

Blake Elec. Contr. Co. v Ameribuild Constr. Mgt.
2008 NY Slip Op 32049(U)
July 8, 2008
Supreme Court, New York County
Docket Number: 0112112/2007
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Jacob A. Milder

PART _____

Index Number : 112112/2007
BLAKE ELECTRIC CONTRACTING
VS.
AMERIBUILD CONSTRUCTION
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 112112-07

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

Read on this motion to ~~for~~ dismiss Third-
Party complaint

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
the attached Memorandum Decision + Order.

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

FILED
JUL 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 7, 2008

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
BLAKE ELECTRIC CONTRACTING CO., on behalf of
itself and all other persons similarly situated as trust fund
beneficiaries of Lien Law trusts of which Ameribuild
Construction Management, Inc. Is a Trustee,

Index No. 112112/07

Plaintiffs,

-against-

AMERIBUILD CONSTRUCTION MANAGEMENT,
INC., BRANDON ROTH, CIAO-DI RESTAURANT
CORPORATION and JOHN DOES "1" THROUGH "10,"

Defendants.

-----X
AMERIBUILD CONSTRUCTION MANAGEMENT,
INC., and BRANDON ROTH,

Index no. 591136/07

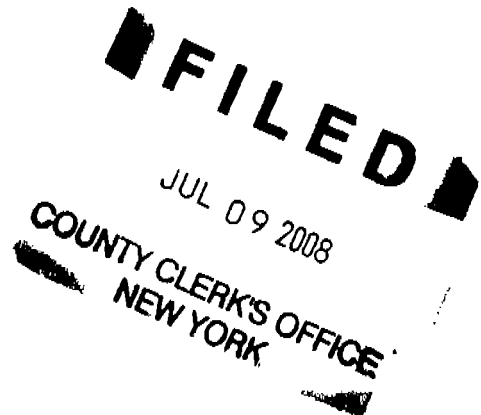
Third Party Plaintiffs,

-against-

PAXTON 350, LLC, ALAN B FRIEDBERG, and
DAVID GRUBER,

Third Party Defendants.

-----X



JOAN A. MADDEN, J:

Third-party defendants Alan B. Friedberg and David Gruber ("the moving defendants")
move for an order (1) dismissing the third-party complaint against them on the ground that it fails
to state a cause of action and based on documentary evidence; (2) granting sanctions against
third-party plaintiffs and/or their attorneys for frivolous conduct. Third-party plaintiffs oppose
the motion. For the reasons below, the motion to dismiss the third-party complaint is granted, and

the request for sanctions is denied.

Background

This is an action brought by the plaintiff subcontractor Blake Electric Contracting Co. ("Blake") to recover moneys allegedly due and owing to it for electrical work performed at 354 Sixth Avenue, New York, NY ("the Premises"). The Premises is owned by defendant Ciao-Di Restaurant Corporation ("Ciao-Di"). Defendant/third-party plaintiff Ameribuild Construction Management, Inc. ("Ameribuild") is a general contractor and construction manager, and was involved in a project at the Premises from approximately 2005 through July 2007. Defendant/third-party plaintiff Brandon Roth is the President of Ameribuild. The moving defendants are members/agents of third-party defendant Paxton 350, LLC ("Paxton").

The third-party complaint alleges that Paxton and the moving defendants signed change orders for work on the Premises for their own behalf and/or as agents of Ciao-Di without Ameribuild's knowledge and consent, therefore causing Blake to perform unauthorized work at the Premises. The third-party complaint thus seeks indemnification/contribution against Paxton and the moving defendants, jointly and severally, for the any amounts awarded to Blake.

The moving defendants seek to dismiss the third-party action against them based on documentary evidence. In support of the motion, the moving defendants submit two "change order" forms that they signed in their capacity as members of Paxton. Based on these change order forms, the moving defendants argue that they cannot be held liable to Ameribuild since they were acting as agents for a disclosed principal and neither change order indicates in any way that they intended to sign them in their individual capacity or to otherwise be held individually liable for any obligations under the change orders.

The moving defendants also seek an award of sanctions against the third-party plaintiffs and/or their counsel for the commencement of frivolous proceedings.

In opposition, the third-party plaintiffs argue that the third-party complaint sufficiently states a cause of action against the moving defendants for tortiously causing plaintiff Blake to breach its subcontractor agreement with Ameribuild by performing unauthorized work as part of construction work for the Premises. Specifically, they argue that the moving defendants signed change orders and took other actions without authorization from Ameribuild that caused Blake to perform unauthorized work for which it charged Ameribuild.

Additionally, third-party plaintiffs argue that the change order forms should be disregarded since they were provided to the moving defendants' counsel in an effort to settle claims against them. Ameribuild also opposes the request for sanctions.

In support of its position, Ameribuild submits the affidavit of its President, defendant Brandon Roth ("Roth"). Roth states that Ameribuild, which he described as a construction company that acts a general contractor and a construction manager, had two contractual arrangements related to the construction work at the Premises. The first contract was a construction management agreement in which Ameribuild provided construction services to Ciao-Di and its development partner, Paxton, in building a multi-story building at the Premises. Although Blake was under contract to perform electrical construction services in constructing the building, like all trades at the project, Blake contracted directly with the owner or developer, and not with Ameribuild. Roth thus asserts that to the extent the money sought by Blake involves work on the multi-story building, Ameribuild as construction manager, would not be liable.

The second contractual arrangement that Ameribuild entered into concerning the

Premises was as a general contractor hired by HSBC Bank to build a bank branch on the first floor of the building constructed on the Premises. As general contractor on this project, Ameribuild hired Blake as a subcontractor to provide certain electrical work. Although Blake is suing for moneys allegedly owed to it by Ameribuild for this work, Roth argues that Ameribuild does not owe this money since the amounts sought by Blake are a result of the change order forms signed by the moving defendants, which were unauthorized by Ameribuild. Specifically, Roth asserts that Blake's performance of this unauthorized work constitutes a breach of Ameribuild's subcontractor agreement with Blake and that the moving defendants purposefully interfered with the subcontractor relationship to shift costs for work to Ameribuild.

In reply, the moving defendants assert that an agent for a disclosed principal may be held liable only where he acts in bad faith and is guilty of tortious conduct independent of his principal, (Murtha v. Yonkers Child Care Assn., 45 NY2d 913, (1978)), and that there are no allegations in the third-party complaint from which this kind of conduct can be inferred. They also argue that as the change order forms are being relied on for their factual content, they may be used in support of their motion, even if they were provided in connection with settlement negotiations.

Discussion

On a motion to dismiss, the court must construe "the complaint liberally, and accept as true facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accord plaintiff the benefit of every possible favorable inference." Richbell Informational Services, Inc. v. Jupiter Partners, 309 A.D.2d 288, 289 (1st Dept 2003) (citations omitted). Thus, a "dismissal under CPLR 3211 (a) (1) is warranted only if the documentary evidence

conclusively establishes a defense to the asserted claims as a matter of law.” Id., at 289 (citations and emphasis in original omitted).

Here, the change orders signed by the moving defendants offered as documentary evidence establish a defense to the claims asserted in the third-party complaint against the moving defendants as a matter of law. First, contrary to the position of the third-party plaintiffs, the change orders, which were exchanged in connection with settlement discussions, may be used to establish a defense to the third-party complaint since “[p]re-existing documents or other materials that are revealed during settlement negotiations do not become immunized merely because of their disclosure in the negotiations.” Alexander Commentaries, Book 7B, McKinney’s Consol. Laws Of New York, CPLR 4501-5000, at 842; see also CPLR 4547.

Next, it is well settled that “an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agents intention to substitute or superadd his personal liability for, or to, that of his principal.” Salzman Sign Co. v. Beck, 10 N.Y.2d 63, 67 (1961), quoting Mencher v. Weiss, 306 N.Y.2d 1, 4 (1953); see also, Rene Boas and Associates v. Vernier, 22 A.D.2d 561 (1st Dept 1965); Jevremov v. Crisci, 129 A.D.2d 174 (1st Dept 1987). A review of the change orders reveals that the moving defendants signed the forms as officers of Paxton, a disclosed principal, and do not evidence any intention by them to be held personally liable. See Salzman Sign Co. v. Beck, 10 N.Y.2d at 67.

The court recognizes that “a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course official duties and regardless of whether the corporate veil is pierced.” American Express Travel Related Servs. Co. v. North Atl. Resources, 261 A.D.2d 310, 311 (1991). Likewise,

while an officer of a corporation cannot be held liable for inducing a breach of contract as long as he acts in good faith as officer of the corporation, he may be liable if it can be shown that he committed "independent torts or predatory conduct." Murtha v. Yonkers Child Care Assn., 45 N.Y.2d 913, 915 (1978)(citation omitted).

In this case, the statements in Roth's affidavit suggest that a viable cause of action may exist against the moving defendants based on allegations of tortious conduct, bad faith or affirmative wrongdoing. Parkway Windows, Inc. v. River Tower Associates, 108 A.D.2d 660, 665 (1st Dept. 1985). Notably, however, the third-party complaint does not include such allegations but instead only alleges that the moving defendants "signed changed orders for work on the Project [i.e. building the HSBC branch] without Ameribuild's consent. . . . [and] caused Blake to perform work on the Project without Amcribuild's consent."

In addition, the third-party plaintiffs have not sought leave to amend the third-party complaint to include allegations based on the Roth affidavit. Accordingly, dismissal of the third-party complaint is warranted here, although without prejudice to third-party defendants seeking leave to amend within thirty days of this decision and order.

Finally, the moving defendants' request for sanctions is denied.

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss the third-party complaint as against third-party defendants Alan B. Friedberg and David Gruber is granted, and the claims against them are severed and dismissed; and it is further

ORDERED that the dismissal of the third-party complaint against third-party defendants

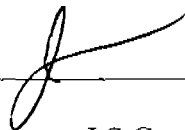
Alan B. Friedberg and David Gruber is without prejudice to the third-party plaintiffs seeking leave to amend the third-party complaint to include additional allegations against the moving defendants within thirty days of this decision and order; and it is further

ORDERED that the request for sanctions is denied; and it is further

ORDERED that the remainder of the third-party action shall continue; and it is further

ORDERED that a compliance conference shall be held in Part 11, room 351, 60 Centre Street on September 18, 2008 at 9:30 AM.

DATED: July 8, 2008



J.S.C.

FILED
JUL 09 2008
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