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Breach of Contract and Fraudulent Inducement Claims: Two Bites at the Apple?

Complaints often assert a breach of contract cause of action that is framed by a fraudulent inducement cause of action. The purpose of this piece is to point out the difficulties presented when the practitioner attempts to plead both claims concurrently.

By **David B. Saxe and Michael Mix** | January 13, 2020

Lawyers who draft complaints often have the habit of expanding their requested legal claims or causes of action into areas that do not have the remotest chance of overcoming a motion to dismiss. Often these same lawyers think that the heft of their papers will prove daunting and intimidating to the adversary and perhaps

even the court. Examples of this are often seen in complaints asserting a breach of contract cause of action that is framed by a fraudulent inducement cause of action. The purpose of this piece is to point out the difficulties presented when the practitioner attempts to plead both claims concurrently.

Under longstanding New York law, a plaintiff cannot establish a claim for fraudulent inducement if the claim duplicates a concurrent claim for breach of contract. However, determining whether a fraudulent inducement claim is actually duplicative of a breach of contract claim has continually vexed litigants and courts. We will examine the factors that courts have employed in recent cases in order to determine whether a fraud claim is duplicative of a contract claim.

Fraudulent Inducement Claims Alleging Misrepresentations of Future Intent Will Be Dismissed as Duplicative. One of the primary areas that courts examine to determine whether or not a fraudulent inducement claim is duplicative of a contract claim is whether or not the complaint alleges a misrepresentation of "present fact" or "future intent to perform under the contract." *Wyle Inc. v. ITT Corp.*, 130 A.D.3d 438, 439 (1st Dept. 2015). A future intent to perform—i.e., "that the defendant was not sincere when it promised to perform under the contract"—will be dismissed as duplicative. *First Bank of the Americas v. Motor Car Funding*, 257 A.D.2d 287, 291 (1st Dept. 1999). The "pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim." *Wyle*, 130 A.D.3d at 439. In order for the fraudulent inducement claim to survive dismissal, the "misrepresentations of present fact must be collateral to the contract and must have induced the allegedly defrauded party to enter into the contract." Id. at 439. In explaining what misrepresentations are "collateral to the contract," the First Department has further explained that "[u]nlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty." *First Bank*, 257 A.D.2d at 292.

The federal courts have worded the standard slightly differently. In *Bridgestone/Firestone v. Recovery Credit Servs.*, 98 F.3d 13 (2d Cir. 1996), the Second Circuit, applying New York law, explained that "[t]o maintain a claim of fraud in such a situation, a plaintiff must either (i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages." Id. at 20 (internal citations and quotation marks omitted). The *Bridgestone/Firestone* recitation of the standard is still often cited today, see, e.g., *Negrete v. Citibank, N.A.*, 759 F. App'x 42, 48 (2d Cir. 2019), and is worded slightly differently than the First Department's holding in *First Bank* that a "misrepresentation of present facts is collateral to the contract ... and therefore involves a separate breach of duty." 257 A.D.2d at 292.

One example of a recent such case in which the court ruled for the plaintiff is *Ohm NYC LLC v. Times Sq. Assoc. LLC*, 170 A.D.3d 534 (1st Dept. 2019). In *Ohm*, the plaintiff tenant alleged that the defendant-landlord misrepresented that a portion of the ground floor would be included in the leased premises in question. The plaintiff brought claims for breach of contract and fraudulent inducement against the landlord. In determining that the plaintiff had stated a cause of action for fraudulent inducement that was not duplicative of its contract

claim, the First Department held that the descriptions of what would be included in the leased premises, "were not promises of future performance, but misrepresentations of a then present fact." Id. at 534. Because the misrepresentations were of present fact, the plaintiff's fraudulent inducement claim could proceed.

By contrast, in *320 W. 115 Realty LLC v. All Bldg. Constr. Corp.*, No. 651613/2018, 2019 N.Y. Misc. LEXIS 5314 (Sup. Ct. N.Y. Cty. Oct. 4, 2019), the plaintiff property owner entered into contracts with the defendant under which the defendant agreed to perform general contracting management services to renovate the plaintiff's property. The plaintiff alleged numerous breaches of the contracts, including that the defendant failed to complete the construction project by the date required, deviated from approved plans, failed to complete major tasks, engaged in shoddy work, and failed to pay subcontractors while falsely certifying that those subcontractors were paid. The plaintiff brought claims for fraudulent inducement and breach of contract. The fraudulent inducement claim was based on the allegation that the defendant falsely represented to the plaintiff that the defendant would perform under the contracts, thus inducing the plaintiff to enter into them. In dismissing the fraudulent inducement claim as duplicative of the contract claim, the court that "Plaintiff alleges that Defendants lacked the intent to perform the Agreements, which is clearly a statement of future intent and is thus not actionable." Id. at *6 (citations omitted).

Fraudulent Inducement Claims Alleging the Same Damages as Contract Claims Will Be Dismissed As Duplicative. Courts will dismiss a fraudulent inducement claim "as duplicative of a breach of contract claim if it seeks the same damages." *Ambac Assur. v. Countrywide Home Loans*, No. 651612/10, 2019 N.Y. App. Div. LEXIS 6580, at *2 (1st Dept. Sept. 17, 2019) (citation and internal quotation marks omitted). The First Department has explained that "the damages recoverable for a breach of contract are meant to place the non-breaching party in as good a position as it would have been had the contract been performed; the damages recoverable for being fraudulently induced to enter a contract are meant to indemnify for the loss suffered through that inducement." *Manas v. VMS Assoc.*, 53 A.D.3d 451, 454 (1st Dept. 2008) (internal citations and quotation marks omitted).

For example, in *Ambac*, the plaintiffs were monoline insurers that issued financial guaranty insurance policies for securitizations sponsored by the defendants containing hundreds of thousands of residential mortgage loans. The plaintiffs claimed that the defendants breached warranties in the insurance agreement concerning the quality of the loans underlying the securitizations, and that the defendants fraudulently induced the plaintiff to insure the securitizations. The First Department held that the fraudulent inducement claim should not be dismissed as duplicative of the contract claim because the defendants "have not established, as a matter of law, that the damages sought in connection with the fraud claim are the same as those sought in connection with the contract claims." Id. The First Department pointed to the fact that the measure of damages was different between the two claims. The court explained that contract damages would be calculated under a contractual "repurchase protocol" requiring the defendants to cure, substitute, or repurchase any mortgage loan that breaches the representations and warranties. By contrast, damages for the plaintiffs' fraud claims would be "determined based on the portion of Ambac's claims payments that flow from the nonconforming loans." Id. at *3. Because the damages for the contract claim (the repurchase protocol) was different than the damages for the fraud claim (claims payments), the two claims were distinct and non-duplicative.

By contract, in *Empire Outlet Bldrs. v. Construction Resources Corp. of N.Y.*, 170 A.D.3d 582, 583 (1st Dept. 2019), the plaintiff was a general contractor who hired the defendant to perform construction work. The plaintiff alleged that the defendant breached its contractual obligation to maintain required general liability insurance. The plaintiff also alleged that the defendant fraudulently induced the plaintiff into entering into the contract by misrepresenting that defendant had such insurance in place. The First Department held that the fraud claim was correctly dismissed as duplicative of the breach of contract claim because the plaintiff "will be fully compensated via the contract claim." Id. The court explained that the plaintiff "can recover more on the contract claim (the benefit of its bargain) than on the fraud claim, on which it is limited to out-of-pocket loss." Id.

A Fraud Claim Will Not Be Dismissed as Duplicative When Asserted Against a Non-Party to the Contract. A "cause of action sounding in fraud is not duplicative of a cause of action to recover damages for breach of contract where the plaintiff sues individuals who were not parties to the contract ..." *Introna v. Huntington Learning Ctrs.*, 78 A.D.3d 896, 888-89 (2d Dept. 2010). (citations omitted). See also *Allenby v. Credit Suisse, AG*, 134 A.D.3d 577 (1st Dept. 2015) ("Since the fraud claim is asserted against all three defendants but a contract claim is asserted against only [one defendant], the fraud claim cannot be duplicative as to [the other two defendants].") (citation and emphasis omitted).

For example, in *Silverboys v. Skordas*, No. 653874/2014, 2019 N.Y. Misc. LEXIS 546 (Sup. Ct. N.Y. Cty. Feb. 11, 2019), the plaintiffs were homeowners that asserted several causes of action, including breach of contract and fraud, against many defendants concerning the construction and renovation of the plaintiffs' vacation home. One of the defendants, a subcontractor, allegedly sold subpar equipment to the plaintiff that was incompatible with the systems for which the equipment was intended. The plaintiff alleged that the subcontractor's representations concerning the quality and compatibility of the equipment was fraudulent. The subcontractor moved to dismiss the fraud claim as duplicative of the contract claim. The court disagreed, finding that "the fraud allegations are independent of the contract allegations. [The subcontractor] was not a party to the [agreement between the plaintiff and the general contractor] and the breach of contract claim was only brought against [the general contractor." Id. at *6.

Conclusion

It may be tempting for a plaintiff to reflexively assert a fraudulent inducement claim in addition to a breach of contract claim. But that plaintiff should be mindful of the above-principles; the fraud claim could be dismissed as duplicative of a contract claim if there is a contract between the parties to the litigation, and the alleged misrepresentation is of future intent or the claims seek the same damages.

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