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

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TRIMASA RESTAURANT PARTNERS, LLC,

Index No. 653546/15

Plaintiff,

-against-

DECISION/ORDER

MICHAEL BORRICO,

Defendant.

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HON. CYNTHIA 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
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Trimasa Restaurant Partners, LLC ("Trimasa") commenced the instant action against defendant Michael Borrico ("Borrico") seeking to recover damages arising out of the construction of a restaurant. Defendant now moves for an Order pursuant to CPLR § 3211 dismissing the complaint. Defendant's motion is resolved as set forth below.

The relevant facts and procedural history of this case are as follows. On or about May 23, 2013, Trimasa, as owner, entered into an agreement with CNY Construction Management Inc. ("CNY"), as contractor, pursuant to which CNY was to construct a restaurant located at 78 Leonard Street, New York, New York (the "Contract"). Borrico is the President of CNY and executed the Contract on behalf of CNY as its President. Pursuant to Article 6 of the Contract, the parties to the Contract are required to resolve any claims between them that could not be resolved in mediation by binding arbitration before the American Arbitration Association

("AAA").

During the construction of the restaurant, disputes arose between Trimasa and CNY and on June 29, 2015, Trimasa commenced an arbitration proceeding against CNY and Borrico with the AAA (the "arbitration"). On or about July 20, 2015, Borrico brought a special proceeding in this court seeking a permanent stay of the arbitration proceeding as against him on the ground that he was not a party to the Contract and thus, he could not be compelled to arbitrate. In a decision and order dated October 9, 2015, this court granted Borrico's petition to permanently stay the arbitration "on the ground that there is no agreement between [Borrico] and [Trimasa] to arbitrate their disputes" (the "Decision"). Thereafter, Trimasa commenced the instant action against Borrico asserting causes of action for breach of contract, fraud, breach of the implied covenant of good faith and fair dealing, negligence, negligent misrepresentation, violation of General Business Law ("GBL") § 349, a declaratory judgment that Borrico is obligated to indemnify plaintiff and an injunction enjoining defendant from refusing to indemnify plaintiff. Defendant now moves for an Order pursuant to CPLR §§ 3211(a)(1), (5) and (7) dismissing the complaint.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *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) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). Further, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

As an initial matter, defendant's motion to dismiss the first cause of action for breach of contract and the third cause of action for breach of the implied covenant of good faith and fair dealing (hereinafter referred to as the "contract-based claims") is granted based on the doctrine of collateral estoppel. Under the doctrine of collateral estoppel, a party is "barred from relitigating in a subsequent proceeding an issue clearly raised in a prior proceeding and decided against that party where the party to be precluded had a full and fair opportunity to contest the prior determination." *Weiss v. Manfredi*, 83 N.Y.2d 974, 976 (1994). "What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding." *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984).

In the instant action, defendant's motion to dismiss the complaint's contract-based claims is granted based on the doctrine of collateral estoppel. As an initial matter, collateral estoppel precludes plaintiff's contract-based claims because this court already addressed and determined the issue of whether there is privity of contract between Trimasa and Borrico. Specifically, this court found that there was no privity of Contract as "[t]he Contract…provides that it is an

"Agreement...Between the Owner (TriMasa...) and the Contractor (CNY...)..." and "[Borrico] signed the contract on behalf of CNY only in his capacity as the President of CNY." The court based its decision on "page 7 of the Contract and an Addendum to the Contract dated June 11, 2013 [which] expressly state that petitioner is signing the Contract as President of CNY" and on the fact that "[n]owhere in the Contract can it be construed that [Borrico] was signing the Contract in his individual capacity." Further, this court finds that Trimasa had a full and fair opportunity to litigate the issue of privity between it and Borrico in the prior proceeding as Trimasa opposed Borrico's petition and argued to this court that privity between it and Borrico did indeed exist. Indeed, Trimasa urged this court to find that privity between it and Borrico exists based on the assertion that Borrico is CNY's alter ego, specifically alleging that "Borrico personally affixed his own signature to the Contract"; Borrico "exercised dominant control over the signatory, CNY"; Borrico is CNY's President and sole owner; Borrico resides in the same property at which CNY's offices are located; and "Borrico repeatedly represented to Trimasa that both he and CNY were undercapitalized, and unable to cover the costs of indemnifying Trimasa, pursuant to their Contract obligations, for the damage and delays caused by the Petitioner's own negligence." However, this court found that said allegations were "insufficient to establish that Borrico is CNY's alter ego as they fail to show that Borrico exercised the requisite degree of control over CNY necessary to justify piercing the corporate veil, especially in light of the fact that they are asserted by [Trimasa's] counsel and no affidavit of a representative of [Trimasa] has been provided." Thus, the first cause of action for breach of contract and the third cause of action for breach of the implied covenant of good faith and fair dealing, which cannot be maintained without a valid contract, must be dismissed.

Trimasa's reliance on *First Capital Asset Mgt. v. N.A. Partners*, 260 A.D.2d 179 (1st Dept 1999) to establish that it did not have a full and fair opportunity in the prior proceeding to litigate the issue of whether there is privity between it and Borrico based on its assertion that Borrico is CNY's alter ego is misplaced. In *First Capital Asset Mgt.*, the court held that a prior determination that the defendant was not personally liable for the purchase price under the terms of a stock purchase agreement did not preclude, on the basis of *res judicata*, a subsequent proceeding to enforce the judgment against the defendant based on allegations that supported piercing the corporate veil because the "necessary elements of proof and evidence required to sustain recovery [on a veil piercing claim] vary materially [from those required to sustain a personal liability claim]." 260 A.D.2d at 181. However, the court did not discuss whether the allegations that support piercing the corporate veil were ever raised in the prior proceeding as they were in Borrico's proceeding to stay the arbitration.

To the extent plaintiff asserts that it did not have the opportunity in the prior proceeding to fully litigate the issue because it was not entitled to "full discovery," to obtain "Defendant's testimony or to hold an evidentiary hearing" in order to sufficiently allege whether Borrico is CNY's alter ego, such assertion is without merit as plaintiff had a full and fair opportunity to present whatever arguments or evidence it wished in order to dispute Borrico's assertion that he was not a party to the Contract and it could have argued, in opposition to Borrico's petition to stay the arbitration, that discovery was needed to determine whether Borrico is the alter ego of CNY. Indeed, this court has discretion to order discovery in a special proceeding pursuant to CPLR § 408 if such a request is made. However, Trimasa did not make any such request in the prior proceeding nor did it make the required showing that there is ample need for such

discovery.

Defendant's motion to dismiss the complaint's fifth cause of action for negligent misrepresentation on the ground that it fails to state a claim is also granted. To sufficiently plead a claim for negligent misrepresentation, a plaintiff must allege "(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 N.Y.3d 144, 148 (2007). Additionally, pursuant to CPLR § 3016(b), "[w]here a cause of action or defense is based upon misrepresentation..., the circumstances constituting the wrong shall be stated in detail."

In the instant action, the court finds that the complaint fails to sufficiently plead a cause of action for negligent misrepresentation. The complaint alleges that "[d]efendant represented to Plaintiff that, among other things, Defendant and CNY would at all times relevant, act in a manner consistent with reasonable business practices and good faith," that "[d]efendant knew or should have known that these misrepresentations were false when made," that "[p]laintiff detrimentally relied on the misrepresentations of Defendant in determining whether to enter into the Contract" and that as a result, "[p]laintiff has been substantially damages (sic) in an amount to be determined at trial." However, said allegations are insufficient to plead a cause of action for negligent misrepresentation. Indeed, nowhere in the complaint does plaintiff allege the existence of a special or privity-like relationship between plaintiff and defendant which would impose a duty on the defendant to impart correct information to the plaintiff. Further, the complaint fails to state the circumstances constituting the negligent misrepresentation with sufficient detail pursuant to CPLR § 3016(b) as it merely states that the alleged misrepresentation

was that defendant would generally act in a manner consistent with reasonable business practices and good faith but fails to identify any specific misrepresentations imparted to plaintiff.

Additionally, this court finds that the complaint's fourth cause of action for negligence must be dismissed on the ground that it fails to state a claim. 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). In the instant action, the complaint fails to sufficiently plead a claim for negligence as it fails to allege a duty owed by the defendant to the plaintiff. Although the complaint alleges that "[d]efendant...negligently performed [his] duties under the agreement," such statement fails to sufficiently allege a duty as this court has already found that defendant was not a party to the Contract. Thus, his duty to plaintiff cannot stem from the Contract.

Additionally, defendant's motion to dismiss the complaint's sixth cause of action for violation of GBL § 349 is granted on the ground that it fails to state a claim. GBL § 349 declares unlawful any "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." "[P]arties claiming the benefit of the section must, at the threshold, charge conduct that is consumer oriented." *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320 (1995); *see also Oswego Laborers' Local 24 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). "The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large; private contract disputes unique to the parties . . . would not fall within the ambit of the statute." *Id.* (internal quotations and citations omitted); *see also Cruz v. NYNEX Information*

Resources, 263 A.D.2d 285, 290 (1st Dept 2000).

In the instant action, this court finds that the complaint fails to sufficiently plead a cause of action for violation of GBL § 349 as it fails to allege conduct aimed at consumers at large. The complaint alleges that defendant violated GBL § 349 by "a. falsely misrepresenting that his company was duly insured with applicable insurance coverage; b. falsely misrepresenting that CNY could perform the agreed upon work; and c. falsely misrepresenting that both he and CNY were financially capable of fulfilling their indemnification agreement under the Contract." However, nowhere in the complaint does plaintiff allege that such misrepresentations were made to consumers at large nor could the complaint make such an allegation as the Contract was entered into only between plaintiff and CNY. Indeed, it is well settled that a private contract dispute, such as this one, does not fall within the ambit of GBL § 349. *See New York Univ.*, 87 N.Y.2d at 308.

Defendant's motion to dismiss the complaint's seventh cause of action for a declaratory judgment that defendant must indemnify plaintiff for all costs and fees that plaintiff has advanced for the clean-up of certain lead dust infiltration in the restaurant is granted on the ground that it fails to state a claim. Indemnification may arise by contract or it may be implied based on the "law's notion of what is fair and proper as between the parties to prevent an unjust result." *McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 374-75 (2011).

As an initial matter, to the extent plaintiff seeks a declaration that it is entitled to contractual indemnification from defendant, such cause of action must be dismissed based on this court's finding that there is no contract between plaintiff and defendant Borrico. Additionally, to the extent plaintiff seeks a declaration that it is entitled to common law

indemnification from defendant, such cause of action must be dismissed. Implied indemnity, or common law indemnity, allows one who "is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer." *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). Here, plaintiff has not alleged any facts to support a claim for common law indemnification as it has failed to allege that it is being held vicariously liable by a third-party in another action on account of defendant's negligence. Rather, plaintiff merely alleges that it is entitled to common law indemnification from defendant based on defendant's breach of the Contract and misconduct which caused harm to the restaurant and thus, is seeking reimbursement from defendant for its own damages.

Further, defendant's motion to dismiss the complaint's eighth cause of action for a preliminary and permanent injunction enjoining defendant from refusing to indemnify plaintiff for all costs and fees that plaintiff has paid for the clean-up of the lead dust infiltration in the restaurant is granted on the ground that it fails to state a claim. As this court has already determined that plaintiff does not have a valid claim for indemnification, either contractual or common law, plaintiff is not entitled to an injunction preventing defendant from refusing to indemnify plaintiff.

However, defendant's motion to dismiss the complaint's second cause of action for fraud on the ground that it is insufficiently pled pursuant to CPLR § 3016(b) is denied. To plead a cause of action for fraud, a plaintiff must allege misrepresentation of a material fact, falsity, scienter, reliance and injury. *See Barclay v. Barclay Arms Associates*, 74 N.Y.2d 644 (1989). Additionally, pursuant to CPLR § 3016(b), "[w]here a cause of action…is based upon…fraud…,

the circumstances constituting the wrong shall be stated in detail."

In the instant action, the court finds that the complaint sufficiently pleads a cause of action for fraud. The complaint alleges that "[d]efendant made material and fraudulent misrepresentations that: a. CNY and all subcontracts were duly insured with required insurance coverage under the terms of the Contract; b. CNY would timely and properly indemnify Trimasa as provided under the Indemnification Agreement of the Contract; and c. Defendant and CNY were financially capable of finishing the project under the terms of the Contract." The complaint further alleges that "[d]efendant made these misrepresentations, as well as further misrepresentations, to induce Plaintiff to enter into an agreement with him and CNY and to continue with the agreement" and that the misrepresentations were made "with the knowledge that they were false and with the intent that Trimasa would rely upon these misrepresentations." Additionally, the complaint alleges that "[a]s a result of the Defendant's fraudulent conduct, Plaintiff was induced to enter into the agreement" as "[p]laintiff reasonably and justifiably relied on…Defendant's false and misleading statements and omissions" and that as a result, "[p]laintiff has suffered damages." As the court finds that plaintiff's cause of action for fraud was pled with sufficient particularity under CPLR § 3016(b), defendant's motion to dismiss on that basis is denied.

Further, defendant's motion to dismiss the complaint's second cause of action for fraud on the ground that it is duplicative of plaintiff's breach of contract claim is denied as this court has already dismissed plaintiff's breach of contract claim against defendant on the basis of collateral estoppel based on this court's finding in the prior proceeding that there is no contract between plaintiff and defendant.

Finally, to the extent plaintiff requests, in opposition to defendant's motion, leave to amend the complaint to correct its deficiencies, plaintiff may move for such relief and provide the court with the proposed amended complaint clearly showing the changes or additions to be made to the pleading as required by CPLR § 3025(b).

Accordingly, defendant's motion to dismiss the complaint is granted to the extent that the complaint's first, third, fourth, fifth, sixth, seventh and eighth causes of action are dismissed. This constitutes the decision and order of the court.

Dated: 3/10/16

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