

Frank Parlamis, Inc. v Helmsley-Spear, Inc.
2007 NY Slip Op 33473(U)
October 23, 2007
Supreme Court, New York County
Docket Number: 0113199/2005
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 15

Index Number : 113199/2005

FRANK PARLAMIS INC.

vs

HELMSELY-SPEAR

Sequence Number : 002

SUMMARY JUDGMENT

FILED
 INDEX NO. _____
 MOTION DATE _____
 OCT 25 2007
 MOTION SEQ. NO. _____
 ZUJ/
 MOTION CAL. NO. _____
 NEW YORK
 COUNTY CLERK'S OFFICE

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOUNTING MEMORANDUM DECISION

Dated: 10/23/07

W
WALTER B. TOLUB S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
FRANK PALARMIS, INC.

Plaintiff,

Index No. 113199/05
Mtn. Seq. 002

-against-

HELMSLEY-SPEAR, INC., 1333 BROADWAY
ASSOCIATES, 1333 BROADWAY ASSOCIATES, LLC
and JACK SIEGEL

Defendants.

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OCT 25 2007
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WALTER B. TOLUB, J.:

By this motion Defendants seek summary judgment dismissing Plaintiff's complaint pursuant to CPLR 3212(b). Plaintiff cross-moves for an order compelling the Defendants to answer disclosure requests. Defendants' motion is granted and Plaintiff's cross-motion is denied as moot.

Facts

Defendant Helmsley-Spear Inc., is the managing agent of the building located at 1333 Broadway, New York ("Building"). Defendant Jack Siegel is an employee of Helmsley Spear Inc. Defendant 1333 Broadway Association, LLC is the net lessor and landlord of the Building ("Landlord"). On June 17, 2003, the Landlord entered into a lease with 1333 Pronto Corp. ("Lease"), d/b/a Pronto Pizza ("Pronto Pizza" or "Tenant"). The Lease provides that it may not be assigned without the Landlord's written consent. (D Ex. C para 56(a)). Pronto Pizza is not a named party in this action.

Plaintiff is a general contractor specializing in the construction and "fit-up" of restaurants. In 2003, Plaintiff was contacted by Pronto Pizza to perform construction work for its store located in the Building.

Mr. Siegel provided Pronto Pizza and Plaintiff with a list of items that needed to be discussed at a preconstruction meeting (P Ex. E). Plaintiff claims that he told Mr. Siegel he would not sign a security contract with Pronto Pizza unless an agreement was reached by which the Lease would be Assigned to the Plaintiff in the event of a default. Plaintiff further claims that Mr. Siegel represented that the Assignment request was agreed to by the Defendants. Plaintiff claims that he relied on Mr. Siegel's representations and only then signed the contract with Pronto Pizza. The Defendants were not parties to the security contract and there is no clause in the contract regarding a Lease Assignment to the Plaintiff. (Security Contract Ex. D).

Plaintiff asserts that after work began, he inquired as to the Assignment and that Mr. Siegel represented that the Assignment would be provided if Plaintiff performed sprinkler work for the building. Plaintiff performed the sprinkler work in addition to other work in the building in order to complete the Pronto Pizza project.

Pronto Pizza defaulted on its notes and Plaintiff sought what he thought was his security, the Lease assignment.

Defendants refused to give consent to an Assignment of the Lease.

Plaintiff then brought the underlying action claiming that: (1) it is a third-party beneficiary to the Lease between the landlord and tenant; (2) as a third-party beneficiary he is entitled to damages caused by not being able to begin work on the Pronto Pizza project because of the Building violations; and (3) Defendants were unjustly enriched because of the work that Plaintiff performed in the Building.

Defendants seek summary judgment dismissing the Complaint because Plaintiff is not a third-party beneficiary to the Lease between the Landlord and Tenant and therefore has no enforceable rights with respect to the Defendants. Additionally, Defendants argue that Plaintiff cannot assert claims against the Defendants on behalf of the Tenant, a non-party. Defendants motion is granted and Plaintiff's cross-motion for discovery is not decided since it is deemed moot.

Discussion

Defendants' motion is granted because the Plaintiff is not a third-party beneficiary of the Lease between the Pronto Pizza and Defendants and has no enforceable rights against the Defendants.

It is well settled that third-party beneficiary status only exists where the party is an intended beneficiary. Hot Water Specialists, Inc. v. Hans Bazlen, 91 AD2d 1013 [2d Dept 1983] *emphasis added*). An intended beneficiary is defined as one where

(1) performance of the underlying promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (2) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. (22 NY Jur.2d Contracts, §304; Fourth Ocean Putnum Corp. v. Interstate Wrecking Co., 66 NY2d 38 [1985]). If a party is not an intended beneficiary, he is a mere incidental beneficiary, with no enforceable rights. (Fourth Ocean Putnum Corp. v. Interstate Wrecking Co., 66 NY2d 38 [1985]) Furthermore, reliance by the claimed beneficiary must be reasonable under the circumstances. (Id.)

It is the Plaintiff's burden to establish that it is a third-party beneficiary. (Flemington National bank and Trust Co. v. Dolmer Leasing Corp., 65 AD2d 26 [1st Dept 1989]). Here, Plaintiff seeks third-party beneficiary status under the Lease which was between Pronto Pizza and the Landlord. The Lease is solely concerned with the tenancy of Pronto Pizza at the Building and does not even mention Plaintiff, let alone mention Plaintiff as a third-party beneficiary. Additionally, Plaintiff's argument that its Security Agreement with Pronto Pizza affords it third-party beneficiary status fails because the fact remains that there is nothing in the Lease to support an intent by any of the parties to the Lease to benefit a third-party.

Plaintiff also claims that there was an oral assignment of

the Lease and that there was a direct oral contract with the Landlord regarding sprinkler work that Plaintiff performed as part of the construction contract with Pronto Pizza. However, the "parol evidence rule" forbids proof of an oral agreement that might add or vary the terms of an written contract that was intended to embody the entire agreement between the parties. (Stage Club Corp. v. West Realty Co., 212 AD2d 458 [1st Dept 1995]).

Here, the Lease explicitly requires that any request for an assignment be in writing. Also, Pronto Pizza would be entitled to request an assignment of the Lease, not the Plaintiff. It is clear from all the documentary evidence that Pronto Pizza never made such a request *in writing as required by the Lease* and the "parol evidence rule". (*Emphasis added*).

The Plaintiff also argues that the Defendants were unjustly enriched by the sprinkler work it performed in the Building. A person or entity is deemed to be unjustly enriched if a benefit was received, the retention of which would be unjust. (Sharp v. Kosmalski, 40 NY2d 119, 123 [1979]). The conclusion that one has been unjustly enriched is a legal inference drawn from the circumstances surrounding the transfer of property and the relationship of the parties. (Id.) It is a conclusion reached through the application of the principals of equity. (Id.) The 200 PSI sprinkler test that Plaintiff performed was required by

Code as a direct result of the construction work that it was to perform for Pronto Pizza. Pronto Pizza would be responsible for the payment of the test performed under the Lease as well as the Security Agreement. The Defendants, having no relationship to the Plaintiff or the security contract, have not been unjustly enriched.

Accordingly it is

ORDERED that Defendants' motion for summary judgment is granted and the Complaint is dismissed; and it is further


ORDERED that Plaintiff's cross-motion for discovery is denied as moot; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/23/07

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HON. WALTER B. TOLUB, J.S.C.