Evk Maximus Constr., LLC v Norton Brothers Dunn
2013 NY Slip Op 30859(U)
April 14, 2013
Supreme Court, Suffolk County
Docket Number: 10-18845
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX No. 10-18845
CAL No. 12-01696OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-10-12
ADJ. DATE 12-11-12
Mot. Seq. # 001- MD

--X

EVK MAXIMUS CONSTRUCTION, LLC,

Plaintiff,

- against -

NORTON BROTHERS DUNN,

Defendant.

--X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated September 7, 2012, and supporting papers; (2) Affirmation in Opposition by the defendant, dated November 2, 2012, and supporting papers and memorandum of law; (3) Reply Affirmation by the plaintiff, dated December 7, 2012, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by plaintiff for summary judgment in its favor is denied.

In September 2009, plaintiff EVK Maximus Construction, LLC, was hired by Robert Regina to rebuild a beach house on real property he owns in the Fire Island Pines, a hamlet of the Town of Brookhaven. Earlier that same year, the residence on the property was destroyed by a fire. Known as 244 Bay Walk, the property is located in an area delineated as a flood hazard zone by the Federal Emergency Management Agency (FEMA). As relevant to the instant controversy, local ordinances designed to mitigate losses related to flooding, and to bring the Town of Brookhaven into compliance with the National Flood Insurance Program, require that residences in the flood zone where Regina's property is located be constructed on pilings or a column foundation to elevate them approximately 12 feet above the base flood elevation level.

The alleged written contract between EVK Maximus Construction (hereinafter EVK Maximus) and Regina provides, in relevant part, that the construction to rebuild the house would start no later than October 31, 2009 and would be substantially completed by May 1, 2010. The contract, which names Maximus Construction Company as the contractor, states that all work shall be performed "in accordance to the provisions of the contract documents," and shall comply with all applicable federal, state and local building codes and law. It defines the contract documents as the written agreement, "payment schedule, construction proposal dated May 28, 2009, [and] drawings by Alexander Baer dated May 28, 2009." The Court notes that EVK Maximus had previously been hired by Regina to perform work at the subject property, and that the beach house destroyed by fire in May 2009 was being renovated at that time by EVK Maximus.

In February 2009, presumably in connection with the earlier renovation project, defendant North Brothers Dunn, Engineering & Surveying, LLP, sued herein as Norton Brothers Dunn, allegedly prepared a survey of the subject property on behalf of Regina. North Brothers Dunn, Engineering & Surveying (hereinafter North Brothers) allegedly revised the survey in May 2009, after the fire, and in July 2009, in response to comments from the Suffolk County Department of Health Services. Meanwhile, in June 2009, a site plan for the new residence allegedly was prepared by William Suclow, P.E., at Regina's request. Thereafter, at the request of EVK Maximus, an employee of Norton Brothers allegedly went to the Fire Island Pines and set survey marks, specifically metal tacks, in the boardwalk running along Regina's property for EVK Maximus and its subcontractors to use as reference points during the construction of the new house. The locations where the tacks were set are noted on a revised survey prepared by Norton Brothers in September 2009.

In January 2010, EVK Maximus allegedly discovered that the house it was building for Regina did not comply with a Town of Brookhaven ordinance requiring that the bottom of the lowest structural member of the lowest floor of a new or substantially improved structure located in the relevant flood zone have an elevation of approximately 12 feet above the ground. As the wood pilings that supported the original house were damaged by the fire, the rebuild project at the Regina property involved the removal of the existing pilings and the installation of new wood pilings. EVK Maximus allegedly was forced to spend approximately $90,000 to hire contractors to lift the new house off of the recently installed pilings and move it north, to remove those pilings and install higher pilings, and to reattach the girders for the new house to the new pilings.

Subsequently, EVK Maximus commenced this action against Norton Brothers seeking damages in the sum of $150,000. The first cause of action alleges that EVK Maximus contracted with North Brothers in September 2009 for a survey delineating the elevation at which the new house was to be constructed, that the survey height provided by North Brothers was 4.7 feet too low, and that it incurred additional construction costs due to the improper survey. The second cause of action alleges Norton Brothers was negligent in its preparation of the survey. The third cause of action alleges EVK Maximus was a third-party beneficiary of the contract between Norton Brothers and Regina, and that it was injured as a result of Norton Brothers' breach of its contractual duty to Regina. By its bill of particulars, EVK Maximus alleges, in relevant part, that it contracted with Norton Brothers for it "to determine the appropriate height at which the new house to be constructed on the [Regina] property was to be built," that Norton Brothers was negligent in setting the survey marks for the height of the new house, and that it constructed the new house too low due to the improper marks. EVK Maximus further alleges that it relied upon the September 2009 survey

when constructing the new house, that it discovered the house was not properly elevated in January 2010, and that defendant knew of the incorrect survey in the beginning of January 2010. However, it does not allege that it paid Norton Brothers for the survey or for setting the tacks before the construction work began.

EVK Maximus now moves for an order granting summary judgment in its favor, arguing that the evidence in the record shows Norton Brothers' employee was negligent in setting and labeling the survey marks, upon which it relied when constructing the new house, thereby causing it to expend over $100,000 to bring the house in compliance with the elevation requirement for new structures in areas within the Town of Brookhaven designated as flood hazard zones. EVK Maximus's submissions in support of the motion include copies of the pleadings and the bill of particulars, the September 2009 construction contract with Regina, the revised survey of the property prepared by Norton Brothers in September 2009, transcripts of the parties' deposition testimony, and bills allegedly related to the relocation of the house for the installation of higher pilings. Also submitted in support of the motion is an affidavit of Eric Von Kursteiner, President of EVK Maximus, and an affidavit of Michelle Quartrale, a permit expediter hired by Regina for the construction project. Norton Brothers opposes the motion, arguing that EVK Maximus's submissions are insufficient to meet its burden on the motion, and that the affidavit of its expert, Joseph Fischetti, P.E., raises a triable issue as to whether it owed an obligation to verify that the elevation of the house as designed by a third party complied with the Town Code and FEMA regulations.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

It is fundamental that to recover for negligence, a plaintiff must establish the defendant owed it a duty to use reasonable care, that the defendant breached the duty of care, and that the breach of such duty was a proximate cause of its injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Solan v Great Neck Union Free School Dist.***, 43 AD3d 1035, 842 NYS2d 52 [2d Dept 2007]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). A duty of reasonable care owed by the tortfeasor to the plaintiff is essential to any recovery in negligence (***Eisman v State***, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393). However, a simple breach of contract is not considered a tort unless a legal duty independent of the contract has been violated (***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 389, 521 NYS2d 653 [1987]; *see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]; ***Sommer v Federal Signal Corp.***, 79 NY2d 540, 583 NYS2d 957 [1992]). A party to a contract may be liable in tort when it has "breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (***New York Univ. v Continental Ins. Co.***, 87

NY2d 308, 316, 639 NYS2d 283; *see* ***North Shore Bottling Co. v C. Schmidt & Sons***, 22 NY2d 171, 292 NYS2d 86 [1968]; ***D'Ambrosio v Engel***, 292 AD2d 564, 741 NYS2d 42 [2d Dept], *lv denied* 99 NY2d 503, 753 NYS2d 806 [2002]). However, the legal duty must arise from circumstances "extraneous to, and not constituting the elements of, the contract, although it may be connected with and dependant on the contract" (***Clark-Fitzpatrick, Inc. v Long Is. R.R.***, 70 NY2d 382, 389, 521 NYS2d 653; *see* ***Rich v New York Cent. & Hudson Riv. R.R. Co.***, 87 NY 382 [1882]; ***Krantz v Chateau Stores of Canada***, 256 AD2d 186, 683 NYS2d 24 [1st Dept 1998]).

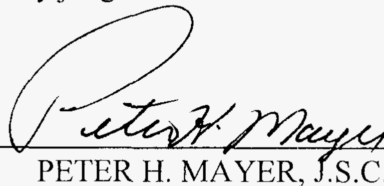
To recover damages for a breach of contract, a plaintiff must show the existence of a contract with the defendant, the plaintiff's performance under the terms of the contract, the defendant's breach of the contract, and damages resulting from such breach (*see* ***Brualdi v IBERIA, Lineas Aereas de España, S.A.***, 79 AD3d 959, 913 NYS2d 753 [2d Dept 2010]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). The nature of the obligations undertaken in a contract is to be construed in accordance with the parties' intent (*see generally* ***Greenfield v Phillies Records***, 98 NY2d 562, 569, 750 NYS2d 565 [2002]). To establish the existence of an enforceable contract, a plaintiff must demonstrate an offer, the acceptance of that offer, consideration, mutual assent, and an intent by the parties to be bound (***Kowalchuk v Stroup***, 61 AD3d 118, 121, 873 NYS2d 43 [1st Dept 2009]). Further, where there is no written agreement between the parties, a contract may be implied in fact "where inferences may be drawn from the facts and circumstances of the case and the intention of the parties as indicated by their conduct" (***Matter of Boice***, 226 AD2d 908, 910, 640 NYS2d 681 [3d Dept 1996]; *see* ***Maas v Cornell Univ.***, 94 NY2d 87, 699 NYS2d 716 [1999]; ***Matter of Pache v Aviation Volunteer Fire Co.***, 20 AD3d 731, 800 NYS2d 228 [3d Dept 2005], *lv denied* 6 NY3d 705, 812 NYS2d 34 [2005]; ***Rocky Point Props. v Sears-Brown Group***, 295 AD2d 911, 744 NYS2d 269 [4th Dept 2002]). The existence of an implied contract is a question of fact, and a party asserting an implied contract for personal services usually must prove the services were performed and accepted with the understanding on both sides that there was a fee obligation (***Shapira v United Med. Serv.***, 15 NY2d 200, 210, 257 NYS2d 150 [1965]; *see* ***Rocky Point Props. v Sears-Brown Group***, 295 AD2d 911, 744 NYS2d 269).

In addition, a party asserting rights as a third-party beneficiary of a contract must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost" (***Burns Jackson Miller Summit & Spitzer v Lindner***, 59 NY2d 314, 336, 646 NYS2d 712 [1983]; *see* ***State of Cal. Pub. Employees Retirement Sys. v Shearman & Sterling***, 95 NY2d 427, 718 NYS2d 256 [2000]; ***Town of Oyster Bay v Doremus***, 94 AD3d 867, 942 NYS2d 546 [2d Dept 2012]). "One is an intended beneficiary if one's right to performance is 'appropriate to effectuate the intentions of the parties' to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance'" (***Lake Placid Club Attached Lodges v Elizabethtown Bldrs.***, 131 AD2d 159, 161, 521 NYS2d 165 [3d Dept 1987]). A party claiming to be a third-party beneficiary of a contract has the burden of demonstrating it has an enforceable right under such contract (*see* ***Strauss v Belle Realty Co.***, 98 AD2d 424, 469 NYS2d 948 [2d Dept 1983]).

Summary judgment in favor of EVK Maximus on the negligence cause of action is denied, as it failed to establish prima facie that Norton Brothers owed and violated a legal duty of care independent of its contractual obligations, or that it engaged in tortious conduct separate from its alleged failure to properly set the survey marks by Regina's property (*see* ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 521 NYS2d 653; ***Gallup v Summerset Homes, LLC***, 82 AD3d 1658, 920 NYS2d 504 [4th Sept 2011]; ***Lantzy v Advantage Bldrs., Inc.***, 60 AD3d 1254, 876 NYS2d 184 [3d Dept 2009]; ***Novelty Crystal Corp. v PSA Institutional Partners, L.P.***, 49 AD3d 113, 850 NYS2d 497 [2d Dept 2008]; ***Campbell v Silver Huntington Enters.***, 288 AD2d 416, 733 NYS2d 685 [2d Dept 2001]). EVK Maximus also failed to submit evidence establishing a prima facie case that, absent contractual privity with Norton Brothers, it was a third-party beneficiary of the agreement between Regina and Norton Brothers for the preparation of a survey (*see* ***BDG Oceanside, LLC v RAD Terminal Corp.***, 14 AD3d 472, 787 NYS2d 388 [2d Dept], *lv dismissed* 5 NY3d 783, 801 NYS2d 802 [2005]; *see also* ***Pile Found. Constr. Co. v Berger, Lehman Assoc.***, 253 AD2d 484, 676 NYS2d 664 [2d Dept 1998]). In fact, EVK Maximus failed to submit any documentary or testimonial evidence regarding the contract between Regina and Norton Brothers, and Von Kursteiner testified at a deposition that he was unsure whether EVK Maximus had a copy of the survey when the construction project began in October 2009. Here, the evidence submitted on the motion raises questions of fact as to the contractual obligations owed by the parties to Regina in connection with the subject property (*see* ***Licare v Wilro Constr., Inc.***, 150 AD2d 647, 541 NYS2d 521 [2d Dept 1989]; *see also* ***Wetzler v O'Brien***, 81 AD2d 517, 437 NYS2d 343 [1st Dept 1981), and as to whether the parties intended that EVK Maximus would be a beneficiary of the survey work (*see* ***Segall v Rapkin***, 243 AD2d 624, 663 NYS2d 234 [2d Dept 1997], *lv denied* 91 NY2d 808, 669 NYS2d 261 [1998]). The Court notes that the deposition testimony indicates the residence actually constructed by EVK Maximus may have deviated from the building plans submitted to the Town of Brookhaven on behalf of Regina, and the engineer's plans for the new residence state the first floor elevation had to be approximately 12 feet above the ground. In addition, EVK Maximus's submissions show a question exists as to the actual elevation of the newly constructed residence before it was moved off of the existing pilings and higher pilings were installed for the foundation.

Accordingly, the motion by EVK Maximus for summary judgment in its favor is denied.

Dated: 4/14/13



PETER H. MAYER, J.S.C.