

<b>Northgate Elec. Corp. v Barr &amp; Barr, Inc.</b>
2008 NY Slip Op 32955(U)
October 10, 2008
Supreme Court, New York County
Docket Number: 603772/07
Judge: Doris Ling-Cohan
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PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

Justice

Northgate Electric Corp.

INDEX NO. 603772/07

- v -  
Barr + Barr, Inc et al

MOTION DATE

MOTION SEQ. NO. 001002/003

MOTION CAL. NO.

The following papers, numbered 1 to 13 were read on this motion to/for Dismiss / Summary Judgment

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

Answering Affidavits - Exhibits

Replying Affidavits (memo)

PAPERS NUMBERED	
<u>1, 2, 3, 6, 7,</u>	<u>10, 11</u>
<u>4, 8, 12,</u>	
<u>5, 9, 13</u>	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that <sup>these</sup> ~~this~~ motion <sup>s</sup> to dismiss & motion for summary judgment are decided in accordance with the attached memorandum decision.

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

**FILED**

OCT 29 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/10/08

[Signature]  
**JUSTICE DORIS LING-COHAN** 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 : IAS PART 36

-----X

NORTHGATE ELECTRIC CORP.,

Plaintiff,

INDEX NO.  
603772/07

-against-

Motion Seq  
001, 002, 003

BARR & BARR, INC., SMITH-PALMER +  
FAMULARI, LTD., PETER HALFON, CONSENTINI  
ASSOCIATES, LLP, and HUNTINGTON HOSPITAL  
a/k/a HUNTINGTON HOSPITAL ASSOCIATION,

Defendants.

-----X

DORIS LING-COHAN, J.:

**FILED**  
OCT 29 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Motion sequence numbers 001, 002 and 003 are consolidated herein for disposition.

This action for breach of contract and related claims arises out of a construction project at defendant Huntington Hospital ("Hospital") in Suffolk County, New York. According to Northgate Electric Corp. ("plaintiff" or "Northgate"), several contracts are involved. The first is between the Hospital and defendant Smith-Palmer + Famulari, Ltd. ("Smith") wherein the Hospital as owner retained Smith as architect for the project. Smith in turn retained defendant Cosentini Associates, LLP. ("Consentini") as its electrical design consultant pursuant to a written proposal dated March 29, 2000. Thereafter, the Hospital retained Barr & Barr, Inc. ("Barr") as construction manager pursuant to an agreement dated April 12, 2003. Barr retained plaintiff as its electrical subcontractor pursuant to an agreement executed on April 15, 2003 (the

“Northgate/Barr subcontract”).

Plaintiff's work on the project was completed in or about May 2006. In November 2006, Barr received final payment from the Hospital and, according to Barr, plaintiff received its final payment. Plaintiff, however, claims that it was owed an additional \$1,907,962 consisting of \$1,730,040 for delay and impact costs and \$177,922 in extended management costs. In November 2007 plaintiff commenced this action seeking damages of \$1,907,962.

The complaint (exhibit C to Barr's moving papers) alleges seven causes of action. Four are asserted against Barr: breach of contract; *quantum meruit*; “Impact Costs”; and, a “First Cause of Action Against All Defendants” which alleges that defendants caused cost increases in the Northgate/Barr subcontract which constituted a cardinal change and abandonment of that contract and resulted in the damages set forth above. Two causes of action are asserted against Smith and Consentini respectively: “Near Privity - Third Party Beneficiary” and the First Cause of Action Against All Defendants. Lastly, two causes of action are asserted against the Hospital: “Quantum Meruit Implied Agreement” and the “First Cause of Action Against All Defendants”.

Barr has now moved (seq. no. 001) to dismiss the complaint pursuant to CPLR 3211; Cosentini has moved (seq. no. 002) to dismiss the complaint pursuant to CPLR 3211(a)1 and 7; and the Hospital has moved (seq. no. 003) for summary judgment pursuant to CPLR 3212.

Barr argues that the causes of action asserted against it should be dismissed for the following reasons: plaintiff did not assert its claims for delay damages, impact costs and extended management costs until June 26, 2007, thereby breaching the notice provision in Article 26 of the Northgate/Barr subcontract, which requires plaintiff to notify Barr of such claims within 15 days of their accrual; plaintiff settled all outstanding claims on April 18, 2006 by

signing a settlement agreement relinquishing its right to assert any further claims; and, plaintiff received final payment in late November 2006 which operated as a release of all claims pursuant to Article 15 of the Northgate/Barr subcontract. Barr then argues that plaintiff's second cause of action for *quantum meruit* must also be dismissed because it is duplicative of plaintiff's breach of contract claim.

Cosentini argues that plaintiff's claims against it should be dismissed because the facts alleged in the complaint fail to demonstrate either privity of contract or a relationship with plaintiff that is the functional equivalent of privity. Cosentini argues further that plaintiff is not a third-party beneficiary of Cosentini's subcontract with Smith because there is no language in that contract evincing the parties' intention to benefit a third party. Cosentini concludes by adopting Barr's arguments along with contending that it is a third-party beneficiary of the notice provisions in the Northgate/Barr subcontract.

In support of its motion for summary judgment the Hospital contends that plaintiff's claim against it for "quantum meruit implied agreement" should be dismissed because under New York law a party cannot assert a quasi-contractual claim for unjust enrichment when a fully executed contract exists (*viz.* the Northgate/Barr subcontract) that governs the entire scope of the party's claim and because New York law bars unjust enrichment claims by subcontractors against owners with which they do not have privity. The Hospital further argues that plaintiff's "First Cause of Action Against All Defendants" should be dismissed as against it because the Hospital was never a party to the Northgate/Barr subcontract and plaintiff does not allege that the Hospital sought a cardinal change in the Northgate/Barr subcontract or abandoned that contract.

Upon the submitted papers, Barr's motion is denied. According to the preliminary statement in Barr's supporting memorandum of law, it is seeking dismissal of the complaint pursuant to CPLR 3211(a)1 (defense based on documentary evidence), (a)(5) (release) and (a)(7) (failure to state a cause of action). To succeed on a motion to dismiss pursuant to CPLR 3211(a)1 the proffered documentation must definitively dispose of the claim (see Demas v. 325 W. End Ave. Corp., 127 AD2d 476, 477 [1<sup>st</sup> Dept 1987]). Here, the documentary evidence relied on by Barr consists of the notice provision in Article 26 of the Northgate/Barr subcontract which requires Northgate to give notice of a claim to Barr within 15 days of its accrual and a purported settlement agreement plaintiff signed on April 18, 2006.

Neither document, however, definitively disposes of plaintiff's claim. Plaintiff's contention that Barr waived its right to enforce the 15 day notice provision in Article 26 pertaining to delay claims because it ignored the 10 day notice provision regarding change orders, precludes dismissal under CPLR 3211(a)1 (see Barsotti's v. Consolidated Edison Co. of New York, 254 AD2d 211, 212 [1<sup>st</sup> Dept 1998] [parties' course of conduct may modify or eliminate contract provisions requiring notice of claims]).

Moreover, the April 18, 2006 settlement agreement is also not dispositive. That agreement provides in pertinent part as follows: "(2) [t]his global change order constitutes a complete and final settlement of all 30 items set forth in the Mediation books [and listed below] submitted to [the] parties in connection with this mediation. (3) In consideration for the issuance of this global change order, Northgate waives and releases Barr from any and all claims and change order requests which were submitted or could have been submitted prior to 11/01/05" (see Barr's moving papers, exhibit F). The language of the settlement agreement is called into

question by an affidavit dated June 5, 2006, entitled "Partial Waiver of Lien and Release" and an affidavit dated November 15, 2006, notarized on November 22, 2006, entitled "Final Waiver of Lien and Release". The affidavits were signed by plaintiff's president and sent to the Hospital and Barr. It appears that neither recipient made a timely objection. The affidavits, which post-date the April 18, 2006 settlement agreement, purport to release the Hospital and Barr from any claims by plaintiff "except for our delay claim." (see plaintiff's opposing affidavit, exhibits 3 and 4).

To the extent that Barr seeks dismissal of the complaint pursuant to CPLR 3211(a) its motion is unfounded.

A motion to dismiss for failure to state a cause of action assumes the truth of the material allegations and everything reasonably to be implied therefrom. (see, *Foley v D'Agostino*, 21 AD2d 60, 65.) In determining such a motion, it is not the function of the court to evaluate the merits of the case (*Carbillano v Ross*, 108 AD2d 776, 777) or express an opinion as to plaintiff's ability to ultimately establish the truth of the averments. (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509.) Rather, the plaintiff must be 'given the benefit of every possible favorable inference' (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634) and the motion to dismiss will fail if, "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275.).

(*Khan v. Newsweek, Inc.* 160 AD2d 425, 426 [1<sup>st</sup> Dept 1990]). Under the above standard, plaintiff has set forth viable causes of action against Barr. The complaint herein which details Barr's alleged breaches of the Northgate/Barr subcontract (see exhibit C to Barr's moving papers, ¶¶ 49-51) and other alleged transgressions states a patently valid claim against Barr which has not been vitiated by the documentary evidence on which Barr relies.

Cosentini's motion to dismiss is also denied. The first cause action against Cosentini labeled, "Near Privity-Third Party Beneficiary", alleges that Cosentini, owed a duty to plaintiff

because it knew that the electrical subcontractor (plaintiff) would rely on the plans and specifications furnished by Cosentini to Smith, and that Cosentini breached this duty by failing to adhere to the standard of care, competence, and skill applicable to electrical design engineers which resulted in over 184 change orders and the damages sought by plaintiff herein (*id.*, ¶¶ 67-81). This cause of action is based on plaintiff's allegation that it was in privity or near privity with the subcontract between Cosentini and Smith, or that it was the third party beneficiary of that subcontract (*id.*, ¶ 81).

Cosentini's arguments and plaintiff's counter-arguments concerning privity and third-party beneficiary status notwithstanding, Cosentini has failed to demonstrate that documentary evidence definitively disposes of plaintiff's claims against it (see Demas v. 325 West End Avenue Corp., *supra*, 127 AD2d at 477) or that plaintiff has failed to state a cause of action against it (see Khan v. Newsweek, Inc. *supra*, 160 AD2d at 426). Plaintiff's ability to ultimately prove the allegations in the complaint is not part of the calculus in determining a motion to dismiss (see AG Capital Funding Partners, L.P. v. State St. Bank and Trust Co., 5 NY3d 582, 591 [2005]). Cosentini's assertion that it is a third-party beneficiary of the notice provisions in the Northgate/Barr subcontract, is inconsistent with Cosentini's argument concerning plaintiff's third-party beneficiary status, and will not be further addressed at this time for the reasons stated above.

The Hospital's motion for summary judgment is granted as it has established a *prima facie* entitlement to judgment as a matter of law, which is not sufficiently refuted.

"Subcontractors, lacking privity of contract, are precluded from bringing suit against the owners directly [citation omitted]" (Bovis Lend Lease LMB v. GCT Venture, Inc., 285 AD2d 68, 69 [1<sup>st</sup>

Dept 2001]). “[I]t is a firmly established principle that a property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi contract theory unless it expressly consents to pay for the subcontractor’s performance...” (Perma Pave Contracting Corp. v. Paerdegat Boat & Racquet Club, 156 AD2d 550, 551 [2<sup>nd</sup> Dept 1989][citation omitted]). It is clear from the papers before the court that the Hospital did not expressly consent to pay for plaintiff’s performance.

Accordingly, it is hereby

ORDERED that Barr’s motion (seq. no. 001) to dismiss the complaint is denied; and it is further

ORDERED that Consentini’s motion (seq. no. 002) to dismiss the complaint is denied; and it is further

ORDERED that the Hospital’s motion (seq. no. 003) for summary judgment dismissing the complaint against it is granted.

The Clerk is directed to enter judgment accordingly; it is further


ORDERED that within 30 days of entry of this order, the Hospital shall serve a copy upon all parties with notice of entry.

This constitutes the decision and order of the court.

DATED: 10/8, 2008

**FILED**

OCT 29 2008

  
Hon. Doris Ling-Cohan, J.S.C.

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NEW YORK**

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