

**Dormitory Auth. of the State of N.Y. v A. Williams
Trucking & Backhoe Trenching, Inc.**

2012 NY Slip Op 33393(U)

March 9, 2012

Sup Ct, New York County

Docket Number: 450133/2011

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PRESENT: _____
Justice

PART 61

Index Number : 450133/2011
DORMITORY AUTHORITY OF THE
vs.
A. WILLIAMS TRUCKING AND
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____
MOTION DATE _____
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 *decided in accordance with the annexed order.*

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Scanned to New York ECF on 3/19/12

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

Dated: 3/19/12

Recs, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED
- 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 : IAS PART 61

-----X
Dormitory Authority of the
State of New York,

Plaintiff,

Index
Number:

-against-

450133/2011

A. Williams Trucking & Backhoe
Trenching, Inc., Aspro Mechanical
Contracting, Inc., CNA Surety
Corporation d/b/a American
Casualty Company of Reading, Pa.,
Dierks Heating Company, Inc.,
Future Tech Consultants of New
York, Inc., Pyramid Fire
Protection, Inc., Smi-Owen Steel
Company, Inc., Stonewall
Contracting Corporation, ADF
South Carolina, Inc.,

Defendants.

-----X
Anil C. Singh, J.:

CNA Surety Corporation d/b/a American Casualty Company of Reading, Pa. (American Casualty) moves, pursuant to CPLR 3211 (a) (7), to dismiss the cross claim asserted against it by Stonewall Contracting Corporation (Stonewall).

Parties and Their Allegations

The action arises out the construction of the Bronx County criminal court complex (the Project) (complaint, ¶ 1). Plaintiff financed and managed the Project (*id.*). It alleges that it hired defendants to perform construction work and construction-related services and that they failed "to perform in accordance with

their contractual obligations", resulting in the Project's completion being delayed from December 31, 2005 until February 2008 and causing increased construction costs (*id.*, ¶ 2).

In March 2001, SMI-Owen Steel Company, Inc. (SMI-Owen) entered into contract number DA 78798/1380909999 (the SMI-Owen Contract) with plaintiff for structural steel work in connection with the Project (*id.*, ¶ 23). On March 25, 2002, American Casualty executed a performance bond (the Performance Bond) in connection with the SMI-Owen Contract in the amount of \$27,850,000 (*id.*, ¶ 25).

The complaint further alleges that, on December 10, 2003, SMI-Owen declared itself in voluntary default, that plaintiff accepted this default and demanded that American Casualty perform under the Performance Bond (*id.*, ¶ 27). Pursuant to its obligations, on January 29, 2004, American Casualty executed a takeover agreement (the Takeover Agreement), under which it agreed to hire A.J. McNulty & Co., Inc. (McNulty) to complete the outstanding work under the SMI-Owen Contract (*id.*, ¶¶ 29-31), but plaintiff asserts that the work was not completed in a timely and adequate manner (*id.*, ¶ 33).

In December 2001, plaintiff entered into contract number DA 84173/1380909999 with Stonewall (the Stonewall Contract) for core and shell work on the Project and plaintiff contends that Stonewall failed to complete its work in a timely and adequate

manner (*id.*, ¶¶ 33-34). Stonewall interposed an answer to plaintiff's complaint, admitting that it entered into the Stonewall Contract and that it agreed to complete the work required, but denying that it had breached its contractual obligations and including a cross claim against American Casualty for contractual indemnification, asserting that American Casualty's, A. Williams Trucking & Backhoe Trenching, Inc.'s (Williams) and ADF South Carolina, Inc.'s (ADF) work at the project was responsible for any delay and that Article 13 of the Stonewall Contract provides it a right to contractual indemnity against other contractors and subcontractors (Stonewall Answer, ¶¶ 65, 77-79) .

Contractual Provisions

Article 13.01 (E) of the SMI-Owen Contract and the Stonewall Contract provide that "[s]hould any other contractor ... sustain damage through any act or omission of the Contractor or any subcontractor, the Contractor shall reimburse said other contractor for all said damages and shall indemnify and hold the Owner harmless from all said claims."

The Takeover Agreement provides in Article V that "[t]he parties do not intend, and no provision herein shall be construed, to create any third-party beneficiaries, or to confer, any benefit, or enforceable rights hereunder, upon anyone other than the parties hereto."

Stonewall contends that, under these provisions, American Casualty agreed to contractual indemnity for the work performed by McNulty, its contractor.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord them every possible favorable inference and determine whether the facts as alleged fit within any cognizable legal theory (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently incredible, or that are flatly contradicted by the documentary evidence, are not accorded such favorable inferences, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

Contract Claim Against a Non-Signatory

Stonewall contends that the contractual provisions in Article 13 give it a direct contract claim against American Casualty. However, Stonewall "was not a signatory to [the Takeover Agreement and, therefore], no cause of action for breach

of contract can be asserted against it" (*Hampton Hall Pty Ltd. v Global Funding Servs., Ltd.*, 82 AD3d 523, 524 [1st Dept], lv denied 17 NY3d 707 [2011]; *Balk v 125 W. 92nd St. Corp.*, 24 AD3d 193 [1st Dept 2005]).

Contractual Indemnity

The right to contractual indemnity depends upon the language of the contractual provision (*Smith v Broadway 110 Devs., LLC*, 80 AD3d 490, 491 [1st Dept 2011]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1051-1052 [2d Dept 2007]). American Casualty signed the Takeover Agreement and this included an express provision stating that it did not create or confer any benefit on a third party.

The general rule is that construction contracts consider third-party beneficiaries to be incidental beneficiaries and not able to enforce contractual rights, such as indemnification provisions (*Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 656 [1976]; *Perron v Hendrickson/Scalamandre/Posillico (TV)*, 283 AD2d 627, 628 [2d Dept 2001]). "The best evidence ... of whether the contracting parties intended a benefit to accrue to a third party can be ascertained from the words of the contract itself" (*Alicea v City of New York*, 145 AD2d 315, 318 [1st Dept 1988]; see also *Artwear, Inc. v Hughes*, 202 AD2d 76, 81-82 [1st Dept 1994]). Where, as in this case, there is an explicit provision barring third-party beneficiary enforcement, "that provision is decisive" (*Nepco Forged Prods. v Consolidated Edison*

Co. of N.Y., 99 AD2d 508, 508 [2d Dept 1984]; see also *Mendel v Henry Phipps Plaza W., Inc.*, 16 AD3d 112, 113 [1st Dept 2005] *affd* 6 NY3d 783 [2006]). Accordingly, the portion of Stonewall's cross claim that seeks contractual indemnity against American Casualty is dismissed.

Order

It is, therefore,

ORDERED that CNA Surety Corporation d/b/a/ American Casualty Company of Reading, Pa.'s motion to dismiss the cross claims asserted against it by Stonewall Contracting Corporation is granted and the said cross claims are dismissed.

Dated: *March 9,* 2012

ENTER:



J.S.C. **HON. ANIL C. SINGH**
SUPREME COURT JUSTICE