

Turbo Enters., Inc. v Structuretone (UK), Inc.

2009 NY Slip Op 32380(U)

October 13, 2009

Supreme Court, New York County

Docket Number: 602080/07

Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK
J.S.C.

PART 29

Index Number : 602080/2007

TURBO ENTERPRISES, INC.

vs.

STRUCTURETONE (UK)

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in 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

*and cross motion are decided
in accordance with the
accompanying memorandum
decision.*

FILED
OCT 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/13/09


BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

-----X
TURBO ENTERPRISES, INC.,

Plaintiff,

-against-

STRUCTURETONE (UK), INC., L.M. SCOFIELD
COMPANY, ACE WESTCHESTER SPECIALTY
GROUP, ILLINOIS UNION INSURANCE COMPANY
and ACE INA HOLDINGS, INC.,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 602080/07
Motion Seq. No. 003

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NEW YORK

Plaintiff Turbo Enterprises, Inc. ("Turbo"), a subcontractor responsible for leveling the third floor of the Tiffany's store located at 727 Fifth Avenue in Manhattan (the "flooring job"), commenced this action to recover monies "backcharged" and withheld by the general contractor Structuretone (UK), Inc. ("Structuretone"), after Turbo had completed its work.

According to the Complaint, Turbo used certain leveling materials manufactured by L.M. Scofield Company ("Scofield") to level the rough concrete floor so that carpet could be laid on a smooth surface. Some time after the carpet was installed by a non-party agent of Structuretone, and the floor fitted out with store display cases, Structuretone advised Turbo that the floor was exhibiting some defects. Assuming that the "leveling" materials had separated from the concrete floor, Structuretone hired other

companies to remove the carpet and re-level the floor.

Structuretone then "backcharged" and withheld from Turbo \$467,000 owed by Structuretone to Turbo for construction-related work performed at Structuretone's request at various other locations in New York City not associated with the flooring job at Tiffany's.

Initially, the Complaint asserted claims for breach of contract (first cause of action), breach of implied contract (second cause of action), and negligence in performance of the written and implied contracts (third cause of action) against Structuretone, breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose (fourth and fifth causes of action) against Scofield, and breach of contract against Turbo's insurers (sixth cause of action).

By Decision/Order dated March 20, 2008 on motion seq. no. 001, the Hon. Helen E. Freedman granted Scofield's motion to dismiss the fourth and fifth causes of action. Soon after Scofield made that motion, Structuretone filed an Answer containing cross-claims against Scofield and the insurance defendants for indemnity and contribution. Scofield then moved to dismiss Structuretone's cross-claims as against it, which motion was granted by Judge Freedman by

Decision/Order dated June 9, 2008 on motion seq. no. 002.

Structuretone now moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the first, second and third causes of action in the Complaint for failure to state a cause of action or, in the alternative, pursuant to CPLR § 3212, granting it summary judgment on the grounds that it is not the proper defendant in this action because the entity which contracted with Tiffany's for the renovation of the store's third floor and subcontracted the flooring job to Turbo is actually Structure-Tone, Inc. ("STI").

Turbo opposes the motion and cross-moves for an Order, pursuant to CPLR §§ 305(c), 305(a) and 1003, granting it leave to amend the Summons in this matter, to join STI as a party defendant, and finding that STI is estopped from asserting the Statute of Limitations as to any of the causes of action in the Complaint.

Structuretone contends that it

is a New York Corporation, formed on April 19, 1990 and is a parent company for overseas operations of other Structuretone affiliated entities. [Structuretone] does not transact business in the United States nor has it ever acted in any capacity as a general contractor or construction manager. It has never issued purchase orders or subcontracts to any subcontractor or other entity.¹

¹ Structuretone submits certificates issued by the New York State Department of State showing that Structuretone and STI

However, Turbo contends that Structuretone is bound by certain admissions made in opposition to Scofield's motion to dismiss Structuretone's cross-claims. In particular, counsel for Structuretone repeatedly referred to Structuretone as "STI," and stated that

[i]n 2005, STI was hired as a general contractor for the interior renovation of Tiffany's ... As part of the interior renovation STI engaged the services of [Turbo].

Turbo also contends that Structuretone never disputed in its Answer or responses to the Bill of Particulars, that it was not the proper defendant in this action. Thus, it should be estopped from now claiming that STI, and not Structuretone, entered into the purchase orders with Turbo.²

Structuretone further contends that this Court should also deny Turbo's cross-motion for leave to amend the Summons and join

are separate companies, STI having been in existence since August 26, 1971.

² In addition, Turbo contends that the purchase orders, which Structuretone argues were issued by and signed on behalf of STI, are printed on letterhead containing the same shaded square box logo followed by the single word "Structuretone" which appears on Structuretone's web page. Turbo also contends that there is no operational difference between Structuretone and STI because the two entities have the same office address and the same agent for service of process, and Structuretone's Chairman or Chief Executive, Anthony M. Carvette, is also the President of STI.

STI as a party defendant because the Complaint fails to state a cause of action against either Structuretone or STI.

Specifically, Structuretone contends that the breach of contract claim (first cause of action) is meritless because the "Terms and Conditions" on the reverse side of the purchase orders, which comprise the contract with Turbo, do not impose any obligation on STI to supervise Turbo's work either before or after completion.

In opposition, Turbo contends that the duty to supervise arises under the "Standard Form of Agreement Between Owner and Construction Manager" entered into between Structuretone and Tiffany's on or about February 10, 2004, which provides at paragraph 3.3.1 of the General Conditions of the Contract for Construction that "[t]he Contractor shall supervise and direct the Work, using the Contractor's best skill and attention..." and is incorporated into the "Terms and Conditions" by operation of paragraph 2 on the reverse side of the purchase orders which provides that:

[Turbo] is bound to Structure Tone [sic] for the performance of the Work in the same manner as Structure Tone is bound to [Tiffany's] under Structure Tone's contract with [Tiffany's].

Structuretone, however, is correct in asserting that STI would owe a contractual duty to supervise only to Tiffany's and that duty does not run to Turbo.

In addition, Structuretone points out that Turbo, after being paid in full for the flooring job, executed a release in which it agreed to "defend, indemnify and hold [Structuretone] and [Tiffany's] harmless from any and all claims arising out, under or in connection with the Subcontract and/or the performance of [the flooring job]..."

The claim for breach of implied contract (second cause of action) is dismissed on the ground that there was an express contract between the parties. See *Clark Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987) which held that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter (citations omitted)."

The claim for negligence in performance of the written and implied contracts (third cause of action) is also dismissed since under New York law, "no cause of action exists for negligent performance of a contract." *Fluhr v. Goldscheider*, 264 AD2d 570,

571 (1st Dep't 1999).

Accordingly, Structuretone's motion to dismiss the Complaint is granted on the ground that the Complaint fails to state a cause of action against Structuretone, or against STI if it were joined as a party-defendant. Turbo's cross-motion is, therefore, denied as moot.

The Clerk is directed to enter judgment dismissing plaintiff's Complaint against defendant Structuretone (UK), Inc. with prejudice and without costs or disbursements. The sixth cause of action asserted against the insurance defendants is now the only remaining claim in this action and is hereby severed and continued.

Counsel for plaintiff and the defendant insurers are directed to appear for a conference in IA Part 39, 60 Centre Street, Room 208 on December 2, 2009 at 10:00 A.M.

This constitutes the decision and order of this Court.

Dated: October 13, 2009



BARBARA R. KAPNICK

J.S.C.

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