Mammoet USA N., Inc. v New York Wheel Owner LLC
2021 NY Slip Op 32425(U)
November 22, 2021
Supreme Court, New York County
Docket Number: 656224/2020
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET CHAN** **PART** **49M**

Justice

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MAMMOET USA NORTH, INC.,MAMMOET AMERICAS HOLDING, INC.,

Plaintiffs,

- v -

NEW YORK WHEEL OWNER LLC,NEW YORK WHEEL MEZZ, LLC,NEW YORK METROPOLITAN REGIONAL CENTER, L.P. II

Defendants.

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INDEX NO. 656224/2020

MOTION DATE 05/04/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 32, 33, 34, 35, 36, 37, 48, 49, 50, 51, 52, 53, 54, 56

were read on this motion to/for DISMISS.

In this action arising out of a failed project to construct a giant observation wheel (the "Wheel" or the "Project") in Staten Island, New York, defendant New York Wheel Mezz LLC ("NYW Mezz") moves pursuant to CPLR 3211(a) (1) and (7) to dismiss count six of the complaint which seeks recovery under completion guaranty provided by NYW Mezz in connection with the Project. Plaintiff Mammoet USA North, Inc. ("MUSA") opposes the motion.

Background

This action has its genesis in a March 5, 2014 design-build agreement ("DBA") between Mammoet-Streneth LLC, known as the Design Build Team ("DBT"), and defendant New York Wheel, LLC ("New York Wheel"), the developer of the Project, under which DBT agreed to design and build the Wheel (NYSCEF #2, ¶ 1; NYSCEF #'s 27-29). The Wheel was to be located at Staten Island ferry terminal on land owned by non-party the City of New York (the "City") and leased to New York Wheel (NYSCEF # 2, ¶¶ 1,3).

In connection with New York Wheel's lease of city-owned land, defendant NYW Mezz, an entity related to New York Wheel, provided to the City a "Completion Guaranty" (the "Mezz Guaranty" or the "Guaranty") dated May 20, 2015 (NYSCEF #2, ¶¶ 221-226; NYSCEF # 35, Mezz Guaranty). Under the Guaranty, NYW Mezz guaranteed *inter alia:*

> "that any and all liens or claims of any persons furnishing materials, labor or services in connection with the design and/or construction, and, if applicable, demolition, of the Guaranteed Work filed with respect to the Premises and the City's interests therein, shall be removed by bonding or otherwise discharged within the time periods provided in the Lease [the lease agreement between the City and New York Wheel ("Lease")] (the 'Lien Discharge Obligation')."

(NYSCEF # 35, § 1(a)(ii) (underlining in the original).

Shortly after the parties entered into the DBA, the Project ran into difficulties. And in 2017, New York Wheel filed an action in the United States District Court for the Southern District of New York against DBT, its members and various companies associated with DBT asserting claims for breach of contract, fraudulent inducement and breach of a guarantee (the "Federal action"). DBT answered the complaint and asserted various counterclaims against New York Wheel and a third-party claim against the City. During the pendency the Federal action, DBT filed for bankruptcy, and DBT's claims were assigned to MUSA.

By Decision and Order dated August 6, 2020, Hon. Jesse M. Furman dismissed certain of MUSA's claims, including those asserted against the City and New York Wheel alleging the violation of New York Lien Law Section 5[1] based on the failure to provide a payment guarantee of the work to DBT (*New York Wheel Owner LLC v Mammoet Holding, B.V.*, 481 F Supp 3d 216, 238-243 [SD NY 2020]). Although the issue of whether the Mezz Guaranty satisfied the City's obligations to DBT under Lien Law Section 5 was raised by the parties, the court did not reach this issue as it dismissed the claims on the grounds that Lien Law Section 5 does not provide for a private right of action for damages against the City, or against a private party, like New York Wheel (*id.*).

In November 2020, Judge Furman dismissed the Federal action for lack of subject matter jurisdiction after it was disclosed that there was an absence of diversity. As a result, the litigation arising out of the Project is now before this

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[1] Lien Law Section 5 provides, in relevant part, that:

> "[w]here no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of the moneys due to the contractor[.]"

court. In addition to this action, New York Wheel has filed an action titled *New York Wheel Owners LLC v Mammoet Holding B.V.*, Index No. 656661/2020.

In the action at hand, plaintiffs assert seven counts against the various defendants (NYSCEF #2). At issue here is the sixth count asserted by MUSA against NYW Mezz which seeks recovery of amounts allegedly owed by NYW Mezz under the Mezz Guaranty. Specifically, this count alleges that MUSA is entitled to enforce the Guaranty as a third-party beneficiary, and that the Guaranty was intended to satisfy Lien Law Section 5, which provides that the City, as a public owner must require a private entity to post a bond to protect contractors, such as DBT (*id.*, ¶¶ 221-226).

NYW Mezz moves to dismiss the sixth count asserting that DBT is not a third-party beneficiary of the Guaranty which does not include language stating that the contracting parties intended to benefit DBT by permitting it to enforce the Guaranty (citing, *inter alia*, *Dormitory Auth. of the State of New York v Samson Constr. Co.*, 30 NY3d 704, 710 [2018]). Instead, NYW Mezz posits, the language of the Mezz Guaranty demonstrates that the City is its exclusive beneficiary (citing NYSCEF # 35, Mezz Guaranty at 1 [providing that the Guaranty is made to and "for the benefit of the City of New York"]; § 1[b]["Guarantor does hereby absolutely, unconditionally and irrevocably, as primary obligor and not merely as surety, guarantee for the benefit of the City the prompt and complete observance, fulfillment and performance of the following obligations of Developer [i.e. New York Wheel] under the Lease); § 15 [the Guaranty shall "inure to the benefit of and be enforceable by the City and its successors, transferees and assigns"]).

Moreover, NYW Mezz argues that the allegations that the Mezz Guaranty was intended to satisfy Lien Law Section 5 are insufficient to give rise to DBT's right to enforce the Guaranty. In support of its position, NYW Mezz cites three recent cases involving Lien Law Section 5 claims in which courts dismissed claims by contractors asserting rights as third-party beneficiaries of guaranty agreements made between a developer and the City when leasing City land (citing *A.J. McNulty & Co. Inc. v Outlet Bldrs. LLC*, 2020 WL 11567469 [Sup Ct N.Y. Co. March 9, 2020] [Sherwood, J.]; *St. George Outlet Dev., LLC v Casino Mech. Corp.*, 67 Misc 3d 1212[A], 2020 N.Y. Slip Op. 50516(U) [Sup. Ct. NY Co. May 6, 2020] [Ostrager, J.]; *Empire Outlet Bldrs. LLC v NYC Fire Sprinkler Corp.*, 2020 WL 3473682 [Sup Ct NY Co. June 23, 2020] [Borrok, J.]).

MUSA opposes the motion, asserting that contrary to NYW Mezz's arguments, New York law does not require an intended third-party beneficiary to be specifically named in a contract to have enforceable rights thereunder if, as in this case here, a third-party falls within a class that is identifiable from the contract (citing, e.g., *Newin Corp. v Hartford Accident & Indem. Co.*, 37 NY2d 211, 219 [1975]; *MK W. St Co. v Meridian Hotels, Inc.*, 184 AD2d 312, 313 [1st Dept 1992]).

MUSA argues that here, DBT was within the class that was intended to be protected under the Mezz Guaranty, which the City required New York Wheel to obtain under the Lease. Additionally, MUSA argues that the Mezz Guaranty was intended to satisfy the City's obligations under Lien Law Section 5, which mandates that the public owner of land require that project owners, such as New York Wheel, to obtain a bond or other undertaking to provide contractors, such as DBT, a source of recovery in the event the project owner fails to pay. In this case, MUSA argues that based on New York Wheel's failure to pay DBT, it is entitled to recover under the Guaranty.

In support of this argument, MUSA points out that in the Federal action, in its motion to dismiss MUSA's claim against it for violation of Lien Law Section 5, the City contended that it had met the requirements of the Section by procuring the Mezz Guaranty (NYSCEF # 50 at 9-11; NYSCEF # 51 at 7-11). MUSA also notes that based on the City's representations in its papers, MUSA successfully moved for leave to assert a third-party claim against NYW Mezz for breach of its obligations under the Mezz Guaranty in the Federal action.

In reply, NYW Mezz argues that the unambiguous language of the Guaranty demonstrates that MUSA is not an intended third-party beneficiary and that the City's extra-contractual statements are foreclosed by the entire agreement clause in the Guaranty (NYSCEF #35, § 18[2]) and, in any event, are unpersuasive as they were made in connection with the City's defense of claims against it.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by

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[2] Section 18 titled, Entirety, provides:

This Guaranty embodies the final, entire agreement of Guarantor and the City with respect to Guarantor's guaranty of the Guaranteed Obligations and supersedes any and all prior commitments, agreements, representations, and understandings, whether written or oral, relating to the subject matter hereof. This Guaranty is intended by Guarantor and the City as a final and complete expression of the terms of Guarantor's guaranty of the Guaranteed Obligations, and no course of dealing between Guarantor, the City, no course of performance, no trade practices, and no evidence of prior, contemporaneous or subsequent oral agreements or discussions or other extrinsic evidence of any nature shall be used to contradict, vary, supplement or modify any term of this Guaranty. There are no oral agreements between Guarantor and the City.

documentary evidence, they are not presumed to be true or accorded every favorable inference'" (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]).

"A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary." (*LaSalle Nat. Bank v Ernst & Young, LLP*, 285 AD2d 101, 108 [1st Dept 2001]). While a third-party beneficiary need not be named in the contract, the intent to benefit the third-party must be apparent from the face of the contract (*id.*). Additionally, the Court of Appeals has held that particularly in the context of construction contracts, it must be "clear from the language of the contract that there was an intent to permit enforcement by the non-party" (*Dormitory Auth. State of New York v Samson Constr. Co.*, 30 NY3d 704 [2018]). [internal citation and quotation omitted]).

Here, the Mezz Guaranty does not express an intent to benefit DBT or any other contractor on the Project. Instead, the Guaranty states that it is for the benefit of, and enforceable by the City (and its successors, transferees and assigns) (NYSCEF # 35 at 1; §§ 1(a), 15). Additionally, the Guaranty only addresses liens and claims filed against "Premises and the City's interests therein," and not unpaid obligations to contractors such as DBT (*id.* § 1[b]). Under these circumstances, DBT cannot be considered an intended third-party beneficiary of the Mezz Guaranty (*see e.g., A.J. McNaulty & Co. Inc.*, 2020 WL 11567469, *2 [finding that plaintiff contractor working on a private project build on City-owned land was not a third-party beneficiary of standby guaranty which stated that its "'provisions were for the benefit of the City and its successors, transferees and assigns"']; *St. George Outlet Dev., LLC*, 2020 N.Y. Slip Op. 50516(U), *3-4 [holding that contractor working on project on city-owned property was not a third-party beneficiary of standby guaranty where guaranty's payment and performance obligations were for the benefit of the City and did not guarantee " 'prompt payment' " to the contractors such as plaintiff]; *Empire Outlet Bldrs. LLC*, 2020 WL 3473682, *4 [stating that plaintiff-subcontractor was not an intended beneficiary of standby guaranty "made to and for the benefit of the City"]).

MUSA counters, *inter alia*, that these cases failed to take into account *Daniel-Morris Co. v Glens Falls Indem. Co.* (308 NY 464, 467-468 [1955]) in which the Court of Appeals upheld that a plaintiff materialman's right to sue on a bond even though he was not directly named on the bond. However, *Daniel-Morris Co.* is inapposite as the payment bond at issue in that case obligated the defendants to "promptly make payment to all persons supplying labor and material in the prosecution of work ..." (*id.* at 467). Thus, the court found that "the primary purpose of the bond—payment of the materialmen—can be enforced by a materialman" (*id.* at 468).

Finally, contrary to MUSA's position, in the absence of any language in the Guaranty from which an intent to benefit DBT can be discerned, any intent by the City to satisfy its obligations under Lien Law Section 5 through Mezz Guaranty is irrelevant, particularly as the Guaranty's entire agreement clause precludes consideration of extra-contractual statements.

Conclusion

In view of the above, it is

ORDERED that defendant New York Wheel Mezz, LLC' s motion to dismiss count six of the complaint is granted; it is further

ORDERED that the Clerk of the Court is directed to dismiss the complaint against New York Wheel Mezz, LLC; it is further

ORDERED that the action is severed and continued against the remaining defendants; it is further

ORDERED that the caption shall be amended to reflect the dismissal of New York Mezz, LLC and shall read as follows:

MAMMOET USA NORTH, INC., and MAMMOET AMERICAS HOLDING, INC.,
Plaintiffs,

NEW YORK WHEEL OWNER LLC, and
NEW YORK METROPOLITAN REGIONAL CENTER, L.P,

Defendants.

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it is further

ORDERED that counsel for New York Mezz LLC shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's office who are directed to mark their records to reflect the change in the caption; it is further

ORDERED that the such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on the Courthouse and County Clerks Procedures for Electronically

Filed Cases (accessible at the"E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that a preliminary conference by telephone will be held with the remaining parties, on January 7, 2022 at 11 am, with the call in number to be provided by the court.

11/22/2021
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE