

<b>Metropolitan Bridge &amp; Scaffolding Corp. v New York City Hous. Auth.</b>
2016 NY Slip Op 31632(U)
August 25, 2016
Supreme Court, New York County
Docket Number: 653507/2013
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

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METROPOLITAN BRIDGE & SCAFFOLDING  
CORP.,

Plaintiff,

-against-

Index No. 653507/2013  
Motion Date: 5/11/2016  
Motion Seq. No. 005, 006

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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NEW YORK CITY HOUSING AUTHORITY,

Defendant/Third-Party Plaintiff,

-against-

LIBERTY ARCHITECTURAL PRODUCTS CO.,  
INC., G&M EQUIPMENT LEASING LLC,  
DIMITRIOS SPANOS, RALPH CIAIO, MARK  
CERSOSIMO, GINA CIAIO, and MARY SPANOS,

Third-Party Defendants.

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**BRANSTEN, J.**

Motion sequence numbers 005 and 006 are consolidated for disposition.

This matter comes before the Court on Third-Party Defendants' motions to dismiss,<sup>1</sup> seeking dismissal of the third, fourth, fifth, and sixth claims in the New York City Housing Authority's ("NYCHA") Third-Party Complaint, pursuant to CPLR

<sup>1</sup> Motion sequence 005 is brought by Third-Party Defendants Liberty Architectural Products Co., Inc., G&M Equipment Leasing LLC, Dimitrios Spanos, Ralph Ciaio, Gina Ciaio, and Mary Spanos. Mark Cersosimo individually filed a motion to dismiss as motion sequence 006.

3211(a)(1) and (a)(7). NYCHA opposes. For the reasons that follow, the motions to dismiss are denied.

## **I. Background**

On October 9, 2013, Plaintiff Metropolitan Bridge & Scaffolding Corporation (“Metropolitan”) commenced this suit seeking payment for work performed for NYCHA, including weekly maintenance costs and repair costs for equipment damaged by Hurricane Sandy. At the core of Metropolitan’s complaint are three separate contracts from 2009, 2010, and 2011, under which Metropolitan agreed to supply sidewalk sheds and related items to NYCHA in connection with various public housing developments located in Brooklyn and Staten Island.

NYCHA’s Third-Party Complaint attacks the validity of these contracts and the payments made pursuant to them. Specifically, NYCHA contends that Third-Party Defendant Mark Cersosimo and Metropolitan fraudulently induced NYCHA into awarding the 2009, 2010, and 2011 contracts and that the remaining Third-Party Defendants conspired, as well as aided and abetted, this alleged fraud.

### *A. Sale of Metropolitan*

Metropolitan was formed by Third-Party Defendants Dimitrios Spanos and Ralph Ciaio in September 2003. From 2003 through 2009, Metropolitan entered into contracts

with NYCHA and the New York School Construction Authority (“SCA”) to install sidewalk bridges.

The parties dispute Metropolitan’s ownership and control. Third-Party Defendants assert that Cersosimo purchased Metropolitan from Dimitrios Spanos and Ralph Ciaio in February 2009. *See* Third-Party Defendants’ Moving Br. at 3.<sup>2</sup> NYCHA counters that the sale of Metropolitan to Cersosimo was a sham, designed to conceal Dimitrios Spanos and Ralph Ciaio’s de facto ownership of Metropolitan so that the two men could continue entering into contracts with public agencies despite their criminal records. *See* Third-Party Compl. ¶¶ 2, 69. Notably, Spanos and Ciaio were arrested on June 22, 2009 for bribing a public servant in connection with their company Third-Party Defendant Liberty Architectural Products Co., Inc.’s use of non-union workers on an SCA project. *Id.* ¶ 40. They later pled guilty on November 30, 2009. *Id.* ¶¶ 37-38.

In April 2014, Cersosimo allegedly sold his stock in Metropolitan to Third-Party Defendants Gina Ciaio and Mary Spanos – the spouses of Dimitrios Spanos and Ralph Ciaio – and owners of Metropolitan’s subcontractor, G&M Equipment Leasing LLC (“G&M”). *See* Affirmation of Eric W. Gentino Ex. I.

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<sup>2</sup> All Third-Party Defendants except for Cersosimo submitted a joint brief in support of their motion to dismiss, which was filed as Motion Sequence 005. The Court refers to this filing here and elsewhere as “Third-Party Defs.’ Br.,” *see* NYSCEF No. 171. Cersosimo filed a separate motion to dismiss and joined in his fellow Third-Party Defendants’ arguments. *See* Affirmation of James Sawyer ¶ 2.

B. *NYCHA Contracts and Metropolitan's Representations About Dimitrios Spanos and Ralph Ciaio*

After the February 2009 sale to Cersosimo, Metropolitan won a bid for a NYCHA sidewalk shed project. In connection with the bid, Metropolitan submitted a so-called VENDEX document on June 16, 2009, certifying that no former principal of Metropolitan had been convicted of or investigated in connection with a crime. (Third-Party Compl. ¶¶ 29-30.) This representation was repeated by Metropolitan in “Certification of No Change” documents submitted to NYCHA on September 11, 2009, September 30, 2010, and October 8, 2010, notwithstanding Dimitrios Spanos and Ralph Ciaio’s arrest and conviction. *Id.* ¶ 35.

Metropolitan again won contracts with NYCHA in 2010 and 2011. In connection with these contracts, Metropolitan submitted “Certifications of No Change,” in which Metropolitan stated, *inter alia*, that none of its former principals had been arrested. *Id.* ¶¶ 46, 48-51. Third-Party Defendants represent that Cersosimo, who made the representations, did not know that Spanos and Ciaio had been charged or convicted of a crime. *See* Third-Party Defs.’ Moving Br. at 4.

In addition to the representations made in the VENDEX submission and the “Certifications of No Change,” Metropolitan also informed NYCHA in a December 16, 2010 letter that “since February 18, 2009, Liberty Architectural Products and its principals, Dimitrios Spanos and Ralph Ciaio, have no involvement in any of the [NYCHA] Projects and will not have any involvement in the future.” *Id.* ¶ 52.

Nonetheless, Spanos and Ciaio attended contract project meetings as “consultants” and

worked as “Project Administrators” on the 2009, 2010, and 2011 contracts. *Id.* In addition, Metropolitan subcontracted work under the 2010 contract to G&M, which was owned by Spanos and Ciaio’s wives – Mary Spanos and Gina Ciaio. *Id.* ¶ 77.

C. *Payments under the Contracts*

Each of the contracts required Metropolitan to pay its workers federal prevailing wage rates, as established in accordance with federal law. *See* Third-Party Compl. ¶ 56. As a condition precedent to receiving payment from NYCHA, Metropolitan was required to submit certified payroll records and “Contractor Daily Sign-In Sheets” for itself and for any subcontractors. *Id.* ¶ 57. These forms were signed by either an officer of Metropolitan or by one of its subcontractors, including G&M. *Id.*

After making approximately \$8 million in payments, NYCHA purportedly discovered that the certified payroll records and sign-in sheets contained false information. For example, for the week ending May 23, 2012, Cersosimo and Third-Party Defendant Gina Ciaio – on behalf of Metropolitan and G&M respectively – each submitted payroll certifications seeking payment for the same individuals at the same time for the same number of hours on the same days. *Id.* ¶ 63(d).

D. *NYCHA’s Third-Party Complaint and the Instant Motions*

On September 9, 2015, NYCHA commenced this third-party action, asserting seven claims for relief: (1) violations of the New York State False Claims Act; (2) conspiracy to violate the New York State False Claims Act; (3) fraud and fraudulent

inducement; (4) conspiracy to defraud; (5) acting in concert to defraud; (6) aiding and abetting fraud; and, (7) unjust enrichment.

The Third-Party Defendants now seek dismissal of four of these claims – fraudulent inducement, conspiracy to defraud, acting in concert to defraud, and aiding and abetting fraud, “except that part, if any, relating to certified payrolls.” (Third-Party Defs.’ Moving Br. at 1.)

## II. Discussion

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep’t 2004). “We . . . determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, “if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted). However, on a CPLR 3211(a)(1) motion,<sup>3</sup> “[i]t is well settled that bare legal conclusions and factual claims, which are either inherently

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<sup>3</sup> While Third-Party Defendant Cersosimo asserts his motion to dismiss pursuant to, *inter alia*, CPLR 3211(a)(1), such a motion is unavailing because Cersosimo interposed an Answer to the Third-Party Complaint before filing the instant motion. *See* CPLR 3211(e).

incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency.” *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The Court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)). Ultimately, under CPLR 3211(a)(1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon*, 84 N.Y.2d at 88.

A. *Fraud and Fraudulent Inducement*

NYCHA's third claim asserts alleges that it was fraudulently induced to enter into the 2009, 2010, and 2011 contracts by Metropolitan and Cersosimo's misrepresentations regarding Dimitrios Spanos and Ralph Ciaio's criminal records. In addition, the claim asserts that certain of NYCHA's payments to Metropolitan and G&M were procured by fraudulent payroll and sign in sheet submissions.

To plead a claim for fraud under New York law, NYCHA must allege: a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 558 (2009). A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b). *Id.*



Third-Party Defendants contend that the instant claim is insufficiently particular and, in any event, fails to plead justifiable reliance and damages. Each of these arguments lacks merit.

1. Particularity

Under CPLR 3016(b), a fraud claim must be pleaded with particularity, and the circumstances constituting the alleged wrong must be stated in detail. *Ramos v. Ramirez*, 31 A.D.3d 294, 295 (1st Dep't 2006). NYCHA has met this specificity requirement by alleging the time, place, and manner of the purported misrepresentations. See *Riverbay Corp. v. Thyssenkrupp Northern Elevator Corp.*, 116 A.D.3d 487, 488 (1st Dep't 2014). NYCHA has alleged the misrepresentations were made in specific dated VENDEX submissions, dated letters, payroll certifications, and sign in sheets, which were submitted to NYCHA. See Third-Party Compl. ¶¶ 28-35, 40-44, 49-52 (detailing June 16, 2009, September 11, 2009, October 16, 2009, September 30, 2010, and October 8, 2010 VENDEX submissions and Certifications of No Change submitted by Cersosimo); 63(a)-(d) (listing allegedly false August 23, 2011, December 18, 2012, June 5, 2012, and May 23, 2012 payroll certifications and contractor sign in sheets). Moreover, NYCHA has alleged the maker(s) of each of these specific misrepresentations. *Id.* As explained by the Court of Appeals, “[t]he purpose of section 3016(b)’s pleading requirement is to inform a defendant with respect to the incidents complained of.” *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 (2008). NYCHA’s pleading easily meets this mark.

## 2. Justifiable Reliance

Next, Third-Party Defendants contend that the pleading fails to allege justifiable reliance. They assert that NYCHA is a sophisticated party and thus has a greater burden to undertake due diligence to check the accuracy of the facts represented in the letters and certified submissions cited above before entering into the 2009, 2010, and 2011 contracts.

Nonetheless, “where a plaintiff has gone to the trouble to insist on a written representation that certain facts are true, it will often be justified in accepting that representation rather than making its own inquiry.” *DDJ Mgmt., LLC v. Rhone Grp. L.L.C.*, 15 N.Y.3d 147, 154 (2010). This is particularly so when the matters represented are particularly within the representing parties’ knowledge and the party to whom the representation is made has no hints as to the matter’s falsity. *See ACA Fin. Guaranty Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1044 (2015).

Here, NYCHA alleges that it entered into the November 30, 2009 and May 7, 2010 contracts in reliance upon the statements in the June 16, 2009 VENDEX questionnaire and the September 11, 2009 Certification of No Change. Third-Party Defendants’ assertion that they informed NYCHA about Dimitrios Spanos and Ralph Ciaio’s convictions on November 30, 2010 – after the 2009 and 2010 contracts were signed – does not negate NYCHA’s reliance. While NYCHA later entered into another contract with Metropolitan on January 21, 2011, it allegedly did so based on a December 16, 2010 representation by Cersosimo that Spanos and Ciaio “have no involvement on any of the [NYCHA] Projects and will not have any involvement in the future.” (Third-

Party Compl. ¶ 52.) NYCHA contends that this representation also proved to be false.

*Id.*

These allegations are sufficient to allege reliance, and while Third-Party Defendants disagree with the facts alleged,<sup>4</sup> such disagreements do not compel dismissal of the complaint. *See ACA Fin. Guaranty Corp.*, 25 N.Y.3d at 1045 (“Nevertheless, the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss.”).

### 3. Damages

Finally, Third-Party Defendants assert that NYCHA has not alleged damages stemming from the alleged fraud since it “cannot demonstrate that it might not have accepted Metropolitan as a contractor had the facts not been misrepresented to it.” (Third-Party Defs.’ Moving Br. at 23.) Nevertheless, under New York law, a public contract procured by fraud is unenforceable and the amounts paid under the fraudulently-induced contract may be recoverable as damages. *See, e.g., S.T. Grand, Inc. v. City of N.Y.*, 32 N.Y.2d 300 (1968) (deeming that government could recover all amounts paid under contract procured by bribery); *H. Novinson & Co., Inc. v. City of N.Y.*, 53 A.D.2d

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<sup>4</sup> Third-Party Defendants note that Cersosimo “stands by his Certifications of No Change as true and accurate when made, according to the best of his knowledge, information and belief.” (Third-Party Defs.’ Reply Br. at 9.) Cersosimo’s statement merely identifies a factual dispute between the parties and does not resolve the fraud claim as a matter of law. Moreover, to the extent that Third-Party Defendants make this argument as part of a CPLR 3211(a)(1) motion, the argument fails as the documents do not “conclusively establish[] a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

831, 831 (1st Dep't 1976) (concluding that "forfeiture of contract proceeds, including amounts already paid to the contractors, may be applicable" to fraudulent inducement claim).

The alleged misrepresentations caused "injury to the extent that [NYCHA was] unable to make an informed decision as to which contractor was in fact the lowest responsible bidder." *Omni Constr. Co., Inc. v. City of N.Y.*, 84 A.D.3d 763, 764 (2d Dep't 2011); *see also* Third-Party Compl. ¶ 72 ("Knowledge of those convictions would have afforded [NYCHA] a rational basis for finding Ciaio, Spanos, and any entity they are associated with (including Metropolitan) non-responsible inasmuch as their criminal records demonstrate[] they ... lacked the business integrity to be entrusted with federally funded contracts.").

Accordingly, NYCHA has alleged damages in connection with its fraudulent inducement claim, and the motion to dismiss this claim is denied.

B. *Aiding and Abetting Fraud and Conspiracy Claims*

Third-Party Defendants argue that the aiding and abetting fraud, conspiracy to commit fraud, and acting in concert to defraud claims each suffer from the same defect – failure to plead an underlying fraud. Since the Court has deemed the fraud and fraudulent inducement claim sufficiently pleaded, Third-Party Defendants' argument for dismissal of claims four, five, and six lacks merit, and their motion to dismiss is denied.

**III. Conclusion**

Accordingly it is

ORDERED that Third-Party Defendants Liberty Architectural Products Co., Inc., G&M Equipment Leasing LLC, Dimitrios Spanos, Ralph Ciaio, Gina Ciaio, and Mary Spano's motion to dismiss the Third-Party Complaint (motion sequence 005) is denied; and is further


ORDERED that Third-Party Defendant Mark Cersosimo's motion to dismiss the Third-Party Complaint (motion sequence 006) is denied; and it is further

ORDERED that Third-Party Defendants are directed to serve an Answer to the Third-Party Complaint, if they have not already done so, within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on Tuesday, October 25, 2016 at 10:00 am.

Dated: New York, New York  
August 25, 2016

**ENTER**

  
Hon. Eileen Bransten, J.S.C.