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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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VERRINO CONSTRUCTION SERVICES CORP.,

Plaintiff,

- v. -

AMG-NYC LLC, 680 FIFTH AVENUE ASSOCIATES L.P., MICHAEL PERRONE, JOYA PERRONE, ROBERT PEARL and JOHN DOE 1 through JOHN DOE 10,

Defendants.

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AMG-NYC LLC, MICHAEL PERRONE, JOYA PERRONE and ROBERT PEARL,

Third-Party Plaintiffs,

-v-

C.B. RICHARD ELLIS, INC., ELIZABETH RAMIREZ a/k/a ELIZABETH RAMIREZ NOBILE, ALESSANDRO MACALUSO and RICHARD VERRINO,

Third-Party Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Index No.
151461/2014

DECISION and ORDER

Mot. Seq. 002

This action arises from a construction project located at 680 Fifth Avenue, New York, New York, twenty-second and twenty-fourth floors (the "Project" or "Property"). Plaintiff, Verrino Construction Services Corp. ("VCS"), brings the underlying action for breach of contract, *quantum meruit*, and satisfaction of a mechanic's lien to recover money allegedly owed under an alleged agreement between VCS and AMG (the "VCS Agreement"). VCS claims to have entered into the VCS Agreement to "pull the construction permit and perform work, labor and

services and furnish necessary materials and equipment, in connection with the renovation of floors 22 and 24 at the building located at 680 Fifth Avenue, New York, New York". VCS claims to have performed its obligations under the VCS Agreement, and that AMG failed to pay the full amount of the balance due and owing for VCS's purported work, labor, services, materials, and equipment under the VCS Agreement.

Defendants/third-party plaintiffs, AMG-NYC LLC ("AMG"), Michael Perrone ("Michael"), Joya Perrone ("Joya"), and Robert Pearl ("Pearl") (collectively, "Third-Party Plaintiffs"), commenced a third-party action for fraud and racketeering based on an alleged scheme to defraud Third-Party Plaintiffs of funds. Third-Party Plaintiffs interposed an answer (the "Answer") to VCS's complaint on June 3, 2014, denying VCS's allegations respecting the VCS Agreement and asserting various affirmative defenses, counterclaims, and cross-claims. The Answer is annexed to Third-Party Plaintiffs' complaint (the "Third-Party Complaint").

Third-Party Plaintiffs allege that third-party defendants, C.B. Richard Ellis, Inc. ("CBRE"), Elizabeth Ramirez a/k/a Elizabeth Ramirez Nobile ("Ramirez"), Alessandro Macaluso ("Macaluso"), and Richard Verrino ("Verrino"), (collectively, "Third-Party Defendants"), engaged in a scheme to defraud Third-Party Plaintiffs by, *inter alia*, presenting false invoices to AMG, demanding kickbacks from AMG and/or Michael and Joya, AMG's principals, and attempting to extort a fifty-percent ownership interest in AMG.

The Third Party Complaint alleges that Ramirez is employed by CBRE and "acts as an agent for co-defendant 680 Fifth Avenue Associates, LLP ("Fifth"), as a real estate manager working in New York City." Verrino is alleged to be the "President and sole shareholder" of VCS. It is alleged that Macaluso "works in the construction trades in New York City."

Third-Party Plaintiffs' complaint alleges that "on or about May 6, 2013, Ramirez, as the real estate manager for CBRE, and agent for Fifth, proffered a contract to . . . AMG" "for AMG to provide certain work and services as set forth therein". An unsigned copy of this contract (the "Contract") is annexed to Third-Party Plaintiffs' complaint. The Answer asserts:

> [T]he alleged representative of Fifth and CBRE, [Ramirez] refused to sign the contract on behalf of Fifth and/or CBRE, unless and until Defendant[/Third-Party

> Plaintiff] AMG and/or the individual Defendants[/Third-Party Plaintiffs] agreed to a "kickback" arrangement whereby Defendant Fifth's and CBRE's representative Ramirez and [VCS]'s representative, Macaluso and/or his company Sandro, Inc. (hereinafter "Sandro"), received a percentage of the contract to AMG.

Third-Party Plaintiffs' complaint alleges that defendant/third party plaintiff "Michael, acting on behalf of AMG, signed the CBRE Agreement and at or about the same time Ramirez advised that she needed to be 'taken care of' in order to sign the contract on behalf of CBRE as agent for Fifth." Third-Party Plaintiffs' complaint asserts:

> [A]t the time of presenting the proposal and, for a considerable time thereafter, Ramirez, on behalf of CBRE, as agent for Fifth, regularly told Defendants AMG and named Defendants/Third-Party Plaintiffs Michael and Pearl, that she would "not execute the contract unless she was paid a percentage of the deal".

Third-Party Plaintiffs' complaint also alleges that "[o]n May 6, 2013, the date of the CBRE/AMG proposal, . . . Ramirez and Macaluso had a New Jersey attorney named Roger B. Radol, who upon information and belief, is Ramirez's personal attorney, prepare a Shareholders' Agreement (hereinafter "Agreement" . . .) naming Ramirez and Macaluso each as twenty five percent (25%) shareholders of [AMG]". An unsigned copy of this purported shareholders' Agreement is annexed to Third-Party Plaintiffs' complaint. Third-Party Plaintiffs' complaint asserts that "[i]n furtherance of this scheme to obtain payment, Ramirez advised that she would not sign off on any work unless the Agreement was executed." Third-Party Plaintiffs' complaint alleges that "Third-Party Plaintiffs refused to execute the unauthorized and illegal Agreement."

Third-Party Plaintiffs' complaint further alleges, through the Answer, that "Macaluso introduced Defendants/Third-Party Plaintiffs] to [Verrino] on or about the first week of May, 2013, after the alleged contract date between Plaintiff and AMG." Third-Party Plaintiffs' complaint alleges that "[n]o where [sic] in said contract between CBRE, as agent for Fifth, and AMG, does the name of VCS, the name of the Plaintiff in the underlying action, appear." The Answer asserts that VCS "managed the Project with Fifth by CBRE or their agent Ramirez in hiring and

retaining any and all subcontractors, overseeing labor, allegedly reviewing bids and providing generally accepted general contracting services."

Verrino now moves for an Order, pursuant to CPLR §§ 3211(a)(1), (a)(3), and (a)(7), dismissing Third-Party Plaintiffs' complaint as against Verrino, on the basis of documentary evidence, lack of capacity, and failure to state a cause of action; or, alternatively, pursuant to CPLR § 602(a), transferring this case to The Honorable Manuel J. Mendez, J.S.C., so that it may be consolidated with a special proceeding under Lien Law § 76 which is currently pending before Justice Mendez.

Third-Party Plaintiffs oppose.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > (1) a defense is founded upon documentary evidence; or
> >
> > (3) the party asserting the cause of action has not legal capacity to sue;
> >
> > (7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to 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 citations omitted]). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep't 2007] [citation omitted]). "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]). In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't, 2003] [internal citations omitted]; CPLR § 3211[a][7]).

The first cause of action of the Third Party Complaint alleges that Ramirez "fraudulently induced AMG to enter into an agreement with CBRE making AMG believe that they would be providing services pursuant to a contract with CBRE. Said Agreement was never signed by Ramirez as agent for CBRE and Fifth, nor by any other person or entity." It further alleges that "Michael, acting on behalf of AMG, signed the CBRE Agreement and at or about the same time Ramirez advised that she needed to be 'taken care of' in order to sign the contract on behalf of CBRE as agent for Fifth." It further alleges, "In furtherance of this scheme to obtain payment, Ramirez advised she would not sign off on any work unless the Agreement was executed. Defendants/Third Party Plaintiffs refused to execute the unauthorized and illegal Agreement Certain funds were paid by CBRE on behalf of Fifth, but upon information and belief, the unpaid balance due AMG is, upon information and belief, an amount equal to that which Ramirez sought for herself and Macaluso."

The elements of fraudulent inducement are: (1) a false representation of material fact; (2) known by the utterer to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages. (*MBIA Ins. Corp. V. Credit Suisse Securities (USA) LLC*, 32 Misc.3d 758, 927 NYS2d 517 [Sup Ct NY, 2011]).]). A cause of action sounding in fraud must be pleaded with particularity. (CPLR § 3016[b]).

Here, even accepting Third-Party Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the first cause of action for fraudulent inducement fails to state a claim as against Verrino. Indeed, Third-Party Plaintiffs' complaint asserts that "VCS is neither a contracting party nor named as a third-party beneficiary thereof", and that "Defendants/Third-Party Plaintiffs never met Verrino until after the CBRE proposal was given to AMG."

As for Third-Party Plaintiffs' second cause of action, also for fraud, a corporate officer or director generally is not liable for fraud unless he or she personally participates in the misrepresentation, or has actual knowledge thereof. (*Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 44 [1980] [citations omitted]). By contrast, "[m]ere negligent failure to acquire knowledge of the falsehood is insufficient." (*Id.*).

The second cause of action of Third Party Complaint alleges that, "Macaluso and Ramirez submitted fraudulent invoices to AMG in order to obtain funds for services not rendered" and that "AMG and the Individual Defendants refused to make payments to Third Party Defendants Macaluso and Ramirez." The Third Party Complaint further alleges that, "[i]n a back-up invoice sent to AMG, references were

made to a check to Ramirez which was endorsed by a "Katherine Ramirez", a party unknown to Defendants[/Third-Party Plaintiffs], with a routing number for a bank in Secaucus, New Jersey near where Ramirez lives." Third-Party Plaintiffs' complaint asserts that "when AMG wrote a check to [non-party Sandro, Inc. ("Sandro")], the check was similarly routed through the same Secaucus bank and endorsed personally by Macaluso, not Sandro." Third-Party Plaintiffs' complaint alleges that such actions "reflect an ongoing pattern in which, upon information and belief, the Third-Party Defendants and Plaintiff VCS cashed checks through banks, check cashing agencies and other non-banking entities", and that, "[t]hese actions, coupled with the extortion and attempts to receive 'kickbacks' from AMG and/or its principals, reflect an ongoing fraud by Third-Party Defendants".

Third-Party Plaintiffs' complaint further alleges, through the Answer, that VCS "on a regular basis, submitted false, inflated, improper and duplicate bills to AMG". The Answer further asserts that:

> [VCS] failed to supervise or review bids and passed on to Defendant[/Third-Party Plaintiff] AMG high subcontracting bills; submitted bills for numerous lunches, dinners and hotel rooms, including champagne ordered through room service, submitted bills for reimbursement for alleged contracting services for which no invoices were submitted and, upon information and belief, do not exist . . .

The Answer asserts that "AMG, Pearl, and Michael have regularly requested appropriate documentation from VCS and Verrino, but have never received the same."

Here, even accepting Third-Party Plaintiffs' allegations as true and drawing all inferences on behalf of the non-moving party, the four corners of Third-Party Plaintiffs' complaint fail to plead with particularity a cause of action for fraudulent invoices as against Verrino individually. Even accepting Third-Party Plaintiffs' allegations that VCS misrepresented certain invoiced amounts as true, Third-Party Plaintiffs' allegation that *VCS* "has actively participated in the extortive acts of Macaluso and Ramirez" is insufficient, without more, to plead "personal participation" or "actual knowledge" on the part of *Verrino* personally.

Moreover, under established principles of agency law, "the acts of agents, and the knowledge they acquire while acting within the scope of their authority are

presumptively imputed to their principals." (*Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465 [2010]). Here, the Third-Party Complaint fails to plead an agency relationship between either Macaluso or Ramirez and Verinno, personally. Accordingly, the four corners of Third-Party Plaintiffs' complaint do not plead a basis to impute Macaluso's or Ramirez's purported wrongdoing to Verrino, individually. (*Serino v. Lipper*, 994 N.Y.S.2d 64, 70 [1st Dep't 2014]; *Weinberg v. Mendelow*, 113 A.D.3d 485, 486 [1st Dep't 2014] [observing that, "even the sole owner of a corporation is entitled to the presumption that he is separate from his corporation"]).

As for Third-Party Plaintiffs' third cause of action, for damages under 18 U.S.C. § 1961 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as an initial matter, State Courts have concurrent jurisdiction over RICO civil claims. (*Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 461 [1988]; *Allied Props., LLC v. 236 Cannon Realty*, LLC, 3 A.D.3d 318 [1st Dep't 2004] [observing that, "the premise . . . that state courts do not have concurrent jurisdiction over RICO claims and that they must resort to federal court, is inaccurate").

In order to state a RICO civil claim, a plaintiff must meet two pleading burdens. (*Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 [2d Cir. 1983]). First, a plaintiff must plead the seven elements of a substantive RICO claim: (1) that the defendant; (2) through the commission of two or more acts; (3) constituting a "pattern"; (4) of "racketeering activity"; (5) directly or indirectly invests in, or maintains an interest in, or participates in; (6) an "enterprise"; and, (7) the activities of which affect interstate or foreign commerce. (18 U.S.C. § 1962[a]-[c]; *Moss*, 719 F.2d at 17). Second, in order to invoke RICO's civil remedies of treble damages, attorney's fees, and costs, a plaintiff must plead that he was, "injured in his business or property *by reason of* a violation of section 1962." (*Moss*, 719 F.2d at 17 quoting 18 U.S.C. § 1964[c] [emphasis added in the original]). Additionally, the seven elements constituting a RICO claim must be pleaded with particularity. (*Fekety v. Gruntal & Co.*, 595 N.Y.S.2d 190, 190 [1st Dep't 1993]).

To establish a pattern of racketeering activity for purposes of RICO, a plaintiff must allege at least two racketeering acts, as those acts are defined under 18 U.S.C. § 1961(1), within a ten-year period. (*East 32nd St. Assocs. v. Jones Lang Wootton USA*, 191 A.D.2d 68, 72 [1st Dep't 1993]). Acts of mail fraud and wire fraud under 18 U.S.C. § 1341 and 18 U.S.C. § 1343, respectively, are racketeering acts within the meaning of RICO. In addition:

> The United States Supreme Court has held that, by its use of the word "pattern", the statute requires not merely a multiplicity of predicates, but that those predicates are ordered by means of "the relationship they bear to each other or to some external organizing principle" and that "they amount to or pose a threat of continued criminal activity".

(*East 32nd St. Assocs. v. Jones Lang Wootton USA*, 191 A.D.2d 68, 72-73 [1st Dep't 1993] quoting *H.J. Inc. v Northwestern Bell Tel. Co.*, 492 US 229, 238, 239 [1989]).

The requisite relationship between predicates may be established where the alleged predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." (*Id.*). As far as the requirement of continuity is concerned, a plaintiff may satisfy the requirement of continuity "in various ways, including a showing that the predicate acts, in and of themselves, extended over a sufficiently substantial period of time." (*Id.*). Alternatively, a plaintiff may satisfy the requirement of continuity by showing that the predicate acts "establish a threat of continued racketeering activity." (*Id.* at 73). Such "open-ended continuity" may be demonstrated, for example, by a showing that the predicates themselves contained a specific threat of repetition, such as a showing that they were part of a series of regularly scheduled extortionate demands. (*Id.*).

Here, Third-Party Plaintiffs' complaint asserts:

> The acts involved as set forth herein plus other acts designed to convert funds due Defendant AMG, theft of funds due AMG by use of wire and/or mail fraud and constructive fraud by the submission of false billings to Defendant AMG by Third-Party Defendant Verrino, e-mails, wire and/or mail fraud and constructive fraud by submitting false billings and other materials that involved interstate commerce.

Third-Party Plaintiffs' complaint further alleges that "each and every such act constitutes a separate violation under 18 U.S.C. Section 1341 [mail fraud] and a separate act of racketeering under 18 U.S.C. 1961", and that, "The racketeering activity engaged in by Third-Party Defendants in conjunction with Co-Defendant Verrino have caused injury to Defendants/Third Party Plaintiffs." Third-Party

Plaintiffs' complaint asserts, through the Answer, that "VCS's President and owner, upon information and belief, Verrino, Co-Defendant Fifth, in conjunction with its agents CBRE, Ramirez and Macaluso, constitute an enterprise within the meaning of RICO", and that, "Verrino, in conjunction with the Co-Defendant Fifth, CBRE and its joint agent Ramirez and Macaluso acted as conspirators and were engaged in activities affecting interstate commerce."

Even accepting Third-Party Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Third-Party Plaintiffs' complaint do not adequately plead a "pattern" of racketeering activity sufficient to support Third-Party Plaintiff's RICO claim as against Verrino. The Third-Party Complaint does not plead when the alleged acts—i.e. the alleged "emails, wire and/or mail fraud and constructive fraud by submitting false billings and other materials that involved interstate commerce"— took place. Accordingly, even accepting Third-Party Plaintiffs' allegations as true, the alleged acts, in and of themselves, do not, without more, plead with particularity facts sufficient to establish a pattern within the meaning of RICO. (*see East 32nd St. Assocs.*, 191 A.D.2d at 73 [finding predicates allegedly extending over period of five and a half months did not, in and of themselves, comprise a pattern within the meaning of RICO]; *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 611 [3d Cir. 1991] [twelve months is not a substantial period of time]).

Nor do the facts alleged demonstrate a threat of future criminal activity constituting a pattern under RICO. Third-Party Plaintiffs' complaint does not allege a series of regularly scheduled extortionate demands, or plead any other specific threat of future criminal activity. Indeed, Third-Party Plaintiffs' complaint does not even allege that the allegedly fraudulent billings were re-submitted to Third-Party Plaintiffs after Third-Party Plaintiffs purportedly refused to pay the same. Third-Party Plaintiffs' complaint contains no allegations of fact suggesting that Third-Party Defendants' purported scheme to defraud Third-Party Plaintiffs of funds extends beyond the time such bills were to be paid. (*c.f.*, *East 32nd St. Assocs. v. Jones Lang Wootton USA*, 191 A.D.2d 68, 73 [1st Dep't 1993] ["Since the specified racketeering acts were alleged to be committed with the purpose of encouraging the purchase of the property, any specific threat of future acts clearly evaporated when the property was purchased."). Accordingly, Third-Party Plaintiffs' third cause of action must be dismissed as against Verrino.

As for Third-Party Plaintiffs' fourth cause of action, Third-Party Plaintiffs' complaint alleges:

> Third-Party Defendants, including Verrino, continually failed both personally and in his capacity as owner of VCS, to provide necessary insurance information to Defendants/Third-Party Plaintiffs in order to properly obtain General Liability and mandatory Worker's Compensation.

Third-Party Plaintiffs' complaint further alleges, "Upon information and belief, Third-Party Defendants paid certain or all subcontractors in cash", and that, "Third-Party Defendants have left Defendant/Third-Party Plaintiffs subject to significant costs as a result of pending insurance and payroll audits from New York State and other insurance providers."

Here, even accepting Third-Party Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of the Third-Party Complaint do not plead a contract between Third-Party Plaintiffs and VCS or Verrino. Indeed, the Answer expressly denies the existence of the VCS Agreement, the alleged contract upon which the underlying first-party action is based. Additionally, even accepting Third-Party Plaintiffs' allegations as true, the four corners of Third-Party Complaint do not plead a subcontract between any of the Third-Party Defendants and Verrino. Accordingly, even viewing Third-Party Plaintiffs' complaint in the light most favorable to Third-Party Plaintiffs, the four corners of the Third-Party Complaint fail to allege any basis for Third-Party Plaintiffs' breach of contract claim as against Verrino personally.

Furthermore, "[i]n the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint, and the pleadings must set forth facts showing the damage upon which the action is based." (*Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 [1st Dep't 1988]). In order to sustain a cause of action for breach of contract, a complaint must plead allegations of fact "from which damages attributable to defendants' conduct might reasonably be inferred." (*Arcidiacono v. Maizes & Maizes*, LLP, 8 A.D.3d 119, 120 [1st Dep't 2004]). Here, even viewing the Third-Party Complaint in the light most favorable to Third-Party Plaintiffs, the Third-Party Complaint does not plead allegations of fact from which damages attributable to Verrino's conduct might reasonably be inferred. Accordingly, even accepting Third-Party Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Third-Party Plaintiffs' complaint are insufficient to sustain Third-Party Plaintiffs' fourth cause of action as against Verrino individually.

In light of the foregoing, Verrino's remaining grounds for dismissal or, alternatively, for consolidation, need not be addressed.

Wherefore, it is hereby

ORDERED that third-party defendant Richard Verrino's motion is granted and Third-Party Plaintiffs' complaint is dismissed as against Richard Verrino and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Third-Party Plaintiffs' complaint as to the remaining third-party defendants, C.B. Richard Ellis, Inc., Elizabeth Ramirez a/k/a Elizabeth Ramirez Nobile, and Alessandro Macaluso, is severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: February 20 2015

FEB 20 2015

EILEEN A. RAKOWER, J.S.C.