

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EVANS SUPPLIES AND : CIVIL ACTION
COMMUNICATION CO., INC. :
 :
v. :
 :
ELLIOTT LEWIS CORPORATION, ET AL. : NO. 06-5685

MEMORANDUM

Padova, J.

May 31, 2007

Defendants City of Philadelphia (the “City”) and Elliott-Lewis Corporation (“Elliott-Lewis”) have filed Motions to Dismiss Plaintiff’s Complaint, which asserts breach of contract and fraud claims as well as claims under 42 U.S.C. §§ 1981 and 1983. For the reasons that follow, both motions are granted.

I. BACKGROUND

Here, the Complaint, attachments, and related matters of public record set forth the following facts.¹ Plaintiff Evans Suppliers and Communications Co., Inc. (“Evans”) is a supplier of materials, equipment, supplies and services. (Complaint ¶ 7.) It is also a participant in the City of Philadelphia’s Minority Business Enterprise program, which “was created to ensure anti-discrimination in bidding and contractual practices involving City of Philadelphia contracts.” (Id. ¶ 10.)

In November 2001, Defendant Elliott-Lewis entered into a contract with the City to perform

¹Documents “integral to or explicitly relied upon in the complaint” and related matters of public record may be considered in connection with a motion to dismiss. In re Burlington Coat Factory Litig., 114 F.3d 1410, 1426 (3d Cir.1997).

high-tech maintenance work at the Philadelphia International Airport (the “Contract”). (Id. ¶ 10.) In its bid for the contract, Elliott-Lewis listed Evans as a minority subcontractor and represented that Evans would receive 2.39 percent of the total amount of the Contract proceeds. (Id. ¶¶ 12-13, 17.) Because the total value of the Contract (including several amendments) was over \$14,000,000, Evans calculated that it would earn over \$330,000 from its Contract-related work. (Id.) Instead, however, Elliott-Lewis made only one \$675 purchase from Evans between November 2001 and June 2004 (id. ¶ 18), and only one additional purchase from Evans between June 2004 and December 31, 2004, when the contract ended. (Id. ¶¶ 19-21.)

In May 2004, Evans contacted “several City officials, including the City Controller, Airport director, Assistant Director, and [the Minority Business Enterprise Council (“MBEC”)] director” (id. ¶ 24), requesting that MBEC investigate Elliott-Lewis’s failure to use it as a contractor. (Id. ¶ 23.) According to the Complaint, the City “failed to investigate Plaintiff’s complaints and . . . sought to have defendant Elliot [sic] Lewis contact Plaintiff to convince him to drop his complaint in return for a small cash payment and other incentives.” (Id. ¶ 25.) Plaintiff, however, refused that “offer” and “sought to enforce his contractual rights in Court.” (Id. ¶ 26.)

Indeed, on March 9, 2005, Evans sued the City and Elliott-Lewis in the Court of Common Pleas for Philadelphia County, alleging breach of contract. The court dismissed the action on preliminary objections, concluding that Evans was neither a party to the contract between the City and Elliott-Lewis, nor an intended third party beneficiary to that contract. Evans Suppliers & Commc’n Co., Inc. v. Elliott-Lewis Corp., No. 0469 March Term 2005, 2005 WL 1793497 (Phila. Com. Pl. July 27, 2005). On appeal, the Superior Court of Pennsylvania affirmed in a June 27, 2006 Memorandum Opinion. Evans Suppliers and Commc’ns Co. v. City of Phila., No. 1660 EDA 2005,

905 A.2d 1052 (Pa. Super. June 27, 2006) (TABLE)).

In the instant action, Evans asserts a breach of contract claim (Count IV) and four additional causes of action: two claims for violation of its Fourteenth Amendment rights brought pursuant to 42 U.S.C. § 1983 (Counts I and II), a claim that it was subject to racial discrimination in violation of 42 U.S.C. § 1981 (Count III), and common law fraud (Count V). Defendants have moved to dismiss all counts of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. STANDARD OF REVIEW

When determining a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court looks primarily at the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir.1994). All well pled allegations in the complaint must be viewed in the light most favorable to the Plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir.1985).

A Rule 12(b)(6) motion will be granted when a Plaintiff cannot prove any set of facts, consistent with the complaint, that would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir.1988). While the court must accept all well pled allegations in the complaint and view them in the light most favorable to the Plaintiff, Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir.1985), it need not credit a complaint's "bald assertions" or "legal conclusions." Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir.1997) (citations omitted); see also Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed.1997) (noting that courts, when examining 12(b)(6) motions, have rejected "sweeping legal conclusions cast in the form of factual allegations" (citation omitted)).

III. DISCUSSION

Defendants assert that all of Evans's claims should be dismissed either on res judicata grounds or because they are barred by the applicable two-year statutes of limitations. In the alternative, they argue that each individual claim, other than the breach of contract claim, should be dismissed because Evans does not allege the necessary elements of the claim. We will dismiss the breach of contract claim on res judicata grounds and dismiss the other claims for failure to allege the necessary elements of the claims.²

A. Breach of Contract

Defendants maintain that Evans's breach of contract claim is barred by res judicata. Res judicata, also called claim preclusion, is:

a doctrine by which a former adjudication bars a later action on all or part of the claim which was the subject of the first action. Any final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action. Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action.

Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309, 313 (Pa.1995) (citing Allen v. McCurry, 449 U.S. 90 (1980)). The purpose of claim preclusion is "to avoid the cost and annoyance of multiple litigation, conserve scarce judicial resources, and promote reliance on judicial decisions by minimizing the possibility of conflicting rulings." Breiner v. Litwhiler, No. 3:CV-00-0594, 2003 WL 463104, at *11 (M.D. Pa. Feb. 21, 2003). Pennsylvania law requires the presence of the following four factors for the application of claim preclusion: "the two actions must share an identity

²Because the non-breach of contract claims are not well-defined, we cannot determine at this point in time whether they are barred by either res judicata or the applicable statutes of limitations.

of the: (1) thing sued upon or for; (2) cause of action; (3) persons and parties to the action; and (4) capacity of the parties to sue or be sued.” O’Leary v. Liberty Mutual Ins. Co., 923 F.2d 1062, 1065 (3d Cir.1991). Significantly for our purposes, the issue of res judicata can be resolved on a Rule 12(b)(6) motion “when all relevant facts are shown by the court’s own records, of which the court takes notice.” Day v. Moscow, 955 F.2d 807, 811 (2d Cir.1992).

There is no dispute that the parties to the instant action are the same as those in the state court action, and that they are suing or being sued in the same capacity as they were in state court. Furthermore, the breach of contract cause of action in the instant complaint is an exact reiteration of the breach of contract claim that was asserted and rejected on the merits in the state court action. Indeed, in both actions, Evans alleged that “Defendant Elliot [sic] Lewis has breached the terms of its contract with Defendant City, to which Plaintiff was a third party beneficiary by failing to place the required orders with Plaintiff.” (Complaint ¶ 22; State Court Complaint ¶ 21.) Furthermore, aside from a few very minor variations, the 19 paragraphs that precede and lay the factual foundation for this claim are identical to the paragraphs preceding this allegation in the state court Complaint. (Compare Complaint ¶¶ 3-21 with State Court Complaint ¶¶ 1-15, 17-20.) As the state court dismissed the breach of contract claim on preliminary objections, finding that Evans was neither a party to the Elliott-Lewis/City contract nor an intended third party beneficiary to that contract and thus, had no standing to assert a breach, Evans Suppliers, 2005 WL 1793497, Evans is precluded from asserting the same breach of contract claim here. Defendants’ motions to dismiss are therefore granted insofar as they seek dismissal of Count IV based on res judicata.

B. Section 1983

In Counts I and II of the Complaint, brought under 42 U.S.C. § 1983, Evans alleges, without

significant elaboration, that Defendants deprived it of its “rights secured by the Fourteenth Amendments [sic] to the United States Constitution.” (Complaint ¶ 29.) We agree with Defendants that these counts should be dismissed for failure to state a claim upon which relief may be granted.

In order to state a claim pursuant to 42 U.S.C. § 1983, a plaintiff must allege (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 930 (1982).

While Evans asserts “[o]n information and belief” that both defendants were acting “under color of state law” (Complaint ¶ 29), this bald and unsupported allegation cannot suffice to satisfy that element of a claim against Defendant Elliott-Lewis, which is a private corporation. Morse, 132 F.3d at 906 (stating that court need not credit a complaint's “bald assertions” or “legal conclusions.”) While “a private party’s conduct may be held attributable to the state and subject to § 1983 liability when a ‘symbiotic relationship’ exists between the acting party and the state,” Reitz v. County of Bucks, 125 F.3d 139, 147 (3d Cir. 1997), Evans does not allege such a “symbiotic relationship” or any other basis on which it is legally appropriate to treat Elliott-Lewis as a state actor here. Accordingly, for that reason alone, Evans’s § 1983 claims against Elliott-Lewis may be dismissed for failure to state a claim.

In addition, Evans’s § 1983 claims against both Defendants may be dismissed for failure to allege conduct that deprived Evans of rights, privileges or immunities secured by the Constitution or laws of the United States. The only specific federal or constitutional right that Evans alleges was violated is the right to Equal Protection. (Complaint ¶ 32.) In order to state a § 1983 claim based on an Equal Protection Clause violation, a plaintiff must allege that it is a member of a protected

class, is similarly situated to members of an unprotected class and was treated differently from members of the unprotected class. See Wood v. Rendell, Civ. A. No. 94-1489, 1995 WL 676418, at *4 (E.D. Pa. Nov. 3, 1995).

As best as we can discern from the Complaint, Evans maintains that it is a member of a protected class because it is a minority-owned business. It does not complain, however, that Defendants treated it differently from similarly situated non-minority-owned businesses. Rather, it appears to complain only that it was not granted special treatment that it should have been afforded as a minority-owned business under the City's Minority Owned Business Program. Under these circumstances, Evans has not alleged the necessary elements of a § 1983 claim against either Elliott-Lewis or the City. Defendants' motions to dismiss are therefore granted as to Counts I and II.

C. Section 1981

In Count III, Evans asserts that Defendant Elliott-Lewis violated 42 U.S.C. § 1981 when it (1) "used Plaintiff to obtain the contract with [the City] and thereafter refused to provide any work to Evans," and (2) "sought to silence Evans so that the minority requirement of the contract would not be investigated." (Complaint ¶ 34.) Elliott-Lewis argues that this claim should also be dismissed for failure to state a claim upon which relief may be granted. We agree.

To state a claim under § 1981, a plaintiff must allege that: (1) it is a member of a racially cognizable group; (2) the defendant intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute, that is, making and enforcing contracts. Wood v. Cohen, Civ. A. Nos. 96-3707, 97-1548, 1998 WL 88387, at *5 (E.D. Pa. Mar. 2, 1998).

Again, we presume that Evans considers itself to be a member of a racially cognizable group

because it is a minority-owned business. Evans does not, however, allege anywhere in its complaint that Elliott-Lewis discriminated against it because it was a minority-owned business. Rather, it merely alleges that Elliott-Lewis did not provide enough work to Evans and that when Evans lodged a complaint against Elliott-Lewis on that basis, Elliott-Lewis offered Evans a small cash payment to drop the complaint. (Complaint ¶ 25.) While Evans baldly asserts that this cash payment was offered “so that the minority requirement of the contract would not be investigated” (id. ¶ 34), it alleges no additional facts to support this allegation. Indeed, Evans does not even allege that Elliott-Lewis failed to fulfill a contractual requirement that it use minority contractors; it merely alleges that Elliott-Lewis did not use Evans. Under these circumstances, there are simply insufficient allegations in the Complaint to state a cognizable claim against Elliott-Lewis for racial discrimination under 42 U.S.C. § 1981. Elliott-Lewis’s motion to dismiss is therefore granted as to Count III.

D. Fraud

In Count V of the Complaint, Evans asserts a claim of fraud and misrepresentation against Elliott-Lewis. Elliott-Lewis argues that we should dismiss this Count for failure to plead fraud with particularity pursuant to Fed. R. Civ. P. 9(b). We agree.

Rule 9(b) requires that all averments of fraud be stated with particularity “in order to place defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior.” Seville Indus. Mach. Corp. v. Southmost Corp., 742 F.2d 786, 791 (3d Cir. 1984). Under Pennsylvania law, the elements of a fraud claim are: (1) a representation; (2) which is material; (3) that is falsely made “with knowledge of its falsity or recklessness as to whether it is true or false;” (4) made “with the intent of misleading another into relying on it;” (5) “justifiable reliance on the misrepresentation;” and (6)

a resulting injury that is proximately caused by the reliance. Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aide Corp., 315 F. Supp.2d 666, 686 (E.D. Pa. 2004) (citing Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994) and Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 296 (3d Cir. 1991)).

Evans's complaint does not even generally allege these essential elements of fraud, much less allege them with particularity. The sum total of the factual allegations against Elliott-Lewis are that Elliott-Lewis (1) entered into a contract with the City (Complaint ¶ 10); (2) identified Evans as a minority subcontractor in its bid for that contract (Complaint ¶¶ 11-12); (3) did not use Evans as a subcontractor to the extent it represented it would in the bid (Complaint ¶¶ 18, 20-22); and (4) offered Evans money to drop a subsequent complaint against it (Complaint ¶ 25). At best, these allegations state a claim for breach of contract, which, as explained above, is barred by the doctrine of res judicata. Accordingly, Evans has failed to state a claim for fraud, and Elliott-Lewis's motion to dismiss is granted as to Count V.

E. Leave to Amend

The United States Court of Appeals for the Third Circuit has instructed that "if a complaint is vulnerable to 12(b)(6) dismissal, a District Court must permit a curative amendment, unless an amendment would be inequitable or futile." Alston v. Parker, 363 F.3d 229, 235 (3d Cir.2004) (citing Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir.2002)).

Here, it is plain that any amendment to Evans's breach of contract claim would be futile as that claim is barred by res judicata. We will, however, give Evans leave to amend its other counts to elaborate on its allegations and better convey the substance of its claims.

IV. CONCLUSION

For the foregoing reasons, the City's and Elliott-Lewis's motions to dismiss are granted. An appropriate order follows.

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ORDER

AND NOW, this 31st day of May 2007, upon consideration of the City of Philadelphia's Motion to Dismiss the Complaint (Docket Entry # 4), the Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) of Defendant Elliott-Lewis Corporation (Docket Entry # 5), the Application to Treat As Uncontested Elliott-Lewis Corporation's Motion to Dismiss (Docket Entry # 8), the Motion of Elliott-Lewis Corporation for Leave to File a Reply Brief in Support of its Motion to Dismiss (Docket Entry # 10), and Plaintiff's Response to the Motions to Dismiss, **IT IS HEREBY ORDERED** that:

1. The City of Philadelphia's Motion to Dismiss the Complaint is **GRANTED**.
2. The Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) of Defendant Elliott-Lewis Corporation is **GRANTED**.
3. The Application to Treat As Uncontested Elliott-Lewis Corporation's Motion to Dismiss is **DENIED**.¹
4. The Motion of Elliott-Lewis Corporation for Leave to File a Reply Brief in Support

¹ Elliott-Lewis Corporation filed this Application on May 4, 2007, the same day that Plaintiff filed its response to the motions to dismiss. Accordingly, we exercise our discretion to refuse to treat Elliott-Lewis's motion to dismiss as uncontested. See Local Rule of Civil Procedure 7.1 ("In the absence of a timely response, [a] motion may be granted as uncontested") (emphasis added).

of its Motion to Dismiss is **GRANTED**.

5. Count IV is **DISMISSED WITH PREJUDICE**.
6. Counts I, II, III and V are **DISMISSED WITHOUT PREJUDICE**.
7. Plaintiff may file an amended complaint, curing the deficiencies of Count I, II, III and V within 20 days of the date of this Order.

BY THE COURT:

/s/ John R. Padova, J.
John R. Padova, J.