Vanguard Constr. & Dev. Co., Inc. v B.A.B. Mechanical Servs., Inc.
2015 NY Slip Op 31794(U)
September 18, 2015
Supreme Court, New York County
Docket Number: 152264/15
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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VANGUARD CONSTRUCTION & DEVELOPMENT CO., INC.,

Plaintiff,

-against-

B.A.B. MECHANICAL SERVICES, INC. and BENJAMIN BRANCATO,

Defendants.

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Index No. 152264/15

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Affidavits in Reply.....	3
Exhibits.....	4

Plaintiff Vanguard Construction & Development Co., Inc. ("Vanguard") commenced the instant action against defendants B.A.B. Mechanical Services, Inc. ("BAB") and Benjamin Brancato ("Brancato") asserting causes of action for breach of contract, indemnification, fraud, negligence, breach of the duty of good faith and fair dealing and violation of New York's Lien Law arising out of two projects for which plaintiff was hired as contractor. Defendants now move for an Order pursuant to CPLR §§ 3211(a)(3), (4) and (7) dismissing the complaint in its entirety as against defendant Brancato and dismissing the complaint's fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action as against defendant BAB. For the reasons set forth below, defendants' motion is granted in part and denied in part.

The relevant facts according to the complaint are as follows. Plaintiff was retained as contractor for the Tenant Build-Out Amida Care Project located at 225 West 34th Street, New York, New York (the "Amida Project"). In or around June 2014, plaintiff entered into a contract with BAB, as subcontractor, pursuant to which BAB was to provide all labor and materials necessary to complete certain HVAC-related work for the Amida Project for the base amount of $800,000.00 (the "Amida Contract"). Thereafter, BAB entered into contracts with certain sub-subcontractors and suppliers, including S.R. Mechanical/Design Corp. ("SR Mechanical"), pursuant to which they would supply and install insulation, ductwork, duct collars and ceiling grids for the Amida Project.

Plaintiff alleges that at some point, it became apparent that BAB could not properly perform its contractual obligations under the Amida Contract as a result of which plaintiff terminated BAB from the Amida Project. Additionally, plaintiff alleges that due to BAB's failure to perform pursuant to the Amida Contract, it was forced to pay BAB's sub-subcontractors and suppliers with respect to the Amida Project and to repair BAB's negligent and defective work performed on the Amida Project.

Plaintiff was also retained as contractor for the Blue Ridge Gymnasium/IT Office, 14th Floor Project located at 660 Madison Avenue, New York, New York (the "Blue Ridge Project"). In or around August 2014, plaintiff entered into a contract with BAB, as subcontractor, pursuant to which BAB was to provide all labor and materials necessary to complete various HVAC and sheet metal-related work for the Blue Ridge Project for the base amount of $315,000.00 (the "Blue Ridge Contract"). Thereafter, BAB entered into contracts with certain sub-subcontractors and suppliers pursuant to which they were to furnish and/or install refrigerant piping, ceiling-hung air handlers, drain lines, ductwork, building automation and low voltage control devices for

the Blue Ridge Project.

Plaintiff alleges that at some point, it became apparent that BAB could not properly perform its contractual obligations under the Blue Ridge Contract as a result of which plaintiff terminated BAB from the Blue Ridge Project. Additionally, plaintiff alleges that due to BAB's failure to perform pursuant to the Blue Ridge Contract, it was forced to pay BAB's sub-subcontractors and suppliers with respect to the Blue Ridge Project and to repair BAB's negligent and defective work performed on the Blue Ridge Project. In or around March 2015, plaintiff commenced the instant action asserting twelve causes of action against BAB and Brancato, the owner and president of BAB, based on BAB's alleged failure to perform its contractual obligations pursuant to the Amida Contract and the Blue Ridge Contract.

On a motion addressed to the sufficiency of the complaint pursuant to CPLR § 3211 (a)(7), the facts pleaded are assumed to be true and accorded every favorable inference. *See Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to whether it states in some recognizable form any cause of action known to our law." *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977), citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956).

As an initial matter, defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's claims against Brancato is denied. A party seeking to pierce the corporate veil must allege that (1) the individual exercised complete domination of the corporation with respect to the transaction attacked; and (2) such domination was used to commit a fraud or wrong

against the plaintiff which resulted in the plaintiff's injury. *See Love v. Rebecca Development, Inc.*, 56 A.D.3d 733 (2d Dept 2008). "A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard." *Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 109 (1st Dept 2002). "Failure to plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal of the action." *Id.* at 110. Indeed, an allegation that a corporation was completely dominated by its shareholders and acted as their alter egos, without more, is not sufficient to warrant the relief of piercing the corporate veil. *See Goldman v. Chapman*, 44 A.D.3d 938 (2d Dept 2007). The general rule "is that an 'officer or director is liable when he acts for his personal, rather than the corporate interests.'" *Id.* (quoting *Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 230 (1st Dept 1998)). Thus, "a pleading must allege that the acts complained of, whether or not beyond the scope of the defendant's corporate authority, were performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendant." *Id.*

In the instant action, this court finds that the complaint sufficiently states a claim against Brancato as it alleges specific facts sufficient to pierce the corporate veil. The complaint alleges that (1) Brancato "is the alter ego of BAB"; (2) Brancato "exercised complete domination and control over all business affairs of BAB"; (3) Brancato "use[d] BAB to siphon funds for his personal benefit"; (4) Brancato "disregard[ed] customary corporate formalities and erroneously submitte[d] lien waivers and release[s] to Vanguard in execution of Brancato's personal capacity and not in a representative capacity"; (5) Brancato "[s]iphoned off some of the funds received from Vanguard and paid them to himself rather than to the sub-subcontractors and suppliers

employed by Brancato and/or BAB; (6) Brancato "[f]ailed to properly capitalize BAB, and at all times material hereto has been insufficiently capitalized and under insured"; and (7) "BAB's separate identity and corporate status, if any, has been ignored and disregarded by Brancato in order to perpetuate wrongs against Vanguard and preclude Vanguard from obtaining the benefit of the promises made under the [] contracts and separately made by Brancato." These allegations which, if taken as true, as the court must do on a motion to dismiss, are sufficient to allege a claim against Brancato individually based on piercing the corporate veil.

However, defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing the complaint's fifth cause of action for fraud arising out of the Amida Project and sixth cause of action for fraud arising out of the Blue Ridge Project is granted. A fraud-based cause of action can only lie "where the plaintiff pleads a breach of a duty separate from a breach of the contract." *Manas v. VMS Assocs., LLC*, 53 A.D.3d 451, 453 (1st Dept 2008); *see also Krantz v. Chateau Stores of Canada, Ltd.*, 256 A.D.2d 186, 187 (1st Dept 1998), citing *Wegman v. Dairylea Coop.*, 50 A.D.2d 108, 113 (4th Dept 1975)("To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties.") However, even where a plaintiff pleads a breach of duty which is collateral to the contract, a fraud cause of action must be dismissed if the damages alleged would also be recoverable under the breach of contract cause of action. *See Manas v. VMS Associates, LLC*, 53 A.D.3d 451 (1st Dept 2008).

Here, this court finds that plaintiff's fifth and sixth causes of action for fraud must be dismissed in their entirety on the ground that said causes of action are duplicative of plaintiff's breach of contract causes of action. The complaint's fifth and sixth causes of action allege that BAB submitted false Lien Waivers and releases to plaintiff representing the amount due from

plaintiff to BAB for the work performed; the amount BAB was paying to its sub-subcontractors and suppliers; and concealment of defective work. Specifically, the fifth and sixth causes of action allege that BAB intentionally falsified said Lien Waivers and releases and that plaintiff relied on said Lien Waivers and releases to remit payment to BAB for the work it allegedly performed and labor and/or materials provided on behalf of plaintiff on the Amida Project. Further, the fifth and sixth causes of action allege that had plaintiff known that BAB's Lien Waivers and releases were falsified, plaintiff would not have remitted payment to BAB. However, this court finds that said allegations are duplicative of plaintiff's breach of contract causes of action. As an initial matter, both the Amida Contract and the Blue Ridge Contract require BAB to submit to plaintiff Lien Waivers and releases before it can be paid for any work performed. Thus, any failure to properly provide said waivers and releases constitutes a breach of contract. However, even if said allegations constituted a breach of duty collateral to the contracts on the ground that it is not necessarily a breach of the contracts to provide falsified Lien Waivers and releases, the fifth and sixth causes of action must be dismissed as duplicative of plaintiff's breach of contract causes of action on the ground that the damages sought by plaintiff are recoverable under the breach of contract causes of action. Indeed, plaintiff has not alleged that it sustained any damages that would not be recoverable under its breach of contract causes of action as it seeks to recover the amount paid to BAB for the work performed plus the amount it paid to BAB's sub-subcontractors and suppliers after its contracts with BAB were terminated.

Additionally, defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing the complaint's seventh cause of action for negligence arising out of the Amida Project and eighth cause of action for negligence arising out of the Blue Ridge Project is granted. To

sufficiently plead a claim for negligence, a plaintiff must allege (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Solomon by Solomon v. City of New York*, 66 N.Y.2d 1026 (1985). However, "[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island R.Co.*, 70 N.Y.2d 382, 389 (1987). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract." *Id.*

In the instant action, this court finds that plaintiff's seventh and eighth causes of action for negligence must be dismissed in their entirety on the ground that said causes of action are duplicative of plaintiff's breach of contract causes of action. The complaint's seventh and eighth causes of action allege that BAB had a duty of care to perform its work on the Amida Project and the Blue Ridge Project in a professional and workmanlike manner; that BAB breached its duty by failing to properly perform its work in a professional and workmanlike manner and by failing to pay its sub-subcontractors and suppliers; and that said breach was the proximate cause of the damages suffered by plaintiff. However, said allegations are identical to those asserted in plaintiff's breach of contract causes of action. Indeed, the seventh and eighth causes of action do not allege a legal duty independent of the Amida Contract or the Blue Ridge Contract and the legal duty that is alleged does not spring from circumstances extraneous to the Amida Contract or the Blue Ridge Contract. Thus, the seventh and eighth causes of action must be dismissed.

Additionally, defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing the complaint's ninth cause of action for breach of the duty of good faith and fair dealing arising

out of the Amida Project and tenth cause of action for breach of the duty of good faith and fair dealing arising out of the Blue Ridge Project is granted. It is well settled that New York Law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim based on the same facts is also pled. *See Kaminsky v. FSP Inc.*, 5 A.D.3d 251 (1st Dept 2004). In order to maintain such a claim, plaintiff must allege a "breach of a duty other than, and independent of, that contractually established between the parties." *Id.*

In the instant action, this court finds that plaintiff's ninth and tenth causes of action for breach of the duty of good faith and fair dealing must be dismissed in their entirety on the ground that said causes of action are duplicative of plaintiff's breach of contract causes of action. The complaint's ninth and tenth causes of action allege that BAB breached its duty of good faith and fair dealing by failing to pay its sub-subcontractors and suppliers. However, such allegation does not constitute a breach of a duty independent of the duty contractually established between the parties. Indeed, pursuant to the Amida Contract and the Blue Ridge Contract, BAB was required to pay its sub-subcontractors and its suppliers and its failure to do so forms the basis of a breach of contract claim and not a claim for breach of the implied covenant of good faith and fair dealing.

Finally, this court turns to defendants' motion for an Order pursuant to CPLR §§ 3211(a)(4) and (7) dismissing the complaint's eleventh cause of action for trust fund diversion pursuant to Lien Law Article 3-A arising out of the Amida Project and twelfth cause of action for trust fund diversion pursuant Lien Law Article 3-A arising out of the Blue Ridge Project. As an initial matter, defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing the eleventh and twelfth causes of action on the ground that plaintiff lacks standing to assert said

claims is denied. Pursuant to Lien Law § 77(1), "[a] trust arising under this article may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding a trust claim..." Indeed, it is well-settled that if a party is a subrogee of a trust beneficiary, it may assert a claim pursuant to Article 3-A of the Lien Law for trust fund diversion, even if it is not itself a beneficiary of the trust. *See Matter of RLI Ins. Co., Sur. Div.*, 97 N.Y.2d 256 (2002); *see also Caristo Constr. Corp.*, 21 N.Y.2d 507 (1968); *see also J. Petrocelli Const., Inc. v. Realm Elec. Contractors, Inc.*, 15 A.D.3d 444 (2d Dept 2005).

Here, this court finds that plaintiff has standing to assert claims for trust fund diversion pursuant to Lien Law Article 3-A against defendants as a subrogee of the trust's beneficiaries based on plaintiff's allegations in the complaint that it has paid the outstanding claims of the trust's beneficiaries, specifically, BAB's sub-subcontractors and suppliers. The complaint alleges that plaintiff paid BAB in full for the work it performed and that BAB failed to pay its sub-subcontractors and suppliers with the funds paid to it by plaintiff. Additionally, the complaint alleges that based on BAB's failure to do so, plaintiff was caused to pay BAB's sub-subcontractors and suppliers in full and now seeks to recover said amounts.

However, defendants' motion for an Order pursuant to CPLR § 3211(a)(4) dismissing the eleventh and twelfth causes of action on the ground that another action is pending for the same relief is granted. Pursuant to Lien Law § 77(2), an action to enforce a trust "may be maintained at any time during the improvement of real property...provided no other such action is pending at the time of the commencement thereof." Here, it is undisputed that in December 2014, SR Mechanical commenced an action against, *inter alia*, Vanguard, BAB and Brancato asserting causes of action for, *inter alia*, breach of contract and trust fund diversion pursuant to Lien Law Article 3-A (the "December 2014 Action"). Thus, as there is currently an action pending for

trust fund diversion against the same defendants in the instant action, the complaint's eleventh and twelfth causes of action for trust fund diversion pursuant to Lien Law Article 3-A are dismissed without prejudice with leave to renew at such time when SR Mechanical's claims for trust fund diversion pursuant to Lien Law Article 3-A against defendants in the December 2014 Action are resolved.

Accordingly, defendants' motion is resolved as set forth herein. This constitutes the decision and order of the court.

Dated: 9/18/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.