

**Trustees of Plumbers Local Union No. 1 Additional
Sec. Benefit Fund v City of New York**

2009 NY Slip Op 30378(U)

February 13, 2009

Supreme Court, New York County

Docket Number: 103822/08

Judge: Joan A. Madden

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

PRESENT: How Joan A. Madala

PART 11

Index Number : 103822/2008

TRUSTEES

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 12-11-08

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 is decided in accordance with the attached memorandum decision for

FILED

FEB 23 2009

COUNTY CLERK'S OFFICE

NEW YORK

Dated: February 13, 2009

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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
COUNTY OF NEW YORK, PART 11

-----x
TRUSTEES OF THE PLUMBERS LOCAL UNION NO.1
ADDITIONAL SECURITY BENEFIT FUND,

Index No. 103822/08

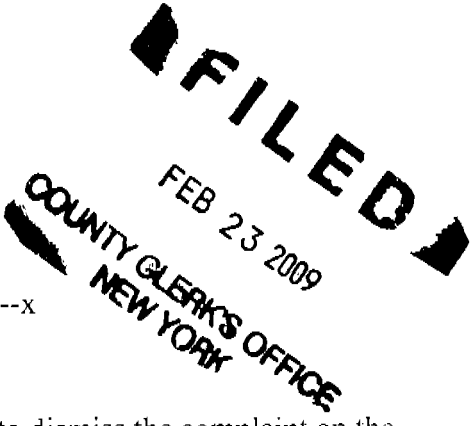
Plaintiffs,

- against -

CITY OF NEW YORK,

Defendant.

-----x
JOAN A. MADDEN, J.:



Defendant the City of New York ("City") moves to dismiss the complaint on the grounds of lack of standing and/or capacity to bring the subject action, and for failure to state a cause of action. Plaintiffs oppose the motion, which is denied for the reasons below.

Background

The following facts are based on the allegations in the complaint and the documentary evidence submitted on the motion.

The City is a municipal corporation organized and existing under the laws of the State of New York. Plaintiff, the Trustees of the Plumbers Local Union No. 1 Additional Security Benefit Fund ("Fund"), is an irrevocable trust established to provide supplemental health, welfare and related benefits to eligible employees of various employers that agree to contribute a specified amount to said Fund.

On October 18, 2006, the City entered into a written agreement ("Union-City Agreement") with Local Union No. 1 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Union"). Pursuant to the Union-City Agreement, the City is obligated to contribute a specified amount to the Fund for each day worked by each person actively employed by the

City as a Plumber, Plumber’s Helper, Supervisor Plumber, Thermostat Repairer, Supervisor Thermostat Repairer, Pipe Caulker, or Tapper (hereinafter “Covered Employees”).

Paragraph 2(b) of the Union-City Agreement provides:

It is further understood and agreed by the parties to this [Union-City] Agreement, that such Fund will be held and managed by the Trustees thereof, under the terms and provisions of a Declaration of Trust, Trust Agreement or other instrument to which the Trustees and the Union will be the parties. The Union hereby further agrees that nothing in said Declaration of Trust, Trust Agreement or other instrument shall be inconsistent with or contradict any of the terms and provisions of this Agreement.

The provision of the Restated Trust Agreement of the Plumbers Local Union No.1 Additional Security Benefit Fund (“Trust Agreement”) that is at issue here is Article VI, Section 6, as amended effective October 7, 2003, which provides in relevant part:

Regular, prompt and correct payment of amounts due by individual Employers to this Fund is essential for the maintenance of the Fund....[P]ayments...are due by the twentieth (20th) day following the end of each calendar month....The Trustees may assess liquidated damages against delinquent employer in the amount of twenty percent (20%) of the amount due if payment is not received by the due date....The Trustees may also require any delinquent employer to pay interest at a rate up to 18% per annum, on the amount due from the date of delinquency until the date of payment.

The complaint alleges that during portions of 2007 and 2008, the City continuously failed to remit contributions to the Fund until after the due date specified in the Trust Agreement. As a result, under the terms of the Trust Agreement, the Trustees of the Fund assessed and demanded liquidated damages and interest against the City in the amount of \$41,181.60 and \$6,350.95, respectively. The City refused to pay these amounts.

The Fund then brought this action to compel the City to pay the interest and liquidated damages due and owing under the terms of the Trust Agreement. The complaint alleges that the City breached the Union-City Agreement by failing to remit contributions to the Fund until after the specified due date, as specified in the Trust Agreement, and by failing to pay the accrued interest and liquidated damages.

The City now moves to dismiss the complaint on the grounds that the Fund is not a signatory or an intended third party beneficiary to the Union-City Agreement and thus lacks standing and/or capacity to bring the subject action, and that the complaint fails to state a cause of action as the Union-City Agreement does not incorporate by reference the terms of the Trust Agreement.

The City further argues that Article VI, Section 6, which pertains to the assessment of liquidated damages in the event of delay, is unenforceable under paragraph 2(b) as the provision is inconsistent with and contradicts Paragraphs 4 and 5 of the Union-City Agreement which provide, respectively, that the City's obligation to contribute to the Fund is limited to per annum payments, and that the City will not be liable for delay in payment due to the Union caused by any action which is beyond the City's control.

The Fund opposes the City's motion, arguing that as a trustee of an express trust it may sue in its own name. The Fund further argues that since under the terms of the Union-City Agreement, the City's performance is to be rendered directly to the Fund, it is an intended third party beneficiary of that Agreement, and thus has standing to sue for the City's failure to comply with the Agreement. The Fund also contends that since the Union-City Agreement incorporates by reference the terms of the Trust Agreement, the City is obligated to pay interest and liquidated damages under the provisions of the Trust Agreement and that such

* 5]
provisions are not inconsistent with or contradictory to the provisions of the Union-City Agreement.

Discussion

The first issue is whether the Fund's Trustees are proper plaintiffs and have standing to bring the subject action. As the Fund is an express trust, the Trustees of the Fund have standing to bring this action in their own name. Banca Commerciale Italiana Trust Co. v. Clarkson, 274 NY 69, 74 (1937).

The City argues, however, that since the Trustees of the Fund did not sign the Union-City Agreement the Fund does not have the right to enforce its terms as third-party beneficiaries of the Agreement. A non-party to a contract has been held to be a third-party beneficiary when "...performance is to be rendered directly to a third-party under the terms of an agreement..." Goodman-Marks Assoc., Inc. v. Westbury Post Assoc., 70 AD2d 145, 148 (2d Dept. 1979). Moreover, there is no requirement that the non-party seeking status of a third-party beneficiary be named in the agreement's text as long as the surrounding circumstances evidences a clear intent to confer an immediate benefit on that non-party. Newin Corp. v. Hartford Acc. & Indem. Co., 37 NY2d 211, 219 (1975); see also Internationale Nederlanden (U.S.) Capital Corp v. Bankers Trust Co., 261 AD2d 117, 123 (1st Dept 1999); compare, Alicea v. City of New York, 145 AD2d 315 at 318 (1st Dept. 1988)(holding that plaintiffs were not intended third-party beneficiaries of contract between another party and the defendant City of New York when no clauses in the contract required that payments be made to the plaintiffs and nothing in the contract established that there were any direct dealings between plaintiffs and the City of New York).

Here, although the Union-City Agreement does not expressly make reference to the Fund as a third party beneficiary, it can be inferred from the language of the Union-City

Agreement that the Fund is an intended third-party beneficiary of the Agreement since it provides under paragraph 2(a) that the City's payments were "to be remitted to [the Fund]." See Goodman-Marks Associates, Inc. v. Westbury Post Associates, 70 AD2d at 147 (holding that even though plaintiff was a non-signatory, it was a third-party beneficiary of the subject contract when such contract stated that "[the defendant] will pay [the] balance of [the] fee to [the plaintiff]").) Accordingly, the Fund has standing as a third-party beneficiary to assert the claims in the complaint.

The City also argues that the complaint fails to state a cause of action, contending that the provisions of the Trust Agreement on which the Fund relies are not incorporated into the Union-City Agreement and, in any event, are not enforceable since they are inconsistent with the Union-City Agreement.

On a motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference" Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff'd, 94 NY2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. However, dismissal based on documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader...is not a fact at all and...no significant

dispute exists regarding it.” Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

“Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms.” Beal Sav. Bank v. Sommer, 8 NY3d 318, 324 (2007). “The court should construe [an] agreement[] so as to give full meaning and effect to the material provisions [and] [a] reading of the contract should not render any portion meaningless.” Id., at 324 (citation and internal quotations omitted). “Further, a contract should be read as a whole and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.” Id. (citation and internal quotation omitted).

Under these principles, the City’s interpretation of the Union-City Agreement is unavailing. First, Paragraph 2(b) of the Union-City Agreement provides that the Fund will be managed by the Trustees in accordance with the terms of the Trust Agreement. The terms of the Trust Agreement include Article VI, Section 6 which gives the Trustees the authority to take actions necessary to enforce the payment of timely contributions and to assess liquidated damages against employers who do not make timely contributions. Accordingly, Article VI, Section 6 of the Trust Agreement is incorporated by reference into the Union-City Agreement.

Next, contrary to the City’s position, Article VI, Section 6 of the Trust Agreement is not inconsistent with Paragraphs 4 and 5 of the Union-City Agreement. Paragraph 4 of the Union-City Agreement provides that “[t]he obligation of the City...shall in no event exceed the annual sum or appropriate pro-rata share thereof...irrespective of any upward modification, by reason of increase in costs, increase in insurance premium, other insurance penalty...or any other anticipated or unforeseen reasons...” This provision, which prohibits

the Fund from increasing the City's obligation to pay contributions to offset increases in the Fund's costs, does not prevent the Fund from assessing delay damages.

Paragraph 5 of the Union-City Agreement provides that "[t]he Union agrees that the City shall not be liable for any delay in any payment...which delay is caused by any action which is beyond the City's control, such as an act of God..." While paragraph 5 exempts the City from liability for a delay in payment caused by an action beyond the City's control, there is no indication in the record at this juncture that the City's delay here was due to circumstances beyond its control.

Accordingly, the City's motion to dismiss for failure to state a cause of action must be denied.

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss by the defendant the City of New York is denied; and it is further

ORDERED that the City of New York shall answer the complaint within 30 days of the date of this decision and order, a copy of which is being mailed by chambers to counsel for the parties.

The court notes that as the City of New York is a defendant, this action is being referred by separate order to a City Part.

Dated: February 13 2009

FILED
FEB 23 2009
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