

**National Union Fire Ins. Co. of Pittsburgh, PA v
Razzouk**

2018 NY Slip Op 30189(U)

January 30, 2018

Supreme Court, New York County

Docket Number: 653191/2012

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN

PART 33

Justice

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NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, AS SUBROGEE OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

INDEX NO. 653191/2012

MOTION DATE

Plaintiffs,

MOTION SEQ. NO. 009 010

- v -

SASSINE RAZZOUK, GRACE RAZZOUK, DANIELLE RAZZOUK, MONIQUE RAZZOUK, RUDELL & ASSOCIATES, INC., MDM CAPITAL, INC., RUDICON POWER CORPORATION, RODOLFO QUIAMBAO

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 140, 141, 142, 143, 145, 149

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 010) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205

were read on this motion to/for AMEND CAPTION/PLEADINGS

Plaintiff Consolidated Edison Company of New York, Inc. (Con Ed) and its insurer, plaintiff National Union Fire Insurance Company of Pittsburgh, PA (National Union), seek to recover monies defendants fraudulently obtained from it in an admitted kickback and bribery scheme. Before this court are two motions: motion sequence 009 (MS9) is co-defendants Rudell & Associates, Inc., Rudicon Power Corporation, and their owner, Rodolfo Quiambao's (collectively, the Rudell defendants) motion to compel co-defendants Sassine Razzouk and Grace Razzouk to appear at examinations before trial (EBTs) or be subject to sanctions; motion sequence 010 (MS10) is Con Ed's motion for leave to amend the Amended Complaint. The Razzouk defendants oppose the motion. The Rudell defendants likewise oppose Con Ed's motion and cross-move to dismiss the action, which plaintiffs oppose. The decision and order on the motions and cross-motion are as follows:

Background

Defendant Sassine Razzouk, a former Con Ed section manager, pleaded guilty to federal criminal charges related to bribery and receiving kickbacks from the Rudell defendants, and to tax evasion (MS10, Nguyen Aff, Exh 1, Sassine Razzouk Guilty Plea). The criminal scheme involved awarding contracts to the Rudell defendants in exchange for Sassine Razzouk's approval for post-contract changes to inflated project costs, overcharges, and bills for nonexistent work (Amended Complaint at ¶42). Once the kickback scheme was discovered, Con Ed requested and was granted reimbursement from National Union for about \$6 million in losses it sustained (MS10, Nguyen Aff, Exh 3). National Union commenced the instant action to recover those funds. Con Ed joined the action and the complaint was amended as of right on December 14, 2012.

Plaintiffs' causes of action in the Amended Complaint relevant to the instant motions are for fraud, breach of fiduciary duty, and unjust enrichment against defendant Sassine Razzouk, and fraud against the Rudell defendants. A claim of unjust enrichment is also made against Sassine Razzouk's wife, Grace Razzouk; his daughters, Danielle and Monique Razzouk; one of Sassine Razzouk's shell companies, MDM Capital Inc.; and the Rudell defendants. The Amended Complaint accounts for roughly \$6 million in fraudulent payments from 2008 to 2010.

During discovery, defendants disclosed checks related to the bribery scheme dating back to 2002. Con Ed claims that this disclosure showed that the scheme to defraud it began back in 2002, and estimates that at least \$12 million in fraudulent payments were made to defendants (Nguyen Aff, Exh 4; Con Ed's Reply Memo at 1). Consequently, Con Ed moves in MS10 for leave to serve a Second Amended Complaint to increase the amount in dispute and to expand the timeframe of the fraudulent activity (Nguyen Aff, Exh 5). The Rudell defendants cross-move to dismiss the action for failure to state a claim pursuant to CPLR § 3211.

MS10 -Defendants' Cross-motion to Dismiss

The Rudell defendants' cross-motion is addressed first as it raises threshold issues. Their cross-motion claims that Con Ed lacks standing to bring this suit, that the documentary evidence contradicts any claim against them, and that plaintiffs' claims for fraud or quasi-contract cannot exist as a matter of law where, as here, the subject matter at issue is covered by valid contracts. The Rudell defendants also seek to dismiss Con Ed's claim for commercial bribery.

When considering a motion to dismiss pursuant to CPLR § 3211, the court must afford a pleading liberal construction, accept the allegations as true, and afford plaintiff every possible favorable inference (*see Johnson v Proskauer Rose*, 129 AD3d 59, 67 [1st Dept 2015]). The court need only determine whether "the facts

as alleged fit within any cognizable legal theory” (*Faison v Lewis*, NY3d 220, 224 [2015]).

Standing

The Rudell defendants argue that Con Ed lacks standing since it assigned its claims to National Union, thereby surrendering its right to pursue the claims here. They add that should this court determine otherwise, then National Union cannot simultaneously have standing to some or all the claims asserted.

For this issue, the Assignment and Release Agreement between Con Ed and National Union, executed on May 11, 2012, is informative [the Agreement]. The Agreement granted National Union rights to seek only the repayment for the amount it paid Con Ed – \$5.65 million (MS10, Nguyen Aff, Exh 3). The assignment did not extend to “any additional dishonest conduct of Razzouk discovered after [Con Ed’s] execution of this Assignment and Release” (*id.* at p 2). Moreover, a partial assignee may only bring a suit for money damages where the co-assignees are also parties (*see Kronman v Palm Mgt. Assoc. Ltd. Partnership*, 276 AD2d 338, 339 [1st Dept 2000]). Thus, not only do Con Ed and National Union have standing, they are necessary parties to the action.

Dismissal pursuant to CPLR 3211(a)(1)

The Rudell defendants’ cross-motion to dismiss under CPLR 3211(a)(1) is based on documentary evidence. Such a dismissal is warranted only if the documentary evidence utterly refutes plaintiffs’ allegations and conclusively establishes a defense to the asserted claims as a matter of law (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431, 433-34 [1st Dept 2014]). As fraud is the main claim here, the Rudell defendants must present documentary evidence that conclusively presents an absence of fraud (*see Spoleta Constr. v Aspen Ins. UK*, 27 NY3d 933, 936 [2016]). This, they did not do. Therefore, dismissal pursuant to CPLR 3211(a)(1) is not warranted. This defense is also raised for the first time in their cross-motion, and thus, arguably, the defense was waived (*see CPLR §3211[e]*). The branch of the cross-motion to dismiss under CPLR 3211(a)(1) is denied.

Fraud claims duplicative of breach of contract claims

The Rudell defendants argue that the causes of action for fraud, aiding and abetting fraud, rescission, unjust enrichment, and money had and received must be dismissed because they are duplicative or overlap with plaintiffs’ breach of contract cause of action.

However, it is well settled that a “defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations.” (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316

[1995]). New York courts recognize that bribery to procure a contract constitutes present acts collateral to and independent of the actual performance of the contract (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]; see *Pramer v Abaplus*, 76 AD3d 89, 99-100 [1st Dep't 2010]). And the Appellate Division, First Department has held that a victim of fraud may assert fraud claims in addition to a breach of contract claim (see *Am. Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 478 [1st Dept 2016]; *Pramer*, 76 AD3d at 99-100). As such, Con Ed, the victim of defendants' fraud and bribery scheme, may pursue both a fraud claim and a breach of contract claim. Thus, the branch of the cross-motion to dismiss the causes of action for fraud, and aiding and abetting fraud is denied.

Plaintiffs' claims of rescission, unjust enrichment, and money had and received were pled in the alternative. As to the contracts where plaintiffs claim no work was actually performed, rescission is an appropriate remedy. Pursuant to CPLR § 3002(e), claims for damages and rescission are not inconsistent and may be pled simultaneously. As to the claims of unjust enrichment and money had and received, these claims are not duplicative of the breach of contract claim because they are based in equity and would survive voiding of any contracts (see *Pramer*, 76 AD3d at 100; *Gordon v Oster*, 36 AD3d 525 [1st Dept 2007]). The branch of the cross-motion to dismiss the causes of action for rescission, unjust enrichment, and money had and received is denied.

Commercial bribery

The Rudell defendants, relying on *Sardanis v. Sumitomo Corp.* (279 AD2d 22d [1st Dept 2001], argue that plaintiffs' cause of action for commercial bribery should be dismissed because no private right of action exists under Penal Law for commercial bribery.

Plaintiffs counter with a Fourth Department case, *Niagara Mohawk Power Corp. v Freed* (265 AD2d 938 [4th Dept 1999]), that recognized a public utility's private right of action under the Penal Law for commercial bribery. Con Ed is a public utility. Plaintiffs add that "even if a private right of action were not available to Con [Ed] under the Penal Law, the *Sardanis* court still recognized a claim for commercial bribery under tort law. 279 A.D.2d at 229-30" (MS10 – Pltfs' Memo of Law in Opp, p 33). Citing *Pramer S.C.A. v. Abaplus Intern. Corp.* (76 AD3d at 99), plaintiffs claim that "the plain language of *Sardanis*" has been interpreted to mean that "a commercial bribery private right of action exists under tort law." (MS10 – Pltfs' Memo of Law in Opp, p 33).

In *Sardanis*, the Appellate Division, First Department, rejected the Fourth Department's position in *Niagara Mohawk Power Corp.* and denied a private cause of action under the Penal Law for commercial bribery (*Sardanis*, 279 AD2d at 230). Later, in *Pramer*, the First Department "adhere[d] to [its] prior holding in *Sardanis* that a private right of action is not implied under the commercial bribery provisions

of the Penal Law . . .” (*Pramer*, 76 AD3d at 99). The First Department’s position on this issue cannot be plainer, and plaintiff’s interpretation stating otherwise distorts the First Department’s plain language on the issue. Accordingly, the branch of the Rudell defendants’ cross-motion to dismiss plaintiffs’ cause of action for commercial bribery is granted.

MS10 – Plaintiff Con Ed’s Motion to Amend

Con Ed’s motion pursuant to CPLR §§ 3025 and 203 (f) to amend its Amended Complaint to enlarge the timeframe of defendants’ fraudulent kickback scheme is granted.

Con Ed initially pleaded that the fraud started “[f]rom a date currently unknown, but at least as early as in or about January 2008 through December 2010.” (Amended Complaint ¶ 90). The Complaint conceded that “[t]he full extent of the defendants’ bribery/fraud scheme, which by its nature was intended to evade detection, has not been discovered, and remains under investigation.” (*Id.* at ¶ 70). Con Ed submits that since it was joined as a party in this action, discovery led to evidence indicating the scheme to defraud began in 2002. The Razzouk defendants oppose the motion and argue that the claims dating back 15 years are time-barred. Moreover, they claim Con Ed and/ or National Union knew or should have known of the timeframe of the fraud given their own investigations and that of the Attorney General. Beyond that, the Razzouk defendants claim that the expansion of the timeframe will prejudice them.

CPLR § 3025 provides that courts shall freely grant leave for a party to amend their pleadings “unless the proposed amendment is palpably insufficient or patently devoid of merit” or will prejudice or surprise the opposing party (*MBIA Ins. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Pursuant to CPLR § 203(f), a plaintiff can utilize the relation back doctrine to successfully expand upon a preexisting cause of action where the relevant statute of limitations period has expired (*see Buran v Coupal*, 87 NY2d 173 [1995]).

Con Ed’s expansion of the time frame of the Amended Complaint is proper to conform its causes of action with the discovery available to it. The Court of Appeals has recognized that “it is almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of the party against whom the defense is being asserted” (*Jered Contracting Corp. v N.Y. City Transit Auth.*, 22 NY2d 187, 194 [1968]). Con Ed’s initial pleadings indicated that the extent of the fraud was not entirely known and that an amendment was likely.

It cannot be said that defendants will suffer any prejudice or surprise by the amendment. The Razzouk defendants claim that the delay in the amendment will

make it more difficult to defend the claim against them, causing prejudice. Given the claim against them, defendants were in the best position to understand the type of preparation needed to defend themselves (*see Murray v City of N.Y.*, 43 NY2d 400 [1977]; *Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546, 548 [2013]). Their claim of surprise and prejudice that an amended complaint will cause them is unpersuasive when the evidence had been in their possession. Further, their argument that the expansion of the timeframe exposes them to significantly higher liability does not establish prejudice (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]; *O'Halloran v Metro. Transp. Auth.*, 154 AD3d 83, 89 [1st Dept 2017]).

The Razzouk defendants' argument that Con Ed's proposed amendment is time-barred for failure to meet the requirements of the fraud tolling statute under CPLR §§ 203(g) and 213(8), is unavailing. As discussed above, Con Ed's amendment is timely under CPLR § 203(f). And thus, there is no need to satisfy the fraud tolling requirements of CPLR §§ 203(g) and 213(8). Moreover, Con Ed is not filing a new suit or adding a new cause of action unrelated to the claims in the Amended Complaint. Therefore, Con Ed need not avail itself of the fraud tolling statute.

Accordingly, Con Ed's motion to amend the Amended Complaint is granted. The Second Amended Complaint is deemed served on all parties.

MS 9 – The Rudell defendants' motion to compel

The Rudell defendants move to compel Sassine Razzouk and Grace Razzouk to appear for examinations before trial or be subject to sanctions. The motion is granted to the extent that the parties shall appear at a compliance conference to schedule all outstanding depositions with firm dates.

Accordingly, it is hereby, ORDERED, that the Rudell defendants' motion to compel (Motion Sequence 009) is granted to the extent that the parties shall appear for a compliance conference on **March 7, 2018 at 10:30 am** to schedule all outstanding depositions, it is further,

ORDERED that Consolidated Edison Company of New York, Inc.'s motion to amend (Motion Sequence 010) is granted in its entirety and the Second Amended Complaint is deemed served on all parties, and it is further

ORDERED that the Rudell defendants' cross-motion (Motion Sequence 010) is granted only to the extent that the 14th cause of action for commercial bribery is dismissed.

Consolidated Edison Company of New York, Inc. is directed to serve a copy of this decision with notice of its entry on all parties and the clerk of the court within 30 days.

This constitutes the decision and order of the court.

1/30/2018
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

DO NOT POST

FIDUCIARY APPOINTMENT

REFERENCE