[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice

PART 5

Index Number : 603811/2008

OMNI CONTRACTING COMPANY INC

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

DISMISS ACTION

CPLR 77

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to ..., were read on this motion to/for dismiss

	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

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 9/27/10

SEP 27 2010

BARBARA JAFFE 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 : PART 5

----------x

OMNI CONTRACTING COMPANY, INC.,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION (Contract No. 20020009141, Project No. LCN005NEW), and PMS CONSTRUCTION MANAGEMENT CORP.,

Defendants.

----------x

Index No. 603811/08

Motion Subm: 8/3/10
Motion Seq. Nos.: 001,
Calendar Nos.: 77,

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Neil H. Angel, Esq.
Feinstein & Nisnewitz, P.C.
42-40 Bell Blvd.
Bayside, NY 11361
718-631-0800

For City of New York:
Bob Bailey, Esq.
Michael A. Cardozo
Corporation Counsel
100 Church St., Room 3-230
New York, NY 10007
212-788-1191

For PMS Construction:
Michael R. Strauss, Esq.
Hollander & Strauss, LLP
40 Cutter Mill Rd.
Great Neck, NY 11021
516-498-1000

By pre-answer notice of motion dated January 8, 2010, defendant City moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint against it. By pre-answer notice of motion dated March 15, 2010, defendant PMS Construction Management Corp. (PMS) moves pursuant to CPLR 3211(a)(1), (5) and (7) for an order dismissing the complaint against it. Plaintiff opposes both motions.

I. PERTINENT BACKGROUND

On January 18, 2002, City, through its Department of Design and Construction (DDC), entered into a professional service contract with PMS for construction management and services for various citywide capital construction projects (the construction management contract).

(Affirmation of Bob Bailey, Esq., dated Jan. 8, 2010 [Bailey Aff.], Exh. C). As pertinent here, PMS agreed to hire subcontractors for all construction services required for the capital construction projects through a competitive bidding process. It was also agreed that all subcontracts would contain a provision prohibiting the subcontractor from making any claim against City arising from such subcontract or any acts or omissions by PMS and a provision precluding any damages for delay caused by any act or omission of City or any of its representatives. (*Id.*). The contract also contains other requirements for any subcontractors hired by PMS and otherwise dictates the terms of PMS's performance.

By contract dated June 25, 2004, PMS, as the general contractor, entered into an agreement with plaintiff as the subcontractor for general construction work at the Soho Branch Library (the project contract). (*Id.*, Exh. D). That contract contains a dispute resolution procedure which requires, as pertinent here, that any disputes plaintiff may have be submitted to City solely through PMS. (*Id.*). Pursuant to section 3.2 of the contract, plaintiff agrees to be bound by and to assume for PMS's benefit all contractual obligations and liabilities that PMS had assumed for City. Annexed to the contract are the project specifications and drawings, which were apparently prepared by City.

On or about March 30, 2009, plaintiff served its verified complaint, in which it alleges that after a competitive bidding process, it entered into the project contract with PMS, which was acting on behalf of City and DDC, and that its performance under the contract was prevented or waived by defendants' actions in impeding and preventing it from completing its work by the project deadline, resulting in delay damages of $499,243.70. (*Id.*, Exh. A). It also alleges that the delay was caused, in part, by defendants' preparation and dissemination of "inaccurate,

inappropriate, unworkable and/or defective plans, specifications, and surveys for the project." (*Id.*).

II. CITY'S MOTION TO DISMISS

A. Contentions

City argues that there is no privity between it and plaintiff, as plaintiff contracted with PMS, and numerous provisions in the project contract assign authority over plaintiff solely to PMS. City thus maintains that the documentary evidence establishes an absence of contractual privity between it and plaintiff, thereby precluding plaintiff from asserting a breach of contract claim against it. City also contends that each contract bars plaintiff from bringing any claim against it, including one for delay damages. (Memorandum of Law in Support of City Defendants' Motion to Dismiss Complaint, dated Jan. 8, 2010).

In opposition, plaintiff asserts that given City's role in preparing the plans for the project and controlling it by dictating the requirements for subcontracts and overseeing PMS's performance, its relationship with City may be characterized as the "functional equivalent of privity" and that discovery on this issue is warranted. It asks that City remain in the case in the interest of judicial economy as PMS will likely implead it as a third-party defendant in the event of a dismissal and as City possesses documentation relevant to the action. (Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss Complaint, dated May 24, 2010 [Plaintiff's Memo]).

In reply, City argues that plaintiff has failed to plead or establish all of the elements necessary to show that their relationship constituted the functional equivalent of privity, absent any allegation that it was aware that plaintiff would rely on its plans, and absent any contact

between them when the plans were issued, and as such facts are already within plaintiff's knowledge, no discovery is needed. (Reply Memorandum of Law, dated June 4, 2010).

B. ANALYSIS

On a motion to dismiss pursuant to CPLR 3211, the court must liberally construe the pleading, accept the facts as true as alleged, and accord the non-moving party the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Pursuant to CPLR 3211(a)(1), a party may move to dismiss a pleading on the ground that it has a defense based on documentary evidence. Such a motion will be granted only if the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383 [1st Dept 2002], *quoting Scadura v Robillard*, 256 AD2d 567 [2d Dept 1998]). A contract qualifies as documentary evidence. (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004] ["where a written agreement unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1)"]; *Fortis Fin. Servs., LLC*, 290 AD2d at 383 [interpreting contract]).

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*). However, when extrinsic evidence is submitted on the motion, the allegations are not deemed true, and the standard of review becomes whether the proponent of the pleading has a cause of action, not whether she has stated one. (*Biondi v Beekman Hill House Apt. Corp.*, 257

AD2d 76 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009] [criterion under CPLR 3211(a)(7) is "not whether the proponent of the pleading has simply stated a cause of action, but whether he or she actually has one"]; *IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401 [1st Dept 2007] [same]). A claim is thus subject to dismissal when it is established that "the essential facts have been negated beyond substantial question" by the evidence. (*Biondi*, 257 AD2d at 81).

1. Breach of contract

It is well-settled that a subcontractor may not recover for breach of contract from an owner, rather than a general contractor, absent a contract or privity between it and the owner. (*CDJ Bldrs. Corp. v Hudson Group Constr. Corp.*, 67 AD3d 720 [2d Dept 2009]; *IMS Engrs.-Architects, P.C. v State of New York*, 51 AD3d 1355 [3d Dept 2008], *lv denied* 11 NY3d 706; *Kelly Masonry Corp. v Presbyt. Hosp. in City of New York*, 160 AD2d 192 [1st Dept 1990]; *Perma Pave Contr. Corp. v Paerdegat Boat and Racquet Club, Inc.*, 156 AD2d 550 [2d Dept 1989]).

As plaintiff alleges that the project contract was breached, and as that contract is between plaintiff and PMS alone, City has established, *prima facie*, that plaintiff has no cause of action for breach of contract against it. (*See CDJ Bldrs. Corp.*, 67 AD3d at 722 [subcontractor's breach of contract claim against owners dismissed as contract was between it and prime contractor and owners were not signatories to it]; *IMS Engrs.-Architects, P.C.*, 51 AD3d at 1355 [plaintiff subcontractor's breach of contract claim against defendant landowner dismissed as plaintiff's contract was solely with general contractor and it thus lacked contractual privity or functional equivalent with defendant]; *Perma Pave Contr. Corp.*, 156 AD2d at 551 [same]; *E. States Elec.*

Contrs., Inc. v William L. Crow Constr. Co., 153 AD2d 522 [1st Dept 1989] [same]).

A party's claim that its non-contractual relationship with another party constitutes the functional equivalent of privity appears to be restricted to causes of action for negligent misrepresentation or a similar tort. (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 [1989]; *see eg Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311 [1st Dept 2009] [contractor's claim for indemnity based on functional equivalent of privity rejected absent claim of negligent misrepresentation or similar tort]).

In *Ossining*, 73 NY2d 417, the plaintiff school district had retained the defendant architectural firm to provide a structural evaluation of its buildings. The architectural firm then sub-contracted with the defendant engineering firm to assist it. Based on an allegation that the architectural firm had prepared erroneous reports relating to the buildings' structures, plaintiff asserted claims for negligence and malpractice against both defendants and a breach of contract against the defendant architectural firm. The engineering firm moved for an order dismissing the complaint, arguing that the plaintiff had no claim against it absent contractual privity. While the Court agreed that privity was required, it found that the plaintiff had demonstrated that its relationship with the engineering firm was the functional equivalent of privity, having demonstrated a negligent misrepresentation used for a particular purpose, reliance on the negligent misrepresentation by a known party in furtherance of that purpose, and conduct by the defendant linking it to the relying party and evincing its understanding of the party's reliance. Specifically, the Court found that as the engineering firm knew that its reports would be given to and relied upon by the plaintiff and had direct contact with the plaintiff, which showed that it

knew that the plaintiff would rely on its report, the functional equivalent of privity was established.

Ossining followed two decisions in which the Court rejected the plaintiff's arguments that they were in functional privity with another party. In *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536 (1985), the plaintiff financial services company sued the defendant accounting firm on the ground that it had prepared misleading and/or fraudulent audit reports for a company for which the plaintiff had provided financing. The Court dismissed the complaint, finding that the plaintiff had not alleged that the defendant had directly dealt with the plaintiff or had agreed to prepare the reports for the plaintiff's use, or that there had been any action or contact directly between the plaintiff and the defendant. (*Id.* at 553-554).

And, in *Westpac Banking Corp. v Deschamps*, 66 NY2d 16 (1985), the plaintiff lender sued the defendant accountant for negligently preparing a borrower's financial statements. In dismissing the complaint, the Court found that plaintiff had not alleged that the defendant knew that the statements would be shown to the plaintiff. Rather, when the statements were prepared, the plaintiff was one person in a class of potential lenders and thus, the Court held, the defendant did not know that the plaintiff would rely on the statements. The plaintiff also failed to allege any direct contact between it and the defendant at the time the defendant prepared the statements.

Following *Ossining*, the Court held in *Sec. Pac. Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695 (1992), that the plaintiff lender, having made a loan to another entity based on an audit report prepared by the defendant accounting firm, had no claim against the accounting firm absent any allegation that the firm had been retained or agreed to prepare the report for the plaintiff's specific benefit, or that it had directly supplied or agreed to supply the plaintiff with a

copy of the report.

Finally, in *Parrott v Coopers & Lybrand, L.L.P.*, 95 NY2d 479 (2000), the Court held that the defendant accounting firm could not be held liable to the plaintiff employee notwithstanding his reliance on the firm's reports in making decisions relating to his employee stock ownership plan, absent any allegation of conduct directly linking the firm and the plaintiff such that the firm should have understood that the plaintiff would rely on its reports. That the employee was a member of a class of employees which may have been known to the firm was held insufficient absent a showing of direct contact between the firm and the specific employee.

Thus, in determining whether the functional equivalent of privity exists between two parties, the party asserting it must allege that there was a misrepresentation and that at the time of the misrepresentation, the party asserting it was specifically known to the party making the misrepresentation, and that there was direct contact between the two parties at the time of the misrepresentation. (*See Bri-Den Constr. Co., Inc. v Kapell & Kostow Architects, P.C.*, 56 AD3d 355 [1st Dept 2008], *lv denied* 12 NY3d 703 [2009] [plaintiff contractor that bid on contract which included plans and specifications prepared by defendant firm was not known to firm at time of alleged negligent misrepresentation as it was then only part of class of future bidders and thus could not maintain claim against firm for negligence, negligent misrepresentation, or malpractice]; *Ford v Sivilli*, 2 AD3d 773 [2d Dept 2003] [plaintiffs-purchasers were part of class of people who could have relied on defendants' representations, which is not equivalent to being known parties]; *Marcellus Constr. Co., Inc. v Vil. of Broadalbin*, 302 AD2d 640 [3d Dept 2003] [defendant engineering firm prepared bid documents for project including information about subsurface conditions, plaintiff contractor awarded contract and alleged that firm misrepresented

conditions, resulting in additional expenses; court rejected claim of functional equivalent of privity, finding that plaintiff not known to firm merely because it was a potential bidder but rather was part of class which may have acted in reliance on defendant's information, and found absence of conduct between plaintiff and firm showing that firm understood that plaintiff specifically would be relying on its information in preparing its bid]; *see also Sykes v RFD Third Ave. 1 Assocs., LLC*, 67 AD3d 162 [1st Dept 2009] [claim dismissed as plaintiffs failed to allege that they were known to defendant firm at time of alleged misrepresentation beyond knowledge that some purchaser would rely in future on its information, or that firm agreed to provide information directly to them or that there was direct contact between them]).

Here, as the allegedly negligently prepared plans were included with the project contract, they existed before plaintiff's bid for the project was accepted and before the contract signed. Moreover, having alleged in the complaint that it received the project contract through competitive bidding, *eg*, part of the class of bidders who could have relied on the plans, plaintiff was merely a potential future bidder among a class of bidders and thus, was not specifically known to City as the entity which would rely on the plans. Plaintiff also does not allege any direct contact with City before it was awarded the contract, and thus, there is no indication that plaintiff was known to it when the plans were prepared or that there was any contact with it sufficient to give City notice that plaintiff would rely on the plans. Subsequent contact is irrelevant. (*See eg DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302 [1st Dept 2005] [no direct communications between plaintiff investment firm and auditors]; *IT Corp. v Ecology and Envtl. Eng'g, P.C.*, 275 AD2d 958 [4th Dept 2000], *lv denied* 96 NY2d 702 [2001] [complaint did not allege any contact between plaintiff contractor and defendant firm before plaintiff submitted

bid for project or that defendant was aware of plaintiff's identity; "although defendant may have known that potential bidders would rely upon its work to prepare their bid, the complaint does not allege that defendant knew that plaintiff was one of those bidders."]; *Cal Mart Enterprises, Inc. v Eustance & Horowitz, P.C.*, NYLJ, May 23, 2002, at 24, col 5 [Sup Ct, Rockland County] [plaintiff contractor did not have privity with firm that provided plans for project as plans were prepared before plaintiff won project bid, its identity not known to firm when plans were prepared other than general knowledge that some contractor would probably rely on plans once project was awarded, and no evidence of contact between them]; *Indus. Temperature Sys., Inc. v Tishman Interiors*, NYLJ, Nov. 8, 1999, at 22, col 2 [Sup Ct, New York County] [plaintiff subcontractor did not show that architectural firm made representations directly to it regarding plans in effort to shape its conduct; complaint alleged that negligent acts occurred before contractor began work on project]).

While plaintiff argues that discovery is warranted on this issue, whether or not it had direct contact with the City or was known to City at the time the plans were prepared are matters within its knowledge; any relevant information should be in its possession. In any event, it does not specify what discovery is needed. (*Port Auth. of New York and New Jersey v Rachel Bridge Corp.*, 192 AD2d 489 [1st Dept 1993] [affirming grant of summary judgment to third party as defendant failed to produce evidence establishing that its relationship with party was functional equivalent of privity; defendant's cross-motion to postpone summary dismissal pending discovery properly denied absent demonstration that evidence of parties' relationship within exclusive possession of third party]).

Thus, plaintiff has failed to allege sufficiently or establish that its relationship with City

constituted the functional equivalent of privity relating to the project contract or that discovery may lead to evidence showing such privity.

2. Claim precluded by contract

Moreover, the project contract contains provisions precluding plaintiff from asserting any claim against City based on PMS's action, and such provisions have been enforced. (*See IMS Engrs.-Architects, P.C.*, 51 AD3d at 1357-1358 [subcontractor had no standing to sue defendant property owner as contract between owner and general contractor waived any claim by subcontractor against owner]; *Bd. of Mgrs. of the Alexandria Condominium v Broadway/72nd St. Assocs.*, 285 AD2d 422 [1st Dept 2001] [contract clause negated enforcement of contract by third party]; *Braun Equip. Co., Inc. v Meli Borelli Assocs.*, 220 AD2d 312 [1st Dept 1995] [subcontract expressly precluded third-party privity between subcontractor and owner, thus subcontractor's remedy was only against contractor]).

3. Judicial economy

That City possesses relevant documents does not constitute a sufficient basis for denying dismissal as the parties will be able to seek the documents even if City is a non-party, and PMS's ability to implead City as a third-party defendant is irrelevant to whether or not plaintiff has stated a direct claim against City.

III. PMS'S MOTION TO DISMISS

PMS alleges that plaintiff's claims against it must be dismissed as plaintiff made fraudulent misrepresentations during its bidding on the project contract. PMS relies on three decisions in which plaintiff's complaints against City were dismissed on the ground that plaintiff had made fraudulent representations on a questionnaire submitted as part of its bid on various

City projects. (*Omni Contracting Co., Inc. v City of New York, et al.*, Sup Ct, Queens County, Sept. 25, 2009, Kerrigan, J., index No. 30640/08; *Omni Contracting Co., Inc. v City of New York*, Sup Ct, New York County, Nov. 13, 2009, Smith, J., index No. 603812/08; *Omni Contracting Co., Inc. v City of New York*, Sup Ct, New York County, March 5, 2010, Kern, J., index No. 105634/07; *Omni Contracting Co., Inc. v City of New York*, Sup Ct, New York County, June 21, 2010, Kern, J., index No. 105634/07 [denying motion to reargue and renew prior order]). PMS argues that as plaintiff made the same fraudulent misrepresentations on the same questionnaire as in the earlier cases, the decisions are persuasive authority and/or collaterally estop plaintiff from advancing the argument again here. (Affirmation of Michael R. Strauss, Esq., dated March 15, 2010).

Plaintiff maintains that the other decisions are wrongly decided and has appealed them. (Plaintiff's Memo.). The parties agreed at oral argument that this issue should be decided before addressing any of the other grounds set forth by PMS in its motion to dismiss.

As plaintiff has appealed all three decisions and its time to perfect the appeal of Justice Kerrigan's decision has been enlarged to October 22, 2010, and absent any binding authority on this issue, judicial economy warrants a stay of a decision on PMS's motion pending a decision on Omni's appeals.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the City of New York's motion to dismiss is granted, and the complaint and all cross-claims are dismissed against defendant City of New York with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an

appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that the remainder of the action shall continue; it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158; and it is further

ORDERED, that PMS Construction Management Corp.'s motion to dismiss is stayed as set forth above, and the parties are directed to contact the justice assigned to the action after it has been transferred to a non-city part once an appeal has been decided.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: September 27, 2010
New York, New York

SEP 27 2010

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK