SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN Justice PART 3

Index Number : 600990/2010
MA ANGELIDES INC
vs.
BOVIS LEND LEASE LMB INC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 600990/10
MOTION DATE 12/23/10
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6-1-11

HON. EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X

M.A. ANGELIADES, INC.

Plaintiff,

-*against*-

BOVIS LEND LEASE LMB, INC., NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION and CITY OF NEW YORK,

Defendants.
----------X

Index No.: 600990/10
Mtn. Date: 12/23/10
Mtn. Seq. No.: 001

PRESENT: HON. EILEEN BRANSTEN, J.S.C.

Defendants City of New York and New York City Department of Design and Construction ("Movants") seek dismissal of the claims against it asserted by M.A. Angeliades ("Plaintiff"). Plaintiff opposes the motion.

BACKGROUND

Prior to March 1999, the City of New York, acting through the former New York City Department of General Services ("DGS"), entered into an agreement ("the Contract") with Lehrer McGovern Bovis, Inc., now known as Bovis Lend Lease LMB, Inc. ("Bovis"). The Contract was for design, pre-construction, construction and construction management services relating to a project for Fire and Life Safety Improvements in various facilities at Rikers Island Correctional Facility in Manhattan, New York (the "Project"). Amended Verified Complaint ("Am Compl") at ¶ 6. New York City Department of Design and Construction ("DDC"), as successor entity to DGS (which is no longer in existence), succeeded to all of DGS's obligations relating to the Project. *Id.*

On March 24, 1999, Bovis and Plaintiff entered into a contract (the "Subcontract") under which Plaintiff was responsible for all general construction work on the Project. *Id.* at ¶ 7. Bovis entered the contract as an agent and construction manager for DDC and the City. In that capacity Bovis carried out work and responsibilities with respect to the Project. *Id.* at ¶ 8.

Plaintiff commenced work on the Project in April 1999. *Id.* at ¶ 9. The Project was originally scheduled for completion on December 31, 2001. The completion date of the Project, and the Contract, was eventually extended through January 2007. *Id.* at ¶ 10.

On March 16, 2010, prior to commencement of this action, Plaintiff presented a written Verified Notice of Claim to notify the defendants of the claims upon which this action is founded. *Id.* at ¶ 12.

On April 19, 2010, Plaintiff filed a summons and verified complaint against Bovis, DDC and the City. Affirmation of Joyce J. Sun, Esq. In Opposition to Defendants City of New York and DDC's Motion to Dismiss ("Opp Affirm") at ¶ 7; Ex. 3. Plaintiff asserts causes of action concerning: (1) unpaid extra work; (2) extended general conditions and delay damages; (3) contract balance, contract retainage and other withheld amounts; (4) interest due to late payment of change orders; and (5) quantum meruit recovery. Plaintiff seeks to recover $3.6 million for the work it allegedly performed.

On July 14, 2010, Bovis answered and cross-claimed against the City and DDC based in part on alleged "acts, errors and/or omissions" by the City and DDC. *Id.* at ¶ 8.

On July 28, 2010, Plaintiff served an amended verified complaint. *Id.* at ¶ 9. Plaintiff added a new allegation regarding DGS and its relation to DDC, including that "[u]pon

information and belief, the DDC is a successor entity to the former DGS, an entity which is no longer in existence, with respect to the Project, and has succeeded to all of the obligations of the DGS with respect to the Project." Am Compl at ¶ 6.

On July 7, 2010, Movants brought this motion to dismiss the complaint. On September 7, 2010, by Court-ordered stipulation, the parties agreed that this motion would be applied as to Plaintiff's Amended Complaint. *Id.* at ¶ 10. The motion was fully submitted on December 23, 2010.

ANALYSIS

"On a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law. ... While a complaint is to be liberally construed on a CPLR 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based on the undisputed facts [...]." *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003) (citations omitted).

"[W]here a written agreement unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1).... This follows from the bedrock principle that it is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document [...]." *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004) (citations omitted).

I. **Lack of Privity Between Plaintiff and Movants Warrants Dismissal of the Claims**

a. Arguments

i. Movants

Defendants City of New York and New York City Department of Design and Construction, as Movants, first argue that no contractual privity exists between them and Plaintiff. Movants argue that Plaintiff has a contractual relationship only with Bovis, and thus, without privity of contract, Plaintiff does not have a legally valid claim against Movants. Movants further state that Plaintiff does not dispute the absence of a contractual relationship between Plaintiff and the City and that Plaintiff provides only "conclusory allegations" of an agency relationship between the two. Am Compl at ¶¶ 8, 32. Movants argue that Plaintiff does not plead facts that demonstrate or provide reasonable belief that Bovis acted as the City's agent when Bovis entered into the Subcontract with Plaintiff, and thus the pleading is insufficient on its face to establish an agency relationship as a matter of law.

Movants further provide that relevant provisions in the Contract and Subcontract contradict Plaintiff's allegations of agency. The Contract states, in part, that:

> Bovis is to provide to the City with "investigation, planning, pre-construction, construction, management, supervision and coordination of all work necessary and required for the [p]roject to effectuate its timely completion'
> Sections 7.1, 11.1;
>
> Bovis is to enter into subcontracts for "all construction services required for the [p]roject"
> Section 10.2;
> Bovis is to "[d]etermine the need for and undertake default proceedings against … subcontractor[s]."
> Section 11.5.15.

Movants appear to argue that these sections show that Bovis, and not Movants, had authority over the Project and that Bovis was not an agent of Movants. Movants also provide that the Subcontract authorizes Bovis to approve certain bond sureties selected by Plaintiff, to approve Plaintiff's subcontractors, to approve Plaintiff's supervisory personnel, to declare Plaintiff in default, to order changes in the work and to terminate Plaintiff's Subcontract.

Thus, Movants maintain that because the documentary evidence establishes a lack of contractual privity between them and the Plaintiff, Plaintiff is precluded from asserting any claims against them as a matter of law.

ii. Plaintiff

In response, Plaintiff contends that it properly alleges a valid claim against Movants. Plaintiff asserts that its claim is based on the relationship between Bovis and Movants as exhibited by the parties' conduct and dealings with each other, and that such course of conduct gives rise to the functional equivalent of contractual privity and the obligation by Movants to pay for Plaintiff's performance. In addition, Plaintiff avers that Movants have not offered documentary evidence demonstrating that they did not expressly agree to pay for Plaintiff's work.

Plaintiff next argues that the nature of the relationship between Movants (as owner) and Bovis (as construction manager) subjects Movants to liability to Plaintiff. Plaintiff argues that allegations in the complaint set forth a proper and valid claim against Movants for recovery based on the Movants-Bovis's principal-agent relationship. Am Compl, ¶¶ 8, 38. Plaintiff asserts that these allegations, alleging that Movants obligated themselves to pay Plaintiff for its work, satisfy the rule established in *Perma Pave Contracting Corp.* that an owner is "liable to a

subcontractor on a quasi contract theory" when "it expressly consents to pay for the subcontractor's performance." *Perma Pave Contracting Corp. v. Paerdegat Boat & Racquet Club, Inc.*, 156 A.D.2d 550, 551 (2d Dep't 1989).

Plaintiff also offers extensive Contract and Subcontract provisions that purportedly give a picture of the extensive authority that Movants had in directing and controlling the Project. *See* §§ 10.2.1(f); 10.2.4; 10.6.

Plaintiff also cites Article 33 of the Contract which provides the Commissioner of the DDC with broad general powers to determine questions relating to the contract and its performance. Article 33 states that:

> The Commissioner, in addition to those matters elsewhere herein expressly made subject to his determination, shall have the power: (a) to review and determine any and all questions in relation to this Agreement and its performance; and (b) to modify or change his Agreement.

Plaintiff further offers that specific Subcontract provisions demonstrate that the City ran the Project and controlled key aspects of Plaintiff's performance and payment. *See* Subcontract §§ 5.9; 5.26; 19.1.

Plaintiff avers that Movants' argument that the Contract bars Plaintiff from asserting claims against Movants is contradicted by §§ 5.26 and 19.1 of the Subcontract General Conditions. Plaintiff argues there would be no need to include provisions requiring the Contractor's waiver of a "claim or cause of action against Owner" with respect to delays due to disruption of work (Subcontract § 5.26) or for deletion of work (Subcontract § 19.1) if Plaintiff did not have these claims in the first place.

Finally, Plaintiff argues that the Contract did not contain a "no agency" or "independent contractor" clause which should have been included if an agency relationship were not intended.

iii. Movants' Reply

Movants again argue that Plaintiff improperly relies upon allegations that are contradicted by the Contract and Subcontract, and the lack of privity between Plaintiff and Movants warrants dismissal of the claims against them.

b. *Court's Determination*

"Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties." *Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev. Corp.*, 64 A.D.3d 85, 104 (2d Dep't 2009). "As a general rule, a subcontractor is in privity with the general contractor on a construction project, but is not in privity with the owner even if the owner has benefitted from the contractor's work." *CDJ Bldrs. Corp. v. Hudson Group Constr. Corp.*, 67 A.D.3d 720 (2d Dep't 2009); *IMS Engineers-Architects, P.C. v. State of New York*, 51 A.D.3d 1355 (3d Dep't 2008).

Plaintiff alleges that the Project Contract was breached. The Contract was between Plaintiff and the contractor alone. Movants have established that no privity of contract exists between Plaintiff and Movants. Further, Movants have submitted evidence that Contract and Subcontract provisions expressly preclude actions by the subcontractor against Movants. *See, infra*. Thus, Plaintiff has no cause of action as against Movants pursuant to the contract. *See e.g., CDJ Bldrs. Corp.*, 67 A.D.3d at 722 (subcontractor's breach of contract claim against owners dismissed as contract was between it and prime contractor and owners were not

signatories to it); *IMS Engrs.-Architects, P.C.*, 51 A.D.3d at 1355 (plaintiff subcontractor's breach of contract claim against defendant landowner dismissed as plaintiff's contract was solely with general contractor and it thus lacked contractual privity with defendant).

Although Plaintiff alleges a cause of action predicated upon an alleged agency relationship with the Movants, Plaintiff's conclusory allegations have not properly pleaded an agency relationship. In addition, express contractual provisions expressly reject the claims. Accordingly, because there is lack of privity between Plaintiff and Movants, Plaintiff's claims of unpaid extra work, extended general conditions and delay damages, contract balance; conduct retainage; other withheld amounts, interest and quantum meruit are dismissed.

II. Plaintiff is Contractually Precluded from Proceeding Against the City

a. *Arguments*

i. Movants

Movants also argue that the Contract between Bovis and the City specifically provides that Bovis's Project subcontracts contain an agreement that the subcontractors cannot make any claims against the City. First, Movants argue that Section 10.2.2 (g) of the Contract states:

> Such subcontracts shall require that the subcontractor agree not to make any claims against the City, its officers, agents or employees by reason of such subcontract or any acts or omissions of the Contractor.

Second, Movants assert section § 50.2 of the Contract, which provides that:

> The Contractor [Bovis] shall require each subcontractor or consultant to agree in his contract not to make any claim against the City, its officers, agents, or employees, by reason of such contract, or any acts or omissions of the contractor.

Third, Movants argue that General Conditions § 32.7 of the subcontracts similarly states that Plaintiff agreed:

> ... not to make any claims against the Owner [the City], its officers, agents or employees, by reason of the Contract [Subcontract] or any acts or omissions of Construction Manager.

Movants contend that these provisions are standard provisions in many of the City's construction management contracts, are valid and enforceable and thus, preclude Plaintiff from asserting its claims against Movants.

ii. Plaintiff

Plaintiff argues that the Contract and Subcontract provisions do not prohibit all claims by Plaintiff, but only those claims based on the Contract or based on the acts or omissions of Bovis. Plaintiff further maintains that they have properly alleged a claim for quantum meruit recovery and that the fact that there is no contract between Plaintiff and Movants lends support to this claim against Movants.

Plaintiff also argue that Movants' reliance on cases cited in their memorandum of law and on Contract §§ 10.2.2(g) and 50.2 and Subcontract § 32.7 is misplaced and has no bearing as to whether Plaintiff can assert such a claim.

iii. Movants' Reply

In their reply, Movants assert, *inter alia*, that any indication of an agency relationship is contradicted by Contract § 10.2.5. Section 10.2.5 states that Bovis was to enter subcontracts solely on its own account:

> The Contractor [Bovis] shall be solely responsible to the City for the acts or defaults of his subcontractors ... each of whom shall, for this purpose, be deemed to be the agent or employee of the Contractor to the extent of its subcontract.

Movants further argue that Subcontract General Condition § 13.7, which states that: "Contractor expressly waives any claim based on quantum meruit," precludes quantum meruit recovery.

b. *Court's Determination*

"The existence of a valid and enforceable written contract covering a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter." *Hamlet at Willow Creek Dev. Co., LLC, et al. v. Northeast Land Dev. Corp., et al.*, 64 A.D.3d 85, 102 (2d Dep't 2009) (citations omitted). Furthermore, "a property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi contract theory unless it expressly consents to pay for the subcontractor's performance...." *Perma Pave Contracting Corp. v. Paerdegat Boat & Racquet Club, Inc*, 156 A.D.2d 550, 551-52 (2d Dep't 1989).

The record contains no evidence that Movants expressed a willingness to pay the Plaintiff for its performance in this case. Rather, the Contract and Subcontract, "construed according to their plain meaning," contain valid and enforceable provisions that unambiguously preclude Plaintiff from asserting certain claims, including for quantum meruit recovery against Movants. *IMS Engrs.-Architects, P.C. v. State of New York*, 51 A.D.3d 1355, 1357-1358 (3d Dep't 2008) (subcontractor had no standing to sue defendant property owner as contract between owner and general contractor waived any claim by subcontractor against owner); *see Bd. of Mgrs. of the Alexandria Condominium v. Broadway/72nd St. Assocs.*, 285 A.D.2d 422 (1st Dep't 2001) (contract clause negated enforcement of contract by third party); *Braun Equip. Co., Inc. v. Meli*

Borelli Assocs., 220 A.D.2d 312 (1st Dep't 1995) (subcontract expressly precluded third-party privity between subcontractor and owner, thus subcontractor's remedy was only against contractor).

Accordingly, based on the documentary evidence, Movants have further demonstrated that Plaintiff's claims against them should be dismissed as a matter of law.

III. Cross-Claims against Movants

Bovis has levied cross claims against the New York City Department of Design and Construction and the City of New York. The dismissal of Plaintiff's claim against the New York City Department of Design and Construction and the City of New York does not negate the cross claims, and movants do not otherwise argue for the claims' dismissal. The claims thus remain.

Holding

Accordingly, it is

ORDERED that the City of New York and New York City Department of Design and Construction's motion to dismiss the complaint is granted, and this action continues as against the City of New York and the New York City Department of Design and Construction only as to the cross claims asserted against those parties by Bovis Lend Lease LMB, Inc.

This constitutes the Decision and Order of the Court.

New York, New York
May ____, 2011
June 1

ENTER

Hon. Eileen Bransten