2649 E. 23 LLC v New York City Dept. of Bldgs.
2017 NY Slip Op 31419(U)
June 26, 2017
Supreme Court, Kings County
Docket Number: 521977/16
Judge: Reginald A. Boddie
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At an I.A.S. Trial Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 26th day of June 2017.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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2649 E. 23 LLC,

Plaintiff,

Index No. 521977/16
Cal. No. 51 & 52

-against-

NEW YORK CITY DEPARTMENT OF BUILDINGS, SCHNEIDER ASSOCIATES, STEVEN SCHNEIDER, RENZO BLARTE, SEBASTIAN GIULIANO, and DESIGN STUDIO ASSOCIATES,

Defendant.

DECISION AND ORDER

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Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of this motion:

Papers	Numbered
Df. NYC Notice of Motion & Annexed Affirmation/Affidavits	1-2
Df. NYC Memoranda of Law	3-4
Pl. Affirmation in Opposition & Memorandum of Law	5-6
Df. Schneider Assoc. & Schneider Opp	7
Df. DSA Notice of Motion & Annexed Affirmation/Affidavits	8
Pl. Affirmation in Opposition & Memorandum of Law	9-10
Df. DSA Reply	11
Df. Schneider Assoc. & Schneider Opp	12

Upon the foregoing cited papers, and after oral argument, the decision and order on the motion of defendant New York City Department of Buildings (DOB), pursuant to CPLR 3211 (a) (2), (a) (7), and 7803, and defendants Blarte, Giuliano and Design Studio Associates, New York, Inc, sued herein as Design Studio Associates (hereinafter collectively DSA), pursuant to CPLR 3211 and 7503, is as follows:

I. Introduction

In this action, plaintiff seeks to recover damages for negligence and breach of contract against defendants for services and permits rendered in conjunction with a construction project at 2649 East 23rd Street, Brooklyn, New York (subject property). Plaintiff also alleged professional malpractice against defendants DSA, Schneider Associates and Steven Schneider. Plaintiff alleged it owns the subject property and entered into a contract with DSA for architectural services by its predecessor-in-title and member Lawrence Rafalovich (Rafalovich). Plaintiff further alleged DOB negligently "rubber stamped" the plans and permit it issued for construction of a four-story, 11 family building without proper review and caused plaintiff to sustain damages when plaintiff was required to remove the partially constructed fourth story.

II. DSA's Motion

DSA seeks to dismiss the complaint under CPLR 3211 and compel arbitration under CPLR 7503. DSA failed to specify under which section of 3211 it seeks relief. It appears DSA seeks to challenge plaintiff's standing under CPLR 3211 (a) (3) on the grounds that Rafalovich is the record owner of the subject premises, and not plaintiff. However, no proof is attached. Moreover, there is no indication that DSA timely answered the complaint or made a pre-answer motion to dismiss asserting lack of standing as an affirmative defense (CPLR 3211 [e] [Any objection or defense based upon a ground set forth in CPLR 3211 (a) (3) is waived unless raised either by such motion or in the responsive pleading]). Therefore, DSA's motion pursuant to CPLR 3211 (a) (3) is denied.

DSA also seeks dismissal pursuant to CPLR 3211 (a) (2) on the grounds that the court lacks subject matter jurisdiction based on paragraph 5.1 of the contract which requires the parties

to submit to arbitration. It is well-settled that an agreement to arbitrate is not a defense to an action and may not be the basis of a motion to dismiss (*Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y.*, 45 NY2d 735, 738 [1978]). Accordingly, DSA's motion to dismiss pursuant to CPLR 3211 (a) (2) is denied.

DSA further seeks to compel arbitration pursuant to CPLR 7503 (a). "Where there is no substantial question whether a valid agreement was made or complied with, . . . , the court shall direct the parties to arbitrate" (CPLR 7503[a]). Here, DSA and Rafalovich, plaintiff's predecessor-in-title and member, entered into a contract on November 18, 2014, for architectural services for the construction of a three-story, nine family building. Although the complaint references a four-story, 11 family building, plaintiff concedes section 5.0, "Dispute Resolution," of the contract is at issue.

The issue, therefore, is whether the parties agreed to arbitrate the matters in dispute (*Dazco Heating & A.C. Corp. v C.B.C. Indus.*, 225 AD2d 578, 578-579 [2d Dept 1996] [citations omitted]). Plaintiff seeks to avoid enforcement of the arbitration clause on the grounds that there are multiple defendants in this case and various causes of action. The Court finds this argument unavailing as the relevant test here is "whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract" (*Dazco*, 225 AD2d at 579, quoting *Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 96 [1975]). Here, the subject matter of the November 18, 2014 contract and the dispute alleged in the complaint involve DSA's architectural services, including zoning analysis and preparation of plans for construction of a building at the subject premises. Therefore, the subject

matter of the agreement containing the arbitration clause, architectural services to be performed by DSA, and the dispute between its signatories alleged in the complaint, the performance of the architectural services by DSA, are reasonably related (*Maresca v La Certosa*, 172 AD2d 725, 726 [2d Dept 1991]).

Moreover, where the language of the arbitration clause is broad, "it should be given the full effect of its wording in order to implement the intention of the parties" (*Dazco*, 225 AD2d at 579, quoting *Weinrott v Carp*, 32 NY2d 190, 199 [1973]). Paragraph 5.1 broadly states, "Any dispute relating to this Agreement shall be subject to arbitration and will proceed to mediation as a condition precedent." Accordingly, the parties are directed to proceed to arbitration as stipulated in the contract and as a favored method of dispute resolution in New York (*see e.g. Dazco*, 225 AD2d at 199 [citations omitted]).

Additionally, plaintiff opposed DSA's motion to compel arbitration on the grounds that compelling arbitration would extinguish Schneiders' cross-claims for contribution and indemnification as Schneider Associates and Steven Schneider were not parties to the contract. However, paragraph 5.2 provides, the claim of a non-party may be consolidated or joined or otherwise included in arbitration upon written consent of all parties. Accordingly, DSA's motion is granted to the extent the parties are compelled to arbitrate, and without prejudice to the Schneider defendants commencing a plenary action for contribution and indemnification upon resolution of the arbitration (CPLR 1403; 1404 [b]).

III. DOB's Motion

DOB seeks to dismiss the complaint under CPLR 3211 (a) (2) and (a) (7) and convert the case to a special proceeding under CPLR 7803. The complaint alleges, in relevant part, DOB

negligently reviewed and "rubber stamped" plans and erroneously issued permits for the construction of a four-story, 11 unit building at the subject premises on August 7, 2015. Plaintiff alleges, in reliance on the August 7, 2015 permit, it began construction on the four-story building. Plaintiff alleges defendant notified it on March 23, 2106, nearly seven months later, that DOB intended to revoke approval of the plan and permit. Plaintiff alleges on May 26, 2016, DSA notified plaintiff that the fourth story would have to be removed because the New York City zoning laws do not permit a four-story building to be constructed at the subject property. Plaintiff alleges the fourth story was already partially constructed and its removal resulted in damages of at least 3.5 million dollars. Plaintiff proffered a document purported to be the construction plans for a four-story, 11 family dwelling at the subject premises that DOB approved on August 7, 2015. However, this document is illegible and unaccompanied by an application. It is also not evident from the document whether and/or on which date this plan was submitted to DOB.

The documentation proffered by DOB establishes that on April 16, 2015, Rafalovich filed an application with DOB seeking permits for a construction project at the subject property. Paragraph 11, "Job Description," of this application describes the project as, "PROPOSED THREE (3) STORY, NINE (9) FAMILY DWELLING." The document indicates the application was approved on August 7, 2015. On September 8, 2015, DOB sent a notice to Rafalovic and defendants Schneider of its intent to revoke approval(s) and permit(s). Attached was a Notice of Objections (a/k/a Objection Sheet), dated August 27, 2105. On or about December 18, 2015, Steven Schneider prepared a "PW1: Plan/Work Application" which included "PW1A: Schedule A - Occupany/Use" (Schedule A), dated December 9, 2015. Schedule A sought a certificate of

occupancy for an 11 family dwelling and described four stories. On March 23, 2016, DOB sent a notice to Rafalovich of its intent to revoke the approval and permit issued in connection with the subject property. The notice indicated,

> These actions are the result of Steven Schneider, P.E., the Special Inspector for the application number indicated above [321108653, and referenced on all documents proffered herein by DOB], being disqualified from the performance of Special Inspections. You must retain a new Special Inspector in order for this job to continue. . . Failure to do so will result in the issuance of a Stop Work Order and revocation of the permit for this job.

The Court notes, the application submitted on April 16, 2015, indicates the last action was the issuance of a permit on July 15, 2016.

DOB seeks to dismiss the complaint pursuant to CPLR 3211 (a) (2) on the ground that the court lacks subject matter jurisdiction. The Supreme Court has broad subject matter jurisdiction and the power to rule on this case whether it is a tort action or an Article 78 proceeding (Siegel, NY Prac § 12 [5th ed 2017]). Accordingly, dismissal pursuant to CPLR 3211 (a) (2) is denied.

Defendant further seeks to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), or, in the alternative, argues plaintiff should have commenced this case as an Article 78 proceeding. Although defendant frames the issue before the court as a challenge to DOB's issuance or revocation of the permit, plaintiff asserts that it "is not seeking to challenge the determination of either the issuance of the initial permit or the revocation of said permit" (plaintiff's memorandum of law at 5). Plaintiff concedes that "[a]t no time was the permit issued on August 7, 2015 ever revoked" (*id.* at 4), and contends it is not seeking any affirmative action on the part of DOB with respect to the permit issued or intent to revoke (*id.* at 5). Plaintiff admits, in May 2016, it determined that the fourth floor was not permitted by the

zoning law. Based on plaintiff's determination that no changes would allow for the retention of the fourth floor of the building, the fourth floor was taken down, and plaintiff amended its plans with DOB to reflect a three story building instead (*id.* at 4). Plaintiff alleges DOB was negligent in its initial approval of the plans and seeks costs associated with the approval, partial construction, and deconstruction of the fourth floor (*id.* at 5).

In evaluating whether to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the pleadings must be given a liberal construction, the allegations accepted as true, and the plaintiff accorded every possible favorable inference (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]). The decision whether to issue a permit, as here, is a discretionary determination and the actions of the government in such instances are immune from lawsuits based on such decisions (*City of New York v 17 Vista Assoc.*, 84 NY2d 299, 307 [1994] [citations omitted]). There is a narrow exception to that rule in cases where the plaintiffs establish that a special relationship exists between themselves and the municipality (*Emmerling v Town of Richmond*, 13 AD3d 1150, 1151 [4th Dept 2004], citing *see Lauer v City of New York*, 95 NY2d 95, 102-103 [2000]). Here, however, plaintiff's claims against DOB are devoid of any allegation that DOB owed plaintiff a special duty (*cf. Garrett v Holiday Inns*, 58 NY2d 253, 263 [1983]; *cf. Village of Camden v National Fire Ins. Co. of Hartford*, 155 Misc 2d 607, 610 [Sup Ct, Oneida County 1992], *aff* 195 Ad2d 1091 [4th Dept 1993]). Therefore, plaintiff's negligence claim must fail (*Valdez v City of New York*, 18 NY3d 69, 80 [2011]).

DOB's motion pursuant to Article 78 is denied as moot. NYC Charter § 645 (b) (1) provides, in relevant part, "[w]ith respect to buildings and structures, the commissioner shall

have the following powers and duties exclusively, subject to review only by the board of standards and appeals as provided by law: to examine and approve or disapprove plans for the construction or alteration of any building or structure." DOB's determination, if any, regarding the factual questions raised in the August 28, 2015 Objection Sheet and referred to in the September 8, 2015 notice required an appeal to the Board of Standards and Appeals (BSA) prior to seeking judicial relief (*Matter of Wilkins v Babbar*, 294 AD2d 186, 187 [1st Dept 2002] citing *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418 [1996] [reasoning that "[t]he BSA, comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution" [citing *see* NY City Charter §§ 659, 666]). However, plaintiff was clear that it was not seeking to challenge the issuance of the permit or intent to revoke. As such, defendant's motion, pursuant to Article 78, is denied as moot. DOB's motion to dismiss, pursuant to CPLR 3211 (a) (7), is granted and the complaint is dismissed against DOB.

Dated: June 26, 2017

E N T E R:

Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BOODIE
J.S.C.