Perkins Eastman Architects, P.C. v Nations Academy, LLC

2011 NY Slip Op 30805(U)

March 25, 2011

Supreme Court, New York County

Docket Number: 603326/09

Judge: Emily Jane Goodman

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SCANNED ON 4/5/2011

[* 1]

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

PRESENT: ~~EMILY JANE GOODMAN.~~ PART 17

Index Number : 603326/2009
PERKINS EASTMAN ARCHITECTS
VS.
NATIONS ACADEMY, LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

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

n 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 is decided

per attached

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

FILED

APR 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/28/11

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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PERKINS EASTMAN ARCHITECTS, P.C.,

Plaintiff,

-against-

Index No.: 603326/09

NATIONS ACADEMY, LLC and
GEMS AMERICAS, INC., d/b/a
GEMS EDUCATION,

Defendants.

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FILED
APR 05 2011
NEW YORK
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN, J.:

Plaintiff, an architectural firm, seeks compensation from defendants for services rendered. Gems Americas, Inc. (Americas) moves, pursuant to CPLR 3212 (a) (1) and (7), to dismiss the complaint and for sanctions pursuant to 22 NYCRR § 130-1.1.

In the complaint, plaintiff alleges that its claim arises from defendants' breach of a series of contracts relating to the development and construction of schools that defendants Americas and Nations Academy, LLC (Nations) were developing as part of their global network of international schools. Plaintiff also alleges that Americas, a Delaware corporation, is a corporate affiliate and/or subsidiary of two nonparties, the GEMS Education Group (Education) and the Varkey Group, both of which are organized under the laws of the United Arab Emirates. Plaintiff contends that, among other things, Education operates private schools internationally.

The complaint states that, at various times in 2007, plaintiff was retained by and contracted with Nations and Americas to provide various architectural services, pursuant to agreements for different projects involving the development and construction of schools.

Plaintiff claims that it was not fully paid for its work, and is owed $3 million. The causes of action of the complaint sound in breach of contract, unjust enrichment, quantum meruit and account stated.

Discussion

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference" (*M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 260 [1st Dept 2008], *affd as mod* 12 NY3d 798 [2009] [internal quotation marks and citation omitted]). Where extrinsic evidence is submitted in connection with the motion, "the appropriate standard of review is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007] [internal quotation marks and citation omitted]).

Americas' sole argument for dismissal is that, because it was not organized until January 15, 2009, and did not exist until after the occurrence of the transactions described in the complaint, it could not have retained plaintiff's services in 2007 and is not liable for them. In support of its motion, Americas submits a copy of its certificate of incorporation and a certification from the Delaware Secretary of State demonstrating that the certificate of incorporation was filed on January 15, 2009. Americas also submits a copy of its certificate of authority to do business in New York, dated May 8, 2009. As the vehicle for the submission of

these documents, Americas submits the affidavit of Dr. Manuel J. Rivera. Rivera avers that he is the chief executive officer of Americas. Plaintiff does not challenge that the documentary evidence Americas submits is conclusive evidence of Americas' date of incorporation.

In opposition, plaintiff argues that its agreements are enforceable against Americas because plaintiff was retained with the understanding that the ultimate recipient of the work was Education and a subsidiary that it would later form, which turned out to be Americas. Plaintiff also argues that Americas should be estopped from denying its corporate existence due to the representations and conduct of its agents. Plaintiff further contends that Americas is a party to the agreements because a corporation may be held liable for the contractual obligations of its promoters where it is merely the promoter's alter ego.

Plaintiff's opposition is predicated on the affidavit of one of its principals, Raymond Bordwell. Bordwell avers that plaintiff had a series of contracts for architectural work, relating to the development and construction of schools, including schools proposed for, among other places, New York, Maryland and Paris. Bordwell states that in spring 2007, plaintiff was approached by individuals whom it was led to believe represented Nations and Education, and was informed that Education was the ultimate beneficiary and provider of financial support for the school projects. Bordwell asserts that while the initial school was to be built in New York, for Nations, during plaintiff's work on the various projects for which it was eventually requested to provide architectural services, the distinction between Nations and Education was not delineated, and the recipient and beneficiary of the work, and therefore the client, was to be whatever American-based entity Education formed to forward the projects. Bordwell states that plaintiff understood that Education might possibly form a series of corporate entities to build and

operate the schools. Bordwell contends that he paid little attention to Education identifying which corporation would be building the schools according to plaintiff's plans, or whether the entity had been formed, because in real estate development it is not untypical for the rendering of architectural services, and the securing of funds and government approval, to be performed before the formation of a business entity.

Bordwell states that in October 2007, after plaintiff began work on an initial project, which involved the development of a global prototype for schools, representatives of Nations and Education requested that plaintiff expand its work to provide services relating to the design of two proposed schools to be located, respectively, in Manhattan and Maryland. Bordwell avers that at the start of work on these projects, plaintiff was told that Nations would be the entity operating them, but that it was also understood that Nations might not be plaintiff's ultimate client, constructor or operator of either school, or the recipient/beneficiary of plaintiff's work product.

Bordwell avers that another expansion of work occurred in November 2007, when defendants requested that plaintiff provide architectural analysis for possible school sites around the world. Bordwell states that whether Nations, or another Education entity, was to be the ultimate client, the recipient or beneficiary of plaintiff's work product, or the constructor or operator of the schools, was not set in stone. Bordwell maintains that, in October 2008, he understood that the owner of plaintiff's work product would be a "Gems America" entity, and possibly branded as "Nations Academy."

Bordwell further avers that plaintiff's services were performed at the request of, and submitted to, several executives of Nations and Education, acting as promoters of Americas.

Bordwell states that each stage of the architectural services was reviewed by one of these Education executives, and eventually with representatives working for Americas. Bordwell also states that during plaintiff's working relationship with Nations, Education and Americas, it was apparent to him that the "Gems people," presumably indicating representatives of these entities, intended that plaintiff's work would also be for Education and Americas (Pl. Op. Aff., Exh. A., ¶ 20). Bordwell asserts that plaintiff's work for Nations was often referred to by Education's general counsel as "part of Gems DNA" (*id.* at 21).

Bordwell continues that after plaintiff completed certain work that was sent to Education's chairman, Sunny Varkey, Education officials requested that he travel to Dubai to meet with Education executives. Bordwell states that Sunny Varkey also came to New York to review plans, and on numerous occasions met with Bordwell at Nations' New York offices, which later became Americas' offices. Bordwell contends that during plaintiff's work on various projects, the entity for whom work was being performed was interchangeable, but that it was understood that the ultimate beneficiary of the work, and the client, would be both Education and whatever corporate entity it formed in the United States. Bordwell maintains that Americas is that entity.

Bordwell avers that, in summer 2008, he worked with Education in New York, with Rivera, who was identified to him as an Education executive, the new executive officer for Nations, and the intended CEO of Americas once it was formed. At this time, Bordwell became concerned because Nations and Education's deal with the New York developer ended, and the

payments from Nations and Education were falling behind, with $3 million owed.[1] Bordwell states that, during discussions, Rivera and an Education executive led him to believe that the project work product would belong to Education and, once it was formally organized, to Americas. Bordwell further states that they assured him that Education would continue its plan for a worldwide network of schools, for which plaintiff had done work, in some form under one of Education's subsidiaries and that Education would pay plaintiff, directly, or through a subsidiary.

Bordwell avers that in October 2008, Rivera and others from Education reaffirmed to plaintiff that Education and Americas were the entities for which plaintiff had performed its work and would pay the outstanding fees, and repeatedly stated that the plans, designs and other work product generated by plaintiff over the previous year were to be the property of Education and Americas. Bordwell believes that, for that reason, the executives discussed with him ways that Education either directly, or through Nations or Americas, including through additional work assignments with inflated fees, would pay fees owed for work performed. Bordwell states that Education and, he believes, Americas, retained the work product. Bordwell avers that plaintiff submitted work product to Nations, Education and Americas worth more than $6 million, with a current balance owed of more than $3 million.

Plaintiff's argument that Americas is liable, based on an estoppel theory, is unpersuasive.

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[1]Bordwell states that payments from Americas were falling behind, but this statement is discounted as unsupported legal conclusion, as America did not exist during the time period indicated by Bordwell. In addition, to the extent that Bordwell appears to state or suggest that Rivera was an agent of Americas or that a representative of Americas reviewed architectural services before Americas was formed, these statement are discounted because Americas could not have reviewed architectural services or had agents prior to its existence.

"A corporation [that is not a de jure corporation may] be deemed to exist, and thus possess the capacity to contract, pursuant to the doctrine of incorporation by estoppel" (*Rubenstein v Mayor*, 41 AD3d 826, 828 [2d Dept 2007]). The incorporation by estoppel doctrine generally precludes a party that has agreed to look to a corporation for compensation concerning a transaction from seeking to obtain relief from the corporation's owners (*id.*; *see Boslow Family Ltd. Partnership v Glickenhaus & Co.*, 7 NY3d 664, 668 [2006]). Courts also have determined that a corporation that "has held itself out to the general public as a corporation [will not] be allowed to hide behind its deception [and is] therefore estopped from denying the existence and viability of its corporate entity" (*Matter of Gold Depository Unlimited of Am.*, 106 Misc 2d 992, 993 [Sup Ct, NY County 1980]).

In this case, plaintiff does not state that, during the time that the alleged contracts were entered or performed, anyone represented or led it to believe that Americas was an existing corporation, when it was not. Indeed, plaintiff makes clear that it had knowledge that the entity that would be constructing or operating the schools was yet to be formed, and, therefore, did not exist. Consequently, the doctrine of corporation by estoppel is not a basis for relief for plaintiff.

Plaintiff argues that Americas is liable to it because the agreements were preincorporation contracts. Americas argues that plaintiff's contention of a preincorporation contract is newly minted, and fails because none of the agreements alleged in the complaint or Bordwell's affidavit were made for or on behalf of Americas. Americas also argues that plaintiff does not allege that Americas took any steps after its incorporation to ratify, adopt or accept performance of any of the agreements.

"It is a familiar principle that a corporation will be liable on a contract of its promoters

only if adopted, either expressly or by acceptance of benefits referable to that contract (*Morgan v Bon Bon Co.*, 222 NY 22, 26-27 [1917]" (*Matter of Reif* [*Williams Sportswear*], 9 NY2d 387, 392 [1961]; *Metro Kitchenworks Sales, LLC v Continental Cabinets*, LLC 31 AD3d 722, 723 [2d Dept 2006] [A "purported principal, which had neither de facto nor de jure existence at the time the contract was entered into, cannot be bound by the terms thereof 'unless the obligation is assumed in some manner by the corporation after it comes into existence by adopting, ratifying, or accepting it'" (quoting 14 NY Jur 2d, Business Relationships § 97)]; *Bommer v American Spiral Spring Butt Hinge Mfg. Co.*, 81 NY 468, 473 [1880] ["the company, by availing itself of the agreement, enjoying its benefits, and acting under and in part performing it, made it its own as effectually as if it had formally and by resolution adopted and ratified its terms"]). "[A] positive, authorized act [by or on behalf of the corporation] is normally essential to corporate responsibility for preincorporation contracts" (*Matter of Reif*, 9 NY2d at 392). While the clearest evidence of a binding adoption would be by the corporation's formal resolution approving the contract, adoption may be through other means, such as where a corporation accepts a contract's benefits (*see id.*).

To support its argument that none of the agreements alleged in the complaint or the Bordwell affidavit were made for or on behalf of Americas, Americas points to Bordwell's assertion that, at the outset of the engagement, plaintiff understood that Education may form a series of entities to build and operate the schools, and that since Nations was already organized, plaintiff was told that Nations would be the entity operating the New York and Bethesda schools.

While Bordwell does state that the initial school was to be in New York and for Nations, he also states that during later work on various projects, the distinction between Nations and

Education was not preserved, and that whatever American-based entity Education formed was the be the recipient and beneficiary of the work (Bordwell Aff., ¶¶ 6-7).[2] Bordwell further avers that, in October 2008, Rivera and others from Education reaffirmed to plaintiff that Education and Americas were the entities for which plaintiff had performed its work and would pay plaintiff's outstanding fees. Therefore, on this record, it cannot be determined, as a matter of law, that none of the alleged agreements for work were made for the benefit of, or on behalf of, a to-be-formed corporation, or that plaintiff will not be able to demonstrate that the corporation was Americas.[3]

Americas maintains that plaintiff alleges that the agreements were entered into, the services performed, and the payment default effected prior to Americas' incorporation, and that plaintiff does not allege that Americas took any steps whatsoever after its incorporation to ratify or accept performance of any of the agreements. In his affidavit, Bordwell states that Education representatives stated "that the plans, designs and other documents generated by plaintiff over the previous year were to be the property of Education and Americas" and that Americas now retains plaintiff's work product (Bordwell Aff., ¶¶ 34, 35). At this early juncture, with only a sparse

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[2]While it appears, from the wording of the complaint, that the parties entered into written agreements for the work projects, neither party provides a copy of an agreement.

[3]In opposition, Bordwell submitted correspondence, dated May 8, 2008, from Manhattan Community Board Four to the New York City Industrial Development Agency (IDA), in which the Community Board states that it was their understanding that a not-for-profit corporation of Nations Academy named "Cities School Network Inc." was seeking financial assistance from the IDA for a proposed new private school. Americas argues that this letter impeaches plaintiff's speculative contention that Americas was the business entity that Bordwell claims was to be formed by Nations and/or Education. As Americas argument was raised in its reply, plaintiff has not had the opportunity to address Americas' contention. However, the motion to dismiss will not be decided on a letter from a nonparty discussing its "understanding."

record before the court, and an affidavit from American's which merely concludes from its date of incorporation that "[i]t is impossible, therefore, that...America's could have engaged in any of the transactions alleged." Bordwell's averments, afforded the benefit of reasonable inferences, are sufficient to allege America's acceptance, after its incorporation, of a contractual benefit consisting of plaintiff's work product (*see Universal Indus. Corp. v Lindstrom*, 92 AD2d 150 [4th Dept 1983] [finding that action against corporation was not precluded concerning contract for goods sold and shipped prior to formation of corporation]).[4]

As the court has determined that there is a basis for sustaining the claim, it is unnecessary to reach plaintiff's argument that Americas is the alter ego of those that plaintiff maintains were its promoters.[5] As the complaint has not been dismissed, Americas is not entitled to an award of the sanctions it requests of costs and attorneys' fees for this motion.

Conclusion

In light of the foregoing it is

ORDERED that the motion of GEMS Americas, Inc. to dismiss the complaint and for

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[4]The court assumes as true, for purposes of this motion, plaintiff's contention that Americas has its work product, but makes no binding determination as to the significance of such receipt or retention, including whether or not the acceptance or receipt of any alleged work product was a benefit to Americas.

[5]The court also need not address plaintiff's equitable estoppel argument. In any event, plaintiff does not make clear when it was assured, purportedly by Americas' representatives, that Americas would pay for the work, and does not point to a basis in law for estopping *Americas* from denying its existence, or anything else, based on representations allegedly made by Education's representatives.

sanctions is denied.

This Constitutes the Decision and Order of the Court.

Dated: March 25, 2011

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED

APR 05 2011

NEW YORK
COUNTY CLERK'S OFFICE