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

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 601641/2008
RONEL BENNETT, INC. OF N.J.
VS.
KEYSPAN ENERGY
SEQUENCE NUMBER : 005
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for Summary judgment.

1-2

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	5
Replying Affidavits	6

Cross-Motion: ☑ Yes ☐ No 3, 4

Upon the foregoing papers, it is ordered that this motion + cross-motion for summary judgment by defendants Turner Construction + Port Authority of the State of New York are granted in accordance with the attached memorandum decision.

FILED
MAR 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

JUDGE DORIS LING-COHAN

Dated: 3/26/10

J.S.C.

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

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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RONEL BENNETT, INC. OF NEW JERSEY and NELSON STEWART,

Plaintiffs,

-against-

KEYSPAN ENERGY CORPORATION, KSI CONTRACTING, LLC, TURNER CONSTRUCTION COMPANY, S. LEO HARMONAY, ANTHONY A. GIANNICO, VINCENT MISEO, STEVEN GREENSPAN, TRAVELERS INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK, JOHN DOE 1, JOHN DOE 2, and JOHN DOE 3,

Defendants.

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Index No. 601641/2008

Motion Seq. No.: 005

Ling-Cohan, J.:

In motion sequence 005, defendant Turner Construction Company (Turner) moves, pursuant to CPLR 3212, for partial summary judgment, dismissing all causes of action asserted as against it and striking its name from the caption. Defendant the Dormitory Authority of the State of New York (DASNY) cross-moves for partial summary judgment, dismissing all the causes of action asserted as against it and striking its name from the caption.

Background

This action arises out of the defendants' alleged failure to pay plaintiffs for work they performed, as subcontractors, on a public improvement project for the reconstruction and improvement of a library at Brooklyn College (the Brooklyn Project).

On January 19, 2000, non-party Roy Kay entered into a written agreement with defendant DASNY, whereby Roy Kay agreed to act as prime contractor for HVAC and duct and electrical work on

the Brooklyn Project (Contractor Agreement). DASNY also hired defendant Turner as the construction manager of the Brooklyn Project.

On January 28, 2000, non-party Reliance, as surety, issued a Labor and Materials Payment Bond to Roy Kay, as principal, for $9,448,000 (the Payment Bond). After the execution of the Contractor Agreement and Payment Bond, defendant Travelers Insurance Company (Travelers) allegedly became successor-in-interest to all of Reliance's debts and obligations relevant to this action, including the Payment Bond. In addition, Roy Kay was purchased by defendant KSI Contracting, LLC (KSI), and KSI allegedly became successor-in-interest to all of Roy Kay's debts and obligations relevant to this action.

On February 28, 2002, plaintiff Ronel Bennett, Inc. of New Jersey[1] (Ronel) submitted a written proposal to KSI, describing certain work that Ronel would perform on the Brooklyn Project for a total cost of $750,000. On March 15, 2002, KSI and Ronel entered into a written subcontract agreement incorporating the terms of Ronel's proposal (the Subcontractor Agreement). In addition to the work performed pursuant to the Subcontractor Agreement, Ronel allegedly performed additional work, outside of the scope of the Subcontractor Agreement, for a total price of $2,020,768 (the Additional Work).

Plaintiffs allege that Ronel was only paid $220,000 for the

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[1] Plaintiff Nelson Stewart is the Chief Executive Officer of Ronel.

work performed under the Subcontractor Agreement and $1,250,000 for the Additional Work. Plaintiffs further allege that KSI falsely omitted Ronel on all KSI Monthly Payment Applications submitted to DASNY and Turner, and that Turner recommended to DASNY that these Monthly Payment Applications be paid, despite knowing that plaintiffs were not being paid and that KSI was receiving payments for work performed by plaintiffs.

On August 22, 2002, Ronel filed a notice under the New York Lien Law in the sum of $1,180,000 against KSI for monies due under the Subcontractor Agreement (the Mechanic's Lien). The Mechanic's Lien was docketed by DASNY on August 26, 2002. On September 20, 2002, Ronel allegedly provided Travelers with notice of its claim under the Payment Bond. On November 20, 2002, defendant Federal Insurance Company (Federal), as surety, issued a Discharge of Mechanic's Lien Bond, naming DASNY as obligee, and KSI as principal. In or about June 2003, DASNY was served with a complaint, filed in Kings County by plaintiffs, which contained a cause of action for the foreclosure of the Mechanic's Lien. The court notes that it is unclear as to the status of the action filed in Kings County, but the papers imply that the action has been discontinued.

On May 30, 2008, plaintiffs commenced the present action. Plaintiffs assert claims against defendants Turner and DASNY for breach of contract, account stated, unjust enrichment, quantum meriut, foreclosure on the Mechanic's Lien, enforcement of the Payment Bond, constructive trust and accounting, and fraud and

misrepresentation. Defendants Turner and DASNY both move for summary judgment dismissing these claims.

Analysis

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient enough to raise an issue of fact warranting a trial. *Id.*

Defendants Turner and DASNY argue that, as matter of law, plaintiffs' breach of contract claims must be dismissed, because plaintiffs did not have a contract with either party. It is undisputed that the plaintiffs only entered into a contractual agreement with defendant KSI. However, plaintiff Nelson Stewart, in his affidavit[2] in opposition to the motion and cross motion, asserts that the plaintiffs are third-party beneficiaries of the agreement between DASNY and Turner.

> Parties asserting third-party beneficiary rights under a contract must establish: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost [citation omitted].

Mendel v Henry Phipps Plaza W., Inc., 6 NY3d 783, 786 (2006).

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[2] While plaintiff submits in opposition a document labeled "Affirmation of Nelson Stewart. Sr...", since it is sworn to and notarized, the court deems it an affidavit.

Plaintiffs present no evidence that the agreement between DASNY and Turner was intended for the plaintiffs' benefit. Plaintiffs merely state the bare conclusion that they were third-party beneficiaries of the contract. This is not enough to raise an issue of fact. Thus, the breach of contract claims are dismissed as against DASNY and Turner.

Plaintiffs' claims for an account stated against DASNY and Turner are also dismissed as a matter of law. "An account stated is an account, balanced and rendered, with assent to the balance either express or implied." *Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 (2nd Dept 1995). There can be no account stated where no account was presented. *Id.* Here, there are no allegations that plaintiffs rendered an account to defendants DASNY or Turner, and there are no allegations of assent to the balance of an account, either express or implied, by DASNY or Turner.

Plaintiffs argue that they had a meeting with DASNY on August 3, 2004, where they discussed the plaintiffs' submissions for contract work and change orders, the failure of KSI to list the plaintiffs in the Monthly Payment Applications to DASNY, the fact that plaintiffs had not been paid, and DASNY's liability for such. Even if such alleged discussion was considered a "rendering of an account," it is well recognized that rendition of an account alone, without an acceptance by the other party, does not constitute an account stated. *Waldman v Englishtown Sportswear*, 92 AD2d 833, 836 (1st Dept 1983). Further, the court

notes, in the complaint, that plaintiffs allege that "Ronel rendered to KSI a full, just and true account of the transactions between Ronel and KSI and the amounts that KSI owed Ronel." Complaint, ¶ 41. There are no allegations that plaintiffs rendered an account to DASNY and Turner, and that DASNY and Turner assented to an account rendered, either expressed or implied.

DASNY and Turner argue that plaintiffs' quasi contract claims for unjust enrichment and quantum meriut should also be dismissed as a matter of law. Plaintiffs argue that their breach of contract claims against KSI do not prevent recovery from DASNY and Turner, if it is found that there is no contractual relationship between plaintiffs and DASNY and Turner.

Where there is the existence of a contract governing the subject matter of the plaintiff's claims, as there is here between plaintiffs and KSI, recovery in quasi contact for events arising out the same subject matter is precluded. *Feigen v Advance Capital Management Corp.*, 150 AD2d 281, 283 (1st Dept 1989). More importantly, the existence of a contract governing the subject matter of the plaintiff's claims also bars any quasi-contractual claims against nonsignatories to the contract. *Id.; see also Bellino Schwartz Padob Advertising, Inc. v Solaris Marketing Group, Inc.*, 222 AD2d 313 (1st Dept 1995). Thus, the quasi contract claims against DASNY and Turner are dismissed as a matter of law.

DASNY and Turner also seek summary judgment on plaintiffs'

claim for foreclosure on the Mechanic's Lien. As previously stated, on August 22, 2002, Ronel filed a notice of the Mechanic's Lien in the sum of $1,180,000 against KSI. The Mechanic's Lien was docketed by DASNY on August 26, 2002. On September 20, 2002, Ronel allegedly provided Travelers with notice of its claim under the Payment Bond. On November 20, 2002, Federal, as surety, issued a Discharge of Mechanic's Lien Bond, naming DASNY as obligee, and KSI as principal. In July 2003, DASNY was served with a complaint, filed in Kings County by plaintiffs, which contained a cause of action for the foreclosure of the Mechanic's Lien.

Defendant DASNY argues that this claim must be dismissed, because it was not served with a notice of pendency, as required by New York Lien Law § 18, and thus, that the Mechanic's Lien expired. DASNY submits the affidavit of Faith Foster, Legal Assistant for DASNY's General Counsel's Office, who affirms that since the date of docketing the Mechanic's Lien in 2002 to the date of her affidavit, DASNY has not been served with a notice of pendency in connection with the Mechanic's Lien. *See* DASNY Notice of Cross-Motion for Partial Summary Judgment, Affidavit of Faith H. Foster, ¶ 6.

Plaintiffs do not dispute this fact, and in fact, do not even address this claim in their opposition affirmation. The complaint also does not allege that a notice of pendency was ever served. A mechanic's lien terminates one year after the notice of lien is filed, unless both an action is commenced to foreclose

the lien and a notice of pendency is duly filed. New York Lien Law § 18. Here, plaintiffs filed a notice of lien in August 2002, and an action seeking to foreclose on the Mechanic's Lien in July 2003. However, as plaintiffs admittedly failed to serve DASNY with a notice of pendency, the Mechanic's Lien expired in August 2003, as they did not meet the requirements of section 18 of the Lien Law. Therefore, this claim is dismissed as against DASNY.

Defendant Turner also argues that it cannot be liable under the Lien Law. Specifically, Turner asserts that, under Lien Law Section 24, a mechanic's lien is enforceable against the person liable for the debt upon which the lien is founded, and it is not liable for a debt owed pursuant to the contract between KSI and plaintiffs. Again, plaintiffs do not address this claim in their opposition, and therefore, raise no issues of fact to dispute Turner's prima facie showing. Further, there is no evidence that Turner was ever served with a notice of pendency. Thus, plaintiffs' claim for foreclosure on the Mechanic's Lien is dismissed as to defendant Turner, as well.

Plaintiffs' claims against Turner and DASNY for enforcement of the Payment Bond are also dismissed as a matter of law. The Payment Bond was originally issued by Reliance, as surety, to Roy Kay, as principal, with DASNY as obligee. As stated above, Travelers is the successor-in-interest to Reliance, and KSI is the successor-in-interest to Roy Kay. The main purpose of the Payment Bond was to make sure subcontractors, or other laborers,

were paid for their work, if KSI did not pay them in full or at all. *See* Payment Bond, Notice of Cross-Motion for Partial Summary Judgment, Exhibit F, at 1. Further, as obligee, the Payment Bond protected DASNY from claims by unpaid subcontractors or laborers. *Id.* It is clear that any claims to collect under the Payment Bond are to be brought against the surety, and therefore, claims cannot be brought against DASNY and Turner for its enforcement.

DASNY and Turner also seek summary judgment dismissing plaintiffs' claims for constructive trust and accounting. Both defendants argue that KSI is statutory trustee under the Lien Law trust alleged in plaintiffs' complaint. Plaintiffs offer no rebuttal and do not dispute any factual claims made by DASNY and Turner in regard to this claim.

Funds received by a contractor in connection with a contract for a public improvement constitute assets of a trust. New York Lien Law § 70. These trust assets, of which the contractor is trustee, shall be held and applied for payments of claims of subcontractors. New York Lien Law § 71 (2) (a). Pursuant to section 71 of the Lien Law, and based on the undisputed facts, KSI would be the statutory trustee. In fact, plaintiffs allege in their complaint that DASNY has paid KSI the amounts owed for the Brooklyn Project and that the funds received by DASNY, which are in the hands of KSI, constitute trust assets. Complaint, ¶¶ 81, 82. These claims must be dismissed as against DASNY and Turner.

Finally, DASNY and Turner seek summary judgment on plaintiffs' claims for fraud and misrepresentation. DASNY and Turner argue that, as a matter of law, plaintiffs' allegations, whether true or false, cannot support a claim for fraud and misrepresentation.

Plaintiffs' claims for fraud and misrepresentation are primarily based on their allegations that they were told that a surety was in place, that they would be paid for their work, that issues of non-payment would be directed to the surety, that the surety would be brought in to make payments, that the surety would take over the project, that an accounting would be performed, that their work orders would not be falsified and no false contract would be created, and that parties would not interfere with plaintiffs' work and payments. *See* Complaint, ¶ 88. In their opposition affirmation, plaintiffs make similar allegations, with the exception that they acknowledge that there was a Payment Bond.

In New York, a cause of action for fraudulent misrepresentation requires four elements: "(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiffs reasonably relied upon the representation, and (4) the plaintiffs suffered damage as a result of their reliance." *Swersky v Dreyer & Traub*, 219 AD2d 321, 326 (1st Dept 1996). However, alleged misrepresentations that are merely promissory in nature are insufficient to support such a claim; "they must be misstatements

of material fact or promises made with a present, albeit undisclosed, intent not to perform them". *Edelman v Buchanan*, 234 AD2d 675 (3rd Dept 1996). Here, plaintiffs' allegations relate to promises and future expectations, and thus, are insufficient to support a claim for fraudulent misrepresentation. This is also true in regard to plaintiffs' fraud claims, as alleged misrepresentations of future intention or promises are insufficient to support a claim for fraud. *Schonfeld v Thompson*, 243 AD2d 343 (1st Dept 1997). Therefore, these claims are dismissed.

Accordingly, it is

ORDERED that defendant Turner Construction Company's motion for summary judgment and defendant the Dormitory Authority of the State of New York's cross motion are granted, and the complaint is dismissed as to both these defendants with costs and disbursements to defendants Turner Construction Company and the Dormitory Authority of the State of New York 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; and it is further

ORDERED that the action continues as to the remaining defendants; and it is further

ORDERED that the caption of this case is amended in accordance with this decision to read as follows:

RONEL BENNETT, INC. OF NEW JERSEY and
NELSON STEWART,

Plaintiffs,

Index No. 601641/2008

-against-

KEYSPAN ENERGY CORPORATION,
KSI CONTRACTING, LLC, S. LEO HARMONAY, ANTHONY A.
GIANNICO, VINCENT MISEO, STEVEN GREENSPAN,
TRAVELERS INSURANCE COMPANY, FEDERAL
INSURANCE COMPANY, JOHN DOE 1,
JOHN DOE 2, and JOHN DOE 3,

Defendants.

It is further

ORDERED that withing 30 days of entry of this order, defendant Turner Construction Company shall serve a copy upon all parties, with notice of entry, as well as the Clerk of the Court and the Clerk of Trial Support, who shall amend their records to reflect the amendment to the caption.

Dated: March 26, 2010

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

J:\Summary Judgment\Bennett.corbio.wpd