

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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AMERICAN BUILDERS & CONTRACTORS
SUPPLY CO., INC. d/b/a ABC SUPPLY CO., on
behalf of itself and all others similarly situated,
Plaintiffs,

MICHELE M. WOODARD, J.S.C.

-against-

TRIAL/IAS Part 11
Index No.: 15749/2010
Motion Seq. No.: 02, 03
DECISION & ORDER

MR. FUSSY ROOFING, L.L., MR. FUSSY
CONTRACTING, LLC, SCOTT REEVES a/k/a SCOTT
D. REEVES, DREW REEVES a/k/a ANDREW S. REEVES,
SCOTT A. MCINTOSH a/k/a SCOTT ARTHUR
MCINTOSH, BRENDA J. MCINTOSH and CHRISTOPHER
RISDALE a/k/a CHRIS RISDALE,
Defendants.

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Papers Read on this Motion:

Defendant's Notice of Motion	02
Plaintiff's Notice of Cross-Motion	03
Defendant's Memorandum of Law in Support of Motion to Dismiss	xx
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss	xx
Defendant's Affirmation in Opposition to Plaintiff's Cross-Motion	xx
Defendant's Opposition	xx

In motion sequence number two, the defendant moves for an order pursuant to CPLR §3211 (a)(7) and CPLR §3016(b) dismissing the plaintiff's eighth cause of action alleged in plaintiff's amended verified complaint. In motion sequence number three, the plaintiff moves by Notice of Motion for an order pursuant to CPLR §3025(b) granting plaintiff leave to amend its Amended Verified Complaint to set forth the eighth cause of action in further detail.

The plaintiff has alleged in its complaint that the individual defendants were members of Mr. Fussy Roofing, LLC and Mr. Fussy Contracting, LLC. The plaintiff alleges that the two companies were sold and delivered building materials and accessories by the plaintiff on credit for use and incorporation in various construction sites at the special instance and request of the individual defendants. The plaintiff believes that the defendants were paid for the projects but yet have failed to tender payment for the building supplies provided by the plaintiff. The plaintiff alleges that

defendants Scott Reeves, Scott McIntosh, and Brenda McIntosh were all former employees of the plaintiff before Mr. Fussy Roofing and Mr. Fussy Contracting were established. The plaintiff alleges that upon the aforementioned defendants departure from plaintiff's employ they opened Mr. Fussy Roofing and Mr. Fussy Contracting with defendants Christopher Risdale and Andrew Reeves. The plaintiff alleges that during the period between May 13, 2009 and September 23, 2009, the defendants began purchasing building materials and accessories which amounted to over \$250,000. The plaintiffs allege that the defendants have failed to pay the outstanding bill and have transferred all of the assets of Mr. Fussy Contracting and Mr. Fussy Roofing to another entity to avoid paying the plaintiff. The plaintiff claims that the defendants were able to engage in this fraudulent scheme based on their knowledge, as former employees, of the intimate workings of American Builders. The plaintiff claims that the defendants have reported to other members of the construction community in Rochester, New York that they do not intend on paying the bills. It is believed that Mr. Fussy Contracting and Mr. Fussy Roofing are insolvent and judgement proof. It is further alleged that the assets of the two companies have been transferred to other entities to avoid paying the plaintiff.

In considering a motion to dismiss for failure to state a cause of action (see, CPLR §3211 [a] [7]), the pleadings must be liberally construed (see, CPLR §3026). The sole criterion is whether “from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, [1977]; *see also Bovino v Village of Wappingers Falls*, 215 AD2d 619[2d Dept 1995]). “The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration” (see, *Morone v Morone*, 50 NY2d 481[1980]; *Gertler v Goodgold*, 107 AD2d 481[1st Dept 1985], *affd* 66 NY2d 946[1985]).

To properly plead a cause of action to recover damages for fraud, “a plaintiff must allege that: (1) the defendant made a representation or a material omission of fact which was false and which the defendant knew to be false, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury” (*see Northeast Steel Prods., Inc. v John Little Designs, Inc.*, 80 AD3d 585[2d Dept 2011]). Moreover, CPLR §3016(b) requires that “the circumstances constituting the wrong shall be stated in detail.” However, “ [t]his provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause

of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*Pike v New York Life Ins. Co.*, 72 AD3d 1043 [2d Dept. 2010], quoting *Lanzi v Brooks*, 43 N.Y.2d 778, [1977]). In addition, "at this early stage of the litigation, plaintiffs are entitled to the most favorable inferences, including inferences arising from the positions and responsibilities of defendants," and "plaintiffs need only set forth sufficient information to apprise defendants of the alleged wrongs" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442 [1st Dept 2010]).

The plaintiff has properly plead its cause of action for fraud and the defendants' application to dismiss the plaintiff's complaint is **denied**.

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. CPLR §3025(b). Based on the foregoing, the plaintiff's application is **granted** and the Amended Verified Complaint attached to the application is deemed served as of the date of this decision.

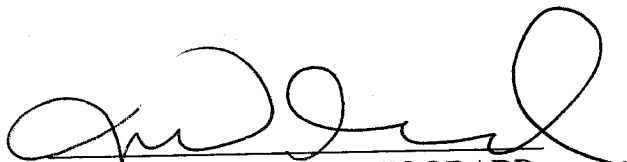
ORDERED, the previous issued stay is hereby vacated. It is further

ORDERED, that the parties are directed to appear for a Compliance Conference on April 19, 2011 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: April 1, 2011
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

ENTERED

APR 11 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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