Lehm Holdings, LLC v Certified Constr. Corp.
2013 NY Slip Op 32008(U)
August 22, 2013
Supreme Court, New York County
Docket Number: 653556/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER **PART 15**
Justice

LEHM HOLDINGS, LLC,

Plaintiff,

- v -

CERTIFIED CONSTRUCTION CORP., JOHN GRADY, JOE GRADY, BELMONT FREEMAN, AKF ENGINEERS LLP, and ROSS DALLAND, P.E.,

Defendants.

INDEX NO. 653556/2012
MOTION DATE ______
MOTION SEQ. NO. 1
MOTION CAL. NO. ______

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answer — Affidavits — Exhibits	4
Replying Affidavits	5

In this action, Plaintiff Lehm Holdings, LLC ("Plaintiff" or "Lehm") asserts claims against defendants involved in the restoration and conversion of a building located at 7 West 54th Street, New York, New York ("the Project"). As against defendant AKF Engineers LLP ("AKF"), Lehm asserts three causes of action: breach of the Consulting Agreement between defendant Belmont Freeman and AKF as intended third party beneficiary (second cause of action), unjust enrichment (fourth cause of action), and malpractice and gross negligence (ninth cause of action).

AKF now moves for an Order, pursuant to CPLR §§3211(a)(1) and (7), to dismiss Plaintiff's Amended Complaint as against AKF. Plaintiff opposes.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the

ground that:

(1) a defense is founded upon documentary evidence; or

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Plaintiff's second cause of action is for breach of contract of AKF's consulting agreement with Belmont Freeman as a third party beneficiary. The Amended Complaint alleges that in April 2005, Lehm retained Belmont Freeman to provide architectural and construction administration services in connection with the Project, and that in June 2005, Lehm and Belmont Freeman entered into an agreement. Belmont Freeman thereafter engaged AKF to provide engineering and construction administration services in connection with the Project. The second cause of action alleges that Lehm was an intended third-party beneficiary of the Belmont Freeman/AKF agreement, that AKF represented and agreed to provide engineering and construction administration services in compliance with industry standards and professional standards of care, and failed to do so, causing Lehm resulting damages.

Parties asserting third-party beneficiary rights under a contract must show "(1) the existence of a valid and binding contract between other parties, (2) that the

contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost." *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y. 3d 783, 751 [2006]. "Performance rendered directly to plaintiff would indicate that plaintiff is a third-party beneficiary." *See Tarrant Apparel Group v. Camillo Consulting Group, Inc.*, 40 A.D.3d 556 [1st Dep't 2007].

In opposition to AKF's motion to dismiss, Plaintiff submits the attorney affirmation of Aaron Abraham, which provides a copy of the Belmont Freeman/AKF Contract. That contract states "[t]he Owners of 7 West 54th Street [Lehm] would like AKF to prepare design drawings" and required AKF to meet and work with Lehm throughout the Project. Abraham further avers that the Contract required AKF provide additional design and construction administration services directly to Lehm and for the parties to work closely together, including frequent interactions among the parties. Plaintiff also submits the affidavit of Stuart Zimmer, a managing member of Zimmer Lucas Partner, LLC, of which Plaintiff was a wholly owned subsidiary at all times in connection with the Project. Zimmer avers that, "During the initial stages of the Project, AKF worked with LEHM and was present on-site during the preliminary pre-design inspections. Furthermore, AKF and Lehm interacted with each other on a frequent basis, attending meetings and inspections together throughout the entirety of the Project. Moreover, AKF would often communicate with Lehm via telephone or e-mail to discuss various issues relating to the Project."

Plaintiff has stated a claim for breach of the Belmont Freeman/AKF contract as a third party beneficiary. Furthermore, AKF's argument that Section 9.7 of that Contract, which states, "Nothing contained in this Agreement shall create a contractual relationship with or cause of action in favor of a third party against the Owner or Architect" does not flatly contradict the legal conclusions and factual allegations of the complaint as this is an action by Plaintiff, the Owner.

Plaintiff's fourth cause of action is for unjust enrichment against AKF. To prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dept. 2011]). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes

recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]. However, a party is not "precluded from bringing an action for breach of contract and, as alternative theories, quantum meruit and unjust enrichment" when "[t]here is a dispute as to the scope of work, intended by the original oral contact and whether plaintiff is owed money outside the scope of that agreement." *Loheac v. Children's Corner Learning Ctr.*, 51 A.D. 3d 476, 476 [1st Dept 2008]. Here, Paul Bello, a Principal of AKF, attests in his affidavit that "[m]y office has been unable to locate an executed version of the [AKF Contract], nor are we certain if one exists. As there is a dispute concerning the existence and terms of the contract, the fourth cause of action for unjust enrichment stands.

Plaintiff's ninth cause of action alleges malpractice and gross negligence against AKF. Plaintiff alleges that AKF was responsible "for providing engineering and construction administration services, "breached those duties by "providing defective services" and "designing the Project in a manner not consistent with applicable building codes" and "performed their professional services contrary to sound engineering practices." "A viable tort claim against a professional requires that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity." *Onebeacon Insurance Company v Winden*, LLC, 2008 N.Y. Misc. LEXIS 9398 (N.Y. Sup. Ct. Aug. 14, 2008); *Ossining Union Free School Dist. v. Anderson LaRocca Anderson,* 73 N.Y.2d 417 (1989). *See also 143 Bergen Street LLC v. Ruderman*, 39 Misc. 2d 1203(A)(N.Y. Sup. Ct. March 22, 2013) ("[c]onsidering the scope of his involvement with the project, [defendant] should have understood that his services were being relied on by the owners of the property"). Furthermore, an independent duty may be imposed by law in connection with services performed by professionals regardless of the damages sought or whether the parties were in privity. *New York Central Mut. Fire Ins. Co.* v. *Glider Oil Co., Inc.,* 90 A.D.3d 1638 (4th Dep't 2011). Turning to the four corners of the Amended Complaint, Plaintiff makes out a malpractice and gross negligence claim against AKF.

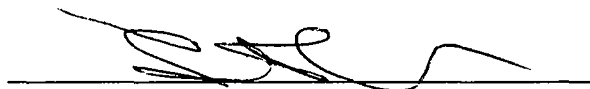
Wherefore it is hereby

ORDERED that Defendant AKF Engineers LLP's motion to dismiss is denied.

[* 5]

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 8/22/13



J.S.C.

HON. EILEEN A. RAKOWER

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