

Spielberg v Twin Oaks Constr. Co. LLC
2015 NY Slip Op 32608(U)
February 5, 2015
Supreme Court, Westchester County
Docket Number: 53158/2014
Judge: William J. Giacomo
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----X
JILL SPIELBERG and ALBERT SIPZENER,

Plaintiff,

Index No. 53158/2014

-against-

Decision & Order

TWIN OAKS CONSTRUCTION COMPANY LLC,
PINTO ELECTRICAL COMPANY, INC., PLUMB-RITE
INC., ACCURATE HEATING & AIR CONDITIONING
LLC, RICHARD BOBROW, DAVID FENTON AND
MARK S. BAKER,

Defendants.

-----X
The following papers numbered 1 to 5 were read on defendant's motion to dismiss the fourth, fifth, sixth and seventh causes of action and to disqualify Harold, Salant, Strassfield & Spielberg from representing plaintiffs in this action.

PAPERS NUMBERED

Notice of Motion/Affidavits/Exhibits/Memo of Law	<u>1-4</u>
Affirmation in Opposition/Memo of Law	<u>5-6</u>

Factual and Procedural Background

Plaintiffs hired defendant Twin Oaks Construction Company, LLC ("Twin Oaks") to perform renovations on their home at 40 Ogden Road, Scarsdale, New York. The contract between plaintiffs and Twin Oaks stated that "Contractor shall perform the Work on a construction management basis where the Owner is responsible for all direct costs incurred plus the construction management fee."

Plaintiffs paid Twin Oaks a construction management fee of \$62,500. According to plaintiffs, Twin Oaks submitted bills to them for "direct supervision" of the project and other charges that plaintiffs considered unwarranted and plaintiffs refused to pay. Upon plaintiffs' refusal to pay the submitted bills, Twin Oaks stopped working on the project.

On July 31, 2014, plaintiffs commenced this action against Twin Oaks, and three employees of Twin Oaks asserting seven causes of action. The first three causes of action are breach of contract actions against Twin Oaks. The fourth cause of action is a breach of contract action against Pinto Electrical Company, LLC, Plumb-Rite, Inc. and Accurate Heating & Air Conditioning, LLC. The fifth cause of action is against David Fenton and Mark S. Barker for a violation of Lien Law § 75. The sixth cause of action is against Twin Oaks, David Fenton and Mark Barker for a violation of Lien Law § 71-a and the seventh cause of action is against David Fenton and Richard Bobrow seeking damages for fraud.

Defendants bring this pre answer motion to dismiss the fourth, fifth, sixth and seventh causes of action and to disqualify plaintiffs' attorney. In support of their motion, defendants argue that with respect to the fourth cause of action, there is no privity of contract between plaintiffs and Pinto Electrical Company, LLC, Plumb-Rite, Inc. and Accurate Heating & Air Conditioning, LLC plaintiffs do not have a direct claim against them. With respect to the seventh cause of action, since plaintiffs have set forth a breach of contract action they cannot also assert a fraud cause of action based upon the same facts.

With respect to the fifth and sixth causes of action, defendants argue that plaintiffs have no standing to bring an action against Fenton and Baker pursuant to Lien Law § 71-a & 75. Defendants argue that Lien Law § 75 provides that a contractor has to hold monies received in trust for the subcontractors, and if these monies are not paid to the subcontractors, the contractor or the principals and owners can be held responsible. Since plaintiffs are not seeking to recover monies on behalf of the subcontractors, they have no standing to bring this claim. Further, there is no allegation that a mechanics lien has been placed on the property.

Finally, defendants argue that the contract between plaintiffs and Twin Oaks was negotiated with plaintiff Jill Spielberg and her father Leonard Spielberg both partners at the law firm of Harold Salant Strassfield & Spielberg. Defendants note that Leonard Spielberg is the attorney of record for plaintiffs. However, since plaintiffs raise issues regarding interpretation of the contract and the intent of the parties both Jill Spielberg and Leonard Spielberg will be necessary witnesses in this matter. Therefore, their firm must be disqualified from representing them at trial.

In opposition, plaintiffs argue this motion is premature. Plaintiffs also argue that pursuant to the contract with Twin Oaks, Twin Oaks was not the general contractor but a construction manager. Therefore, since Twin Oaks was a construction manager it entered into contract with the subcontractors as the plaintiffs's agent. Therefore, there is privity of contract between plaintiffs and Pinto Electrical Company, LLC, Plumb-Rite, Inc. and Accurate Heating & Air Conditioning, LLC.

With respect to their fraud claim, plaintiffs argue that it is not duplicative of their breach of contract claim. Plaintiffs also claim that the fifth and sixth causes of action against Fenton and Baker are proper under the Lien Law.

Finally, plaintiffs argue that there is no basis to disqualify their firm since the contract between plaintiffs and Twin Oaks is not ambiguous, and there will be no necessity for Leonard Spielberg to testify at trial regarding the intent of the parties.

Discussion

Motion to Dismiss

A motion made pursuant to CPLR 3211(e) provides that a motion made pursuant to 3211(a)(7) may be made at any time subsequent to service of a responsive pleading. Thus, the Court deems this motion timely.

On a motion to dismiss a complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, “the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Minovici v Belkin BV*, 109 AD3d 520 [2nd Dept 2013]; see *Leon v Martinez*, 84 NY2d 83, 87–88; *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 791 [2nd Dept 2013]). Moreover, “[w]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one” (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851–852 [2nd Dept 2012]; see *Guggenheimer v Ginzburg*, 43 NY2d 268, 274–275; *Minovici v Belkin BV*, 109 AD3d 520 [2nd Dept 2013]). However, “unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d at 275; see *Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851–852 [2nd Dept 2012]).

Accordingly, giving plaintiff the benefit of every favorable inference this Court finds the fourth, fifth, and sixth causes of action are sufficiently plead to provide defendants with notice of their claims (see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976]; *Well v. Yeshiva Rambam*, 300 A.D.2d 580, 753 N.Y.S.2d 512 [2nd Dept 2002]).

However, plaintiffs’ seventh cause of action against David Fenton and Richard Bobrow sounding in fraud must be dismissed as duplicative of their breach of contract claims. “A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract. A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud” (*J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2009] [internal quotation marks omitted]; see also *Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [1st Dept 2010]). To establish a fraud claim arising in connection with a contractual relationship, “the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties” (*Krantz v. Chateau Stores of Canada*, 256 A.D.2d 186, 187, 683 N.Y.S.2d 24 [1st Dept 1998]).

Here, plaintiffs allege that Fenton and Bobrow told her that if she paid Twin Oaks \$16,562, Twin Oaks would complete its duties pursuant to the contract. Plaintiffs further allege that Fenton and Bobrow knew Twin Oaks would not perform its contractual duties when they made this representation. It is clear that the alleged fraud of which plaintiffs claim is directly related to Fenton and Bobrow as agents of Twin Oaks with regard to Twin Oak's contractual performance. Plaintiffs do not allege a duty which was extraneous to the contract between the parties. Accordingly, the seventh cause of action must be dismissed.

Motion to Disqualify

Defendants seek to disqualify Leonard Spielberg and the law firm of Harold Salant Strassfield & Spielberg. Plaintiff Jill Spielberg is partner of the firm as is her father Leonard Spielberg. Defendants claim that the contract in question was negotiated with David Fenton, Leonard Spielberg and Jill Spielberg. Defendants claim they will call both Leonard Spielberg and Jill Spielberg as witnesses to testify regarding the intent of the parties during the negotiation process.

Plaintiffs do not dispute that Leonard and Jill Spielberg were involved in the negotiation process, however, they contend any testimony given by Leonard Spielberg would be cumulative to that of Jill Spielberg.

"New York's Rules of Professional Conduct suggest disqualification under certain conditions. See 22 NYCRR § 1200.0. For example, Rule 3.7, "Lawyer as Witness," suggests disqualification if "the lawyer is likely to be a witness on a significant issue of fact." Rule 3.7 provides certain exceptions, such as if the testimony relates solely to the nature and value of legal services rendered in the matter, or if disqualification of the lawyer would work substantial hardship on the client. Rule 3.7 also disqualifies an attorney if another lawyer in the firm is likely to be called as a witness and it is apparent that the testimony may be prejudicial to the client, or the lawyer is precluded from representation by Rule 1.7 or Rule 1.9." (*Anderson & Anderson LLP-Guangzhou v North Am. Foreign Trading Corp.*, 45 Misc.3d 1210(A), 2014 WL 5394465 [N.Y. Sup. 2014]).

Notably, "[d]isqualification of an attorney under the advocate-witness rule is required only when it is likely that the testimony to be given by the attorney as witness is "necessary." (*S & S Hotel Ventures v. 777 SH Copr*, 69 NY2d 437, 445-46 1987]; *see also Talvy v. Am. Red Cross in Greater NY*, 205 AD2d 143, 152 (1st Dep't 1994), *aff'd* 87 NY2d 826 (1995). "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence." (*S & S Hotel Ventures*, 69 NY2d at 446; *see also Advent Assocs., LLC v. Vogt Family Inv. Partners, L.P.*, 56 AD3d 1023, 1024 (3d Dep't 2008) (testimony must be unique to attorney-witness)." (*Anderson & Anderson LLP-Guangzhou v North Am. Foreign Trading Corp.*, 45 Misc.3d 1210(A), 2014 WL 5394465 [N.Y. Sup. 2014]).

The standard on a motion to disqualify is whether the movant has met its burden to show that the testimony to be given by the witness is necessary and that if called by the opposing side, the testimony would be prejudicial to the witness-advocate's client (*S & S Hotel Ventures L.P.*, 69 NY2d at 446, *see also Talvy*, 205 AD2d at 152). "Any doubt concerning the necessity for the attorney's testimony should be resolved in favor of disqualification" (*Zagari v Zagari*, 295 AD2d 891, 891 [4th Dept 2002], *citing Matter of Stober v Gaba & Stober, P.C.*, 259 AD2d 554, 555 [2d Dept 1999]; *108th Street Owners Corp. v Overseas Commodities, Ltd.*, 238 AD2d 324 [2d Dept 1997]).

Here, defendants have established that the testimony of Leonard Spielberg will be necessary to resolve issues in this case. Accordingly, Leonard Spielberg is disqualified from representing the plaintiffs in this case.

However, there is no reason to disqualify the firm of Harold Salant Strassfield & Spielberg entirely. (*See Aloyts v. 601 Tenant's Corp.*, 84 A.D.3d 1287, 924 N.Y.S.2d 516 [2nd Dept 2011]; *Talvy v American Red Cross in Greater N.Y.*, 205 A.D.2d 143, 618 N.Y.S.2d 25 [1st Dept 1994]). There is no evidence that any other attorneys in the firm, other than Leonard and Jill Spielberg, were involved in negotiating the contract in question. Therefore, there is no basis upon which to disqualify the firm entirely.

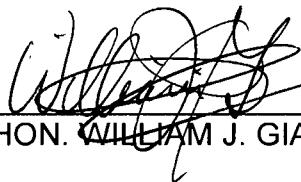
Summary

Defendants' motion to dismiss is DENIED in part and GRANTED in part. The application to dismiss the fourth, fifth and sixth causes of action is DENIED and the application to dismiss the seventh cause of action is GRANTED.

Defendants' motion to disqualify plaintiff's counsel is GRANTED in part and DENIED in part. Defendant's application to disqualify Leonard Spielberg, Esq. from representing plaintiffs in this action is GRANTED, however, defendants' application to disqualify the entire firm of Harold Salant Strassfield & Spielberg is DENIED.

The parties are directed to appear in the Preliminary Conference Part on March 16, 2015 room 800 at 9:30 a.m. for further proceedings.

Dated: White Plains, New York
February 5, 2015


HON. WILLIAM J. GIACOMO, J.S.C.