

Butterbaugh v Bezon
2007 NY Slip Op 33781(U)
November 16, 2007
Supreme Court, Wayne County
Docket Number: 0061628/2007
Judge: Dennis M. Kehoe
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

DONALD and BARBARA BUTTERBAUGH,

Plaintiffs,

-vs-

DECISION
AND
ORDER

STACEY L. BEZON d/b/a MFB GENERAL
CONTRACTING, MICHAEL BEZON,
STACEY L. BEZON individually, and
SAFEGUARD PROPERTY, INC.

Index No. 61628
2007

Defendants.

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Attorneys for Plaintiffs

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Attorneys for Defendant Safeguard Property, Inc.

Stacey L. Bezon d/b/a MFB General Contracting
Michael Bezon and Stacey L. Bezon, Individually
Pro Se

The Defendant Safeguard Property, Inc. ("Safeguard") has moved for an order pursuant to CPLR §3211(a)(7) dismissing the Fourth Cause of action in the Plaintiffs' Complaint, which alleges negligence on the part of Safeguard. In response, the Plaintiffs ("Butterbaugh") have moved for an

order dismissing Safeguard's motion as premature and permitting the Plaintiffs to amend their Complaint pursuant to CPLR §3025, in order to assert a third party beneficiary claim against Safeguard. The Plaintiffs have also moved for a default judgment against Michael and Stacey L. Bezon, Individually, and Stacey L. Bezon d/b/a MFB General Contracting ("Bezon" and/or "MFB"). Bezon has submitted no papers in opposition to the motion, but appeared in person on the return date of the motion.

The action arises from a fire which occurred on May 3, 2006 at premises located at 3171 Canandaigua Road, Macedon, New York, which were owned by the Butterbaughs. The Plaintiffs' insurer agreed to pay the sum of \$118,283.00 to the Plaintiffs and Plaintiffs' mortgagor ("HSBC") for the fire loss sustained by the Plaintiffs. HSBC held this money in escrow during the construction work. The Plaintiffs hire MFB and Bezon to perform the repairs, together with new construction, for the total sum of \$141,000.00. HSBC retained the services of Safeguard to conduct periodic inspections of the work site and to report to HSBC when partial payments to MFB were authorized. During the period from August 19, 2006 through December 20, 2006, MFB was paid a total of \$141,283.00 by the Plaintiffs and HSBC. During that same time, Safeguard did in fact

conduct inspections and authorized payments.

However, the Plaintiffs allege that Bezon stopped working on December 20, 2006 without having completed the construction required under the contract. The Plaintiffs further allege that Stacey Bezon falsely reported to Safeguard that MFB should be paid for work which was not completed, and that Safeguard was negligent in authorizing payments by HSBC under such circumstances.

In their Complaint, the Plaintiffs have set forth claims against MFB and Michael Bezon for breach of contract, negligence and fraud (First, Second and Third Causes of Action, respectively). The Fourth Cause of Action sets forth a claim against Safeguard, based on its alleged negligence in inspecting the construction and authorizing payments under the terms of its contract with HSBC. The Fifth Cause of Action sets forth a claim against Stacey Bezon based on fraud.

Safeguard has moved to dismiss the Fourth Cause of Action, maintaining that, with very limited exceptions, the courts have consistently held that breach of a contractual obligation by a party to the contract will not be sufficient to impose tort liability on a non-contracting third party. These narrow exceptions have been defined by the Court of Appeals in

Church v. Callanan Indus., Inc., 99 NY2d 104 (2002) and Espinal v Melville Snow Contractors, Inc., 98 NY2d 136 (2002). Safeguard maintains that these exceptions do not apply to the instant case.

The Court agrees. The Plaintiffs' contentions regarding Safeguard's alleged negligence do not fit within any of the recognized exceptions to the general rule that a duty of care to non-contracting third parties may not arise out of a contractual obligation or the performance thereof. (See Church at 111). Therefore, the Plaintiffs have failed to meet the threshold burden of making a prima facie showing that Safeguard owed a duty of care to the Plaintiffs in the performance of Safeguard's alleged contractual obligations to HSBC.

In response to Safeguard's motion, the Plaintiffs do not raise any compelling arguments in support of their negligence claim, other than to allege that discovery has not been conducted, and the motion is therefore premature. Rather, the Plaintiffs have cross-moved for an order permitting them to amend their Complaint to allege that they may be intended third party beneficiaries under the terms of the contract between Safeguard and HSBC, and therefore Safeguard may be liable to the Plaintiffs for the breach of its duty to HSBC.

However, in response to the Plaintiffs' cross-motion, Safeguard has submitted a copy of the contract between Safeguard and HSBC. In order to establish a proposed third-party beneficiary claim, Butterbaugh must be able to show that the contract clearly reflects the contracting parties' intention to confer a benefit on the Plaintiffs that is "more than merely incidental to the benefits afforded the contracting parties" and "evince(s) an intent to permit enforcement by the third party". (See, e.g. Teachers, Inc. and Annuity Ass'n v. Tedeschi, 3 AD3d 671 (3rd Dept, 2001)). In this instance, the Plaintiffs are unable to meet that burden; in fact, §26.02 of the contract expressly disavows any intention of the parties to confer benefits on third parties and specifically states that "nothing contained herein shall be construed as creating any right, claim or cause of action in favor of any such third party against either of the parties hereto." Therefore, since Safeguard has come forward with proof demonstrating that the Plaintiffs are no more than, at best, incidental beneficiaries of the contract, the Plaintiffs' motion for leave to amend the Complaint must be denied. (See, e.g. DeLine v CitiCapital Commercial Corp., 24 AD3d 1309 (4th Dept, 2005)).

Finally, the Court has considered the Plaintiffs' motion for a default

judgment pursuant to CPLR §3215 against MFB and Bezon. The Defendants were served with the Summons and Complaint on May 1, 2007. On or about May 25, 2007, the Defendants filed an unsigned “Answer” with the Court, in which they claim that MFB ceased work in December 2006 due to the Plaintiffs’ alleged failure to pay for certain upgrades requested by the Plaintiffs as part of the overall construction.

A strong public policy exists which favors the disposition of matters on their merits. (See, e.g. *Bunch v. Dollar Budget*, 12 AD3d 391 (2nd Dept, 2004)). The instant matter is analogous to the situation in *Ahmed v Aniowski, d/b/a Tom’s Carpentry and Painting*, 28 AD3d 692 (2nd Dept, 2006), in which the defendant made “a good faith, albeit unsuccessful attempt to timely answer the Summons and Complaint and to respond to the motions.” As in *Ahmad* there is no showing that MFB/Bezon’s default was “intentional, made in bad faith, or with an intent to abandon the action”. Given these factors, together with the lack of prejudice to the Plaintiffs, this Court finds that it would be inappropriate to grant a default judgment against the Defendants.

Therefore, the motion to dismiss the Fourth Cause of Action in the Complaint against Safeguard is granted with prejudice, and the Plaintiffs’

motion to amend the Complaint is denied. The Plaintiffs' motion for a default judgment against the Defendants MFB/Bezon is denied, on the condition that the Defendants file an Answer pursuant to CPLR §3011 and §3018 with the Court and serve a copy upon counsel for the Plaintiffs within 20 days after service by the Plaintiffs of a copy of this Decision upon the Defendants.

This Decision constitutes the Order of the Court.

Dated: November 16, 2007
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice

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