

South Hill Bus. Campus, LLC v ASI Energy, LLC
2016 NY Slip Op 32010(U)
October 21, 2016
Supreme Court, Tompkins County
Docket Number: 2016-0398
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 26nd day of August, 2016.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

SOUTH HILL BUSINESS CAMPUS, LLC

Plaintiff,

DECISION AND ORDER

Index No. 2016-0398
RJI No. 2016-0330-M

-vs-

ASI ENERGY, LLC and MCFARLAND
JOHNSON, INC.

Defendants.

APPEARANCES:

COUNSEL FOR PLAINTIFF:

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MCFARLAND JOHNSON:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court on Defendant McFarland Johnson, Inc.'s ("MFJ") motion to dismiss pursuant to CPLR §§3211 (a)(1) and 3211 (a)(7) dated July 11, 2016. MFJ submitted an affirmation of Matthew D. Gumaer, Esq. dated July 11, 2016, with attached exhibits, and an affidavit of Richard Brauer, P.E., dated July 8, 2016, with attached exhibits, and Memorandum of Law dated July 11, 2016. Defendant ASI Energy LLC ("ASI") filed a motion to stay the action, under CPLR 2201, which motion was subsequently withdrawn. South Hill Business Campus LLC ("SHBC") submitted a Memorandum of Law dated August 19, 2016 in opposition to the motion to dismiss filed by MFJ. A reply affidavit of Attorney Gumaer dated August 25, 2016 was also submitted on behalf of MFJ.

The underlying matter arises from a "design-build" contract between SHBC and ASI wherein the property owner, SHBC, contracted for ASI to secure design services and perform construction services for a project at its business campus. Plaintiff alleges that prior to entering into the contract with ASI, they had met and discussed project needs with MFJ, as it was understood that MFJ would be ASI's design/engineering subcontractor. Pursuant to the October 18, 2013 contract, ASI was to, among other things, secure design services from "licensed, independent design professionals" and engineers¹. Payments for design/engineering services would be billed to ASI. Pursuant to Section 2.3(c) of the SHBC/ASI contract, the parties agreed to "look solely to each other with respect to the performance of the agreement". The contract between SHBC and ASI was amended to add additional scope of work based upon the recommendations of ASI and MFJ.

During the course of the project, disputes arose between SHBC and ASI regarding alleged material design defects. In addition, SHBC alleges that ASI failed to pay its subcontractors.

¹ASI contracted with MFJ for design and engineering services pursuant to an undated contract attached to affidavit in support of motion to dismiss.

Discussions between SHBC and ASI to address the disputes failed and on June 14, 2016, SHBC commenced this action by filing a Verified Complaint against ASI and MFJ, alleging breach of contract and negligence against ASI, and negligence against MFJ. ASI filed an Answer with Counterclaims and Cross claims against MFJ on September 9, 2016. SHBC filed a Verified Answer with Counterclaims on September 21, 2016.

Dismissal Pursuant to CPLR §3211

“In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction”. *Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, 326 (2002) *see Leon v Martinez*, 84 NY2d 83, 88 (1994). 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 within any cognizable legal theory”. *Goldman v. Metropolitan Life Ins.*, 5 NY3d 561, 571-572 (2005); *see Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner*, 96 N.Y.2d 300, 303 (2001); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

MFJ Motion to Dismiss Pursuant to CPLR §3211(a)(1)

“Dismissal pursuant to CPLR 3211 (a) (1) may be warranted if there is documentary evidence that conclusively establishes a defense to a claim as a matter of law”. *Maldonado v. DiBre*, 140 AD3d 1501, 1505 (3rd Dept. 2016; *see New York State Workers' Compensation Bd. v. Consolidated Risk Servs., Inc.*, 125 AD3d 1250, 1256 (2015); *see also, Leon, supra* at 88. To prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the movant must demonstrate that “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” *R.I. Is. House, LLC v. North Town Phase II Houses, Inc.*, 51 AD3d 890, 893 (2nd Dept. 2008), *quoting Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *see HSBC Bank USA, N.A. v. Decaudin*, 49 AD3d 694, 695 (2008). “Materials that

clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable" *Ganje v. Yusuf* 133 AD3d 954, 956-957 (3rd Dept. 2015); citing *Midorimatsu, Inc. v. Hui Fat Co.*, 99 AD3d 680, 682 (3rd Dept. 2012), *lv dismissed* 22 NY3d 1036 (2013) (internal quotation marks and citations omitted).

In the present matter, MFJ alleges that the contract between SHBC and ASI conclusively refutes any claim that SHBC may have against MFJ, since that contract provides that SHBC and ASI will "look solely to each other with respect to the performance of the agreement". Neither party has called into the question the authenticity of the contract. However, in order to enforce the terms of the contract against SHBC, and require all disputes regarding the subject project to be resolved between SHBC and ASI, MFJ would need to prove that it is a third party beneficiary of the contract between SHBC and ASI.² However, the plain language of the contract would seem to indicate that MFJ was not a third party beneficiary of the ASI/SHBC contract. Specifically, §2.3 of the contract provides "[t]his agreement is solely for the benefit of the parties"; that would be SHBC and ASI. Therefore, the Court finds that MFJ has failed to "identify any provision in the contract that contain language evincing an intent to benefit it beyond its status as an incidental beneficiary" *IMS Engineers-Architects, P.C. v. State of New York*, 51 AD3d 1355, 1357 (3rd Dept. 2008); see *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 NY2d 38, 44 (1985); *Aymes v. Gateway Demolition Inc.*, 30 AD3d 196, 196 (1st Dept. 2006). This is particularly true in the context of a motion to dismiss pursuant to CPLR §3211 wherein the Plaintiff is to be accorded the benefit of every possible favorable inference.

The Court finds that MFJ has failed to offer documentary evidence that utterly refutes Plaintiff's claims. MFJ's motion to dismiss pursuant to CPLR 3211(1) is **DENIED**.

²SHBC's claim against MFJ sounds in negligence, and the only way the contract between SHBC and ASI could support MFJ's motion would be by applying the provisions of Section 2.3(c) of the contract to MFJ as a third party beneficiary of the contract between SHBC and ASI.

MFJ Motion to Dismiss Pursuant to CPLR §3211(a)(7)

On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, the court “must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the [nonmoving party] the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory” *NYAHS A Servs., Inc., Self-Insurance Trust v. People Care Inc.*, 141 AD3d 785 (3rd Dept. 2016); *Torok v. Moore's Flatwork & Founds., LLC*, 106 AD3d 1421, 1421 (2013) [internal quotation marks and citation omitted]; see *Tenney v. Hodgson Russ, LLP*, 97 AD3d 1089, 1090 (2012). In this matter, SHBC is alleging negligence as against defendant MFJ. “To establish a prima facie case of negligence, the plaintiff is required to demonstrate that the defendant owed a duty to him or her, that the defendant breached that duty and that such breach was a proximate cause of the injuries sustained”. *Evarts v. Pyro Engineering*, 117 AD3d 1148, 1150 (3rd Dept. 2014); see *Ortega v. Liberty Holdings, LLC*, 111 AD3d 904, 906 (3rd Dept. 2013); *Merchants Mut. Ins. Co. v. Quality Signs of Middletown*, 110 AD3d 1042, 1043 (3rd Dept. 2013). In the context of a motion pursuant to CPLR §3211 (a)(7), the plaintiff must plead sufficient facts, which if proved, would constitute a prima facie case for negligence. See e.g. *Daily v. Tops Mkts.*, 134 AD3d 1332 (3rd Dept. 2015) *lv to app denied*, 27 NY3d 909 (2016).

In the present matter, SHBC alleges certain material design defects which were caused by MFJ’s failure to perform its professional design/engineering services using a degree of skill and learning normally possessed and used by design professional in good standing in a similar practice and under similar circumstances. As a result, contends SHBC, they were damaged by MFJ’s failure to exercise this level of care.

Based upon the build-design nature of the subject contract, there is no contract between SHBC and MFJ. The only contracts are between SHBC and ASI and ASI and MFJ. Therefore, the question for the Court is where MFJ’s duty to SHBC, if any, arises from.

New York Courts “have declined to adopt a rule permitting recovery by any ‘foreseeable’ plaintiff who relied on the negligently prepared report, and have rejected even a somewhat narrower rule that would permit recovery where the reliant party or class of parties was actually known or foreseen by the defendants” *Ossining Union Free School District v. Anderson LaRocca Anderson*, 73 NY2d 417, 424 (1989). Specifically, a duty is owed by a professional services defendant where there is “(1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendants linking them to the party or parties and evincing defendant's understanding of their reliance”. *Id.* at 425; *see Credit Alliance Corp. v. Andersen & Co.*, 65 NY2d 536 (1985).

In its complaint, SHBC alleges that its representatives met directly with MFJ on numerous occasions, and MFJ performed inspections of the location of the project. SHBC alleges that MFJ knew that the “professional design services were being provided to induce the Plaintiff to enter into a design-build/turnkey contract with (ASI)” (Complaint at ¶49). It is also alleged that MFJ “knew that its professional design services were for the benefit of (SHBC)”. (Complaint at ¶50). SHBC also alleges that MFJ knew that development of the design program, estimated return on investment, final designs, plans, specifications and recommendations would be relied upon by SHBC. (Complaint at ¶51).

In light of the foregoing, the Court finds that SHBC has sufficiently pled facts to allege MFJ’s awareness of what their designs were to be used for, knowledge of SHBC’s reliance on those designs, and the meetings between representatives of SHBC and MFJ. As pled, it cannot be said that SHBC and MFJ were total strangers separated by their separate relationships with ASI. Rather, MFJ worked directly with SHBC in creating and modifying designs. The Court finds that SHBC has sufficiently alleged and pled a basis for the duty owed to it by MFJ., SHBC has also pled that MFJ has breached that duty alleging material design defects and as a result, has sufficiently pled a cause of action for negligence as against MFJ.

Therefore, MFJ's motion to dismiss pursuant to CPLR §3211(a)(7) is **DENIED**.

This constitutes the **Decision and Order** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry.

Dated: October 21, 2016
Ithaca, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice