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COURT OF APPEALS

STATE OF NEW YORK

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SAMSON CONSTRUCTION,

Appellant,

-against-

NO. 8

DORMITORY AUTHORITY OF THE STATE OF  
NEW YORK,

Respondent.

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20 Eagle Street  
Albany, New York  
January 4, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

MARK C. ZAUDERER, ESQ.  
FLEMMING ZULOCK WILLIAMSON ZAUDERER, LLP  
Attorney for Appellant Perkins Eastman Architects  
One Liberty Plaza, 35th Floor  
New York, NY 10006-1404

DEVIN SLACK, ESQ.  
CORPORATION COUNSEL OF THE CITY OF NEW YORK  
Attorney for Respondents City of New York and Dormitory  
Authority of State of New York  
100 Church Street  
New York, NY 10007

Gina Gattone  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.  
2 The first matter on this afternoon's calendar is appeal  
3 number 8, Dormitory Authority of the State of New York v.  
4 Samson Construction.

5 Counsel.

6 MR. ZAUDERER: May it please the court. Mark  
7 Zauderer for the appellant. And may I respectfully request  
8 two minutes rebuttal time?

9 CHIEF JUDGE DIFIORE: Of course, sir. You may  
10 have it.

11 MR. ZAUDERER: Thank you.

12 CHIEF JUDGE DIFIORE: You're welcome.

13 MR. ZAUDERER: You know, there is a fundamental  
14 premise principle that we learn in law school, and it's  
15 been affirmed by the jurisprudence in this court time and  
16 time again. And it is that when parties embody their  
17 relationship in a contract, their rights and obligations  
18 are defined by that contract, and there are some limited -  
19 - -

20 CHIEF JUDGE DIFIORE: Yes, counsel. But when an  
21 - - - an architect undertakes, as in your case, to perform  
22 services to build a facility such as the OCME Lab, building  
23 then, obviously, is in the center of New York City. It's  
24 adjacent to a public hospital, lots of vehicular and  
25 pedestrian traffic in the area. We're not out in the



1 country. Isn't the nature of that obligation something  
2 special?

3 MR. ZAUDERER: That is a factor, that under this  
4 court's somber jurisprudence, the court could consider as  
5 to whether there's one of these exceptions to this basic  
6 principle that I have outlined, but there are others that  
7 are a sine qua non. And I know of no case where the court  
8 has allowed a duplicative negligence claim to be piled on  
9 top of a contract claim where the parties' obligations are  
10 covered by the contract, when the allegations are identical  
11 and there are no separate damages.

12 JUDGE WILSON: What about the Sears case?

13 MR. ZAUDERER: The cases that were cited against  
14 us, you know, are cases where at the time there was the  
15 possibility - - - it was undefined and unclear whether  
16 there could be a separate damage claim, and then we looked  
17 at those cases. But those were cases where it was not in  
18 the posture that it was in this court where there is no  
19 possibility of there being separate damages because that's  
20 defined by what is in the discovery. It's the thirty-seven  
21 million dollars. And if you look at the two causes about -  
22 - -

23 JUDGE WILSON: What I'm looking - what I'm - - -

24 JUDGE STEIN: Is it relevant that he - - -

25 JUDGE WILSON: Sorry.



1 JUDGE STEIN: - - - that here, the tort claim  
2 being made by DASNY is for damage, not to its own property,  
3 but to the City's property?

4 MR. ZAUDERER: We have - - - we haven't - - - I  
5 don't - - - that's a distinction without a difference.  
6 It's the same claim, it's the same principles we would  
7 argue, apply to this. It's a distinction without  
8 importance in this case. I would like to - - -

9 JUDGE WILSON: Is the general rule you're  
10 articulating applicable sort of to ordinary negligence, but  
11 not to professional malpractice actions?

12 MR. ZAUDERER: Well - - -

13 JUDGE WILSON: It is, haven't we allowed  
14 sometimes a professional malpractice claim and a parallel  
15 duplicative contract claim to go forward at the same time?

16 MR. ZAUDERER: Again, in - - - in cases - - -  
17 there are statements in two of your cases where it said one  
18 of the - - - one or the other could be maintained. I don't  
19 know of a case where they've allowed both in the actual  
20 case. And in fact, that would come in squarely against the  
21 court's jurisprudence in a long line of cases which say you  
22 can't.

23 JUDGE WILSON: Well, are there - - - are there  
24 professional ma - - - have you found any professional  
25 malpractice cases where the court, where we've said you



1 can't? Not a - - -

2 MR. ZAUDERER: Only, and I would say - - -

3 JUDGE WILSON: Not an ordinary (indiscernible) -

4 - -

5 MR. ZAUDERER: - - - in - - - in general, in  
6 dicta. There are two cases that say you can maintain the -

7 - -

8 JUDGE WILSON: And I'm asking for the ob - - -  
9 for the con - - - obverse, right? Have you found a case  
10 decided by the Court of Appeals - - -

11 MR. ZAUDERER: Yes.

12 JUDGE WILSON: - - - where the court has said  
13 plaintiff has tried to bring both a professional  
14 malpractice claim and a contract claim and the court has  
15 said you can't do both.

16 MR. ZAUDERER: Yes. I think that's - - - that's  
17 covered by the Clark-Patrick case against Long Island  
18 Railroad. So that's a case I would cite for one. And I -  
19 - - if I may, I would like to address - - -

20 CHIEF JUDGE DIFIORE: But wasn't the railroad - -  
21 -

22 MR. ZAUDERER: Sorry?

23 CHIEF JUDGE DIFIORE: - - - at issue there?  
24 Wasn't it the railroad's actions? They're not a - - - it's  
25 not a professional - - - they weren't suing the architect



1 or the engineer.

2 MR. ZAUDERER: The - - - there is a distinction  
3 that an architect or an engineer or someone with a  
4 professional capacity could be subject to the analysis that  
5 Your Honor is talking about.

6 But there are certain prerequisites under this  
7 jurisprudence that would have to be met including, as I  
8 say, a sine qua non of separate damages because you would  
9 be obliterating this basic rule, which has been in many of  
10 the cases that where you're just a restatement of the  
11 contract claim as a negligence claim, and you have no new  
12 damages, you don't permit it. You would be turning on its  
13 head the existing jurisprudence.

14 You know, the Sommer case is worth a moment  
15 because it - - - I could see how it puzzled the court and  
16 troubled it. Because there you had an alarm company with a  
17 contract with the owner that provided for 250 dollars in  
18 damages if there were a breach of contract. And somebody  
19 at the alarm company failed to turn on the alarm. There  
20 was a fire in the building, and enormous damage. And the  
21 court was faced with a problem there, as Judge Kaye said in  
22 her opinion, you know, where is the borderline between  
23 contract and tort.

24 And the case laid out a number of factors. I've  
25 - - - they're actually called guideposts in there. And



1 what was obviously troubling the court there, that unless  
2 there was a way around the contract claim to permit the  
3 tort claim, you'd have a fire with the plaintiff having no  
4 remedy except 250 dollars. And that was a - - - by  
5 discernment of the case, a case with a potential for  
6 separate damages.

7 JUDGE WILSON: But Sommer - - - Sommer - - -

8 MR. ZAUDERER: There is no such potential here.

9 JUDGE WILSON: Sommer itself, although it's in  
10 dicta, says professionals, common carriers, and bailees,  
11 for example, may be subject to tort liability for their  
12 contractual duties, irrespective of their contractual  
13 duties.

14 MR. ZAUDERER: I don't dispute that. But I say  
15 and maintain that under your own jurisprudence, there are  
16 other factors including what I've referred to as a sine qua  
17 non of separate damages. You're not going to see - - - I -  
18 - - we have not seen cases where it's clear that when it  
19 came to the Court of Appeals, there were separate damages.  
20 The same allegations, that is, the same facts underlying  
21 both the contract and the tort claim - - - if you look at  
22 the fifth cause of action here and the sixth, it's in haec  
23 verba. It's exactly the same claim.

24 JUDGE FAHEY: Let me ask this though.

25 MR. ZAUDERER: One case, they say breach of



1 contract and the others say tort.

2 If I may respond to the Chief Judge's question  
3 about the importance of professional responsibilities. I  
4 just would like to make clear if it hasn't been made clear  
5 already that if an architect designs a building and there's  
6 a building constructed in the middle of Manhattan, and a  
7 cornice falls off and somebody on the street is injured,  
8 that person's ability to sue is unaffected. We're talking  
9 about this plaintiff, or any plaintiff in a plaintiff  
10 versus defendant case having a tort claim in addition to a  
11 contract claim.

12 JUDGE STEIN: Well, that was the gist of my  
13 earlier question. Had no person or property of DASNY has  
14 been affected by this, so I - - - you know, you may have  
15 misunderstood my question, but it seems to me that it's the  
16 City that might have a tort claim here and - - - and  
17 apparently didn't file it timely, but - - - so that was the  
18 distinction I was - - -

19 MR. ZAUDERER: Well, that's true. The City - - -  
20 the City didn't file it timely. They didn't brief that to  
21 the Appellate Division. It wasn't addressed by the  
22 Appellate Division. That claim is out.

23 JUDGE FAHEY: How - - - how about this. If we -  
24 - - what if we decided that the City was - - - or it's a  
25 question of fact whether the City was - - - intended



1 third-party beneficiary. Would that be dispositive of the  
2 other issues in the case then?

3 MR. ZAUDERER: I submit - - - I submit no, that  
4 it would not. It wouldn't carry with it a dismiss - - -  
5 well, a dismiss con - - - the dismissed tort claim.

6 JUDGE FAHEY: Well, would - - - wouldn't that  
7 preempt, then, the court - - - the tort contract  
8 distinction?

9 MR. ZAUDERER: I'm sorry. I haven't had a moment  
10 - - - I don't want to - - -

11 JUDGE FAHEY: Take a second. Go ahead. Go  
12 ahead.

13 MR. ZAUDERER: I wanted to just address the  
14 third-party beneficiary for one minute - - -

15 JUDGE FAHEY: Sure.

16 MR. ZAUDERER: - - - if I can.

17 JUDGE FAHEY: Well, that's why I'm asking you the  
18 question. What if we decide that it's briefed. It's the  
19 second point. But what if we decide that question first.  
20 Isn't that dispositive of the entire case then?

21 MR. ZAUDERER: You mean if you were to hold that  
22 there's a third-party beneficiary?

23 JUDGE FAHEY: Right. Well, let's say that - - -

24 MR. ZAUDERER: (Indiscernible) that point.

25 JUDGE FAHEY: I don't think we'd - - - I think



1 we'd have to hold it to be a question of fact. That would  
2 be the most that we could hold it.

3 MR. ZAUDERER: I - - - I don't think you could  
4 hold that there's a question of fact.

5 JUDGE FAHEY: Okay.

6 MR. ZAUDERER: The tort claim is out no matter  
7 what you decided on the third-party beneficiary point. But  
8 there's a common point here that I - - -

9 JUDGE FAHEY: No, that's not my question.

10 MR. ZAUDERER: Okay. Sorry.

11 JUDGE FAHEY: I - - - if the Judge would permit  
12 it, I just want to clarify what my - - - my question is is  
13 if we decide that the - - - that there is a question of  
14 fact as to whether or not the City is in an intended third-  
15 party beneficiary, then is that dispositive of the other  
16 claims in the case, the other arguments?

17 MR. ZAUDERER: I would submit, Your Honor, no,  
18 because you are left simply with a breach of contract claim  
19 which now the City presumably can assert in addition to  
20 DASNY.

21 So if I may, this third party, whether - - - both  
22 on the third-party beneficiary point and on the negligent  
23 point, there's a very important public policy issue. And  
24 that is this. In construction contracts as well as many  
25 other situations, you have multiple parties. If you



1 permitted, where there's a contract claim, each person, the  
2 electrician, the plumber, the masonry contractor, is liable  
3 only for what they've contractually undertook to do.

4 If you permit a negligence claim in the same  
5 case, now we get into joint and several liability. So you  
6 can have a ma and pa contractor with minimal assets and  
7 minimal insurance. They get found five percent liable in a  
8 multi-party case. And they - - - and the plaintiff can  
9 satisfy judgement against that party or any party, and that  
10 party is left to hopefully recover ninety-five percent or  
11 that other than its five percent liability from other  
12 parties who may have no money. There are other ma and pa  
13 contractors.

14 And the same thing in the third party, if I may  
15 say, in the third-party beneficiary claim, why it's so  
16 important that the court adhere to its jurisprudence is if  
17 look, if I have a contract to be a supplier for a  
18 manufacturer, and it says you can supply in New York City,  
19 and the manufacturer has distribution in Los Angeles, San  
20 Francisco, and Boston, and I have a dispute. And I say,  
21 look, I have the right to distribute not only in New York  
22 City, but in Los Angeles, and in fact, in Boston.

23 And I come to court and the court says where is  
24 it in the contract. It says you have a right to distribute  
25 in New York City. But I say, well, you know, I can submit



1 affidavits from other people that that's really what was  
2 intended in this contract, I would lose that case in court  
3 because they'd say, look, it's not a question of ambiguity,  
4 the contract gives you the right to New York City and  
5 nothing else.

6 So wouldn't it be anomalous and perverse to  
7 fashion a rule which permit a non-party, a third party, to  
8 that contract under the same contract to claim third-party  
9 beneficiary status, which is what the City is doing here by  
10 submitting affidavits for something that's not in the  
11 contract?

12 And as we point out in the brief, the very  
13 contract between DASNY and the foundation contract to here,  
14 Samson, has an express provision saying they are a third-  
15 party beneficiary. But when they wrote the contract  
16 between DASNY and Perkins Eastman, they omitted it. In  
17 fact, the - - - the - - - the contract is - - - couldn't -  
18 - - couldn't be more - - - more specific.

19 JUDGE WILSON: But it sounds like your argument  
20 is that unless there's an express provision in a contract  
21 providing that person X is the third-party beneficiary,  
22 person X cannot be a third-party beneficiary.

23 MR. ZAUDERER: Doesn't have to say the words  
24 "third-party beneficiary".

25 JUDGE FAHEY: No, it doesn't, but there's - - -



1 there's as I remember the Aspinal rules that apply  
2 generally to the - - - to this principle and it  
3 specifically does not require an express provision.

4 MR. ZAUDERER: We - - - we agree with that. But  
5 it requires words from which you can divine, not which the  
6 City says, you know, outside the contract, we can consider  
7 affidavits. There is a distinction in your case law  
8 between rights that we would charac - - - that you  
9 characterize as incidental benefits. There's no dispute  
10 here that this was to be built for the City.

11 They say well, there's a provision in the  
12 contract that says we have to indemnify the City. But  
13 that's collateral to the purpose of the contract. The  
14 purpose of the contract is to design and to build the  
15 building.

16 CHIEF JUDGE DIFIORE: What about the other  
17 provisions in the contract that identify the city as the  
18 client, that require Perkins to comply with all of the  
19 procedural rules and requirements of the client? What  
20 about - - - what weight do we ascribe to that?

21 MR. ZAUDERER: Those are the perfect definition  
22 of an end user. Everybody knew this was to be built for  
23 the City.

24 You know, these are sophisticated parties. Why  
25 don't they write in the contract the same words they wrote



1 in the contract with Samson which said - - - which talks  
 2 about enforcement? That is the touchstone of your case.  
 3 Not that the City or somebody else is not a beneficiary,  
 4 but that they are being given enforcement rights. And  
 5 that's a very, very important distinction that comes from  
 6 your own - - - your own cases. And it's - - - it's - - -  
 7 it's really the sine qua non of - - - of a third-party - -  
 8 -

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. ZAUDERER: - - - beneficiary. Thank you.

11 CHIEF JUDGE DIFIORE: Counsel?

12 MR. SLACK: Good afternoon, Your Honor - - -

13 JUDGE FAHEY: So counselor, why don't you have to  
 14 have an express provision in your contract with the  
 15 architects as you do with Samson?

16 MR. SLACK: We - - - we agree with - - - with  
 17 Perkins that you don't need a specific express provision.  
 18 That's what this court has held and it's quite - - - it's  
 19 quite well accepted. And we also agree that this court's  
 20 holding in Fourth Ocean states adopt the restatement  
 21 analysis, which is that the circumstances of the  
 22 transaction are the appropriate analysis. Those  
 23 circumstances include both the language in the contract and  
 24 the nature of the transaction. And that makes sense  
 25 because the doctrine developed because - - -



1 JUDGE FAHEY: As the definite - - - does who the  
2 intended beneficiaries are matter?

3 MR. SLACK: Do - - - does - - - I - - - sure. I  
4 mean, it - - - the - - - the - - -

5 JUDGE FAHEY: So the agencies themselves that  
6 would directly profit, does that matter? Do they have to  
7 be identified?

8 MR. SLACK: They don't - - - well, actually, they  
9 don't have to be specifically - - -

10 JUDGE FAHEY: All right.

11 MR. SLACK: - - - identified, although they are -  
12 - -

13 JUDGE FAHEY: But do the end - - -

14 MR. SLACK: - - - here.

15 JUDGE FAHEY: But they're giving us an end-user  
16 argument.

17 MR. SLACK: Sure. So the - - - the City was far  
18 more than - - - so with respect to the end-user argument, I  
19 think the one - - - one way to think about it is the  
20 distinction between a sub-contractor and an owner. So  
21 traditionally, a - - - when in a large construction  
22 project, it's - - - it's - - - it's known and thought that  
23 the default principles that a sub-contractor is not an in -  
24 - - is not an intended beneficiary of a contract between an  
25 owner and a contractor. But the same is not true for an



1 owner.

2           Legions of Appellate Division cases, New York  
3 jurisprudence, the New York pattern jury instructions all  
4 make a distinguished between an owner and a sub-contractor.  
5 And when a sub-contractor and a contractor engage in a  
6 contract for a project where - - - for a large project to  
7 benefit the owner, to build something for an owner, an  
8 owner is largely considered or very often considered to be  
9 the intended beneficiary.

10           JUDGE STEIN: Well, that - - -

11           MR. SLACK: That makes a lot of sense - - -

12           JUDGE STEIN: There's a difference, isn't there,  
13 between intended beneficiary. I mean, it seems to me that  
14 in virtually every construction case, the - - - the owner,  
15 and this is the end-user argument, is the intended  
16 beneficiary of the contract. That - - - that's not subject  
17 to dispute, but as I understand the - - - the case law is  
18 what has to be shown is a clear intent to give that end  
19 user enforcement rights, the right to enforce somebody  
20 else's obligations or rights under the contract, and - - -  
21 and you know, and a couple of things that Fourth Ocean  
22 talked about was for example where there is no other party  
23 that could sue for a breach or - - - or where they'll - - -  
24 and you talked about the language or where the language of  
25 the agreement clearly evidences this intent not to benefit



1 the owner, but to give that owner enforcement rights and I  
2 don't see certainly either of those factors present here.  
3 So - - - so what makes - - -

4 MR. SLACK: Sure.

5 JUDGE STEIN: - - - this different from every  
6 construction contract?

7 MR. SLACK: Okay. A couple of things in response  
8 to that, Your Honor. First of all, that fa - - - I do want  
9 to - - - the factor in Fourth Ocean which is that only the  
10 third-party beneficiary could enforce, that is considered  
11 to be one - - - one indicia, but not the central one. And  
12 it - - - it's related to, I think, another black letter  
13 principle in this area, which is that if performance is  
14 performed directly for the third party, then it's usually  
15 presumed that third party is intended to benefit and to  
16 enforce.

17 So here, we have a large project for the - - -  
18 for using City use funds on City owned land for a facility  
19 that only the City could possibly use. The Dormitory  
20 Authority is a - - - is a public - - - is a public  
21 authority that has no use for a DNA lab. Only the City  
22 could use it.

23 It therefore, no - - - no party could be disa - -  
24 - could be mistaken about the fact that the purpose of the  
25 contract, the purpose of the project, is to benefit the



1 City and to create a facility that that the City needs and  
2 is devised.

3 JUDGE STEIN: No question about that.

4 MR. SLACK: Sure.

5 JUDGE STEIN: Okay.

6 MR. SLACK: And - - - and as a result - - -

7 JUDGE STEIN: But how - - - how does that get you  
8 to - - - to the intent to allow the City to enforce the  
9 contract when the City didn't enter into the contract?

10 MR. SLACK: Because it's related to the third-  
11 party benef - - - the reason for the third-party  
12 beneficiary doctrine, which is that when a project is  
13 undertaken with the intent to benefit, it's just and  
14 pragmatic to have the - - - the party who's really the  
15 reason for the contract in the first place, the reason - -  
16 -

17 JUDGE STEIN: But it sounds - - -

18 MR. SLACK: - - - for the projects.

19 JUDGE STEIN: - - - to me like that you want to  
20 make that the general rule rather than the exception to the  
21 general rule about who's responsible to who when - - - when  
22 there's a contract, and that's what's troubling me here. I  
23 - - - I just, I - - - I don't - - - I see very few  
24 instances in which it would not apply under your - - - your  
25 theory.



1 MR. SLACK: Well, I - - - I - - - I don't think  
2 we wanted to make it the general rule, but I do think that  
3 when you have a public authority that its main purpose is  
4 to oversee construction projects for public - - - public  
5 entities like the City of New York, that's going to be a  
6 particular situation where the third-party beneficiary  
7 analysis is going to take heed of that - - - of the  
8 essential nature of that transaction.

9 But I also - - - I want to make clear, we - - -  
10 we dispute that - - - that there is no contractual language  
11 that indicates an intent for the City to benefit and to  
12 enforce the right. There - - - there's plenty of it, as  
13 Your Honor was pointing out, first of all, the City  
14 agencies are identified as the client, OCME.

15 JUDGE FAHEY: Right. There's four agencies  
16 identified. What language though, not the agencies  
17 themselves, what language are you pointing to?

18 MR. SLACK: Sure. So the - - - on page 148 of  
19 the record, it specifies that the purpose of the contract  
20 is to build a state of the art forensic crime scene lab to  
21 be operated by OCME, so it's known that this is the purpose  
22 of the project. It also defines on page 135 of the record,  
23 it defines the client as the entity for whom DASNY is  
24 performing services, so DASNY is performing services for a  
25 - - - for a party. That party is going to - - - intends to



1 benefit that party by entering into a contract, and under  
2 traditional third-party beneficiary rules, the City would -  
3 - -

4 JUDGE STEIN: How - - - how does any of that  
5 refer to authority to enforce the contract, though? I  
6 mean, all of - - - all of the things that you've just named  
7 clearly identify who's benefitting from this contract, but  
8 again - - -

9 MR. SLACK: Right.

10 JUDGE STEIN: - - - there's a - - - there's this  
11 - - - I feel there's a step missing that - - - and I - - -  
12 and I don't see how that gap is being - - -

13 MR. SLACK: Well, I think - - -

14 JUDGE STEIN: - - - bridged in your analysis.

15 MR. SLACK: - - - as - - - as the restatement,  
16 you know, deals with the analysis, articulates the  
17 analysis, the - - - the intent - - - the intent to benefit  
18 is a way of getting to the idea of who should have the  
19 right to enforce because when - - - when the - - - when the  
20 City is really the true party interest here. They're the  
21 only ones interested in the lab.

22 And that's why we have a third-party beneficiary  
23 doctrine, so that when the central actor, the one who  
24 really cares about this project, who's closely related to  
25 this project, and here, it's undisputed that not only as -



1 - - does the contract name the City in various ways as a -  
2 - - as the purpose of this contract and the purpose of the  
3 project, but also that it has - - - there's no - - - the  
4 City is the dominant player. It is the only reason for  
5 this contract to exist.

6 And as a result, it has the main interest in  
7 enforcing the rights under the contract, and the contract  
8 was entered into for its benefit. That's the nature of  
9 third-party beneficiary analysis.

10 JUDGE RIVERA: Well, so let's take the  
11 hypothetical. We have a contract to build. Something is  
12 built.

13 MR. SLACK: Sure.

14 JUDGE RIVERA: Is your argument that whoever's  
15 the client, the intended beneficiary of that building is  
16 the one who then has any interest in that building?

17 MR. SLACK: Not necessarily.

18 JUDGE RIVERA: So other parties - - - well,  
19 obviously in this case, the architect, but other parties  
20 would have an interest in that building?

21 MR. SLACK: I - - - I think our argument is that  
22 when a project is undertaken for a - - - for a central  
23 actor who's - - - whose designed and conceived of the  
24 project, who is contracted with another party in order to  
25 achieve that, who is - - - who is - - - where the



1 budgeting, where the funds come from, where it's on this -  
 2 - - on property owned by them, where they're - - - they're  
 3 intimately involved in the design, where there's interviews  
 4 and - - - and you know, lots of - - - of dealings, then  
 5 that makes them an intended beneficiary. I mean, frankly,  
 6 I have to say that it's rare to be so much of in - - - of  
 7 indicative of intent to benefit a third party that - - -

8 JUDGE FAHEY: Well, do you have to establish a  
 9 benefit, or do you have to establish the functional  
 10 equivalent of privity?

11 MR. SLACK: I think the two concepts are related.  
 12 And they - - - they both arise out of this - - - this  
 13 situation, which is when, you know, a project is undertaken  
 14 by an architect or a contract. The question really is is  
 15 this - - - is the party on whose behalf the projects that  
 16 are taken sufficiently close to the transaction such that  
 17 it's - - - it's not - - - it's both reasonable and expected  
 18 that they would have a right to enforce because the  
 19 transaction was undertaken with the intent to benefit them  
 20 or - - -

21 CHIEF JUDGE DIFIORE: How important or  
 22 significant is it that the contracting party is the public  
 23 authority whose job it is to raise funds and manage, and  
 24 ultimately who is responsible for payment of the lab; is it  
 25 the City, is it the State?



1 MR. SLACK: We think it is highly, highly  
 2 relevant here because the - - - basically the pur - - -  
 3 DASNY simply functions to provide a service to - - - to  
 4 benefit the City, and so - - - it's also - - - so it's a  
 5 rare case. It's not that your general construction case,  
 6 it's a case where we have this public authority whose - - -  
 7 whose existence is to provide an intent - - - enter into  
 8 contracts to benefit third parties, and that's what we have  
 9 DASNY here. Especially here where to answer Your Honor's  
 10 question, all the - - - essentially all of the funding  
 11 comes from the City.

12 It - - - over 200 million dollars is - - - was  
 13 reimbursed by the City because they were the real party  
 14 here. They were the real party in the transaction and no  
 15 one doubted that.

16 CHIEF JUDGE DIFIORE: So the City's paying for  
 17 the lab?

18 MR. SLACK: The City has paid - - - the City is  
 19 paying for the lab. If - - - if not everything, then  
 20 almost entirely. And that's why - - - I mean, to strip  
 21 away some of the doctrine, the fact of the matter is, we  
 22 have a project that was conceived of by the City, arranged  
 23 for the City, and built for the City's unique needs; no  
 24 other entity would need this other than the City. It makes  
 25 - - - it just makes just and practical sense to permit them



1 to assert a right that arises out of that, and if - - - if  
2 Your Honors would give me one more minute just to respond  
3 to two - - - two quick points that my - - - my counsel  
4 made?

5 CHIEF JUDGE DIFIORE: You have your minute.

6 MR. SLACK: Thank you. Number one, just in terms  
7 of the statute of limitations for the tort claim, because  
8 the City is a third-party beneficiary, and is related to  
9 the transaction or is - - - or perhaps has the functional  
10 equivalent to privity with respect to the transaction, the  
11 claim accrues at the end of the project in 2007, and as a  
12 result, both the contract and the tort claim is timely. So  
13 once we find that the City is in - - - is either in privity  
14 or has functional privity with - - - with Perkins as - - -  
15 as a result of the contractual relationship, the tort claim  
16 is - - - it becomes timely.

17 JUDGE WILSON: Did you raise that in the  
18 Appellate Division?

19 MR. SLACK: We - - - we did. We - - - in the  
20 Appellate Division, we specifically briefed both the  
21 contract and the tort claim. We didn't - - - we didn't  
22 raise the statute of limitation - - -

23 JUDGE WILSON: That's why I'm asking.

24 MR. SLACK: We didn't - - - we didn't - - - I  
25 don't believe we argued statute of limitations, but all the



1 - - - all of the parties understood that the tort claim  
2 rose and fell as a result of third-party beneficiary status  
3 for the very reason - - -

4 JUDGE WILSON: Mr. Zauderer just did not concede  
5 that, so I'm not sure that all of the parties understood  
6 it.

7 MR. SLACK: Well, the City raised - - - argued  
8 that both its tort and contract claims were - - - should go  
9 forward. And the only reason the tort claim could go  
10 forward was because of their status as third-party  
11 beneficiary.

12 JUDGE STEIN: But didn't the Appellate Division  
13 say that DASNY may proceed with its negligence claim? I -  
14 - - I am not sure how you're reading into the Appellate  
15 Division order that your claim - - - that the City's claim  
16 was restored.

17 MR. SLACK: The Appellate Division - - - the  
18 parties briefed that the City had a tort claim. The  
19 Appellate Division's analysis contemplates that it does.  
20 And the Appellate Division's decretal paragraph states that  
21 it - - - it would not - - - it was denying summary judgment  
22 with respect to the sixth cause of action as to plaintiffs  
23 which includes the City and DASNY and is the negligence  
24 claim vis-a-vis Perkins.

25 And one final - - - one final point to make just



1 with respect to independent tort duties with professional  
2 malpractice. It is a long and well-established legal - - -  
3 legal jurisprudence that a - - - architects, lawyers,  
4 doctors, have duties that are both - - - that both sound in  
5 contract and in tort. This court recognized it in the  
6 Sears and Roebuck case. It recognized it in Brushton-  
7 Moira, and it recognized it in Sommer. And so there's - -  
8 - there's simply nothing novel about a party interested in  
9 both claims.

10 JUDGE WILSON: Can I just ask you the same  
11 question that I asked Mr. Zauderer? Have you come across a  
12 case from the Court of Appeals where this court has said  
13 you - - - a plaintiff cannot proceed simultaneously with a  
14 professional malpractice claim and a contract claim?

15 MR. SLACK: I have not come across that case,  
16 Your Honor. And - - - but I - - - but I will say that the  
17 Sears case essentially stands for the opposite. And one  
18 can - - - one can glean that from the analysis of the  
19 method of proof that the court contemplated with to go  
20 forward at trial.

21 In Sears and Roebuck, the - - - this court held  
22 that because the plaintiff was rai - - - was raising both a  
23 contract and a tort claim, its proof would be they could  
24 submit proof of trial both to a breach of particular  
25 contractual provision, or a breach of a duty of care or a



1 breach of some standard of architectural practice that the  
2 defendant had - - - had committed. So that clearly speaks  
3 to the fact that both claims can be brought.

4 Now, that said, we're not going to get  
5 duplicative relief. We're simply trying to make ourselves  
6 whole through both theories of liability.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. SLACK: Thank you very much.

9 CHIEF JUDGE DIFIORE: Mr. Zauderer?

10 MR. ZAUDERER: A couple of points, if I may, in  
11 seriatim. First of all, the privity reference, I submit,  
12 is a misdirection. The privity case that's cited in the  
13 brief was a negligence case, not a contract case. The  
14 question of third-party beneficiary status was assumed. It  
15 was not contested. It was a case where it was held because  
16 of the nature of the privity relationship between the party  
17 to the contract and the third party that the statute of  
18 limitations bar on the party to the contract would be  
19 applied, rather the tort statute of limitation, would be  
20 applied to the other party.

21 If we were to - - - if the Court were to import  
22 the separate jurisprudence that's gone on for a hundred  
23 years with respect to tort and privity into the third-party  
24 contract realm, it would be upending dozens and dozens of  
25 cases that have made the analysis of third-party



1 beneficiary liability without regard to anything regarding  
2 privity. It would - - - they developed on completely  
3 separate lines and I think that would not be a wise course  
4 for the public.

5 I want to also say that the Sears Roebuck case  
6 which was referred to, if one analyzes that case, all that  
7 was held there was that at the pre-discovery stage, the two  
8 claims, tort and contract could proceed because it was not  
9 clear, unlike in this case whether there could be separate  
10 damages proven. So that case is distinguishable.

11 And finally, on the subject of what's in the  
12 contract that suggests a third-party status, the Fourth  
13 Ocean case, which was referred to says very clearly that  
14 they emphasize the factor of upholding the third party's  
15 right to enforce the contract. That's the language we've  
16 been talking about. And the record page 786, I eluded  
17 earlier to the contract between DASNY and Samson, unlike  
18 the one with, with Perkins, says, and I quote, "It is  
19 understood that the client," the City, "is an intended  
20 third-party beneficiary of a contract for the purpose of  
21 recovering any damages caused by the contractor." So they  
22 tied in specifically to the language in Fourth Ocean which  
23 illustrates the principle that enforcement is what is key.  
24 And the distinction or the importance here is whether there  
25 is an enforcement right that could be clearly gleaned from



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the contract, not the right to be the end user at the right  
to benefit from the contract. Thank you.

JUDGE WILSON: You - - -

CHIEF JUDGE DIFIORE: Thank you, counselor.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Gina Gattone, certify that the foregoing transcript of proceedings in the Court of Appeals of Samson Construction v. Dormitory Authority of the State of New York, No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue  
Suite 604  
New York, NY 10001

Date: January 11, 2018

