SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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IPA STONE CORP.,

Plaintiff,

- against -

FACET CONSTRUCTION LLC, MADISONPARK REAL ESTATE COMPANY, LLC, and BOARD OF DIRECTORS OF THE WHITMAN CONDOMINIUM,

Defendants.

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Index No. 653867/2014

DECISION and ORDER

Mot. Seq. 2

HON. EILEEN A. RAKOWER

This action arises out of an agreement (the "Subcontract"), dated December 10, 2012, between plaintiff IPA Stone Corp. ("IPA Stone" or "plaintiff") and defendant Facet Construction, LLC ("Facet") pursuant to which plaintiff agreed to provide goods and services, including custom stone work, at a construction site and building owned and managed by defendants MadisonPark Real Estate Company, LLC ("MadisonPark") and Board of Directors of the Whitman Condominium ("Board")[1] located at 21 East 26th Street, New York, New York (the "Whitman"). MadisonPark entered into a Construction Agreement (Guaranteed Maximum Price) (the "Construction Agreement") with Facet, the general contractor for the construction of the project, on September 29, 2011.

Plaintiff commenced this action by filing a summons and complaint on December 16, 2014, asserting a breach of contract claims against defendants.

Defendants MadisonPark and Board filed a motion to dismiss the complaint on February 13, 2015. After oral argument on October 6, 2015, this Court granted the motion to dismiss plaintiff's complaint as against MadisonPark and Board, but granted plaintiff leave to amend the complaint, stating that "if no such complaint is filed within 30 days, then the motion to dismiss stands."

[1] Moving Defendants state that the caption incorrectly labels Board of Managers of the Whitman Condominium as Board of Directors of the Whitman Condominium.

Plaintiff filed an amended complaint on November 2, 2015, asserting breach of contract, unjust enrichment, third party beneficiary, and negligence claims.

On January 3, 2016, plaintiff filed a motion for default judgment against defendant Facet, for failure to appear or answer the complaint. This Court granted plaintiff's motion for default judgment against defendant Facet on April 8, 2016.

Defendants Madison Park and Board ("Moving Defendants") now move for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing plaintiff's amended complaint in its entirety, based on documentary evidence and for failure to state a cause of action. Moving Defendants submit the attorney affirmation of Benjamin S. Lowenthal, Esq., annexing, *inter alia*, the affidavit of David Mitchell in support of Moving Defendants' first motion to dismiss; the Construction Agreement between MadisonPark and Facet, dated September 29, 2011; the Subcontract between plaintiff and Facet, dated December 10, 2012.

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 N.Y.3d 318, 324 (2007) (internal quotations and citations omitted). 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). "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).

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 A.D.2d 91 (1st Dept. 2003); CPLR § 3211(a)(7).

"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 Dept. 2009). Generally, 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. *See, e.g.*, *CDJ Builders Corp. v. Hudson Grp. Const. Corp.*, 67 A.D.3d 720, 722 (2d Dept. 2009); *Raven Elevator Corp. v. City of New York*, 291 A.D.2d 355, 355 (1st Dept. 2002) ("[A] subcontractor does not have standing to assert claims for breach of contract in lieu of the general contractor, in the absence of an assignment[.]"); *Sky-Lift Corp. v. Flour City Architectural Metals, Inc.*, 298 A.D.2d 214, 214 (1st Dept. 2002) (finding no basis to depart from the general rule that a secondary subcontractor who is not paid by its primary subcontractor cannot look for payment to the contractor with whom the primary subcontractor contracted absent privity of contract); *Andrew R. Mancini Associates, Inc. v. Mary Imogene Bassett Hosp.*, 80 A.D.3d 933, 934 (3d Dept. 2011) ("Subcontractors cannot maintain actions for breach of contract against parties with whom they are not in privity[.]").

Here, plaintiff asserts a cause of action for breach of the Subcontract—a contract to which neither MadisonPark nor the Board were a party. Pursuant to the Construction Agreement between MadisonPark and Facet, Facet agreed to perform certain construction work "both on an in-house basis, and by retaining subcontractors and material suppliers." Section 11.14 of the Construction Agreement expressly provides that Facet "is acting as an independent contractor for all purposes" under the Construction Agreement. Further, under section 11.14, Facet is expressly "not authorized to enter into any contracts or agreements on behalf of Owner or to otherwise create any obligations of Owner to third parties." Because there is no privity of contract between the Moving Defendants and plaintiff subcontractor IPA Stone, plaintiff's breach of contract claim against the Moving Defendants must be dismissed. *See Superb Gen. Contracting Co. v. City of New York*, 70 A.D.3d 517, 518, 893 N.Y.S.2d 866, 867 (1st Dept. 2010) (subcontractor hired by construction manager was not in privity of contract with the City as property owner, and therefore could not recover delay damages against the City as owner where the incorporated prime contract specifically provided that the construction manager was an independent contractor and not an agent or representative of the City).

Plaintiff asserts that its third-party beneficiary and negligence claims are predicated upon the Moving Defendants' "assumed obligation" stated in the Construction Agreement. While plaintiff is correct in noting that, under paragraph 5.7.1 of the Construction Agreement, MadisonPark reserves the right to make payments directly to each subcontractor, section 5.7.1 further states that "[n]otwithstanding the foregoing, this provision shall not be construed to mean that any payment made by Owner to a subcontractor . . . shall relieve Contractor of its

contractual duties and obligations regarding such subcontractor[.]" Similarly, while section 5.7.2 contemplates an assignment of the Contractor's interest in subcontracts to Owner and Lender, such assignment "is to be effective only if Owner or its assignee or its lender undertake construction of the Project in the case of Contractor's default hereunder pursuant to the terms of this Agreement." Thus, plaintiff's argument that certain provisions in the Construction Agreement demonstrate that the Moving Defendants' assumed an obligation to plaintiff is unavailing.

A plaintiff seeking status as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for plaintiff's benefit and (3) that the benefit to plaintiff is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate plaintiff if the benefit is lost. *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786 (2006).

While plaintiff sufficiently alleged the existence of a valid prime contract between MadisonPark and Facet, plaintiff has failed to point to evidence supporting the conclusion that the Construction Agreement was intended for plaintiff's benefit, and that the benefit to plaintiff is immediate and not merely incidental, so as to indicate "the assumption by the contracting parties of a duty to compensate the plaintiff if the benefit is lost[.]" *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 336 (1983). Moreover, section 11.7 of the Construction Agreement explicitly provides that there cannot be any third-party beneficiaries:

> Except as provided in any indemnification or other provision in this Agreement that benefits the Indemnitees, or as otherwise expressly provided in this Agreement, no provision contained in this Agreement shall confer any benefit upon, or grant any rights to, any third parties nor give to third parties (in either case, other than Lender) any claim or right beyond such as may legally exist in the absence of any such provision.

"Where a provision in the contract expressly negates enforcement by third parties, that provision is controlling." *Edward B. Fitzpatrick, Jr. Constr. Corp. v. County of Suffolk,* 138 A.D.2d at 449–450 (2d Dept. 1988); *Mendel v. Henry Phipps Plaza W., Inc.*, 16 A.D.3d 112, 113 (1st Dept. 2005), *aff'd,* 6 N.Y.3d 783 (2006) (holding that plaintiffs were without standing to seek relief under the Agreement because they were not parties to the Agreement and the Agreement contained a provision expressly negating any intent to permit its enforcement by third parties). Accordingly, because plaintiff is not a signatory to the Construction Agreement and

has failed to identify contractual provisions demonstrating that the Construction Agreement was intended for plaintiff's benefit, this Court finds that plaintiff is not an intended third-party beneficiary of the Construction Agreement and not entitled to recover for breach thereof.

A claim of unjust enrichment requires a showing by the plaintiff that (1) the defendant was enriched, (2) the enrichment was at the plaintiff's expense, and (3) the defendant's retention of the benefit would be unjust. *Usov v. Lazar,* 2013 WL 3199652, at *5 (S.D.N.Y. June 25, 2013). Where "there is a valid and enforceable contract between the parties, and the subject matter of the unjust enrichment claim is covered by the contract" the unjust enrichment claim must be dismissed. *CBS Broad. Inc. v. Jones,* 460 F.Supp.2d 500, 506 (S.D.N.Y. 2006) (dismissing plaintiff's unjust enrichment claim where neither side contested the validity of the contract).

Generally, the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter. *See, e.g., Clark-Fitzpatrick, Inc. v. Long Island R. Co.,* 70 N.Y.2d 382, 388 (1987); *Aviv Const., Inc. v. Antiquarium, Ltd.,* 259 A.D.2d 445, 446 (1st Dept. 1999); *see also Abax Inc. v. New York City Hous. Auth.,* 282 A.D.2d 372, 373 (1st Dept. 2001) (general contractor could not maintain quasi-contract claims against property owner where there was a valid contract between contractor and subcontractor governing subject matter of dispute). 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 Contr. Corp. v. Paerdegat Boat & Racquet Club,* 156 A.D.2d 550, 551 (2d Dept. 1989); *Yellowstone Indus. v. Vinco Mar. Mgt.,* 305 A.D.2d 587, 588 (2d Dept. 2003) (noting that the mere fact that the owner receives some benefit from the subcontractor's activities is insufficient).

Here, there is a valid contract between plaintiff and Facet governing the subject matter of the dispute and plaintiff does not allege that the Moving Defendants expressly consented to, or undertook to pay for plaintiff's performance. Therefore, plaintiff's claim for unjust enrichment is dismissed. *Compare DL Marble & Granite Inc. v. Madison Park Owner, LLC,* 105 A.D.3d 479, 479 (1st Dept. 2013) (subcontractor's quasi-contract claims against owner properly dismissed where subcontractor contracted with owner's general contractor, and owner did not expressly consent to pay for subcontractor's work) *with CPN Mech., Inc. v. Madison Park Owner LLC,* 94 A.D.3d 626, 627 (1st Dept. 2012) (issue of fact as to whether two-party checks property owner paid to contractor, showing construction manager as co-payee, constituted express promise by owner to pay contractor directly, or

merely to guarantee payment of construction manager, precluding summary judgment on contractor's quasi-contract claim).

Finally, plaintiff's asserts that defendants were negligent "in failing to ensure that all goods and services provided at 21 East 26th Street, New York, New York were paid for." Amended Compl., ¶ 27. Because plaintiff's negligence claim is predicated upon the same conduct as his breach of contract claim, it must be dismissed as duplicative. *See OP Sols., Inc. v. Crowell & Moring, LLP*, 72 A.D.3d 622 (1st Dept. 2010) ("[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated[.]"); *Pacnet Network Ltd. v. KDDI Corp.*, 78 A.D.3d 478 (1st Dept.2010) ("[C]laims based on negligent or grossly negligent performance of a contract are not cognizable[.]"); *Kordower-Zetlin v. Home Depot U.S.A., Inc.*, 134 A.D.3d 556, 557 (1st Dept. 2015).

Wherefore, it is hereby

ORDERED that the motion by defendants MadisonPark Real Estate Company, LLC and Board of Directors of the Whitman Condominium to dismiss the plaintiff's amended complaint in its entirety is granted, and the Clerk is directed to enter judgment accordingly.

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

DATED: JUNE 28, 2016

JUN 28 2016

EILEEN A. RAKOWER, J.S.C.