

Rose Assoc., Inc. v 8-26 Realty Corp.

2010 NY Slip Op 34088(U)

November 22, 2010

Supreme Court, New York County

Docket Number: 109153/2009

Judge: Bernard J. Fried

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 60

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ROSE ASSOCIATES, INC.,
Plaintiff,

-against-

Index No. 109153/2009

8-26 REALTY CORP., 26TH AND EIGHTH AVENUE LLC,
262 WEST 26TH ST. LLC, AND 264 WEST 26TH ST. LLC,
Defendants.

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APPEARANCES:

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Attorneys for the Defendants

FRIED, J:

In this breach of contract action, Plaintiff, Rose Associates, moves pursuant to CPLR 3211(a)(1) and (7) to dismiss several counterclaims.

The complaint alleges that in July 2007, 8-26 Realty Corp., 26th and Eight Avenue LLC and 264 West 26th St LLC (the "Defendants") entered into an owner representative agreement (the "Agreement") with Rose in connection with the development of a residential apartment building on the Defendants' property at 262-264 West 26th Street, New York, NY.

Under the Agreement, Plaintiff was engaged as the owner representative of the project and charged with overseeing and supervising the project's completion. The Agreement provided that Rose would receive a fee equaling 3 percent of the project's costs. In addition, Paragraph 3.1 of the Agreement provided that Defendants would pay Rose on a fee schedule, with varying monthly payments (\$50,000 for 6 months; \$100,000 for 24 months; and then \$37,500 for 8 months). (Complaint ¶11). Commencing in August 2007 through November 2007, Rose began construction on the site. (Complaint ¶14).

Paragraph 1.3(d) of the Agreement provides that Rose was required to "assist in securing the required financial institutions necessary for the financing of the project." Rose was required to seek out financing from the New York State Housing Financing Agency ("NYSHFA"). Defendants allege that Rose did not employ experienced professionals to seek this financing, and that Rose tacked on unnecessary costs for their work through November 1, 2007. (Answer, ¶22-24).

In light of these purported deficiencies, on or about December 1, 2007, the Defendants suspended Rose from further performance under the Agreement. (Complaint, ¶17). Paragraph 3.3 of the Agreement stated that if the Defendants failed to reinstate Rose within one year of the suspension, Rose is entitled to the full amount of *all* monthly fees earned from the commencement of Rose's engagement up and through the Suspension date, plus an additional 25 percent of the total amount of such earned fees. Here, Rose alleges that it was entitled to \$200,000 for the work performed through November 2007.

Plaintiff alleges in the Complaint that it fully performed its obligations under the Agreement from August 2007 to December 1, 2007, and that they provided the Defendants with regular invoices (to which they did not object). (Complaint, ¶¶ 14-16).

In response, the Defendants have pled four counterclaims. The Second Counterclaim (negligence) alleges that Rose was negligent in its performance of the contract by breaching the duty of care. (Answer, ¶¶ 29, 30). Specifically, Defendants assert that Rose had a duty to investigate the financing options with reasonable diligence, which was separate and independent from the contractual duties.

The Third Counterclaim alleges that Rose is liable for contractual indemnification. Defendants maintain that third counterclaim is sufficient because the express language of the indemnity provision of the Agreement provides that Rose will indemnify Defendants from liability due to Rose's gross negligence or willful misconduct. Defendants argue that Paragraph 6.1 of the Agreement covers the "Company" and "Company Indemnitees," a term which includes the company itself. (Answer, ¶ 33). The Defendants do not object to the dismissal the fourth counterclaim for the disgorgement of fees.

Rose contends that the Second Counterclaim (negligence) is duplicative of the breach of contract claim, and that the Defendants have not alleged the breach of any duty independent of the parties' written agreement. Specifically, Rose points to paragraphs 22-25 (the Counterclaim for the Breach of Contract) and to paragraph 29 (the Negligence Counterclaim), both of which allege identical claims. (Plaintiff's M.O.L., pp.2-3). The Breach of Contract Counterclaim states that Rose breached the agreement by failing to

provide experienced personnel to seek NYSHFA financing, by failing to advise the Owner as to the deadline for the submission of the NYSHFA application, by failing to seek out other sources of financing, and by advising the owner to incur unnecessary fees. (Answer, ¶¶ 22-25). Likewise, the Second Counterclaim (negligence) states virtually identical allegations:

“29. Rose breached its duty owed to the Owner in that it: (1) failed to advise Owner of the deadline to apply for NYSHFA financing; (2) failed to provide experienced personnel to assist in securing financing for the Project; (3) failed to seek alternative sources of financing for the Project; (4) advised Owner to incur unnecessary professional fees; and (5) caused delays in the project.” (Answer, ¶29).

Thus, in light of the virtual similarity between the two counterclaims, Rose asserts that the claim is duplicative of the breach of contract counterclaim.

With respect to the Third Counterclaim (contractual indemnification), Rose asserts that this counterclaim should be dismissed because it fails to state a claim and is refuted by documentary evidence. Paragraph 6.1 of the Agreement provides that Rose agreed to “indemnify the Company, its managers, ... employees, ... and agents and hold the Company Indemnitees free and harmless from and against any claims.” Rose maintains that such language was intended to apply only to third parties. (Plaintiff’s M.O.L., p. 6). Therefore, they assert that the claim should be dismissed.

When a motion is based on documentary evidence, pursuant to CPLR 3211(a)(1), dismissal of a cause of action is warranted “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Peter Lampack*

Agency, Inc. v. Grimes, 29 Misc.3d 1208(A), at *1 (Sup. Ct., N.Y. County 2010). Under CPLR §3211(a)(7), a party may move for dismissal of certain claims if the claims do not “state a cause of action.” On a motion to dismiss under Section 3211(a)(7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...” *Guggenheimer v. Ginsburg*, 43 N.Y.2d 268, 275 (1976). Every factual allegation must be accepted as true and the allegations are to be liberally construed in a light most favorable to the pleading party. See *Leon v. Martinez*, 84 N.Y.2d 83, 97-88 (1994). However, “the court’s attention should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one.” *R.H. Sabar Projects, Inc. v. Gruzen Partnership*, 148 A.D.3d 316 (1st Dept. 1989).

Defendants’ negligence claim will survive if it states duty that is separate from the breach of contractual duties. Negligence allegations that “are based solely on the terms of the Memorandum” are duplicative of the contract claim and accordingly should be dismissed. *Barnelli & Cie S.A. v. Dutch Book Funds, SPC*, 2010 WL 3504780, at *7 (Sup. Ct., N.Y. County 2010) (Bransten, J.). “This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent on the contract.” *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987). In *Barnelli*, the Plaintiff argued that failing to perform duties under the contract in an egregious manner constituted a breach of the duty of care. *Barnelli & Cie S.A.*, 2010 WL 3504780, at *7. Applying *Clark-Fitzpatrick*, Justice Bransten rejected the negligence claim and held that when a party “attempts to assert a cause

of action for negligent breach of contract,” the claim should be dismissed because New York law does not recognize such claims. *Id.*

Here, as in *Barnelli*, the negligence counterclaim is predicated on failure to perform the contractual duties. Defendants claim that their breach of contract claim is distinct from the negligence claim because the breach of contract claim dealt with failure to return unearned fees, whereas the negligence claim dealt with failure to obtain financing. (Defendant’s M.O.L., p. 5-6). The Second Counterclaim, much like the First Counterclaim (Answer ¶¶22-25) is also based on Paragraph 1.3(d) of the Agreement. Moreover, it essentially alleges a negligent breach of contract and reiterates the breach of contract claims dealing with NYSHFA financing while replacing breach of the agreement with breach of duty. (Answer, ¶¶ 29, 30). Accordingly, it is duplicative of the breach of contract claim and must be dismissed.

Turning to the Third Counterclaim, the first issue is whether the Indemnity Provision covers the Defendants. Paragraph 6.1 of the Agreement provides:

“Rose agrees to Indemnify *the Company*, its managers, members, officers, principals (disclosed or undisclosed), employees and agents (collectively, the “Company Indemnitees”) and hold the Company free an harmless from and against any and all claims, costs, . . . by reason of the gross negligence or willful misconduct of Rose.”

The Agreement defines the “Company” as 8-26 Realty Corp., 26th and Eighth Avenue LLC , 262 West 26th St LLC, and 264 West 26th St. LLC (Desimone Affidavit, Exhibit A,

p.1). Thus, the Indemnity Provision expressly covers the Defendants from any injury resulting from Rose's gross negligence.

Nevertheless, even though the Defendants may be covered under the Agreement, the Third Counterclaim is insufficient because the Defendants did not state a cause of action for negligence. Since the the Agreement provides that gross negligence is a triggering condition for liability under the indemnity provision, the Defendants must allege that the injury resulted from Rose's gross negligence. *See In re New York City Asbestos Litigation*, 41 A.D. 299, 302 (1st Dept. 2007) (noting that evidence of negligence is not required only when the indemnity provision is stated broadly and neglects to mention a triggering conduct). Because the Defendants have failed to properly allege gross negligence, which is required by the language of Paragraph 6.1, this counterclaim must be dismissed.

Accordingly, it is

ORDERED that Plaintiff's motion to dismiss the second, third, and fourth counterclaims is granted.

DATED:

11/22/10



HON. BERNARD J. FRIED