SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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UA BUILDERS CORP.,

Plaintiff,

- v -

IMPERIAL GENERAL CONSTRUCTION, CORP., XHELADIN VELIU, ARBEN VELIU, and AFRIM VELIU,

Defendants.

INDEX NO. 652639/2019

MOTION DATE 04/11/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

In this action arising from the alleged breach of construction subcontracts for the performance of certain roofing work at three construction sites in the Bronx, the defendant subcontractor, Imperial General Construction Corp. (Imperial) and its owners, Xheladin Veliu, Arben Veliu, and Afrim Veliu, move pursuant to CPLR 3212 or, in the alternative, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint in its entirety. The plaintiff opposes the motion. For the following reasons, the motion is granted in part.

II. BACKGROUND

As alleged in the complaint, the plaintiff was retained as general contractor to perform certain construction work at three project sites at the following locations in the Bronx: (1) 764 East 152nd Street (the E 152 Project), (2) 915 Dawson Street (the Dawson Project), and (3) 1081 Tiffany Street (the Tiffany Project). On or about July 30, 2018, the plaintiff retained Imperial as

its subcontractor to perform certain roofing and other work at each site. Pursuant to three written agreements applicable to each site, respectively, Imperial was to complete its work to specified standards within five days of receiving notice to proceed. Despite being paid the entirety or almost the entirety of the subcontract prices, Imperial failed to complete work at any project. Further, the plaintiff alleges that the work Imperial did perform was defective, leading to water damage.

The plaintiff commenced this action by filing of the summons and complaint on May 3, 2019. The plaintiff asserts claims against Imperial sounding in breach of contract (first, second, and third causes of action), unjust enrichment (fourth cause of action), and negligence (sixth cause of action), and a claim against Imperial and its owners sounding in fraud (fifth cause of action). The defendants filed an answer on September 5, 2019, asserting ten affirmative defenses and two counterclaims seeking payment from the plaintiff for work Imperial performed on change orders at the E 152 Project and the Tiffany Project and the balance of the subcontract prices. Discovery was completed and the Note of Issue filed on October 13, 2021. The instant motion ensued.

III. DISCUSSION

A. Motion for Summary Judgment

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986);

Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

In support of the branch of their motion seeking summary judgment, the defendants have submitted an affirmation of counsel, a statement of material facts signed only by counsel, and the subject roofing subcontracts. The defendants have submitted no affidavit of facts to support their motion, as is required pursuant to CPLR 3212(b). See Sam v Town of Rotterdam, 248 AD2d 850, 851 (3rd Dept. 1998) ("[T]he inescapable fact is that CPLR 3212(b) very specifically requires a summary judgment motion to 'be supported by an affidavit.'"). The affirmation of the defendants' counsel is not a substitute for this requirement. Since counsel claims no personal knowledge of the facts, his affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010); Miller v City of New York, 277 AD2d 363 (2nd Dept. 2000). While the verified answer might have sufficed, it was not included in the defendants' filing, which, as the plaintiff correctly observes, separately warrants denial of their summary judgment motion. See CPLR 3212(b); Weinstein v Gindi, 92 AD3d 526 (1st Dept. 2012). Finally, even if the court were to consider the verified answer, the boilerplate affirmative defenses asserted therein are insufficient, in the absence of any proof in admissible form, to establish the defendants' entitlement to summary judgment on any claim.

Accordingly, the branch of the defendants' motion seeking summary judgment dismissing the complaint must be denied.

B. Motion to Dismiss

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010).

i. Breach of Contract

The complaint avers that the parties entered into a series of subcontracts pursuant to which Imperial was to perform roofing work of a specified quality at certain properties in the Bronx. The complaint further states that notwithstanding the plaintiff's payment to Imperial of all or substantially all of the subcontract prices, Imperial performed defective work, failed to complete work, and failed to even begin work at one or more of the properties. This is sufficient to state claims sounding in breach of contract. See Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept 2009). The defendants' argument that the complaint must also identify the "specific provisions of the contracts" that were breached in order to state a claim is without basis in law. Thus, the first, second, and third causes of action survive.

ii. Unjust Enrichment

A plaintiff may not recover for unjust enrichment where, as here, it has a valid, enforceable contract that governs the same subject matter as the unjust enrichment claim. See Clark-Fitzpatrick, Inc. v Long Island Rail Road Co., 70 NY2d 382 (1987); Ellis v Abbey & Ellis, 294 AD2d 168 (1st Dept. 2002); Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski, 14 AD3d 644 (2nd Dept. 2005). While the plaintiff would be permitted to proceed in the alternative upon a quasi-contractual theory such as unjust enrichment if there were a question as to whether a valid and enforceable contract existed (see Forman v Guardian Life Ins. Co. of America, 76 AD3d 866 [1st Dept. 2010]), no party raises such issues or disputes the enforceability of the subject agreements in this case. Therefore, the plaintiff's fourth cause of action, sounding in unjust enrichment, is dismissed.

iii. Tort Claims

The defendants assert that the fifth and sixth causes of action are inadequately pleaded because they are duplicative of the plaintiff's first three causes of action, which seek to recover for breach of contract. "It is a well established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Dormitory Authority v Samson Construction Co., 30 NY3d 704 (2018) (citation omitted). However, the Court of Appeals has also recognized that "a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract." North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171 (1968); see also Sommer v Federal Signal Corp., 79 NY2d 540 (1992).

1. Negligence

The Court of Appeals has noted that

> [a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties. In these instances, it is policy, not the parties' contract, that gives rise to a duty of care.

Sommer v Federal Signal Corp., supra. Nonetheless, "merely alleging that the breach of contract duty arose from a lack of due care will not transform a simple breach of contract into a tort." Id. "'[T]he nature of the injury, the manner in which the injury occurred and the resulting harm'" are all relevant factors in considering whether claims for breach of contract and tort may exist side by side." Verizon New York, Inc. v Optical Comms. Group, Inc., 91 AD3d 176 (1st Dept. 2011) (citing Sommer v Federal Signal Corp., supra.). The First Department has described the nature of the harm, "particularly whether it is 'catastrophic,' as 'one of the most significant elements in determining whether the nature of the type of services rendered gives rise to a duty of reasonable care independent of the contract itself.'" Verizon New York, Inc. v Optical Comms. Group, Inc., supra (quoting Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegal & Assoc. Architects, 192 AD2d 151, 154 [1st Dept. 1993]). Accordingly, parallel actions sounding in contract and tort have been found to exist only where a defendant's failure to perform contractual duties competently can have "catastrophic consequences" affecting a significant public interest. For example, the First Department found that a negligence claim was stated, in addition to a claim to recover for breach of a construction contract, where defective construction work on the facade of a city building caused a part of the concrete facade to fall into a courtyard regularly used by college students. See Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegal & Assoc. Architects, supra. Similarly, a landlord's reduction of heat of a commercial building that

caused a burst pipe and $500,000 in flood damage was held to give rise to a negligence claim. See Duane Reade v SL Green Operating Partnership, LP, 30 AD3d 189 (1st Dept. 2006).

Here, the complaint alleges only that Imperial's defective performance "le[d] to water damage" at each of the projects. This allegation is plainly insufficient to establish a negligence claim separate from the plaintiff's breach of contract claim. The facts that roofing subcontractors are subject to state codes and regulations, and that there may be a public interest in compliance with such regulatory schemes, are not independently sufficient to create tort liability. See Verizon New York, Inc. v Optical Comms. Group, Inc., supra. None of the alleged breaches of the subcontracts yielded consequences rising to the level of seriousness and public effect described in the cases cited above. Indeed, no information is provided in the complaint or elsewhere, even after the close of discovery, that would suggest that the water damage was "catastrophic." Nor does mere "project delay," as asserted by the plaintiff in its opposition to the defendants' motion, transform the plaintiff's breach of contract claim into a tort.

Accordingly, the sixth cause of action must be dismissed.

2. Fraud

The plaintiff's allegations in support of its fifth cause of action, alleging fraud, likewise fail to assert the breach of any duty distinct from, or in addition to, the breach of contract. The plaintiff alleges that Imperial and its owners made fraudulent representations, including statements that Imperial was capable of performing and completing the work contemplated by the subcontracts, that the work was being performed properly while the defendants knew there were defects in the work, and that payment for the work was due while the defendants knew the work was not completed properly. The first alleged misstatement amounts to a claim that, in the plaintiff's own words, was false inasmuch as the defendants said they could perform work "when

they knew they could not." This statement is a promissory statement of future performance and does not amount to a misrepresentation of a present fact extraneous to the contract, as required to sustain a separate cause of action based on a fraud in the inducement. See The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 (1st Dept. 2004); First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287 (1st Dept. 1999). Furthermore, the only fraud claimed in relation to the remaining misstatements is based exclusively on the same facts, i.e., nonperformance, as underlie the breach of contract claims. See Gordon v Dino De Laurentiis Corp., 141 AD2d 435 (1st Dept. 1988); MP Innovations, Inc. v Atlantic Horizon International, Inc., 72 AD3d 571 (1st Dept. 2010). In addition, the plaintiff does not allege that it was induced by the defendants' misstatements to do anything outside of the written agreement, i.e., paying the amount agreed to.

Moreover, the plaintiff's assertion that the "Imperial Owners personally participated in the fraudulent representations" is plainly insufficient to satisfy the statutory pleading requirements imposed by CPLR 3016(b). "Allegations of fraud should be dismissed as insufficient where the claim is unsupported by specific and detailed allegations of fact in the pleadings." Callas v Eisenberg, 192 AD2d 349 (1st Dept. 1993); see CPLR 3016(b).

Accordingly, the plaintiffs' fifth cause of action is dismissed as against all defendants.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendants' motion is granted to the extent that, pursuant to CPLR 3211, the fourth, fifth, and sixth causes of action of the complaint are dismissed in their entirety, and the motion is otherwise denied; and it is further

ORDERED that, all causes of action asserted against the individual defendants having been dismissed, the action is dismissed in its entirety as against the defendants Xheladin Veliu, Arben Veliu, and Afrim Veliu, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the first, second, and third causes of action, sounding in breach of contract as against the defendant Imperial General Construction Corp., and the counterclaims asserted by Imperial General Construction Corp., are severed and shall continue.

This constitutes the Decision and Order of the court.

DATED: June 17, 2022

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON