SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 650392/2011
EL-AD 52 LLC
vs.
CLIMATE MASTER, INC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 10-21-11
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion by defendant is granted and the complaint is dismissed with costs and disbursements to defendant, as taxed by the Clerk of the Court upon presentation of a bill of costs. And it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

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

Dated: 3-30-2012

HON. CAROL EDMEAD, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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EL-AD 52 LLC,

Plaintiff,

-against- Index № 650392/11

CLIMATE MASTER, INC.,

Defendant.

----------X

CAROL R. EDMEAD, J.:

In this action for damages, defendant Climate Master, Inc. (Climate) moves for an order, pursuant to CPLR 3211 (a) (7), dismissing the claims against it. The motion is opposed by plaintiff EL-AD 52 LLC (EL-AD).

The following facts are taken from the complaint, affidavits, and evidentiary documents, and are undisputed unless otherwise indicated.

EL-AD was the former owner of real property located at 310 West 52nd Street in Manhattan (the Building) which it renovated and converted into residential condominium units (Renovation Project), and sold to various third parties. EL-AD retained the services of nonparty Tishman Construction Corporation of New York (Tishman) to act as its construction manager for the Renovation Project. In turn, Tishman engaged the services of nonparty Heritage Mechanical Inc. (Heritage) to provide the heating, ventilation and air-conditioning work (HVAC) at the Renovation Project, and Heritage then entered into a purchase order agreement (Purchase Order) with Climate, an HVAC subcontractor. The Purchase Order required Climate to provide Heritage with 733 Climate Master Vertical High Rise Heat Pumps and nine Horizontal Heat Pumps conforming to submitted plans and specifications (together, Heat Pumps) for the

Renovation Project's HVAC.

EL-AD contends, and for the purpose of the motion, Climate does not dispute, that the Heat Pumps were provided, as per the Purchase Order, and that when they were installed in the Building, a large number of them malfunctioned. Some of the pumps would not turn on, and others would randomly shut off and not restart. EL-AD received numerous complaints from its condominium purchasers about the Heat Pumps. EL-AD and Tishman notified Heritage about these problems, and Heritage notified Climate. Climate failed and refused to provide adequate repair service, requiring EL-AD to pay substantial sums of money to hire additional HVAC companies to investigate and remediate the problem-laden pumps.

EL-AD commenced this action against Climate by service and filing of the summons and complaint in the office of the New York County Clerk on or about February 15, 2011. The complaint contains two causes of action sounding in breach of contract premised on EL-AD's contentions that the heat pumps were defective and that Climate knew or should have known that the Heat Pumps were defective because similar problems had been occurring with Climate's heat pumps at other projects in New York City. EL-AD contends that Climate's shipment of defective merchandise constituted a breach of the Purchase Order. It demands damages based upon both the defective merchandise and the reputational injuries it purportedly sustained as a result of the breach.

EL-AD acknowledges that it is not a party to the Purchase Order, but claims to have standing as a third-party beneficiary because the Purchase Order was executed for its benefit. EL-AD's theory of recovery is based upon the long recognized principle that a third party may sue as a beneficiary on a contract made for his benefit if it can show:

> (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost

(*State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434 - 435 [2000][internal quotation marks and citations omitted], *see also Lawrence v Fox*, 20 NY 268, 274, 6 EP Smith 268 [1859]).

Instead of serving an answer to EL-AD's complaint, in or about April 2011, Climate sought removal of this action to the United States District Court for the Southern District of New York on the basis of diversity jurisdiction. However, by agreement of the parties, and by order dated August 29, 2011, the Hon. Harold Baer, Jr. remanded the matter back to Supreme Court New York County, following which, Climate served the instant pre-answer motion to dismiss.

Central to the motion is Climate's assertion that the complaint fails to state a cause of action for breach of contract because EL-AD is not a third-party beneficiary to the Purchase Order. Climate argues that the Purchase Order is an agreement between contractors, and that EL-AD, as the owner, was, and is, merely an incidental beneficiary to that agreement and, therefore, is without standing to sue. Climate supports its motion with a copy of the Purchase Order and contends that the clear language contained in that document absolutely refutes EL-AD's claim of third-party beneficiary status and resolves the issue as a matter of law (CPLR 3211 [a] [1] and [7]). Climate further argues that, even if it were a third-party beneficiary, EL-AD could not recover incidental and consequential damages as both are expressly waived under section four of the Purchase Order, which states: "seller expressly disclaims and excludes any liability for consequential or incidental damages in contract, for breach of any express or implied warranty, or in tort, whether for seller's negligence or in strict liability" (capitalization and underlining

modified).

While the parties in this action do not meaningfully dispute that the Purchase Order, annexed both to the Notice of Motion at Exhibit C and to Climate's Reply papers together with a sworn affidavit from Climate's Credit Manager, Keila McCain,[1] constitutes a valid and binding contract between Climate and Heritage, they sharply disagree as to whether it rendered third-party beneficiary status on EL-AD as the owner.

For its part, EL-AD points to the fact that: (1) EL-AD Properties[2] is named as "Owner" on the face of the Purchase Order; (2) section 3 of the Purchase Order's Terms and Conditions states that "[a]ll material and equipment under this order shall be subject to the approval of the Owner"; (3) section 6 of the Terms and Conditions requires the seller to defend, indemnify and save harmless the purchaser and the owner against claims of patent infringement, claims based on the Heat Pumps, and claims resulting from death or injury to persons and/or the destruction of property (other than the Heat Pumps) caused by the seller's negligence; and (4) Rider A to the Purchase Order states that the Purchase Order is "subject to the approval of the Architect, Engineer and Owner." EL-AD contends that the language used in these provisions bestows third-party beneficiary status on it, and/or is indicative of the contracting parties' intent to do so. Additionally, EL-AD submits the sworn affidavit of Yoel Shargian (Shargian), the chief operating officer of "EL-AD Properties," who attests to the interaction (both verbal and by letters from EL-AD to Climate, dated September 22, 2008, and October 8, 2008) between El-AD and

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[1]In her affidavit, McCain attests that the annexed copy is a true and correct copy of the (only) Purchase Order between Climate and Heritage with respect to the Condo Project.

[2]According to plaintiff, EL-AD Properties is its (EL-AD's) owner's representative.

Climate with respect to multiple requests for the repair or replacement of the faulty Heat Pumps (Shargian Aff. and Letters Annexed to Plaintiff's Memorandum of Law). EL-AD asserts that the direct dealings between it and Climate constitutes evidence that Climate understood EL-AD to be the beneficiary under the Purchase Order, and it seeks an opportunity to uncover evidence to support its claims. EL-AD contends that it is premature to dismiss the complaint prior to discovery, and that it is entitled, under New York law, to have this court "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87 - 88 [1994]).

Climate adheres to its position that the Purchase Order constitutes the entirety of its agreement to sell the Heat Pumps to Heritage, and that it constitutes a complete defense to the complaint as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Climate deems the above referenced provisions to be inadequate to confer third-party, rather than incidental, beneficiary status on EL-AD,[3] and points out that, where a contract is between contractors and subcontractors, New York law does not confer third-party beneficiary status upon an owner unless the contract contains clear and explicit language to that effect.

The New York courts have generally held:

> the ordinary construction contract - - i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party - - does not give third parties who contract with the promisee the right to enforce the latter's contract with another. Such third parties are generally considered mere incidental beneficiaries

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[3]Climate also disputes plaintiff's claim of standing based upon the fact that the Purchase Order identifies "EL AD Properties" and not "EL-AD 52 LLC" as the owner.

(*Port Chester Elec. Constr. Corp. v Atlas,* 40 NY2d 652, 656 [1976]).

In addition to *Port Chester Elec. Constr. Corp.,* the decisions in *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.* (66 NY2d 38 [1985]), and *Piccoli A/S v Calvin Klein Jeanswear Co.*, 19 F Supp 2d 157 (SD NY 1998) and their progeny, also attempt to clarify who is an intended beneficiary as opposed to an incidental beneficiary:

> A third party is an intended beneficiary where either (1) 'no one other than the third party can recover if the promisor breaches the contract' or (2) 'the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party'

(*Piccoli A/S v Calvin Klein Jeanswear Co.*, 19 F Supp 2d at 162, citing *Fourth Ocean*, 66 NY2d at 45; *McClare v Massachusetts Bond. & Ins. Co.*, 266 NY 371, 379 [1935]).

An examination of the subject Purchase Order fails to reveal language which satisfies either of these prongs. It not only fails to expressly state that the owner is an intended beneficiary, but the Purchase Order also fails to contain language prohibiting parties, other than the owner, from seeking recovery for a contract breach, or language evincing a clear intent for the owner to be able to enforce its terms, and to do so at the exclusion of the purchaser, Heritage. EL-AD's arguments notwithstanding, neither the ability of the owner to approve both the Purchase Order and the subject of the Purchase Order (the Heat Pumps), nor the inclusion of an indemnification clause relating to issues of patent infringement, death, personal injury, and non-heat pump related destruction of property, satisfy the criteria set froth in *Piccoli A/S* and *Fourth Ocean.*

"[I]t 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. Assoc., L.P. v Bodner*, 14 AD3d 1, 6

[1st Dept 2004]). Contrary to EL-AD and Shargian's assertions, the post-delivery communications exchanged between EL-AD and Climate about repairs for the Heat Pumps do not render the Purchase Order ambiguous and in need of extrinsic evidence.

What the Purchase Order makes clear, is that, aside from the seller, only the purchaser, has rights and obligations under the agreement, not the owner. After identifying Climate as "Seller," and Heritage as "Purchaser," the Purchase Order provides, among other things, that it "constitute[s] a valid and binding contract between the Purchaser and Seller"; [i]n the event the equipment or material does not meet the foregoing requirements, Seller shall immediately, on notice, replace same or remedy any deficiency without expense to the Purchaser;" "[n]o shipment of non-conforming materials or equipment is authorized without the Purchaser's prior written consent thereto;" and "Purchaser reserves the right to cancel all or any part of this purchase order if not filled within the specified time of deliver" (Purchase Order §§ 1, 4, 5, and 7). Whether it is read piecemeal or as a whole, the terms of the Purchase Order do not suggest, let alone establish, an intent by the contracting parties to bestow third-party beneficiary status on the owner.

Where, as here, plaintiff's "legal conclusions and factual allegations are flatly contradicted by the documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] [internal citations omitted]). As EL-AD is an incidental beneficiary under the Purchase Order, the complaint does not state a cause of action against Climate, and the motion must be granted pursuant to CPLR 3211 (a) (1) and (7).

In view of the dismissal of the complaint for the reasons set forth above, this court need

not reach the plaintiff's additional arguments regarding incidental and consequential damages which appear to be without merit.

Accordingly, it is

ORDERED that the motion by defendant is granted and the complaint is dismissed with costs and disbursements to defendant, as taxed by the Clerk of the Court upon presentation of a bill of costs. And it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

Dated: March 30, 2012

ENTER:

Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD