prejudicial because Perini knew or should have known of its officers' allegedly fraudulent actions prior to commencing this action.

By decision entered March 18, 2010 (*Perini Corp. v. City of New York*, 27 Misc.3d 813 [Barbara Jaffe, J.]), Justice Jaffe granted the branch of the defendant's motion which sought leave to amend the answer to add the affirmative defenses and counterclaims sounding in fraud. In that decision, the court considered plaintiff's arguments regarding the statute of limitations, the MOU, laches, and failure to state a fraud claim and found that "plaintiff neither alleges nor demonstrates that the proposed amendment surprised or would prejudice it" and that the proposed amendment "may be meritorious given the indictment of plaintiff's officers" (*id.* at 819).

Moreover, the court stated:

> " plaintiff offers no evidence that defendant knew of plaintiff's alleged fraudulent activities before the unsealing of the indictment in 2009, and even if the defendant knew before then, a delay in moving for leave does not, in and of itself, preclude the amendment of a pleading absent a demonstration of significant prejudice to the opposing party. To the extent that the 2004 memorandum [MOU] estops defendant from interposing the new fraud defenses and counterclaims, the subsequent indictment of plaintiff's officers effectively negates that estoppel"

(*id.* at 819 [internal citation omitted]).

Moreover, this court vacated the note of issue because discovery was incomplete (*id.* at 817).

In April 2010, Perini filed a notice of appeal of the March 2010 decision but it failed to perfect that appeal.

Positions of the parties:

In support of this motion to dismiss, Perini argues that the 17th and 18th affirmative defenses and the first and second counterclaims must be dismissed because the fraud in the inducement defense and counterclaim cannot be based on a promise to perform in the future and that the first and second counterclaims are untimely and barred by laches. Alternatively, it argues that the second counterclaim is, in actuality, a breach of contract claim which is barred by the six year statute of limitations.

In support of its arguments, Perini relies on documents generated by the defendant during the course of its work on the Project, a press release from the US DOT Office of the Inspector General, as well as, inter alia, Federal Construction Fraud Task Force documents and documents associated with Perini's bid on the Croton project. Most of these documents were not introduced in opposition to the defendant's motion to amend the answer (see the Band affidavit and annexed exhibits). Perini contends that the claims are time barred because, based on these documents, defendant knew or at minimum had reason to make inquiry about Perini's allegedly fraudulent activities long before the unsealing of the indictment in 2009.

In opposition to the motion, defendant contends that dismissal should be denied because the issues of the timeliness of the affirmative defenses and counterclaims as well as the sufficiency of the pleadings were adjudicated by the court in the March 18, 2010 order. Defendant also argues that the new documentary evidence that Perini relies on was not available to defendant prior to unsealing the indictment; that the fraud in the inducement claim is based on plaintiff's "present knowledge" because, when Perini entered into the contract, it knew that it would not use DBE contractors to perform the work; and that the Band affidavit is without merit because Band does not have personal

knowledge of the facts.

Conclusions of law:

A. CPLR 3211 (a) (7) Motion to Dismiss

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v. Gani Realty Corp.*, 60 A.D.3d 491 [1st Dept. 2009]); *Skillgames, LLC v. Brody,* 1 A.D.3d 247, 250 [1st Dept. 2003], citing *McGill v. Parker*, 179 A.D.2d 98, 105 [1st Dept. 1992]); see also *Cron v. Harago Fabrics*, 91 N.Y.2d 362, 366 [1998]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, . . . (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; *see White Plains Plaza Realty v. Cappelli Enterprises, Inc.*, __ NYS2d __, 2013 WL 3455640 [2d Dept 2013]). "However, factual allegations that are clearly contradicted by documentary evidence are not entitled to such consideration" (*see Skillgames*, 1 A.D.3d at 250).

The question of whether the pleader has a cause of action on a motion to dismiss requires the court to make a more rigorous inquiry than on a motion to amend where " [the pleader] need not establish the merit of [their] proposed new allegations . . ., but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 [1st Dept. 2010]; CPLR§ 3025 [b]). Accordingly, on this motion to dismiss, where the parties have submitted evidentiary material, this court will consider whether defendant has causes of action for fraud in the inducement and fraud or illegality in the performance of the contract[1].

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[1] Defendant's argument that the March 18, 2010 decision constitutes law of the case is without merit. The doctrine of "law of the case" is "in essence a doctrine of intra-action res judicata," which "holds that once an issue is decided, it cannot again be litigated at trial level"

[* 8]

Statute of Limitations:

A cause of action in fraud must be commenced within 6 years of the date of the fraudulent act, or within two years of the date the fraud was, or with reasonable diligence, could have been discovered (*Ghandour v. Shearson Lehman Bros.*, 213 A.D.2d 304, 305 [1st Dept 1995]). "The inquiry as to the time that a plaintiff could, with reasonable diligence, have discovered the fraud is a mixed question of law and fact and turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred (*id.* at 305-306).

Here, plaintiff has submitted evidence that demonstrates that defendant had reason to make inquiry regarding the alleged fraud long before the unsealing of the indictment in 2009 (Band aff, exhibits 20, 30, 31, 34, 35, 36 and 37). Indeed, the defendant's own inspector issued daily reports for the period June through November 2001 which show that Fairview Contracting Corporation's (Fairview) DBE work on the project was being performed by Walter Construction (Walter), a non-DBE contractor (Band aff, exhibit 37). Moreover, the U.S. DOT Office of Inspector General issued a press release in September 2004, which states that the president of Fairview plead guilty to money laundering charges in connection with DBE fraud that occurred between January 2000 and December 2001 when he conspired with representatives of Perini and Walter to commit fraud. The press release states, "[t]he scheme involved Fairview acting as a 'front' DBE under three NY City DOT

(Siegel, NY Prac § 276 at 475 [5th ed]). "Once a point is decided within a case, the doctrine of law of the case makes it binding not only on the parties, but on the court as well: no other judge of coordinate jurisdiction may undo the decision" (*id.*, §448 at 781, citing *Matter of Dean v Bradford,* 158 AD2d 771, 772 [3d Dept 1990)]). The doctrine , however, applies only to legal determinations resolved on the merits (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

In this case, the motion to amend did not resolve the issues of timeliness or sufficiency of the pleading on the merits. It simply determined that the amendment "may be meritorious" and that the amendment would not cause plaintiff prejudice or surprise.

construction projects in which Walter actually performed the subcontracted work, while Fairview submitted fraudulent invoices for the associated labor and materials to Perini . . . ." (Band aff, exhibit 20).

Perini has also submitted a November 11, 2002 letter from STV, Inc., the defendant's resident engineer, which memorialized a meeting between STV and members of NYC Department of Transportation (DOT) and New York State DOT. The letter states that Perini made no effort to meet its DBE goals and that it provided "'contrived paperwork in an effort to prove higher DBE participation'" (Band aff, exhibit 34). It also produced a 2003 letter from the New York State DOT to NYC DOT stating that one of Perini's DBE contractors, VVSS, did not do any work on the project and that Perini did Fairview's assigned work.

In this case, the documentary evidence demonstrates that plaintiff possessed timely knowledge, "sufficient to have placed [it] under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations" (*Rite Aid v. Grass*, 48 A.D.3d 363, 364-365 [1st Dept. 2008]; *see also Port Parties, Ltd. v. ENK Intern. LLC*, 84 A.D.3d 685, 686 [1st Dept. 2011]).

The defendant's argument that it could not have stated these fraud causes of action until the indictments were unsealed because, before then, it did not have the specific information that Perini's principals were involved in the alleged fraud or that the contract at issue in this action was involved, is without merit. The notice that triggers the two year discovery period is not notice reflecting positive knowledge of the fraud, or reflecting all the legal elements of a fraud claim (*Davis v. Smith Corp.*, 262 A.D.2d 752, 754-755 [3d Dept. 1999]). Rather, "a plaintiff need only be aware of enough operative facts so that, with reasonable diligence, [he] could have discovered the fraud (id. at 755

[internal quotation marks and citations omitted]; *see also Hopkinson v. Estate of Siegal*, 2011 WL 2935876 *3 [SD NY July 12, 2011]; *City of New York v. Morris J. Eisen*, P.C., 226 A.D.2d 244, 244-245 [1st Dept. 1996][city should have discovered the fraud prior to the date testimony was given in a criminal proceeding to incriminate the defendant]).

> "Where circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him"

(*Prestrandrea v. Stein*, 262 AD2d 621, 622 [2d Dept. 1999][internal quotation marks and citations omitted])[2].

Here, defendants have failed to address or refute their knowledge of the US DOT Department of Investigation press release or the STV or inspection reports which were sufficient to have put a reasonable person under a duty to make inquiry regarding the alleged fraudulent scheme (see Kantor aff, Smollens aff, exhibit F).

Based on the fact that the Court finds that defendants' 17th and 18th affirmative defenses and first and second counterclaims are time barred, it will not address plaintiff's additional arguments.

Accordingly, it is hereby

ORDERED that plaintiff, Perini Corporation's motion to dismiss the 17th and 18th affirmative defenses and first and second counterclaims is granted; and it is further

ORDERED that the parties shall appear at a scheduled compliance conference on September

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[2] Assuming arguendo that the 2nd counterclaim is a breach of contract claim, it would be barred by the six-year contractual limitations period (see *Brick v* Cohn-Hall-Marx *Co.,* 276 NY 259 [1937]; CPLR 213 [2]).

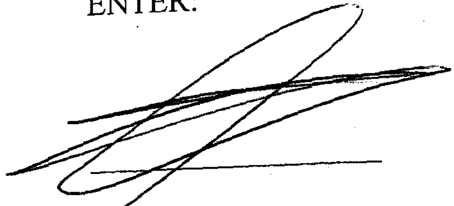
[* 11]

17, at 80 Centre Street at 2:00 p.m. in Room 103; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: August 12, 2013
AUG 12 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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