

Northgate Elec. Corp. v Barr & Barr, Inc.
2009 NY Slip Op 30444(U)
February 23, 2009
Supreme Court, New York County
Docket Number: 603772/07
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 603772/2007
NORTHGATE ELECTRIC
VS.
BARR & BARR
SEQUENCE NUMBER : 004
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 ...

1, 2

Answering Affidavits -- Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *for summary judgment*
is decided in accordance with the attached
memorandum decision.

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

FILED
FEB 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: *[Signature]*

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

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NORTHGATE ELECTRIC CORP.,

Plaintiff,

INDEX NO.
603772/07

-against-

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

Motion Seq
004

Defendants.

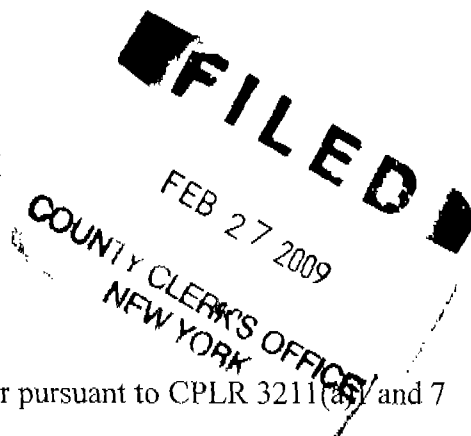
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HON. DORIS LING-COHAN, J.:

Defendant Peter Halfon ("Halfon") moves for an order pursuant to CPLR 3211(a) and 7 and CPLR 3212 granting him summary judgment dismissing all claims and cross-claims asserted against him.

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. Several contracts are involved.

By agreement dated May 9, 2000 (the "Architect Agreement"), the Hospital as owner retained Smith-Palmer + Famulari, Ltd. ("Smith") in association with Halfon, as architects for the project. Smith in turn retained defendant Consentini 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



[* 3]

dated April 12, 2003. Barr retained Northgate Electric Corp. (“plaintiff” or “Northgate”) 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, plaintiff received a purported final payment from Barr of \$3,352,311. Plaintiff claims that it was owed an additional \$1,907,962.00, consisting of \$1,730,040.00 for delay and impact costs and \$177,922.00 in extended management costs. In November 2007, plaintiff commenced this action by service of a summons and complaint seeking damages of \$1,907,962.00.

The complaint (exhibit 1 to Goldstein moving affirmation) alleges seven causes of action. Four causes of action 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, Halfon and Consentini: “Near Privity - Third party beneficiary” and the “First Cause of Action Against All Defendants” regarding cost increases. Two causes of action are asserted against the Hospital: “Quantum Meruit Implied Agreement” and the First Cause of Action Against All Defendants.

In January 2008, Halfon served his answer to the complaint and Barr moved (seq. no. 001) to dismiss the complaint pursuant to CPLR 3211. In February 2008, Consentini moved (seq. no. 002) to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), and the Hospital moved (seq. no. 003) for summary judgment pursuant to CPLR 3212. Such motions were consolidated for disposition.

By decision and order dated October 8, 2008, this court denied Barr's motion indicating that the four causes of action asserted against Barr stated "patently valid" claims. The court denied Consentini's motion indicating that, *inter alia*, Consentini's reliance on documentary evidence was misplaced and that the complaint stated valid causes of action against it. The Hospital's motion for summary judgment was granted.

Halfon has now moved for summary judgment and related relief contending that all claims and cross-claims asserted against him should be dismissed. As noted above, the complaint asserts two causes of action against Smith and Halfon: "Near Privity - Third party beneficiary" and a First Cause of Action Against all Defendants based on alleged cost increases. Halfon contends that plaintiff did not have contractual privity with him or a relationship so close as to be the functional equivalent of privity because the Hospital was the ultimate beneficiary of the Architect Agreement and Halfon's services were retained for the direct benefit of the Hospital. Halfon further argues that plaintiff was not an intended third-party beneficiary of the Architect Agreement because no such intent was expressed. Halfon also argues that the complaint fails to allege viable causes of action against him because an architect or engineer cannot be found liable in negligence to a third-party as a matter of law, absent active wrongdoing or breach of an expressed contractual duty. Halfon concludes that plaintiff's claims against him should be dismissed because he owed no duty to plaintiff and because his services at the project were not the proximate cause of plaintiff's alleged damages.

Summary judgment is a drastic remedy which should not be granted if there is any doubt as to the existence of a triable issue (see Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223, 231 [1978]). Furthermore, the facts must be viewed in the light most favorable to the non-moving

party (cf. Hotopp Associates, Ltd., v. Victoria's Secret Stores, Inc., 256 AD2d 285, 286-287 [1st Dept 1998]).

Based upon the submissions, there has been no showing of privity between Halfon and plaintiff since plaintiff was not a party to the Architect Agreement and had no rights or obligations thereunder (see Perma Pave Contracting Corp. v. Paerdegat Boat & Racquet Club, Inc., 156 AD2d 550, 551 [2nd Dept 1989]). Although “near privity” is an elusive concept which has been described as “reliance by the plaintiff that was ‘the end aim of the transaction’” and a bond “so close as to approach that of privity” (Ossining Union Free School District v. Anderson LaRocca Anderson, 73 NY2d 417, 425 [1989]), the First Department has recently proclaimed that “for a relationship to approach ‘near’ privity’s borders, for the purpose of maintaining a professional negligence claim, the professional must be aware that its services will be used for a specific purpose, the plaintiff must rely upon those services, and the professional must engage in some conduct evincing some understanding of the plaintiff’s reliance [citation omitted]” (Allianz Underwriters Insurance Company v. Landmark Insurance Company, 13 AD3d 172, 175 [1st Dept 2004]).

Here, the complaint alleges and plaintiff argues that at the time Halfon entered into the Architect Agreement he knew that his plans and specifications would be relied upon by subcontractors such as plaintiff (see complaint, Halfon’s exhibit 1, ¶¶ 57-59), that plaintiff relied on Halfon’s services (*id.*, ¶¶ 60-61) and that Halfon interacted directly and indirectly with plaintiff by reviewing requests for changes and responding to inquiries knowing that plaintiff was relying on his actions (*id.*, ¶¶ 59, 61). In view of the case law cited above regarding motions for summary judgment, including Rotuba Extruders and Hotopp Associates, plaintiff has succeeded

in creating a factual issue as to its “near privity” status to warrant a denial of Halfon’s motion for summary judgment dismissing such claim.

There are, however, no factual issues with respect to plaintiff’s claim that it is a third-party beneficiary of the Architect Agreement. “The third-party beneficiary concept arises from the notion that ‘it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay’ or perform” (Fourth Ocean Putnam Corp. v. Interstate Wrecking Co. Inc., 66 NY2d 38, 43 [1985], citing, *inter alia*, Lawrence v. Fox, 20 NY 268 [1859] [An action lies on a promise made by the defendant upon valid consideration to a third person for the benefit of plaintiff, although the plaintiff was not privy to the consideration]). For the Architect Agreement to confer third-party beneficiary rights upon plaintiff, it must appear that no one other than plaintiff can recover if Halfon breaches that agreement or that the Architect Agreement sets forth a clear intent to permit enforcement by plaintiff (see Artwear, Inc. v. Hughes, 202 AD2d 76, 82 [1st Dept 1994]). This is clearly not the situation at bar (see Architect Agreement, exhibit 1 to Halfon affidavit).

Plaintiff’s remaining claim that Halfon, along with the other defendants, improperly caused cost increases in the Northgate/Barr subcontract which resulted in plaintiff’s alleged damages, presents an issue which shall await trial for resolution.

Finally, Halfon’s request for dismissal of all cross-claims asserted against him is not opposed and therefore granted.

Accordingly, it is

ORDERED that Halfon’s motion for summary judgment and related relief is granted to the extent that (i) plaintiff’s claim against Halfon based on its alleged third-party beneficiary

status is dismissed; and (ii) Halfon's request for dismissal of all cross-claims asserted against him is granted without opposition. In all other respects the motion is denied; it is further

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

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: February 23, 2009


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

J:\Summary Judgment\Northgate Electric.bar.wpd

FILED
FEB 27 2009
COUNTY CLERK'S OFFICE
NEW YORK