

49 East 21 LLC v AJS Project Mgt., Inc.

2008 NY Slip Op 31773(U)

June 17, 2008

Supreme Court, New York County

Docket Number: 0601417/2006

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK

PRESENT: J.B.C.

PART 2

Index Number : 601417/2006

49 EAST 21 LLC

vs.

AJS PROJECT MANAGEMENT

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 25 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/17/08

Luy

J.S.C.

Check one: FINAL DISPOSITION

LOUIS B. YORK NON-FINAL DISPOSITION
J.S.C.

Check if appropriate

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. LOUIS B. YORK
Justice

PART 2

-----X
49 EAST 21 LLC and THE ELAD GROUP, LTD.,

Plaintiffs,

Index No.
601417/06

-against-

**AJS PROJECT MANAGEMENT, INC. , MATRIX
CONSTRUCTION, LLC, ROBERT C. HOHMANN,
ANTHONY SCLAFANI, ULTIMATE PARRTITIONS, INC.,
SILIGHT LIGHTING, INC., OCEAN-BREEZE AIR
CONDITIONING CORP., K-VENT,INC., OAKWOOD
CLASSIC & CUSTOM WOODWORKS, INC., NORTHLAND
CONSTRUCTION, LLC, CASTLE MASONRY, INC., B&B
IRON WORKS CORP., ARCADE CONTRACTING &
RESTORATION, INC., A.U.M A&C, LTD., MAKUNA
TILE, INC., C.H. SCHMITT & CO., INC., DANICA
PLUMBING & HEATING, LLC, U.S. ELECTRIC CORP.,
KING FREEZE MECHANICAL CORP., SERVTECH CORP.,
KUDOS CONSTRUCTION CORP., EAST COAST
ELECTRIC, INC., and DOES 1 TO 10,**

Defendants,

-----X
KING FREEZE MECHANICAL CORP.,

Third-Party Plaintiff,

Index No. 590757/06

-against-

**AVALANCHE AIR ENTERPRISES, INC., and
AVALANCHE COOLING CORP.,**

Third-Party Defendants,

-----X
**AJS PROJECT MANAGEMENT, INC., MATRIX
CONSTRUCTION, LLC, ROBERT C. HOHMANN,
ANTHONY SCLAFANI,**

Index No. 591080/06

Second Third-Party Plaintiffs,

-against-

**ROTAVELE ELEVATOR, C.H. SCHMITT & CO., INC.,
SERVTECH CETRA/RUDDY, INC., DUN RITE
FLOORING , NORTHLAND CONSTRUCTION, U.S.
ELECTRIC CORP., EL-AD PROPERTIES NY, LLC,
THOMAS ELLIOT and MIKI NAFTALI,**
Second Third-Party Defendants.

-----X
LOUIS B. YORK, J.:

Defendant Danica Plumbing & Heating LLC, now known as Danica Group LLC (Danica) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint as to it.

Plaintiffs 49 East 21 LLC (49 East) and The Elad Group, Ltd. are, respectively, the owner and the developer of a building located at 49 East 21st Street in Manhattan that plaintiffs wished to convert from commercial use to residential condominium units. On or about October 31, 2003, 49 East entered into a contract with defendants AJS Project Management, Inc. (AJS) and Matrix Construction, LLC (Matrix), as general contractor. On or about November 24, 2003, Matrix entered into a subcontract with Danica as subcontractor, pursuant to which Danica would provide plumbing work, HVAC, mechanical ductwork, and sprinkler installation at the premises. The fifth cause of action in the complaint alleges breach of contract against each of the subcontractor defendants, on the theory that each subcontract with Matrix was intended to confer a benefit upon plaintiffs, or alternatively, that each subcontract provided a beneficial interest to plaintiffs in the enforcement of the subcontract against Matrix and the subcontractor. The sixth cause of action alleges that each of the subcontractor defendants was negligent in the

performance of its work.

"A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary." LaSalle National Bank v Ernst & Young LLP, 285 AD2d 101, 108 (1st Dept 2001). That, like all subcontractors on construction jobs, Danica may have contemplated that its performance would ultimately benefit plaintiffs, does not suffice to make plaintiff an intended beneficiary of Danica's contractual obligations to Matrix. A party will be recognized as an intended beneficiary of a promise, either if "performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary' [citation omitted]" (Fourth Ocean Putnam Corp. v Interstate Wrecking Co., 66 NY2d 38, 44 [1985]), a condition that is not relevant here, or if "the language of the contract ... clearly evidences an intent to permit enforcement by the third party." Id. at 45. "[T]he best evidence of [an] intent to bestow a benefit upon a third party is the language of the contract itself." 243-249 Holding Co., LLC v Infante, 4 AD3d 184, 185 (1st Dept 2004), and indeed, "the parties' intent to benefit the third party must be apparent from the face of the contract." LaSalle National Bank v Ernst & Young LLP, 285 AD2d at 108,

Here, the contract between Matrix and Danica disavows any intent to benefit 49 East. While the Standard Form of Agreement Between Contractor and Subcontractor, AIA Document A401 -- 1997, separate copies of which, identical in all relevant respects, were signed by Matrix and Danica, provides, at paragraph 1.1, that "The Subcontract

Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other contract documents enumerated therein; ..." (emphases added), the portion of paragraph 1.1 that is underlined here is crossed out. In addition, the provision at paragraph 4.6 for indemnification of the Owner by the Subcontractor is crossed out. Finally, the Subcontract deletes, by crossing out all references to the Contract, except the initial reference thereto which merely serves to identify the location of the work to be performed pursuant to the Subcontract. In short, while the Subcontract does not include a clause explicitly barring enforcement by 49 East (see City of New York [Dept. of Parks & Recreation -- Wollman Rink Restoration] v Kalish-Jarcho, Inc., 161 AD2d 252 [1st Dept 1990]), nothing in the language of the subcontract evinces an intent to benefit 49 East, or to allow it to enforce the Subcontract against either Matrix or Danica, and the deletions mentioned above implicitly negate any such intention. Consequently, the fifth cause of action is not viable as against Danica. That the Contract requires Matrix to make 49 East the third-party beneficiary of each subcontract that Matrix enters into is a matter between 49 East and Matrix. It is irrelevant to plaintiff's contractual claim against Danica.

The sixth cause of action alleges that "[e]ach of the Subcontractor Defendants breached its duty to meet its obligations with respect to the Work in a skillful and workmanlike manner." Generally, a non-party to a contract may sue in tort for a party's failure to perform its contractual duty: (1) where the contracting party, in fails to exercise

reasonable care in the performance of its duties, by launching a force or instrument of harm; "... (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." Espinal v Melville Snow Contrs., Inc., 98 NY2d 136, 140 (2002) (internal quotation marks and citations omitted). While plaintiffs contend in their brief that they detrimentally relied upon the subcontractors' performance of their contractual duties, the complaint alleges the same damages in the sixth cause of action as it alleges in the fifth cause of action, and it alleges no fact from which reliance may be inferred, other than the reliance that any owner of a construction project would have on the work that is to be performed by the contractor and the subcontractors. In any event, the owner of a construction project may not recover economic losses arising from negligent construction by a party with whom it is not in privity of contract. Residential Bd. of Mgrs. of Zeckendorf Towers v Union Square-14th Street Assocs., 190 AD2d 636 (1st Dept 1993); Key Intl. Mfg., Inc. v Morse/Diesel, Inc., 142 AD2d 448 (2d Dept 1988); Lake Placid Club Attached Lodges v Elizabethtown Bldrs., 131 AD2d 159 (3d Dept 1987).

Accordingly, it is hereby

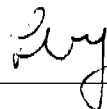
ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant Danica Plumbing & Heating LLC and the Clerk is directed to enter judgment in favor of said defendant with costs and

disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of this action shall continue.

Dated: 6/17/08

ENTER:



J.S.C.

LOUIS B. YORK
J.S.C.

FILED
JUN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE