



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 29, 2023

Saad Benkirane
2710 12th Street South
Arlington, VA 22204

James R. Hart
10505 Judicial Drive, Suite 207
Fairfax, VA 22030

Re: Benkirane v. City Concrete Corp., CL 2022-16459

Dear Mr. Benkirane and Mr. Hart:

This matter is before the court on Plaintiff's motion for reconsideration of the court's order of August 11, 2023 sustaining Defendant's demurrer to Count I (violation of the Virginia Consumer Protection Act ("VCPA")) and to Count III (fraud in the inducement) of Plaintiff's First Amended Complaint ("FAC"). For the reasons set forth below, the court denies the motion as to Count I and grants the motion as to Count III.

ANALYSIS

1) Virginia Consumer Protection Act claim: In Count I, Plaintiff claims that Defendant violated the VCPA; Defendant responds that the transaction at issue is not encompassed by the VCPA because the transaction was a commercial transaction, not a "consumer transaction" within the meaning of the VCPA.

The contracts at issue here are 1 page form contracts on the letterhead of City Concrete Corp. At the top, they identify the "Builder" as "GW Real Estate Enterprise" and state "Attn: Sam Benkirane". The contracts further state at the top: "Re: Concrete proposal for - Sam

Benkirane Residence". Below the terms of the contract, the contracts state "City Concrete Corp. Subcontractor" under which is a signature line on which is the signature of a representative of City Concrete Corp. Below that signature line is a paragraph entitled "Acceptance of proposal" and, under that paragraph, there is a line for "Accepted: Signature" where there is a signature of "Sam Benkirane" followed by a line for "Title" on which is typed "Authorized Rep". Immediately below "Accepted: Signature" are the words "General Contractor/Builder".

As a result of these contracts, the court found, and now confirms, that the parties to the contract are GW Real Estate Enterprise and City Concrete Corp. Plaintiff, as an individual, is not a party to the contract; he is the authorized representative of one of the parties, GW Real Estate Enterprise. The issue then is whether the transactions between GW Real Estate Enterprise and City Concrete Corp. are "consumer transactions" within the meaning of the VCPA.

Code § 59.1-198 provides in pertinent part that the term "Consumer transaction" means: "1. The . . . sale . . . of goods or services to be used primarily for personal, family or household purposes" The goods and services to be used pursuant to the parties' contracts here were not to be used "primarily for personal, family or household purposes" of GW Real Estate Enterprise, as an Enterprise would not engage in personal, family or household activities. Rather, those goods and services were to be used for a commercial purpose, *i.e.*, the construction of a residential building by GW Real Estate Enterprise.

The circuit courts which have opined on the issue of whether a commercial transaction is encompassed by the VCPA have held that a commercial transaction is not encompassed by the VCPA. See *e.g.*, *Murray v. Royal Const. Co.*, 61 Va. Cir. 643 (2002) ("The EIFS is a component part of Murray's home installed by a contractor or subcontractor. Murray does not allege he purchased the EIFS from Dryvit. The sale of the EIFS to a contractor or subcontractor is a commercial transaction, not a consumer transaction within the Virginia Consumer Protection Act (VCPA)") and *In Re: All Pending Chinese Drywall Cases*, 80 Va. Cir. 69 (2010) ("A sale between commercial parties of a good intended for use as a component part in the construction of a building is not a 'consumer transaction' within the meaning of the VCPA").

Plaintiff asserts that the VCPA "protects a consumer who is a party to the contract as well as the consumer who is a third party." *Motion to Reconsider* 4. In support of his position, Plaintiff cites the second definition of the term "Services":

- (ii) work performed for the supplier by an agent whose charges or costs for such work are transferred by the supplier to the consumer or purchaser as an element of the consumer transaction
-

Code § 59.1-198.¹

This definition of "Services" has no bearing on the case at bar as it concerns a supplier (here, City Concrete Corp.) that had an agent who performed work for it. Here, the FAC does not allege that City Concrete Corp. had an agent who performed work for it. In short, the second definition of the term "Services" has nothing to do with a consumer who is a third party.

Plaintiff also asserts that the VCPA "does not require the consumer to directly contract with the supplier, so long as the work was for personal, residential purposes." *Motion to Reconsider 4*. The case relied upon by Plaintiff, *Nazar v. Balderson*, 104 Va. Cir. 173 (2020), does not support Plaintiff's position.

In *Nazar*, "Plaintiffs purchased the Property on or about April 4, 2019 for \$289,000.00." Because the plaintiffs, not an entity like GW Real Estate Enterprise, were the purchasers, the transaction was a consumer transaction, not a commercial transaction. As a result, the circuit court overruled the demurrer because "Plaintiffs sufficiently pled that the action involves a 'consumer transaction' and that Defendant was 'supplier' for all intents and purposes of the VCPA claim."

Plaintiff's contention (*Motion to Reconsider 4*) that Defendant cited no authority for its argument that the VCPA does not apply to circumstances where the consumer did not directly contract with the supplier where the work was for personal, residential purposes is unavailing in view of the plain language of Code § 59.1-198 defining "Consumer transaction." As that definition makes clear, the contracts between GW Real Estate Enterprise and Defendant were not "Consumer transactions" because the goods and services to be used pursuant to those contracts were not to be used "primarily for personal, family or household purposes" of GW Real Estate Enterprise, as an Enterprise would not engage in personal, family or household activities. Rather, those goods and services were to be used for a commercial purpose, *i.e.*, the construction of a residential building by GW Real Estate Enterprise.

Finally, Plaintiff's assertions that "he personally applied for permits in his own name," that "he requested proof of insurance in his personal name," that "the proposal listed the project as his personal residence," and that he "communicated solely on his own behalf" (*Motion to Reconsider 4*) do not alter the language of the contract, *i.e.*, that he was the "Authorized Rep" of the builder, GW Real Estate Enterprise.

In sum, Plaintiff's motion for reconsideration as to the VCPA claim

¹ Pursuant to Code § 59.1-198, "Supplier" means "a seller, lessor, licensor, or professional who advertises, solicits, or engages in consumer transactions, or a manufacturer, distributor, or licensor who advertises and sells, leases, or licenses goods or services to be resold, leased, or sublicensed by other persons in consumer transactions."

is DENIED.

2) Fraud claims: Plaintiff asserts that he "adequately pleaded the elements of fraud under Virginia law" in Count III of the FAC. *Motion to Reconsider* 8.

The elements of a claim for fraud in the inducement, which must be proven by clear and convincing evidence, are: "(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." *Bryant v. Peckinpaugh*, 241 Va. 172, 175 (1991). The material fact must be a "present or a pre-existing fact" *SuperValu, Inc. v. Johnson*, 276 Va. 356, 367 (2008).

A) Fraud as to validity of license: Plaintiff asserts that he alleged that "Defendant falsely stated it was properly licensed and qualified to perform concrete work," that the statement was a material fact, that "Defendant knew its statements were false," that the statement was intended to mislead, that "Plaintiff reasonably relied" upon the statement, and that "Plaintiff suffered damages as a result of Defendant's fraud." *Motion to Reconsider* 8. These are the elements of a claim for fraud, but the issue is whether Plaintiff pled them in the FAC.

Although Plaintiff's argument fails to refer to the paragraphs of the FAC in which the elements of a claim for fraud in the inducement are set forth, the court observes the following.

In paragraph 13, Plaintiff alleges that he was informed by Mr. Neiva (the owner of City) that "City had a valid contractor's license" Paragraph 24 alleges that Mr. Benkirane (the "Authorized Rep" of GW Real Estate Enterprise) "relied on City's and Mr. Neiva's representations that City had a valid contractor's license" Paragraph 25 alleges that Mr. Benkirane "later learned that City listed Eric Clark as its Qualified Individual and Designated Employee for purposes of maintaining its DPOR license." Paragraph 42 alleges that Mr. Clark "was not a full-time employee or officer of City." Paragraph 85 alleges that Mr. Neiva "misrepresented the status of City's license" and Paragraph 86 alleges that "City and Mr. Neiva intentionally and knowingly made these statements with the intent to mislead Mr. Benkirane into executing the Agreements."

If, as a matter of law, the fact that Mr. Clark "was not a full-time employee or officer of City" made City's license invalid, then the FAC alleges all the elements of fraud in the inducement.

City argues that, "[u]nless Benkirane had alleged that the Board of Contractors had taken some action to suspend or revoke City's license, there was no actionable misrepresentation." *Def. Resp.* 6. Further, City asserts:

But Benkirane's absurd legal conclusions as to the validity of City's license are not supported by factual allegations. Benkirane complains about the supposed part-time status of a City employee and extrapolates that suspicion to a conclusion that City was somehow unlicensed. Benkirane ignores the fact that complaints against licensed contractors are handled administratively under § 54.1-1114 and are DPOR's exclusive purview. Unless Benkirane can allege some action by DPOR which invalidated City's contractor's license, there is no actionable misrepresentation and no "fraud" on that topic.

Id.

The court disagrees. First, Plaintiff's legal conclusions as to the validity of City's license are supported by factual allegations as the FAC alleges that Mr. Benkirane "later learned that City listed Eric Clark as its Qualified Individual and Designated Employee for purposes of maintaining its DPOR license" (¶ 25) and that Mr. Clark "was not a full-time employee or officer of City." ¶ 42.

Second, Plaintiff's allegations about Mr. Clark, *i.e.*, that he was City's "Designated Employee for purposes of maintaining its DPOR license" (¶ 25) and that he "was not a full-time employee or officer of City" (¶ 42), are sufficient, pursuant to Code § 54.1-1106(E), to show that City was unlicensed.

Code § 54.1-1106(E) provides in pertinent part:

The license shall permit the applicant to engage in contracting *only so long as* the designated employee is in the full-time employment of the contractor or is a member of the contractor's responsible management. . . . (emphasis added).

The "designated employee" is:

the contractor's full-time employee, or a member of the contractor's responsible management, who is at least 18 years of age and who has successfully completed the oral or written examination required by the Board on behalf of the contractor.

Code § 54.1-1100.

As relevant here, "Full-time employee" means "an employee who spends a minimum of 30 hours a week carrying out the work of the licensed contracting business" and "Responsible management" means the "officers of a corporation" 18VAC50-22-10.

Accordingly, if Mr. Clark was City's "Designated Employee for purposes of maintaining its DPOR license," but he "was not a full-time employee or officer of City" as alleged in the FAC, City's license would not, as a matter of law, "permit [City] to engage in contracting" because

"engag[ing] in contracting" is permitted "only so long as the designated employee is in the full-time employment of the contractor or is a member of the contractor's responsible management. . . ." Code § 54.1-1106(E).

Third, while it is true that "complaints against licensed contractors are handled administratively under § 54.1-1114 and are DPOR's exclusive purview," nothing in Code § 54.1-1114² undermines or contradicts the plain language of Code § 54.1-1106(E).

Fourth, in light of the plain language of Code § 54.1-1106(E), to allege a misrepresentation, the FAC need not, as Defendant argues, "allege some action by DPOR which invalidated City's contractor's license" *Def. Resp.* 6.

In sum, the court finds that, with respect to plaintiff's claim for fraud in the inducement based upon the alleged misrepresentation of City's license status, the FAC sufficiently alleges a cause of action and Plaintiff's motion for reconsideration is GRANTED as to that claim.

B) Fraud as to misrepresentations alleged in Paragraph 81: Count III of the FAC includes in Paragraph 81 several alleged misrepresentations by City, to wit:

(a) City could complete the construction project in a certain period of time with full knowledge that it could not; (b) the cost estimates provided to Mr. Benkirane were accurate, with full knowledge that they were not; and (c) the work to be performed would be of good and workmanlike manner, with full knowledge that City lacked the requisite experience, credentials and qualifications to perform the Project.

None of these misrepresentations are of a present or a pre-existing fact, but are, at best, promises of future performance, and "fraud ordinarily cannot be predicated on unfulfilled promises or statements regarding future events." *SuperValu, Inc. v. Johnson*, 276 Va. 356, 367 (2008). The parties agree, however, that fraud can be premised on promises that, at the time they are made, the defendant had no intention of performing. See *SuperValu, Inc.*, 276 Va. at 368 ("if a defendant makes a promise that, when made, he has no intention of performing, that promise is considered a misrepresentation of present fact and may form

² "Any person may file complaints against any contractor licensed or certified pursuant to this chapter. The Director [of the Department of Professional and Occupational Regulation] shall investigate complaints and the Board [for Contractors] may take appropriate disciplinary action if warranted. Disciplinary proceedings shall be conducted in accordance with the Administrative Process Act (§ 2.2-4000 et seq.). The Board shall immediately notify the Director and the clerk and building official of each city, county or town in the Commonwealth of its findings in the case of the revocation of a license or certificate, or of the reissuance of a revoked license or certificate."

the basis for a claim of actual fraud").

Even if the allegations ("could complete" project in certain period of time, "cost estimates . . . were accurate," and work "would be of good and workmanlike manner") are construed as promises, there are no allegations that City had "no intention of performing" those promises. Fraud "'must be distinctly alleged.'" *Sweely Holdings v. Sun Trust Bank*, 296 Va. 367, 382 (2018). See also *Southall et al. v. Farish et al.*, 85 Va. 403, 410 (1888) (complaint "must show, specifically and in detail, in what the fraud consists"). The court thus cannot construe the allegations that City had "knowledge" that it could not perform as allegations that City had "no intention of performing" the promises.

Accordingly, as to the claims for fraud in the inducement in Paragraph 81 of the FAC, Plaintiff's motion for reconsideration is DENIED.

An appropriate order will enter.

Sincerely yours,

A solid black rectangular redaction box covering the signature of the judge.

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SAAD BENKIRANE)	
)	
Plaintiff)	
)	
v.)	CL 2022-16459
)	
CITY CONCRETE CORP.)	
)	
Defendant)	

ORDER

THIS MATTER came before the court on Plaintiff’s motion for reconsideration of the court’s order of August 11, 2023 sustaining Defendant’s demurrer to Count I (violation of the Virginia Consumer Protection Act (“VCPA”)) and to Count III (fraud in the inducement) of Plaintiff’s First Amended Complaint (“FAC”).

THE COURT, for the reasons set forth in the court’s letter opinion of today’s date, hereby DENIES Plaintiff’s motion as to the VCPA claim (Count I); GRANTS Plaintiff’s motion as to the fraud in the inducement claim based upon the alleged misrepresentation of City’s license status (Count III), and DENIES Plaintiff’s motion as to the fraud in the inducement claim based upon misrepresentations alleged in Paragraph 81 (Count III), and

THE COURT further ORDERS that Defendant shall file an answer to Count III within 15 days.

ENTERED this 29th day of November, 2023.



Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR
THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT
PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

Saad Benkirane
Plaintiff

James R. Hart
Counsel for Defendant