UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

CALAMAR CONSTRUCTION SERVICES, INC.,	)	
Plaintiff,	)	Civ. 1:23-cv-10786
v.	)	
THE MASHPEE WAMPANOAG VILLAGE LIMITED PARTNERSHIP; and RAYMOND JAMES AFFORDABLE HOUSING INVESTMENTS, INC.,	)	
Defendants.	)	

CALAMAR CONSTRUCTION SERVICES, INC.'S OPPOSITION TO RAYMOND JAMES AFFORDABLE HOUSING INVESTMENTS, INC.'S MOTION TO DISMISS

Calamar Construction Services, Inc. ("Calamar") was led by Raymond James Affordable Housing Investments, Inc. ("Raymond James") to believe that it should forbear pursuing its remedies under its construction contract based on certain assurances. Raymond James assured Calamar that it would work with the Mashpee Wampanoag Village Limited Partnership ("Village LP") to ensure that Calamar received payment for the additional costs it was incurring due to the Village LP's extra-contractual demands and changed circumstances. It did so with the intent of stalling Calamar's initiation of dispute resolution because Raymond James sought to push the project along as fast and as far as possible in order to secure available tax credits and did so even though it knew that the Village LP would not pay Calamar. False assurances made with the intent to alter behavior are not hopeful speculation—they are fraud. Because Raymond James's actions constitute misrepresentation and tortious interference with contract under Massachusetts law, Calamar's amended complaint properly states claims against Raymond James; therefore, Raymond James's motion to dismiss should be denied in its entirety.

I. LEGAL STANDARD

The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court accepts the well-pleaded allegations in the complaint as true and construes reasonable inferences in the plaintiff's favor." *Verax Biomedical Inc. v. Am. Nat'l Red Cross*, No. CV 23-10335, 2024 WL 208127, at *4 (D. Mass. Jan. 19, 2024) (citing *Breiding v. Eversource Energy*, 939 F.3d 47, 49 (1st Cir. 2019)).

II. ARGUMENT

A. The Amended Complaint States a Claim for Tortious Interference with Contract.

In order to state a claim for tortious interference with a contract, a plaintiff "must prove that (1) he had a contract with a third party; (2) the defendant knowingly interfered with that contract [by inhibiting the third party's or the plaintiff's performance thereof, depending on the theory]; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." *O'Donnell v. Boggs*, 611 F.3d 50, 54 (1st Cir. 2010) (quoting *Harrison v. NetCentric Corp.*, 433 Mass. 465, 476 (2001)). The amended complaint alleges that Calamar had a contract with Village LP and that Raymond James acted intentionally and with improper motive and means to interfere with the performance of contract, and that Calamar was harmed as a result.

i. Misrepresentation is an improper means.

Raymond James's first argument in support of its motion to dismiss is that Calamar fails to plead improper means. *See* Def. Raymond James Mem. in Supp. of Its Mot. To Dismiss, ECF

No. 40, at 7 [hereinafter "RJ Mem."]. Although Raymond James claims that the conduct alleged in the Complaint (making false statements with the intent that Calamar rely on them to its detriment) is a "far cry from the types of 'means' that have been found improper," *id.*, "[i]t is well-established that a misrepresentation is an improper means of interference." *Bhammer v. Loomis, Sayles & Co., Inc.*, No. CV 15-14213-FDS, 2016 WL 3892371, at *7 (D. Mass. July 14, 2016). Massachusetts courts have repeatedly referred to "the improper means of misrepresentation" in discussing tortious interference, citing the *Restatement (Second) of Torts* § 767(a), comment c, and noting that Comment c declares that "fraudulent misrepresentation" is among the things that "are ordinarily wrongful means." *Draghetti v. Chmielewski*, 416 Mass. 808, 817 & n. 12, 626 N.E.2d 862, 869 (1994); *see also Cutting Edge Homes, Inc. v. Mayer*, 229 N.E.3d 613, 617 (Mass. App. Ct. 2024) (explaining that to establish improper motive or means "the defendant must have acted improperly, with 'improper' generally meaning innately wrongful, [and] predatory in character, *deceitful, or involving* threats, *misrepresentation*, or defamation." (citation and quotation marks omitted) (emphases added)).

Calamar squarely alleges that Raymond James used the improper means of misrepresentation and deceit to interfere with Calamar's contract with Village LP. The amended complaint alleges that "Raymond James told Calamar . . . to continue working on the Project while it solved the payment and change order issue" and "that it would resolve the payment dispute" between Calamar and the Village LP, Amend. Compl. ¶¶ 68–69 (ECF No. 33); that "Raymond James knew that Calamar would rely on its statement . . . as Raymond James was a financial backer . . . of the Village LP," *id.* ¶ 69; that "Raymond James knew that it would not resolve the dispute with the [Mashpee Wampanoag] Tribe," *id.* ¶ 70; that "Raymond James instead encouraged the Village LP to persist in its contractual violations with regard to the TERO dispute,"

id. ¶ 71; and that "Raymond James did so with the deliberate purpose of maximizing the returns available to the Village LP and depriving Calamar of contractually merited funds," *id.* ¶ 72. In other words, the amended complaint alleges that Raymond James made a representation to Calamar (that it "would resolve the payment dispute" with the Village LP) that it knew at the time was false ("Raymond James knew that it would not resolve the dispute with the Tribe"). *Id.* ¶ 70. Such a statement constitutes a fraudulent misrepresentation and therefore a wrongful means of interference with a contract. *See Restatement (Second) of Torts* § 767 cmt. c (1979) ("A representation is fraudulent when, to the knowledge or belief of its utterer, it is false in the sense in which it is intended to be understood by its recipient."); *Barr Inc. v. Studio One, Inc.*, 146 F. Supp. 3d 375, 382 (D. Mass. 2015) ("By alleging that Defendant's certification was knowingly false and was motivated by the prospect of additional compensation in the event of Plaintiff's termination, Plaintiff has alleged that Defendant's actions were improper in motive or means."). Calamar need not demonstrate improper motive where improper means were used. *See Armstrong v. White Winston Select Asset Funds, LLC*, 648 F. Supp. 3d 230, 256 (D. Mass. 2022) ("[T]he plaintiff need not prove both.").

ii. Raymond James's actions interfered with the contract.

Raymond James attempts to reframe its misrepresentations as aimed at "an attempt to advance the purpose of the Construction Contracts" rather than interfere because it sought to encourage Calamar to continue work on the project as expeditiously as possible. RJ Mem. at 7. But Raymond James's fraud did not just ensure that Calamar kept working (without pay)—it also prevented Calamar from exercising its contractual rights in reliance on those statements. Under the contract, Calamar had the right to "stop the Work until payment of the amount owing has been received." General Conditions § 9.7 (ECF 38, Ex. C, at 78). It had the further right under the

contract to terminate the contract for failure of payment. *Id.* § 14.1.1, at 88 ("The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor . . . because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents."). Calamar "completed a significant portion of the remaining work on the Project . . . in reliance on Raymond James's statements that it was working with the Village LP to resolve the payment dispute." Amend. Compl. ¶¶ 82–83. Because Raymond James's misrepresentation altered Calamar's performance and exercise of its contractual rights, it was improper interference. *See Steranko v. Inforex, Inc.*, 362 N.E.2d 222, 235 (Mass. App. Ct. 1977).

Calamar also alleges that Raymond James induced Village LP to breach the contract. In Paragraph 124 of the Amended Complaint, Calamar alleges that:

> Raymond James intentionally and improperly interfered with the relationship by, among other actions, encouraging the Village LP to breach the Contract and Secondary Contract or to insist on employment of tribal workers notwithstanding the contractual requirements.

Amend. Compl. ¶ 124; *see also id.* ¶ 71 ("Raymond James instead encouraged the Village LP to persist in its contractual violations with regard to the TERO dispute."). Raymond James calls these allegations a "highly implausible conclusion," RJ Mem. at 9, but never explains why Calamar's sworn allegations are so "highly implausible" that they must be disregarded at the motion-to-dismiss stage. *Cf. Washtenaw Cnty. Emps. Ret. Sys. v. Avid Tech., Inc.*, 28 F. Supp. 3d 93, 103 (D. Mass. 2014) ("[T]he Court is instructed to 'accept as true all well-pleaded facts in the complaint and draw all reasonable inferences in favor of the plaintiffs.'" (citation omitted). Nor are the allegations altogether implausible: Raymond James was "a financial backer . . . of the Village LP" and needed the "Project . . . put into service by the end of the year" to receive its tax credits. Amend. Compl. ¶¶ 69, 73. It also knew that "the Tribe would insist on TERO workers" for the

Project and so encouraged the Village LP to "insist on employment of tribal workers" so that the Village LP would continue moving the project forward. *Id.* ¶¶ 66, 124.

Raymond James's motion does not cite any authority in support of its position that Raymond James cannot be liable for interference for having encouraged Village LP to breach its contract with Calamar simply because Village LP may have had other reasons for doing so; the law does not limit the tortious interference cause of action to plaintiffs who allege that the defendant's inducement was the *only* reason for the breach. *See Koch Acton, Inc. v. Koller*, No. CV 21-10374-FDS, 2024 WL 1093001, at *13 (D. Mass. Mar. 13, 2024) ("But assuming, as the Court must, that plaintiff can establish improper motive or means, a causal connection is certainly plausible on the current evidence."). It is true that causation is required to state a claim for tortious interference, but Raymond James cites no authority to support its position that the defendant's actions must be the solitary cause of the breach.

Finally, this Court may give short shrift to Raymond James's repeated claims that the amended complaint "never squarely alleges that [Raymond James] actually induced Village LP to breach the Contract at all," instead alleging only that Raymond James was "encouraging" the Village LP to breach. RJ Mem. at 10. The difference between "induce" and "encourage" is semantics: "Inducement" means simply "[t]he act or process of enticing or persuading another person to take a certain course of action." *Inducement*, Black's Law Dictionary (11th ed. 2019). Courts have found "encouraging" sufficient to satisfy the elements for tortious interference and especially in light of the reasonable inferences that must be given to the amended complaint at this stage, Calamar's pleading is sufficient. *See Conning v. Halpern*, No. 18-CV-12336-ADB, 2021 WL 1580837, at *11 (D. Mass. Apr. 22, 2021).

* * *

Raymond James had an interest in keeping the Mashpee Wampanoag Tribe happy and supporting the project and an interest in keeping Calamar working as long as possible so that it could receive tax credits. To promote those interests, it made false statements to Calamar to induce it to keep working and forgo its rights on the promise of eventual payment and induced the Tribe to wrongfully and unlawfully enforce an employment ordinance against Calamar in violation of the contract. These allegations suffice to show tortious interference with contract.

B. The Amended Complaint States a Claim for Misrepresentation and Negligent Misrepresentation.

Raymond James's misrepresentations, described above, are themselves sufficient for their own separate claim. Because these statements were false and were reasonably relied upon by Calamar to its detriment, Raymond James is liable for the harms that it caused.

i. Raymond James's false statements qualify as negligent misrepresentations.

While Raymond James does not address Calamar's intentional misrepresentation claim,[1] it seeks to dismiss Calamar's negligent misrepresentation claim. To recover for negligent misrepresentation, a plaintiff "must prove that the defendant (1) in the course of his business, (2) supplied false information for the guidance of others (3) in their business transactions, (4) causing and resulting in pecuniary loss to those others (5) by their justifiable reliance on the information, and that he (6) failed to exercise reasonable care or competence in obtaining or communicating the information." *Gossels v. Fleet Nat. Bank*, 902 N.E.2d 370, 377 (Mass. 2009).

[1] Count Five pleads two theories in the alternative: intentional misrepresentation and negligent representation. The intentional misrepresentation claim is that "Raymond James knew its statements were false when they were made," Amend. Compl. ¶ 135; the (alternative) negligent misrepresentation claim is that "Raymond James made the statements without exercising reasonable care or competence in determining whether the statements were true and likely to occur," *id.* ¶ 136. The reasons supporting denial of Raymond James's motion to dismiss with regard to negligent misrepresentation apply equally to denying any attempt to dismiss a claim for intentional misrepresentation.

Raymond James, the "financial backer" of the project and an entity whose representatives took "an active role in the day-to-day activities of the Village LP," told Calamar that it "would resolve the payment dispute." Amend. Compl. ¶¶ 11, 69. It did so knowing that no such resolution would occur and knowing that Calamar would not be paid. *See id.* ¶¶ 70, 72. Thus, Raymond James "supplied false information for the guidance of others." Raymond James's suggestion that its statement cannot be false "because it is a forward-looking statement about the future," RJ Mem. at 12, makes little sense if, as is alleged, Raymond James never did or intended to do the thing it claimed it would do in the first place.

Moreover, the cases Raymond James itself cites demonstrate this very point. Raymond James misleadingly extracts from *Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc.*, 918 N.E.2d 36, 49 (Mass. 2009), the statement that "'false statements of opinion, of conditions to exist in the future,' and promises to perform an act cannot sustain a claim for negligent misrepresentation," RJ Mem. at 12 (citation omitted)— without acknowledging that the rest of the sentence from *Cumis* continues "unless the promisor *had no intention to perform the promise* at the time it was made," 918 N.E.2d at 49 (emphasis added). That is precisely what Calamar alleges here. *See* Amend. Compl. ¶ 70 ("Raymond James knew that it would not resolve the dispute with the Tribe."); *id.* ¶ 135 ("Raymond James knew its statements were false when they were made . . . ."); *see also Barden v. Harpercollins Publishers, Inc.*, 863 F. Supp. 41, 43 (D. Mass. 1994) (cited in RJ Mem. at 12) (while as a rule "statements of opinion or judgment relating to future events are generally not actionable," there is an exception where (as is alleged here) "the defendant misrepresents his actual present intent to perform a future act" or "where the parties have unequal knowledge of the subject matter in question and where the future event is fully within the declarant's control" (citation omitted). Raymond James's assertion that it "could not have induced Calamar to rely on

a statement when the results of its efforts had not yet occurred," RJ Mem. at 14, fails for the same reason—*Cumis* and *Barden* make clear that a promise to do something in the future may be actionable if the promisor had no intention to perform at the time the promise was made.

Also wrong is the assertion in the motion that "Calamar acknowledges that [Raymond James] did in fact advocate for the position advanced by Calamar . . . . ." RJ Mem. at 12. Calamar acknowledges nothing of the sort. On the contrary, a jury could find that if (as the amended complaint alleges) Raymond James told Calamar it would resolve the dispute, but knew that it would not, Raymond James was *not* "advocat[ing] for the position advanced by Calamar," and did *not* "'work with the Village LP' to attempt to resolve the dispute." RJ Mem. at 12. In any event, what Calamar alleges is not just that Raymond James represented that it would "advocate for the position advanced by Calamar," but that it would in fact *resolve Calamar's dispute* with the Tribe. Amend. Compl. ¶¶ 68–69. Raymond James tries to district attention from Calamar's allegation that Raymond James represented that it would resolve Calamar's dispute with the Tribe when it never intended to do so by focusing on Calamar's allegation that Raymond James told it "that the Tribe would insist upon TERO workers" and "would accept change order for cost overruns under certain conditions," Amend. Compl. ¶¶ 66–67, RJ Mem. at 13, but those are not the statements Calamar alleges are actionably false.

Calamar furthermore has properly alleged justifiable reliance. Raymond James's argument that the amended complaint fails to plead "actual knowledge of plaintiff's reliance," RJ Mem. at 13, dismisses Paragraph 69, which alleges that "Raymond James knew that Calamar would rely on its statement that it would resolve the payment dispute as Raymond James was a financial backer and limited partner of the Village LP." Amend. Compl. ¶ 69. Raymond James characterizes this paragraph as a "highly conclusory allegation," "bald assertion," and "threadbare

recitation," RJ Mem. at 14, but beyond the deprecative descriptions it is unclear what additional facts it believes Calamar should have alleged to show the fact that Raymond James knew that Calamar would rely on its representation that it would resolve the payment dispute. Calamar could reasonably have relied on assurances given by "a financial backer and limited partner" of its contractual counterparty, Amend. Compl. ¶ 69—an entity a jury could infer would have substantial influence over the counterparty—that its payment dispute with the Village LP would be resolved and it would be paid. In any event, even though Calamar does allege it, "actual knowledge of plaintiff's reliance" is not an element of a negligent misrepresentation claim. *See Gossels v. Fleet Nat. Bank*, 902 N.E.2d 370, 377 (Mass. 2009) (elements of negligent representation do not include "actual knowledge of plaintiff's reliance"). To the extent that Raymond James seeks to claim that Calamar's reliance was unreasonable, "Massachusetts courts have expressed a strong preference that reliance, in the context of negligent misrepresentation claims, be determined by a jury." *First Marblehead Corp. v. House*, 473 F.3d 1, 11 (1st Cir. 2006).

Raymond James insists that "it would not be reasonable for Calamar to expect that [Raymond James's] statement—that it would work in the future on the issues sought by Calamar—meant that [Raymond James] already knew it could and would convince Village LP to change its position and accommodate Calamar's issues." RJ Mem. at 14. The problem here is Calamar alleges that Raymond James did in fact represent that it could and would convince Village LP to change its position, and that promise to perform an act in the future is actionable if (as Calamar alleges) Raymond James "had no intention to perform the promise at the time it was made." *Cumis Ins. Soc'y*, 455 Mass. at 474; Amend. Compl. ¶ 68 ("Raymond James told Calamar that it would work to resolve the dispute with the Tribe and to continue working on the Project while it solved the payment and change order issue"); ¶ 69 ("Raymond James knew that Calamar would rely on

its statement that it would resolve the payment dispute as Raymond James was a financial backer and limited partner of the Village LP"); ¶ 70 ("Raymond James knew that it would not resolve the dispute with the Tribe.").

The final argument in the motion is that "there are circumstances in which a plaintiff's reliance on oral statements in light of contrary written statements is unreasonable as a matter of law." RJ Mem. at 15. That may be, but Raymond James identifies no such circumstances here, instead simply declaring in conclusory fashion that nothing Raymond James may have said changed Calamar's rights or obligations under the construction contract. RJ Mem. at 15. Calamar's claim is not that the terms of the contract should be modified based on oral statements made by Raymond James; it is that Calamar relied on those statements in deciding to keep working on the project rather than pursuing other remedies for Village LP's breaches. Amend. Compl. ¶ 134.

* * *

Simply put, Raymond James assured Calamar that it would be paid for its work if it just kept its head down and continued on the project, knowing that its promise was false and that Calamar would be left in the cold. Such a statement constitutes a misrepresentation under Massachusetts law and therefore Calamar's claim should overcome Raymond James's motion to dismiss.

CONCLUSION

Calamar has stated a claim for tortious interference and for intentional and negligent misrepresentation. The motion to dismiss should therefore be denied.

Respectfully submitted,

CALAMAR CONSTRUCTION SERVICES, INC.

By its Attorneys,

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Dated: June 21, 2024

/s/ Kenneth E. Rubinstein

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CERTIFICATE OF SERVICE

I hereby certify this 21st day of June 2024 that this document is being served on all parties hereto.

Dated: June 21, 2024

/s/ Kenneth E. Rubinstein

Kenneth E. Rubinstein (BBO# 641226)