STATE OF NEW YORK COURT OF CLAIMS

441 RIVER AVENUE, INC.,

Claimant,

DECISION AND ORDER

-v-

THE STATE OF NEW YORK,

Claim No. 135926
Motion Nos. M-96771
CM-97063

Defendant.

BEFORE: **HON. RICHARD E. SISE**
Acting Presiding Judge of the Court of Claims

APPEARANCES: **For Claimant:**
KRAMER LEVIN NAFTALIS & FRANKEL, LLP
BY: James G. Greilsheimer, Esq.

For Defendant:
HON. LETITIA JAMES, ATTORNEY GENERAL
BY: Rosalinde Y. Casalini
Assistant Attorney General

The following papers were read on Defendant's motion to dismiss and Claimant's cross-motion for permission to late file a claim:

1. Notice of Motion filed May 17, 2021;
2. Affirmation of Rosalinde Y. Casalini filed May 17, 2021 with Exhibits A-F annexed;
3. Memorandum of Law filed May 17, 2021;
4. Notice of Cross-Motion filed August 6, 2021;
5. Affirmation of James G. Greilsheimer filed August 6, 2021 with Exhibits A-D annexed;
6. Memorandum of Law filed August 6, 2021;
7. Affirmation of Rosalinde Y. Casalini filed September 23, 2021 with Exhibits A-C annexed;
8. Memorandum of Law filed September 23, 2021;
9. Affirmation of Ryan O. Miller filed October 5, 2021;
10. Letter of Rosalinde Y. Casalini filed October 6, 2021.

Filed papers: Claim

On July 3, 2013 defendant appropriated a permanent easement of 1,492 square feet across the frontage of claimant's lot on Exterior Street in the Bronx (Lot 103). The easement did not encroach on the building situated on the lot. In the previous month defendant had also appropriated easements on two adjoining properties (Lot 100 and Lot 107). The easements were taken for the purpose of facilitating a rehabilitation project on the Major Deegan Expressway.

According to claimant, in a letter dated June 27, 2013 defendant offered, based on its highest approved appraisal, $110,000 as compensation for the easement on Lot 103. The Explanation of Acquisition/Offer of Settlement provided to claimant indicated that the amount of the offer covered direct damages only as no severance damages were found. Claimant retained an appraiser to prepare a damage analysis and for advice in connection with the taking. In April 2016 claimant proposed that the matter be resolved for $225,000. On May 16, 2016 claimant sent an email to defendant indicating that its counter-offer was being increased to $260,000 to include a claim for attorney's fees pursuant to EDPL § 701. On May 23, 2016 defendant informed claimant that it was agreeable to the proposed $260,000 settlement and advised claimant that it would have to waive all claims associated with the taking. On June 22, 2016 claimant executed an Agreement of Adjustment and Release of Owner settling the matter for $260,000 while releasing all claims.

On November 28, 2018 the City of New York acquired, by eminent domain, Lot 103, together with the adjoining properties, Lot 100 and Lot 107. In its appraisal prepared in connection with the taking by the City, claimant valued its property at $8,370,000. In connection with that taking claimant' s appraiser prepared an Easement Analysis Report which concluded

that the easement taken by the State did not inhibit the use and development potential of Lot 103 and therefore, did not materially impact its market value. The appraisal prepared on behalf of the City valued Lot 103 at $5,080,000 but concluded that the impact of the easement reduced the value of Lot 103 by 90% to $508,000.

Thereafter, in the course of its discussions with the City regarding the value of Lot 103, claimant obtained copies of the appraisals exchanged between the City and the former owner of Lot 107, characterized by claimant as "very similar". Claimant discovered that in resolving litigation in the Court of Claims regarding the value of the earlier taking of the easement on Lot 107, the parties had concluded that the easement reduced the value of that property by 90%. Thereafter, on October 2, 2020, claimant obtained a copy of an New York State Department of Transportation internal memorandum, written in June 2016, which broke down damages for the taking of the easement on Lot 103 to include $110,000 for direct damages; $103,500 for indirect damages; $11,500 for concrete paving and asphalt within the easement area; and $35,000 for attorney's fees. According to claimant, DOT had never disclosed its settlement analysis during negotiations despite the conclusion in the initial offer that there were no indirect damages and the latter conclusion that there was a loss of 10% of the value to the remainder.

Concerned that the City may prevail in its argument that the value of the remainder of Lot 103 was reduced by 90% by the State's taking of a permanent easement, claimant brought this claim in which it has captioned causes of action for fraud, equitable fraud, fairness and interest of justice, the constitutional requirement of just compensation and the constitutional requirement of equal treatment. Defendant has now moved to dismiss the claim on the basis of the grounds set forth in the following CPLR 3211 provisions: (a)(1) documentary evidence, (a)(2) and (a)(8) lack

of personal and subject matter jurisdiction, (a)(5) release and (a)(7) failure to state a cause of action.

The motion to dismiss the fraud cause of action as jurisdictionally defective is based on an argument that the claim was not timely filed in accordance with Court of Claims Act § 10. Defendant contends that under Court of Claims Act § 10 (3-b) the claim needed to be served and filed within 90 days of accrual in order to invoke the State's waiver of sovereign immunity (Court of Claims Act § 8). According to defendant, the time for presenting a claim based on the fraud cause of action would have begun to run, alternately, when claimant signed the Agreement on June 13, 2016 or on November 4, 2020.[1] In either event, defendant argues, the claim was not filed within 90 days of accrual as February 3, 2021 was the 91st day after November 4, 2020.

In opposing this aspect of the motion to dismiss, claimant maintains that the fraud cause of action did not accrue until October 2, 2020, the date on which it obtained the internal memorandum prepared by defendant, and that the filing period was tolled until November 4, 2020. Furthermore, defendant argues, filing of a claim based on fraud is governed by Court of Claims Act § 10 (4) which provides that filing must occur within 6 months of accrual which the February 3, 2021 filing satisfied.

Court of Claims Act § 10 (3-b) governs claims brought to recover damages for injuries to property or for personal injuries caused by an intentional tort. Court of Claims Act § 10 (4) applies to any claim for breach of contract, express or implied, and any other claim not otherwise

[1] Claimant alleges that it discovered the fraud on October 2, 2020, when it obtained the copy of an New York State Department of Transportation's (DOT) internal memorandum indicating that indirect damages had resulted from the creation of the easement. If accepted, executive orders in place at that time would have delayed the running of the Court of Claims Act § 10 filing period until November 4, 2020 (*see Brash v Richards*, 195 AD3d 582 [2d Dept 2021]).

provided for by section 10. Despite the appeal of claimant's argument that a cause of action for fraud is not one for injury to property, or for personal injury, and therefore, not governed by section 10 (3-b), case law in this Department supports defendant's argument that the 90 day filing period in section 10 (3-b) governs (*Rodriguez v State of New York*, 197 AD3d 1055 [1st Dept 2021]; cf. *Igwe v State of New York*, 100 AD3d 830 [2d Dept 2012], [applying Court of Claims Act § 10 (4) to a claim for fraud]). Accordingly, with respect to the cause of action for fraud, the claim is untimely.

A cause of action for equitable fraud, a misnomer, is based on material misrepresentations, innocent or unintentional, on which an action in equity might be maintained to rescind a consummated transaction (*People v Credit Suisse Sec. (USA) LLC*, 31 NY3d 622 [2018]). An action for rescission requires only proof of a material misrepresentation of fact and justifiable reliance that induced the aggrieved party to enter into the transaction (*id.* at 639). Recission may also be allowed for a unilateral mistake if the mistake was known to the other party at the time of the negotiating of the contract and was not corrected by it (*Sheridan Drive-In, v State of New York*, 16 AD2d 400, 405 [4th Dept 1962]). Traditionally, an action for equitable rescission is governed by CPLR 213 (1), except where the grounds to rescind the transaction are based on the defendant's actual fraud, in which case CPLR 213 (8) will apply instead (*People v Credit Suisse Sec. (USA) LLC* at 640).

A cause of action for rescission based on mistake runs from the date of the alleged mistake or actionable wrong (*Prand Corp. v County of Suffolk*, 62 AD3d 681 [2d Dept 2009]; *Goldberg v Manufacturers Life Ins.* Co., 242 AD2d 175 [1st Dept 1998]). Where the rescission action is based on fraud, it must be brought either within six years of the commission of the

fraud, or within two years from the discovery of the fraud or from when the fraud could have been discovered with reasonable diligence (*Goldberg* at 180). Thus, if the cause of action is read to be based on mistake the claim would have accrued on June 22, 2016 when claimant executed the agreement. The filing in February 2021 would, therefore, be untimely under any provision in Court of Claims Act § 10. Moreover, even if the cause of action is read to be based on fraud, the claim filing would still be untimely for the reasons set forth above in addressing the timeliness of the cause of action for fraud.

The third cause of action, grounded on fairness and the interest of justice, seeks vacature of the settlement agreement and to have the parties restored to the status quo ante based on misrepresentations by defendant and a failure to disclose. The grounds mimic those in the second cause of action for equitable fraud and are therefore, subject to the same filing periods. Accordingly, this cause of action is also untimely.

The cause of action for just compensation under the constitution, i.e. appropriation, had to have been filed within three years of accrual (Court of Claims Act § 10 [1]). Here, the appropriation occurred in 2013 and therefore, the claim filing in 2020 is untimely. The claim is also untimely with respect to the cause of action for violation of claimant's equal protection rights as that cause of action had to be filed within 90 days of accrual (Court of Claims Act § 10 [3] or [3-b]) and, by any measure of accrual, was not.

PERMISSION TO LATE FILE A CLAIM

Inasmuch as each of the five causes of action are subject to dismissal as not timely filed, the motion for permission to late file a claim must be addressed. Court of Claims Act § 10 (6)

provides that a party who fails to file a claim within the time permitted by section 10 may make an application to the court for leave to late file the claim. The application may be brought at any time before a like claim would be barred under the provisions of CPLR article 2 (*Shah v State of New York*, 178 AD3d 871 [2d Dept 2019], lv dismissed 35 NY3d 982 [2020]; Court of Claims Act § 10 [6]).

The statute of limitations for fraud is governed by the CPLR 213 (8) which provides that such a claim must be brought within six years from the date the cause of action accrued, or two years from the time the claimant discovered the fraud, or could, with reasonable diligence, have discovered it, whichever is greater. Here the fraud cause of action accrued in either 2016, when the Agreement was made, or in 2020, when claimant learned that DOT had earlier concluded there were indirect damages. As both events occurred within six years of the time this motion was made, the application for permission to late file is timely in either event. The same analysis applies to the causes of action for equitable fraud and the interest of fairness. The fourth cause of action, treated as an implied contract for purposes of an application to late file (Court of Claims Act § 10 [6]), is governed by the six year period of limitation in CPLR 213 (2). That claim, however, accrued in 2013 when the taking occurred (citation) and the statute of limitations, therefore, expired in 2019, well before the instant application was made. The cause of action for equal protection is governed by the 3 year period of limitation in CPLR 214 [5] (*Brown v State of New York*, 250 AD2d 314 [3d Dept 1998]) and regardless of whether accrual occurred in 2013 or 2016, the application to late file such a claim is untimely. The court, therefore, has no power to grant leave to late file the causes of action sounding in appropriation and violation of equal protection rights.

The late filing provision in section 10 (6) list six criteria for the court to consider in determining if the filing should be permitted: whether the delay in filing was excusable; whether the state had notice of the essential facts constituting the claim; whether the state had an opportunity to investigate the circumstances underlying the claim; whether the claim appears to be meritorious; whether the failure to file or serve a timely claim or to serve upon the attorney general a notice of intention resulted in substantial prejudice to the state; and whether the claimant has any other available remedy. Other factors deemed relevant by the court may also be considered.

EXCUSE

The reasonableness of the excuse for failing to timely file the claim relates to the time between accrual of the claim and the filing period prescribed by the appropriate subdivision of section 10 (*Cole v State of New York*, 64 AD2d 1023 [4th Dept 1978]). Here, the excuse offered by defendant, that it worked diligently to prepare the claim after the misrepresentation was revealed, is inadequate, without regard to whether the delay was one day or four years, as it amounts to law office failure (*Hyatt v State of New York*, 180 AD3d 764 [2d Dept 2020]; *Langner v State of New York*, 65 AD3d 780 [3d Dept 2009]).

MERIT

"To be meritorious, a claim must not be patently groundless, frivolous or legally defective, and the record as a whole must give reasonable cause to believe that a valid cause of

action exists" (*Sands v State of New York*, 49 AD3d 444, 444 [1st Dept 2008] citing *Matter of Santana v New York State Thruway Auth.*, 92 Misc 2d 1, 11 [Ct Cl 1977]).

FRAUD

The cause of action for fraud requires that claimant allege a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the claimant and damages(*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401 [1st Dept 2020]) Attached to, and incorporated into, the claim is a June 2013 Explanation of Acquisition/Offer of Settlement prepared by DOT regarding the taking of the easement on Lot 103. The document contains a description of the subject property and identifies the permanent easement as containing 1,492± SF running along the subject's frontage on the westerly side of Exterior Street. The document notes that by law the acquiring agency must provide the owner with the amount of their highest approved appraisal. The document contains a settlement offer of $110,000 representing direct damages only and shows that no indirect or severance damages were found. Claimant alleges that it then proceeded with negotiations on the basis that only direct damages were involved. In then proposing to settle the matter for $225,000 claimant indicated to DOT that it had calculated damages based on the value of the square footage of the easement area alone. Thus, claimant alleges, in agreeing to its counter offer without revealing that it had changed its assessment as to whether the property suffered indirect damages, DOT misrepresented a material fact. While DOT did not affirmatively misrepresent its position in agreeing to the counter offer, non-disclosure may have the effect of a misrepresentation where the party "knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in

accordance with reasonable standards of fair dealing." (Restatement [Second] of Contracts § 161 [1981]). As pled, the proposed claim sufficiently alleges a misrepresentation of a material fact.

The more difficult question is whether claimant justifiably relied on the representation that no indirect damages were involved. Claimant was the owner of a property worth multiple millions of dollars, was represented in its negotiations by an attorney and had engaged a professional appraiser who concluded that only direct damages were involved. "If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him [or her] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he [or she] must make use of those means, or he [or she] will not be heard to complain that he [or she] was induced to enter into the transaction by misrepresentations" (*ISS Action, Inc. v Tutor Perini Corp.,* 170 AD3d 686, 688 [2d Dept 2019] [citations and quotation marks omitted]). However, at the pleading stage a party need only plead reliance on a misrepresentation made by the defendant since the reasonableness of ones reliance raises factual issues that cannot appropriately be resolved at the pleading stage unless the misrepresentation is explicitly contradicted by a written agreement (*Knight Sec. v Fiduciary Trust Co.*, 5 AD3d 172, 173 [1st Dept 2004]). While claimant signed a release waiving all claims related to the easement, that writing does not directly address the specific categories of damages represented. Consequently, though claimant faces a difficult evidentiary showing, the allegation of reliance on a misrepresentation is sufficient for the purposes of this motion.

As for the elements of knowledge of falsity and intent to deceive, claimant would not, at this stage of the proceedings, have access to information which would reveal defendant's state of mind. Consequently, the allegations in the proposed claim provide sufficient circumstantial

evidence with respect to these two elements (*see Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401 [1st Dept 2020]).

EQUITABLE FRAUD

As the elements of the cause of action for rescission are contained within the elements of the cause of action for fraud the analysis with respect to the appearance of merit is the same with the exception of one issue. Defendant contends that because the cause of action seeks equitable relief, this court is without jurisdiction to hear it. "In determining the subject matter jurisdiction of the Court of Claims, the issue is '[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim'" (*Sarbro IX v State of N.Y. Off. of Gen. Servs.*, 229 AD2d 910, 911 [4th Dept 1996]), quoting *Matter of Gross v Perales*, 72 NY2d 231, 236 [1988], rearg denied 72 NY2d 1042). "As long as the primary claim is for money damages, the court 'may apply equitable considerations' and grant incidental equitable relief" (*id.* at 911, quoting *Psaty v Duryea*, 306 NY 413, 417 [1954]). Any reading of the claim shows that claimant is primarily seeking money damages. Accordingly, the court has jurisdiction to hear the claim.

NOTICE AND AN OPPORTUNITY TO INVESTIGATE

Defendant did not have timely notice of the essential facts and an opportunity to investigate.

SUBSTANTIAL PREJUDICE

Defendant argues that it would be prejudiced if it is required to defend against this claim because it would be required to investigate facts that occurred approximately 8 years ago, would provide claimant with an opportunity to renegotiate the terms of the settlement and, would expose the State to years of potential interest payments on any award. The latter two circumstances would only arise if claimant is successful in proving its claim and in that instance the outcome could hardly be classified as prejudicial to defendant. Moreover, given that the claims are based on allegations of fraud and misrepresentation, whatever prejudice suffered by the State arising from the lack of timely notice and an opportunity to investigate should not fall to claimant (*Di Maio v State of New York*, 128 Misc 2d 101 [Ct Cl 1985, Korman, P.J.]).

OTHER AVAILABLE REMEDY

As the State is the only party responsible for whatever damages claimant suffered as a result of taking the easement, no other remedy is available to claimant.

Consideration of the relevant factors in Court of Claims Act § 10 (6) weigh in favor of granting the application to late file a claim for fraud and recission.

Accordingly, it is

ORDERED, that the motion to dismiss is granted, and it is further

ORDERED, that the cross-motion for permission to late file a claim is granted and claimant is directed to serve and file the proposed claim within 30 days of the date of filing of this decision and order.[2]

Albany, New York
February 3, 2022

RICHARD E. SISE
Acting Presiding Judge of the Court of Claims

[2] Claimant is advised that, as the previously filed claim has been dismissed, the previous filing will not constitute compliance with the directive here to file and serve the proposed claim.