

Yawand-Wossen v M Square Bldrs. LLC

2021 NY Slip Op 32849(U)

December 23, 2021

Supreme Court, New York County

Docket Number: Index No. 154127/2020

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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YADEY YAWAND-WOSSEN,

Plaintiff

Index No. 154127/2020

- against -

DECISION AND ORDER.

M SQUARE BUILDERS LLC,

Defendant

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LUCY BILLINGS, J.S.C.:

Defendant moves to dismiss the amended verified complaint's second and third claims, both for fraud, and claim for punitive damages, based on documentary evidence, failure to state a cause of action, and failure to plead fraud with the required specificity. C.P.L.R. §§ 3016(b), 3211(a)(1) and (7). Upon such a motion, the court considers the facts alleged in the complaint and presumes them to be true. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d 169, 175 (2021); Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 141 (2017); Seaman v. Schulte Roth & Zabel LLP, 176 A.D.3d 538, 538 (1st Dep't 2019).

I. THE ALLEGED FACTS

According to the amended verified complaint, plaintiff owns premises at 160 East 95th Street, New York County. Aff. of Lawrence M. Segan Ex. A (Am. V. Compl.), NYSCEF Doc. 12, ¶ 6.

She retained an architect and a project manager to renovate the premises. Id. On November 28, 2017, plaintiff and defendant entered a contract for renovation of the premises, for which plaintiff was to pay defendant \$1,973,491.20. Id. ¶ 10.

Defendant represented that it possessed "the experience, skill, and financial wherewithal to complete the Project correctly, competently, and in a timely manner." Id. ¶ 9. The contract provided that the project was to be substantially completed before March 1, 2019. Id. ¶ 11. The parties stipulate that \$1,973,491.20 was the original amount under their contract and that they amended the amount to \$2,196,530.55 through subsequent change orders.

On or about March 1, 2019, defendant represented that it had paid for "materials, equipment, and sub-contractors," and completed so much of the project as to entitle defendant to \$95,485.09 that plaintiff had withheld pursuant to the contract as retainage, funds payable to defendant to be withheld by plaintiff until defendant completed 80% of the project. Id. ¶ 16. Once plaintiff paid the retainage to defendant, its work suffered. Its supervisor was absent from the premises.

Defendant fired the project foreperson because it could not pay him and provided insufficient workers to perform the work.

Defendant also cut back on materials for the project because of a lack of funds, failed to pay contractors, failed to complete

work, falsely claimed how much work defendant had completed, and falsified requests for payment. Id. ¶ 19.

Plaintiff alleges that, by February 2019, defendant no longer intended to complete the project, but intended to elicit as much money from her as possible. Id. ¶ 20. On May 6, 2019, defendant informed plaintiff it could not complete the project. Plaintiff eventually hired another contractor to complete the project, which caused her damages of \$443,367.88. Plaintiff also claims contractual late completion fees of \$52,750.00 (\$250 per day for 211 work days). Plaintiff subsequently informed defendant that completion of the project actually would cost an additional \$131,479.50, due to the need to repair defendant's poorly performed work.

The amended complaint alleges a claim for breach of the parties' contract and two claims for fraud in the inducement. The second claim alleges fraud in inducing plaintiff to enter the original contract. The third claim alleges fraud in inducing her to pay the retainage. As set forth above, defendant moves to dismiss the fraud claims and plaintiff's claim for punitive damages applicable to all three substantive claims.

II. DEFENDANT'S MOTION TO DISMISS CLAIMS

A. Grounds for the Motion

In moving to dismiss the fraud claims pursuant to C.P.L.R. § 3211(a)(1), based on documentary evidence, and C.P.L.R. §

3211(a)(7), failure to state a cause of action, defendant maintains that the contract between the parties shows the fraud claims duplicate the breach of contract claim. Defendant also maintains that plaintiff, by alleging, at most, defendant's misrepresentation of its intention to perform under the contract, fails to allege an actionable misrepresentation. Regarding the second claim, defendant takes the further position that plaintiff alleges no facts to support defendant's inability to perform under the contract as of November 28, 2017, and that her bare, conclusory allegation without such facts does not support a fraud claim pursuant to C.P.L.R. § 3016(b). Regarding the third claim, in addition to maintaining that the claim duplicates the contract claim, defendant contends that, pursuant to the contract, defendant owed no obligation to pay the subcontractors and suppliers before receiving plaintiff's payments. Defendant also contends that plaintiff alleges no injury from defendant's alleged failure to pay the subcontractors and suppliers.

Plaintiff contends that the contract does not definitively refute the amended complaint's allegations, that the fraud claims are based on a duty outside the contract, and that plaintiff has alleged all required elements of the second and third claims. Plaintiff points to the injury she suffered when she paid the retainage, which she would not have paid had defendant not misrepresented its completion of the required 80% of the project.

Finally, plaintiff claims punitive damages are available because, while defendant's actions are not aimed at the public, punitive damages may be awarded if defendant's conduct exhibits a high degree of moral culpability demonstrating reckless or conscious disregard of other persons' rights.

B. Applicable Standards

As set forth above, defendant seeks dismissal of plaintiff's fraud claims pursuant to C.P.L.R. § 3211(a)(1), based on documentary evidence; C.P.L.R. § 3211(a)(7), based on failure to state a cause of action; and C.P.L.R. § 3016(b), based on failure to plead fraud with the requisite detail. To succeed on a motion to dismiss pursuant to C.P.L.R. § 3211(a)(1), the documentary evidence submitted that forms the basis of a defense must "utterly refute[] the plaintiff's factual allegations, conclusively establishing a defense as a matter of law."

Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d at 175 (quoting Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002)). See Atsco Footwear Holdings, LLC v. KBG, LLC, 193 A.D.3d 493, 494 (1st Dep't 2021). The court considers the facts alleged in the complaint as true and affords plaintiff the benefit of every favorable inference. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d at 175. Factual allegations flatly contradicted by documentary evidence,

however, as well as claims consisting of bare legal conclusions, are not entitled to any such consideration. Myers v. Schneiderman, 30 N.Y.3d 1, 11 (2017); Array BioPharma, Inc. v. AstraZeneca AB, 184 A.D.3d 463, 464 (1st Dep't 2020).

C.P.L.R. § 3211(a)(1) does not explicitly define documentary evidence, but the documents must be unambiguous, of undisputed authority, with contents that are essentially undeniable, to establish a conclusive defense. VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC, 171 A.D.3d 189, 193 (1st Dep't 2019). The documentary evidence defendant presents is the parties' contract and its subsequent amendments.

Upon defendant's motion to dismiss the amended complaint pursuant to C.P.L.R. § 3211(a)(7), defendant bears the burden to establish that the amended complaint "fails to state a viable cause of action." Connolly v. Long Island Power Auth., 30 N.Y.3d 719, 728 (2018). In evaluating defendant's motion, as under § 3211(a)(1), the court must accept plaintiff's allegations as true, liberally construe the amended complaint, and draw all reasonable inferences in her favor. Doe v. Bloomberg L.P., 36 N.Y.3d 450, 454 (2021); Connolly v. Long Island Power Auth., 30 N.Y.3d at 728; JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); M & E 73-75 LLC v. 57 Fusion LLC, 189 A.D.3d 1, 5 (1st Dep't 2020). Again, however, the court will not give such consideration to allegations that consist of only bare

legal conclusions. Myers v. Schneiderman, 30 N.Y.3d at 11; Simkin v. Blank, 19 N.Y.3d 46, 52 (2012); M & E 73-75 LLC v. 57 Fusion LLC, 189 A.D.3d at 5. Instead, the court accepts as true only plaintiff's factual allegations that set forth the elements of a legally cognizable claim and from them draws all reasonable inferences in her favor.

Dismissal is warranted if the amended complaint fails to allege facts that fit within any cognizable legal theory. Sassi v. Mobile Life Support Servs., Inc., 37 N.Y.3d 236, 239 (2021); Faison v. Lewis, 25 N.Y.3d 220, 224 (2015). Although defendant may not rely on evidence outside the pleaded claims, plaintiff may rely on admissible evidence to supplement and remedy any defects in her complaint, Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 (1998); US Suite LLC v. Barata, Baratta & Aidala LLP, 171 A.D.3d 551, 551 (1st Dep't 2019); Ray v. Ray, 108 A.D.3d 449, 452 (1st Dep't 2013), because the question is whether plaintiff maintains a claim, not whether plaintiff has artfully articulated or correctly labeled it or defendant disputes it. Chanko v. American Broadcasting Cos., 27 N.Y.3d 46, 52 (2016). Therefore the court disregards the affidavits by defendant's President except to the extent that they authenticate the documentary evidence on which defendant relies. C.P.L.R. § 3211(a)(1).

C. The Fraud Claims

Claims based on fraud "must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." MP Cool Invs. Ltd. v. Forkosh, 142 A.D.3d 286, 290-91 (1st Dep't 2016). Plaintiff must set forth the circumstances constituting fraud in detail. C.P.L.R. § 3016(b); Epiphany Community Nursery Sch. v. Levey, 171 A.D.3d 1, 9 (1st Dep't 2019); MP Cool Invs. Ltd. v. Forkosh, 142 A.D.3d at 291.

Both fraud claims duplicate the breach of contract claim. Besides punitive damages, litigation costs, and interest, the contract claim seeks damages of \$496,117.88, representing the costs to complete the work under the contract and contractual late completion fees. Am. V. Compl. ¶¶ 23, 57. The second claim, for fraud in the inducement of the contract, seeks the return of all funds paid by plaintiff, totaling \$1,944,005.64, plus punitive damages. This requested relief amounts to rescission of the contract, returning the parties to the status quo before entering the contract, which is impossible here. If defendant were to return to plaintiff all her payments to it, she could not return its work and materials, to restore both parties to their positions before entering the contract. El Toro Group, LLC v. Bareburger Group, LLC, 190 A.D.3d 536, 537-38 (1st Dep't 2021). Damages for fraud, moreover, are the actual losses from

the fraud: the additional amount plaintiff spent as a result of the fraud. Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 421 (1996); Empire Outlet Bldrs. LLC v. Construction Resources Corp. of N.Y., 170 A.D.3d 582, 583 (1st Dep't, 2019). Since the first claim, for breach of the contract, seeks that amount, the second claim, for fraud, must fail because it seeks damages that duplicate the damages that the contract claim seeks. MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC, 165 A.D.3d 108, 114 (1st Dep't 2018).

The third claim, for fraud based on misrepresentations that defendant was entitled to the retainage, seeks the return of the retainage. Pursuant to the parties' contract, if defendant failed to supply workers or materials, failed to pay subcontractors, substantially breached any contract provision, or abandoned the project, plaintiff was entitled to terminate the contract, stop payments to defendant, and complete the work using other vendors as she did. If plaintiff's costs to complete the work exceed the amount owed to defendant under the contract, defendant is required to pay the difference to plaintiff. Aff. of Patrick Fitzpatrick Ex. A, NYSCEF Doc. 19, §§ 14.2.1 - 14.2.4. Therefore the retainage, had plaintiff withheld it, would be applied to the amount needed to complete the work, which the first claim, for breach of the contract, seeks. In sum, plaintiff seeks the same damages twice. The third claim, the

alternative fraud claim, thus also must fail because it duplicates the contract claim.

The fraud claims also fail to state a cause of action for which relief may be granted. The heart of the first fraud claim is that defendant misrepresented to plaintiff it was "able, competent, and skilled to provide professional quality construction and contracting services to complete the Project." Am. V. Compl. ¶ 39. This vague allegation lacks any specification as to who made that representation, to whom, or when. I.M.P. Plumbing & Heating Corp. v. Munzer & Saunders, LLP, No. 14688, ___ A.D.3d ___, 2021 WL 5456172, at *2 (1st Dep't 2021). The allegation further lacks any specific facts that indicate the alleged misrepresentation was intentional. Bullen v. CohnReznick, LLP, 194 A.D.3d 637, 637 (1st Dep't 2021). Plaintiff thus fails to plead the claim with the specificity sufficient to satisfy C.P.L.R. § 3016(b).

Nor has plaintiff alleged justifiable reliance on defendant's misrepresentation. Plaintiff alleges that she contracted for over \$2,000,000.00 worth of renovations and previously retained the assistance of both an architect and a project manager, but omits that she or her agents performed any due diligence in selecting defendant as her contractor or confirming its alleged representations. OmniVere, LLC v. Friedman, 174 A.D.3d 443, 444 (1st Dep't 2019); Rubin v.

Sabharwal, 171 A.D.3d 580, 580 (1st Dep't 2019); New York City Educ. Constr. Fund v. Verizon N.Y. Inc., 114 A.D.3d 529, 530 (1st Dep't 2014). Therefore the second claim, for fraud, fails due both to lack of specificity, as required by C.P.L.R. § 3016(b), and to failure to plead justifiable reliance. C.P.L.R. § 3211(a)(7).

The third claim, also for fraud, alleges that defendant falsely represented it had paid for materials, equipment, and subcontractors and completed 80% of the work, to entitle defendant to an additional payment from plaintiff. This claim fails for the same reasons discussed above. Plaintiff does not describe the alleged false statements with specificity, nor does she allege facts showing her reliance on those representations was justifiable.

D. Punitive Damages

Finally, defendant moves to dismiss the amended complaint to the extent that it seeks punitive damages. Punitive damages may be allowed for fraud claims based on private conduct, if "gross, wanton, or willful fraud or other more culpable conduct" merits the award, Borkowski v. Borkowski 39 N.Y.2d 982, 983 (1976), but the fraud claims fail. To obtain punitive damages based on a breach of contract claim, plaintiff must establish (1) an independent tort (2) of an egregious nature (3) directed at her and (4) also part of a pattern of conduct directed at the public.

Matter of Part 60 Put-Back Litig., 36 N.Y.3d 342, 360 (2020).

Because the fraud claims fail, no tort claim survives as a basis for awarding punitive damages. Therefore the court also dismisses the amended complaint's claim for punitive damages.

III. CONCLUSION

In sum, the court grants defendant's motion to dismiss the amended complaint's second and third claims, for fraud, and so much of the first claim, for breach of a contract, that seeks punitive damages. C.P.L.R. §§ 3016(b), 3211(a)(1) and (7). Defendant shall file its answer to the remainder of the amended complaint within 20 days after the date this Decision and Order is filed.

DATED: December 23, 2021



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C