

Borough Constr. Group, LLC v Red Hook 160 LLC
2019 NY Slip Op 33373(U)
October 23, 2019
Supreme Court, Kings County
Docket Number: 500308/19
Judge: Leon Ruchelsman
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FILED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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BOROUGH CONSTRUCTION GROUP, LLC.,
Plaintiff,

Decision and order

- against -

Index No. 500308/19

MS # 3,4 & 5

RED HOOK 160 LLC, PHILADELPHIA INDEMNITY
INSURANCE COMPANY, ACREFI MORTGAGE
LENDING, LLC, TRI STATE LUMBER, AF SUPPLY
CORP, UNITED RENTALS(NORTH AMERICA), INC.,
WORLDWIDE PLUMBING SUPPLY, INC., CASTLE
MASONRY, INC., WOODBURY CONSTRUCTION, INC.,
GO GREENER PLUMBING, INC., PREMIUM BUILDING
MATERIALS, INC., UNIVERSAL MARBLE AND GRANITE
OF QUEENS AND TPG CONTRACTING, CORP.,

Defendants, October 23, 2019

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff/third party defendant Borough Construction Group LLC has moved seeking to dismiss various counterclaims filed by Red Hook 160 LLC. Red Hook has cross-moved seeking to compel Borough to comply with an order of the court dated February 27, 2019. Defendant ACREFI Mortgage Lending LLC has moved seeking to dismiss the complaint. The motions have been opposed respectively and papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On September 15, 2016 Borough Construction Group LLC entered into a contract with Red Hook 160 LLC concerning the construction and renovation of a project located at 160 Imlay Street in Kings County. Further, on October 25, 2016 the parties entered into another side agreement which further formed conditions and

obligations of the parties. This lawsuit was filed wherein Borough alleges it is owed approximately \$2,542,806.20 for work performed pursuant to the contract. Indeed, Borough filed a Mechanic's Lien in that amount which was the subject of a related action. In that action the court entered an order directing Borough to produce its entire project file. Borough contends the entire file has already been provided. On May 22, 2019 Red Hook filed six counterclaims in this action against Borough. The counterclaims consist of two claims for breach of contract, breach of implied duty, injunctive relief, unjust enrichment and fraud. Borough has now moved seeking to dismiss four of those counterclaims. Further, as noted, ACREFI seeks to dismiss the claim of tortious interference with contract claim asserted by Borough.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint or allegations of the counterclaim complaint as true, whether the party can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint or counterclaim complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

Further, "the corporate veil will be pierced to achieve equity, even absent fraud, '[w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego'" (see, Fernbach, LLC v. Calleo, 92 AD3d 831, 939 NYS2d 501 [2d Dept., 2012]). Conclusory assertions that one corporation acted as the alter ego of another are insufficient to allow claims to be pursued against that corporation (Morris v. New York State Department of Taxation and Finance, 82 NY2d 135, 603 NYS2d 807 [1993]). The factors that must be examined to determine whether such alter ego relationship exists includes whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form (see, John John LLC v. Exit 63 Development LLC, 35 AD3d 540, 826 NYS2d 657 [2d Dept., 2006]). Thus, where it is alleged that two companies maintained the same directors, did not distinguish between the debts and obligations of both companies and that both companies were operated as a single economic entity then sufficient allegations of an alter ego relationship have been presented (UBS Securities LLC v. Highland Capital Management L.P., 93 AD3d 489, 940 NYS2d 74 [1st Dept., 2012]).

The Answer with Counterclaims asserts that "Borough

Construction is the alter-ego of Borough Equities as these companies are used interchangeably and have no real or legitimate separate corporate identities" (see, Counterclaims, ¶ 7). The Answer further asserts in the following paragraph that both "Borough Construction and Borough Equities, through Mr. Bauer and Mr. Kanaris created and submitted Project documentation to Red Hook 160 that identified both entities as the Construction Manager and contracting party, not only as to Red Hook 160 but also to various subcontractors and vendors" (id). These allegations, which must be taken as true for purposes of a motion to dismiss (Garendean Realty Owner LLC v. Lang, 175 AD3d 653, 107 NYS2d 416 [2d Dept., 2019]), sufficiently allege non-conclusory assertions that Borough Equities is the alter-ego of Borough Construction. The Answer alleges the two companies are owned by the same individuals and share economic responsibilities in the form of project documentation that had been submitted to Red Hook as well as other entities. Borough Construction argues that "nowhere does RH 160 allege that Plaintiff failed to maintain corporate formalities, had inadequate capitalization, commingled assets or that Equities had use of Plaintiff's funds" (Affirmation in Support of Motion, ¶ 39). However, Red Hook has submitted two subcontracts between Borough and other entities wherein the entity contained in those contracts is Borough Equities. Thus, an agreement with City Glass regarding the

subject property is made with Borough Equities as the construction manager. Likewise, an agreement with Vitroni regarding the subject property is with Borough Equities. Moreover, Red Hook submitted the title page of Borough's website which highlights both companies by stating in large print: "BOROUGH EQUITIES, BOROUGH CONSTRUCTION GROUP" and by further stating that "Borough Equities and Borough Construction Group is a privately held full service development firm. We oversee every aspect of a project from conception to acquisition to completion. We also act as the construction manager for certain projects. We are a full service construction company that provides a full range of Construction Management and General Contracting Services" (see, Boroughequities.com submitted within Exhibit B of James Miller's affidavit). These documents surely raise questions whether Borough Equities is the alter-ego of Borough Construction. Consequently, the motion seeking to dismiss any counterclaims against Borough Equities is denied.

Concerning the motion seeking to dismiss counterclaims filed against the individuals Bauer and Kanaris, it is well settled that a plaintiff seeking to pierce the corporate veil must demonstrate the owners of the corporation exercised complete domination over the corporation and abused the privilege of doing business in the corporate form and that such activity harmed the plaintiff (East Hampton Union Free School District v. Sandpebble

Builders, Inc., 66 AD3d 122, 884 NYS2d 94 [2d Dept., 2009]). Further, to state a claim against an individual director or officer, the plaintiff is required to present particularized allegations that the acts of the corporate officers were beyond the scope of employment or for personal gain (see, Petkanas v. Kooyman, 303 AD2d 303, 795 NYS2d 1 [1st Dept., 2003]). The allegations that comprise the counterclaims contain a single conclusory paragraph regarding the individual officers. Thus, in paragraph 10 of the counterclaims it states that "as the sole members and managers of Borough, Mr. Bauer and Mr. Kanaris exercise complete control and domination over Borough and personally directed and benefitted from the various fraudulent conduct alleged herein" (id). Red Hook argues that officers may be held personally liable if they engaged in fraud. However, Minico Insurance Agency, LLC v. AJP Contracting Corp., 166 AD3d 605, 88 NYS3d 64 [2d Dept., 2018], cited by Red Hook does not stand for the legal proposition that fraud can always satisfy the elements of dominion and control. Rather, that case merely concluded that sufficient facts existed to pierce the corporate veil. As the court noted, "the plaintiff sufficiently alleged that Pappas exercised complete domination and control over AJP in order to commit a wrong against the plaintiff that resulted in injury to the plaintiff" (id). However, in this case, as noted, there are no specific facts demonstrating the individual

defendants exercised any dominion and control sufficient to pierce the corporate veil. Indeed, there are no facts presented at all demonstrating such dominion and control. The counterclaim merely alleges in conclusory fashion such dominion and control, without providing any underlying facts supporting that contention. The fraud allegations, if true, therefore, concern the corporate entity and not any of the individuals. Therefore, the motion seeking to dismiss the counterclaims as to defendants Bauer and Kanaris is granted.

Concerning the actual counterclaims, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & McLaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Thus, fraud must be pled with a heightened degree of specificity and detail (Minico Insurance Agency LLC, v. AJP Contracting Corp., 166 AD3d 605, 88 NYS3d 64 [2d Dept., 2018]).

The counterclaims consist of only two misrepresentations that can form the basis for a fraud claim. First, allegations Borough instructed employees to create false work logs

(Counterclaim, ¶¶ 82-85) or that the work performed was not in accordance with project standards (Counterclaim, ¶¶ 86-88) does not constitute fraud since those issues were not misrepresentations that induced any reliance. Thus, the counterclaim sufficiently alleges, first that Borough misrepresented the cost saving benefits of self-performing the work which resulted in intentional overbilling (Counterclaim, ¶¶ 61-81). Moreover, the counterclaim also alleges that improper work performed was intentionally concealed and misrepresentations that no such defects existed were made (Counterclaim, ¶¶ 89-95).

Borough argues that even if true those claims are duplicative of the breach of contract claim. It is true that a misrepresentation of a material fact that is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain an action of fraud and is distinct from the breach of contract claim (Selinger Enterprises Inc., v. Cassuto, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only to the intent or ability to perform under the contract then such misrepresentation is duplicative of the breach of contract claim (see, Gorman v. Fowkes, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). Generally, for a fraud claim to be collateral to a breach of contract claim the misrepresentation must consist of a present fact that is unrelated to the precise terms of the contract itself. Thus, in American Media Inc., v.

Bainbridge & Knight Laboratories LLC, 135 AD3d 477, 22 NYS3d 437 [1st Dept., 2016] the plaintiff sued defendant for advertisements it placed in various periodicals without receiving payment pursuant to the contract. The court held misrepresentations made by the defendant were not duplicative of the breach of contract claim. Specifically, the principal of the defendant made statements that he loaned the defendant sufficient funds to cover the advertising expenses thereby inducing the plaintiff to enter into the contract. The court noted those misrepresentations were collateral since they were misrepresentations of present facts, namely that the defendant had sufficient funds. Further, these misrepresentations were collateral to the actual terms of the contract which involved placing advertising in plaintiff's periodicals (see, also, Deerfield Communications Corp., v. Chesebrough Ponds Inc., 68 NY2d 954, 510 NYS2d 88 [1986]). Thus, the critical distinction whether a fraud claim is distinct from a breach of contract claim rests upon the following criteria. The first is whether the misrepresentation concerns a future intent to perform or whether the statement misrepresents present facts (see, Wylie Inc., v. ITT Corp., 130 AD3d 438, 13 NYS3d 375 [1st Dept., 2015]). If the misrepresentation concerns present facts it will generally be considered collateral. If the misrepresentation concerns a future intent to perform then it is generally duplicative of a breach of contract claim. This does

not mean to imply a fraud claim regarding future conduct can never be distinct from a breach of contract claim. It surely can where the promise is collateral to the contract. (see, Fairway Prime Estate Management LLC v. First American International Bank, 99 AD3d 554, 952 NYS2d 524 [1st Dept., 2012]). Moreover, even if the misrepresentation concerns a present statement of facts, those facts must touch a matter that is not the subject of the contract. Therefore, if the promise or misrepresentations "concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (HSH Nordbank AG v. UBS AG, 95 AD3d 185, 941 NYS2d 59 [1st Dept., 2012]).

In this case, the fraud claims, as noted, allege misrepresentations regarding self-performance of the work and concealing defects. Those allegations do not include matters not already subject to the contract. Thus, any misrepresentations of defendant upon which the plaintiff relied in this case, even if they were present facts, were all related to the agreement between the parties which forms the basis of the breach of contract claim. Indeed, the breach of contract claim alleges that Borough failed to "properly issue bid packages to subcontractors and enter into written subcontracts that complied with the CM agreement" and "performing defective work" (see, Counterclaim, ¶ 99).

Therefore, the fraud claim is duplicative of the breach of contract claim and consequently the motion seeking to dismiss the fraud claim is granted.

Likewise, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Since in this case there is a viable claim for breach of contract, the claim for unjust enrichment is duplicative and the motion seeking to dismiss this cause of action is granted.

Concerning the counterclaims seeking specific performance and an injunction, they are based upon Borough's alleged failure to comply with a court order dated February 27, 2019 requiring Borough to produce its complete file in this case. This issue is also the basis of Red Hook's cross motion seeking compliance with that order. Borough has emphatically argued that it has fully complied with that order and has produced the entire project file. The only basis to argue otherwise is an affidavit from James Miller a senior manager of a firm specializing in forensic auditing and construction consulting and auditing. Mr. Miller supplied an affidavit wherein he explains that the "most basic of construction documents" including "a job cost report, executed

subcontracts etc.," have not been produced (see, Affidavit of James Miller, ¶ 7). Further in the affidavit Mr. Miller elaborates upon the importance of those missing documents and the very unlikely event such reports were not issued in this construction project. However, Borough insists it has complied with the court order and has produced the entire project file and that any such documents not submitted were maintained by Red Hook. Thus, Red Hook can only speculate that Borough has not fully complied with the court order. Indeed, there has been no evidence presented such compliance has been lacking. Therefore, the motion seeking to dismiss the third and fourth counterclaims is granted. The cross-motion seeking to compel further compliance is consequently denied.

Turning to ACREFI's motion seeking to dismiss the tortious interference claim, it is well settled the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Tri-Star Lighting Corp., v. Goldstein, 151 AD3d 1102, 58 NYS3d 448 [2d Dept., 2017]). Thus, it must be alleged the defendant's goal was to cause a breach of contract between the parties (In re Refco Inc., Securities Litigation, 826 F.Supp2d 428 [S.D.N.Y. 2011])

and to harm Borough without any justification (Sleifer-Weickel Inc., v. Meteor Skelly Inc., 140 AD2d 320, 527 NYS2d 553 [2d Dept., 1988]).

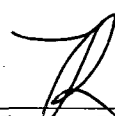
The complaint alleges ACREFI interfered with the contract between Borough and Red Hook by "refusing to approve payment requisitions or approve the release of funds to Owner to pay Borough related to Borough's work in connection with the Project" (see, Supplemental Summons ¶ 112). ACREFI's motion to dismiss is based upon the argument the plaintiff failed to demonstrate the reason the funds were withheld and thus failed to establish ACREFI acted with the intent to cause Red Hook to breach the contract. Indeed, ACREFI argues that it had no authority to control Red Hook's ability to pay Borough and that even if it denied the funds sought by Red Hook that did not relieve Red Hook of making any necessary payments. Therefore, ACREFI could not have been the cause of any breach and cannot be liable for tortious interference with the contract. The affidavit of Michael Bauer does not raise any question of fact in this regard and does not support a tortious interference claim. Mr. Bauer accuses of ACREFI of denying payments because essentially it was trying to avoid paying future requests. However, if that is true it does not address the fact that Red Hook still had independent obligations to satisfy the terms of the contract. Therefore, the complaint insufficiently alleges ACREFI committed any tortious

interference. Therefore, ACREFI's motion to dismiss that cause of action is granted.

So ordered.

ENTER:

DATED: October 23, 2019
Brooklyn, NY



Hon. Leon Ruchelsman
JSC

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