Pioneer & King, LLC v Eurostruct, Inc.
2017 NY Slip Op 31453(U)
June 12, 2017
Supreme Court, Kings County
Docket Number: 508313/16
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of May, 2017.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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PIONEER AND KING, LLC,

Plaintiff,

- against - Index No. 508313/16

EUROSTRUCT, INC.,

Defendants.

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The following papers numbered 1 to 4 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-4

Upon the foregoing papers in this declaratory judgment action, defendant, Eurostruct, Inc. (Eurostruct), moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint of plaintiff, Pioneer and King, LLC (Pioneer).

Background

Dustin Yellin (Yellin) entered into a January 13, 2012 "Standard Form of Agreement Between Owner and Contractor" with Eurostruct (Contract) for a construction project at 159 Pioneer Street in Brooklyn (Property).

The Contract identifies Yellin as "the Owner" and Eurostruct as "the Contractor." Section 1.1.2 of the "General Conditions of the Contract for Construction" provides that:

> "**§ 1.1.2** The Contact Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or

> agreement, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents *shall not be construed to create a contractual relationship of any kind . . . between any persons or entities other than the Owner and the Contractor. . . .*" (emphasis added).

Section 2.1.1 of the Contract provides:

> "**§ 2.2.1** The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. . . . The term 'Owner' means the Owner or the Owner's authorized representative."

Section 3.18.1 of the Contract contains an indemnification provision, which provides, in relevant part:

> "**§ 3.18.1** Contractor shall, to the fullest extent permitted by law with respect to its obligations under the Contract Documents, indemnify, defend, protect and hold harmless Owner and Architect and each of their constituent advisors, partners, employees, agents, representatives, trustees, stockholders, officers and directors, parents, subsidiaries and affiliates, as well as Owner's tenants and lender (collectively, the 'Indemnified Parties') from and against each and all of the following:
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> * * *
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> "**§ 3.18.1.4** Any claim, liability, loss, cost, damage or expense, including attorneys' fees, arising out of or in connection with any claim for the bodily injury or death of any employee of Contractor . . ."

On March 30, 2012, Hugo Malla (Malla), a construction worker employed by Eurostruct, sustained personal injuries during the course of his employment at the Property. Malla was injured when a plank fell on him. On April 9, 2012, Malla commenced a personal injury action against Pioneer (Underlying Personal Injury Action),[1] alleging that he sustained

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[1] *See Malla v Pioneer*, Kings County index No. 7484/12.

serious personal injuries during the performance of his work for Eurostruct due to Pioneer's alleged negligence and violations of the New York Labor Law.

On or about May 22, 2012, Pioneer answered Malla's complaint, denying the material allegations therein and asserting affirmative defenses, including: (1) contributory negligence; (2) payments from collateral sources; and (3) liability is limited under CPLR Article 16.

The Instant Action

On or about May 18, 2016, Pioneer commenced this action for a declaratory judgment by filing a summons and complaint asserting a single cause of action seeking a declaration that Eurostruct is contractually obligated to defend, indemnify and hold Pioneer harmless from any judgment in the Underlying Personal Injury Action.

Pioneer's complaint alleges that "prior to March 30, 2012, Dustin Yellin was the sole member and an agent of PIONEER" and that Yellin "as agent of PIONEER and on behalf of PIONEER" entered into the Contract with Eurostruct, pursuant to which Eurostruct was to perform construction services at the Property "for PIONEER" (complaint at ¶¶ 7-9). The complaint further alleges that "pursuant to the CONTRACT . . . EUROSTRUCT is required to indemnify and hold harmless PIONEER, along with PIONEER's agents and employees, from and against all claims, damages or losses arising out of or resulting from the performance of the work" (*id.* at ¶ 10).

In 2016, Eurostruct moved to dismiss Pioneer's complaint, pursuant to CPLR 3211 (a) (1) and (a) (7). By order dated December 7, 2016, this court denied Eurostruct's dismissal motion based on Eurostruct's failure to attach a copy of the complaint to its moving papers.

On or about January 10, 2017, Eurostruct re-filed the identical dismissal motion with a copy of the complaint.[2] Eurostruct seeks dismissal on the ground that Yellin executed the Contract "in his individual capacity" and Pioneer is not entitled to indemnification under the Contract because it is not a party to the Contract.[3] Eurostruct contends that Yellin did not execute the Contract on behalf of Pioneer because "not once does the Contract even mention [Pioneer], especially not as 'the Owner,' nor did Yellin sign and indicate that it was on [Pioneer's] behalf."[4] Eurostruct notes that the Contract identifies Yellin as both "Owner" and "Owner's Representative" and that Yellin executed the Contract on his own behalf as "Owner."

Pioneer, in opposition, submitted Yellin's affidavit in which Yellin attests that he owns investment properties "through companies created for the purpose of ownership."[5] Yellin asserts that the Property is one of his investments, which he owns through Pioneer.

According to Yellin, on January 13, 2012, he entered into the Contract with Eurostruct "for work to be done at the Property."[6] Yellin attests that "Eurostruct prepared the [C]ontract, and provided it to me to sign" and that "I understood that Eurostruct was agreeing

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[2] Contrary to Pioneer's assertion, Eurostruct's re-filed dismissal motion is not precluded by the one motion rule set forth in CPLR 3211 (e) because the second dismissal motion merely "responded to and cured a documentary gap identified by th[e] court" (*Ultramar Energy Ltd. v Chase Manhattan Bank, N.A.*, 191 AD2d 86, 88 [1993]).

[3] *See* Eurostruct's January 10, 2017 memorandum of law in support of its dismissal motion (Eurostruct Memorandum) at 1.

[4] Eurostruct Memorandum at 3.

[5] *See* ¶ 3 of Yellin's February 24, 2017 affidavit submitted in opposition to Eurospect's dismissal motion (Yellin Opposition Affidavit).

[6] Yellin Opposition Affidavit at ¶ 4.

to indemnify not only me but also [Pioneer], the record owner of the Property."[7] Yellin contends that Pioneer is entitled to indemnification under Section 3.18.1 of the Contract because Pioneer "was [his] representative and agent for owning the Property [and] I understood [Pioneer] to be one of my corporate affiliates through which I hold my investments."[8] Essentially, Pioneer argues that it is a third-party beneficiary of the Contract because it is Yellin's "affiliate."

Eurostruct, in reply, argues that Yellin is specifically designated as both "Owner" of the Property and Owner's authorized representative under the Contract. Eurostruct further argues that Pioneer is not a third-party beneficiary under the Contract because Pioneer is not one of Yellin's "constituent advisors, partners, employees, agents, representatives, trustees, stockholders, officers and directors, parents, subsidiaries and affiliates," as set forth in Section 3.18.1 of the Contract. According to Eurostruct, "conferring such a status on [Pioneer] would impermissibly expand the indemnification provision beyond its scope."[9]

Discussion

A motion to dismiss under CPLR 3211(a) (1) on the grounds that a claim is barred by documentary evidence may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense to such claim as a matter of law (*see Goseh v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). To be considered "documentary," evidence must be unambiguous and of undisputed authenticity.

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7. *Id.* at ¶ 6.

8. *Id.* at ¶ 7.

9. *See* Eurostruct's March 7, 2017 reply memorandum of law in further support of its dismissal motion (Eurostruct Reply Memorandum) at 4.

Mortgages, deeds, contracts, and any other papers, the contents of which are "essentially undeniable," qualify as documentary evidence" (*see Sands Point Partners Private Client Group v Fidelity Natl. Title Ins. Co.*, 99 AD3d 982, 984 [2012]).

A dismissal motion under CPLR 3211(a)(7) requires determining whether the plaintiff has *stated* a cause of action, but, "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading *has* a cause of action'" (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2010] [emphasis added], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that "a material fact as claimed by the pleader to be one is not a fact at all" (*Sokol*, 74 AD3d at 1182, quoting *Guggenheimer*, 43 NY2d at 275; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). A court considering a dismissal motion on the basis of failing to state a cause of action generally must accept the facts alleged in the complaint as true and make any possible favorable inferences for the plaintiff (*Sokol*, 74 AD3d at 1181), even when such allegations are "upon information and belief" (*see Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 [1989]). However, legal conclusions and factual claims flatly contradicted by the evidence will not be presumed true (*see Sweeney v Sweeney*, 71 AD3d 989, 991 [2010]; *Parsippany Constr. Co., Inc. v Clark Patterson Assoc., P.C.*, 41 AD3d 805, 806 [2007]; *Meyer v Guinta*, 262 AD2d 463, 464 [1999]).

It is well settled that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc., Inc. v Giancontieri,* 77 NY2d 157, 162 [1990]). Eurostruct's dismissal motion is granted because Pioneer, a non-party to the Contract between Yellin and Eurostruct, is not entitled to indemnification under the unambiguous terms of the Contract. The Contract clearly

reflects that Yellin entered into the Contract as "Owner" in his *individual capacity* and not on behalf of Pioneer. Furthermore, section 1.1.2 of the Contract explicitly provides that "[t]he Contract Documents shall not be construed to create a contractual relationship of any kind . . . between any persons or entities other than the Owner and the Contractor."

While the consequences of this ruling may be harsh, the court cannot rewrite the plain terms of the Contract between Yellin and Eurostruct. "It is fundamental that courts enforce contracts and do not rewrite them" (*Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157 [1983]). Accordingly, it is

ORDERED that Eurostruct's motion to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (a) (7), is granted.

This constitutes the decision and order of the court.

ENTER,

J. S. C

Karen B. Rothenberg
Justice, Supreme Court

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