

Talon Air Servs. LLC v CMA Design Studio, P.C.

2009 NY Slip Op 32027(U)

September 3, 2009

Supreme Court, New York County

Docket Number: 602619/2007

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 602619/2007

TALON AIR SERVICES

vs

CMA DESIGN STUDIO

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6/5/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

... this motion to/for _____

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

Answering Affidavits — Exhibits Filed under motion 03

Replying Affidavits _____

PAPERS NUMBERED

1-5

6-7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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

FILED
SEP 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/3/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
TALON AIR SERVICES LLC,

Plaintiff,

-against-

CMA DESIGN STUDIO, P.C., a/k/a CMA DESIGN STUDIO
ARCHITECTS-PLANNERS, P.C., and KEVIN KOUBEK,
P.E.,

Defendants.
-----X

Index No.
2619/07

FILED

SEP 08 2009

COUNTY CLERKS OFFICE
NEW YORK

JANE SOLOMON, J.:

Motion sequence numbers 002 and 003 are consolidated herein for disposition. Plaintiff Talon Air Services LLC (Talon) brings this action for professional malpractice and breach of contract against both defendant CMA Design Studio, P.C. a/k/a CMA Design Studio Architects-Planners, P.C. (CMA),¹ the architect, and defendant Kevin Koubek, P.E. (Koubek), the mechanical engineer, in connection with the construction of an aircraft hangar (the Hangar), owned and operated by Talon, at Republic Airport in Farmingdale, New York.

According to the complaint, Talon suffered damages from having to replace a single-walled non-hazardous waste collection trench (the Single-Walled Trench) in the Hangar, as constructed under the supervision of CMA and Koubek, with a double-walled hazardous waste trench (the Double-Walled Trench) in compliance with the Suffolk County Sanitary Code (the Sanitary Code).

New York State Department of Transportation (DOT) regulations (*see* 17 NYCRR 78.37)

¹According to the complaint, Talon and its sister company, Talon Air Inc. (hereinafter, collectively, Talon) entered into the alleged contract with defendant CMA.

provide that storage, handling, and use of hazardous materials requires the permission of the airport operator. In addition, the Sanitary Code, which has the object of safeguarding “the water resources of the County of Suffolk from toxic and hazardous materials pollution” (*see* Sanitary Code, § 760-1202), requires that “[d]ouble-walled or equivalent facilities are required for all toxic and hazardous materials” (*id.*, § 760-1210).

Talon commenced construction of the Hangar in June 2004, and completed construction in June 2005, when, according to the complaint, it was placed into service. The Hangar was outfitted with the Single-Walled Trench and an Oil/Water Separator Tank. Allegedly, in April 2005, Koubek submitted an application to the Suffolk County Department of Health Services (the Suffolk DHS) for the Hangar configuration, which, as of November 28, 2006, was rejected as noncompliant with Article 12 of the Sanitary Code.

Talon then retained another engineer to prepare new plans and specifications, including plans for a Sanitary Code-compliant Double-Walled Trench. According to the complaint, the reconstruction of the Hangar hazardous-waste system cost Talon in excess of \$200,000.

Talon brings claims against CMA and Koubek for breach of contract (first and third causes of action, respectively) and professional malpractice (second and fourth causes of action, respectively). Upon motion sequence number 002, Koubek moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and granting him judgment on his cross claim for common-law or contractual indemnity, and/or contribution against CMA. Upon motion sequence number 003, CMA seeks summary judgment, pursuant to CPLR 3212, dismissing the complaint and the cross claims of Koubek, and Talon cross-moves for summary judgment against CMA and Koubek as to liability only.

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In support of its motion, submitted April 21, 2009, CMA argues that Talon's cross motion, submitted on May 14, 2009, is untimely because it was not made within 60 days of the filing of the Note of Issue, which was filed on January 30, 2009. It is ironic that CMA's motion for summary judgment was also not made within 60 days of the filing of the Note of Issue. Indeed, Part 55 rules state that "[a]bsent court order, post note of issue dispositive motions shall be within 60 days thereof." In *Miceli v State Farm Mut. Auto. Ins. Co.* (3 NY3d 725 [2004]), the Court of Appeals reinforced the pronouncement of *Brill v City of New York* (2 NY3d 648 [2004]) that statutory and court-ordered time frames are not options, but requirements. See also *Buckner v City of New York*, 9 Misc 3d 510, 515 (Sup Ct, NY County 2005).

However, the motion of Koubek, which was timely, having been submitted on March 26, 2009, raises the claims and issues that are the subject of both CMA's untimely motion, and Talon's untimely cross motion. As such, the court will consider all motions on the merits. See *Filannino v Triborough Bridge and Tunnel Auth.*, 34 AD3d 280, 281 (1st Dept 2006) (owing to court's powers to search the record, a cross motion for summary judgment made after the expiration of the statutory period may be considered by the court where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion).

BREACH OF CONTRACT AS AGAINST CMA (FIRST CAUSE OF ACTION)

CMA notes that the alleged contract between CMA and Talon is unsigned by Talon, but CMA fails to allege that the contract is not a facsimile of a document so signed, or that CMA and Talon did not intend to be bound by the document presented. See *Geha v 55 Orchard Street*, 29 AD3d 735, 736 (2nd Dept 2006), quoting *Flores v Lower E. Side Serv. Ctr.*, 4 NY3d 363, 369

(2005) (“[a]lthough the subject written contract is unsigned, ‘an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound’”). CMA cannot “carry its burden in moving for summary judgment by pointing to gaps in [Talon’s] proof, but must affirmatively demonstrate the merit of its claim or defense.” *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 (4th Dept 1992).

The contract itself does not, however, indicate in any way that the sanitary engineering arrangements were made the responsibility of CMA. Indeed, the contract specifically excludes work related to mechanical or structural engineering. The contract does provide that CMA would be responsible to “file and obtain approval for all work to be performed from the [DOT] so that a General Contractor can obtain a work permit to commence construction.” In addition, the contract states that CMA “will obtain Equipment Use permits as required for the project and provide sign-offs as required.”

There is no clear indication that CMA failed to obtain permission to commence the work from the DOT, or that any equipment was used without a permit. In fact, the complaint states that “[a]fter appropriate review, DOT approved the construction and operation of the Hangar and issued the required permits for its construction at Republic Airport.” Complaint, ¶ 8.

The gravitas of Talon’s breach of contract claim is that CMA failed to perform its obligations under the contract because it did not design a Double-Walled, as opposed to a Single-Walled, Trench. The court finds no such obligation in the contract, nor does Talon indicate any provision from which such an obligation arises. Especially given the explicit indication that the work of CMA would not include mechanical engineering, the claim of such an obligation is without merit.

What is more, there is unrefuted evidence in the record that Talon's original declaration of the use of the Hangar was not subject to Article 12. Koubek has submitted letters of: (i) May 2, 2005 from Talon to Suffolk DHS indicating "washing of aircraft" as sole use of Hangar; (ii) May 3, 2005 from the Principal Public Health Engineer of the Suffolk DHS to Talon acknowledging that a Double-Walled Trench is not necessary for Talon's declared use, and that the Hangar facility is exempt from Article 12; and (iii) May 6, 2005 reiterating the Article 12 exemption. See Koubek Affidavit, Exhibits 2, 3, and 4.

Talon, therefore, prepared for, and opened, a Hangar facility capable of being used for "washing of aircraft," exactly as indicated to the Suffolk DHS. There is no indication from the contract, or the documentary evidence, that CMA had any obligation that diverged from that stated purpose. The first cause of action is dismissed.

BREACH OF CONTRACT AS AGAINST KOUBEK (THIRD CAUSE OF ACTION)

As of February 3, 2004, Koubek entered into a contract with Talon for "mechanical, electrical and plumbing engineering design services." Those services, significantly, included "design and details of the required site drainage for the new tarmac area and any required oil separators for the hangar region." In addition, Koubek undertook to "coordinate all required applications and submissions necessary for the connections to the various utilities (i.e. gas, water, electric, *sanitary and drainage*)." Emphasis added. As such, there is no question that Koubek's undertaking included the waste-collection mechanism (the Trench) for the Hangar.

Koubek argues however, that the intended use of the Hangar did not include activities that required the Double-Walled Trench, but, rather, that Talon and CMA always indicated that the Hangar would be used solely to wash aircraft, which would exempt the Hangar from compliance

with Sanitary Code § 760-1210, obviating the requirement for a Double-Walled Trench.

Indeed, Mr. Carballude of CMA indicated in deposition testimony that the Hangar was “pretty much going to be a storage hangar and maybe would just [*sic*] incidental washing of the planes.” Also, as noted above, Talon assured the Sufflok DHS that the use of the Hangar would be for washing aircraft and storage only, and the Suffolk DHS issued an exemption on that basis. In addition, according to Talon’s own complaint, the Hangar was actually “placed into service” after construction. *See* Complaint, ¶ 9. As such, the allegation that Koubek was somehow responsible to meet the requirements of Article 12, for which there was an applied for, documented, and utilized exemption, is implausible on its face. The third cause of action is dismissed.

PROFESSIONAL MALPRACTICE (SECOND AND FOURTH CAUSES OF ACTION)

Talon maintains that CMA and Koubek each had a duty to exercise greater care in “design, construction and installation of toxic and hazardous waste storage and disposal facilities at the Hangar that complied with the Sanitary Code [Article 12].” As shown above, upon the unconfuted evidence in the record, Talon indicated to the Suffolk DHS that the intended use of the Hangar would be an exempt one, the Suffolk DHS then acted upon Talon’s declaration by issuing an exemption from Article 12 of the Sanitary Code, and Talon availed itself of the exemption by placing the Hangar into service.

That Talon eventually needed the Hangar for other uses does not retrospectively create an obligation on the part of CMA or Koubek to provide for such uses in the design and engineering of the Hangar. And in all events, the completion of the project in compliance with the declared intended use of Talon was not the proximate cause of the injury to Talon. Rather, Talon suffered

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injury from a change in the intended use, for which Talon alone is responsible. The second and fourth causes of action are dismissed. As the complaint is dismissed in its entirety, the remaining motions based upon Koubek's cross claims are moot.

Accordingly, it is hereby

ORDERED that the motion of defendant Kevin Koubek, P.E. (motion sequence number 002) for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to that defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendant CMA Design Studio, P.C. a/k/a CMA Design Studio Architects-Planners, P.C. (motion sequence number 003) for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to that defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: _____

Sept 3, 2009

FILED

SEP 08 2009

**COUNTY CLERK'S OFFICE
NEW YORK**

J.S.

J.S.C.

JANE S. SOLOMON