

Husek v Sand Hill Dev. Corp.

2011 NY Slip Op 32294(U)

August 17, 2011

Supreme Court, Nassau County

Docket Number: 10396/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

JOHN J. HUSEK, INGRID HUSEK and DAVID HUSEK,

Plaintiff(s),

-against-

SAND HILL DEVELOPMENT CORP., GORDON S. HECHT, individually, SWR UNLIMITED, INC., FELICIONI DEVELOPMENT CORP.,

Defendant(s).

_____ x

Index No. 10396/09

Motion Submitted: 7/11/11

**Motion Sequence: 004, 005, 006, 007
008**

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XXXXXX
Answering Papers.....	XXXXXX
Reply.....	XXXX
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

All parties move and/or cross-move for summary judgment pursuant to CPLR §3212.

By agreement dated September 2008, codefendant Sand Hill Development Corp. ["Sand Hill"] and the plaintiff-homeowners John J. Husek and Ingrid Husek, entered into a written contract pursuant to which, for some \$407,000.00, Sand Hill was to demolish an existing structure and then construct a new home for the plaintiffs in Merrick, New York (Cmplt., ¶¶ 17-18; Contract at 1,4, ¶¶ IV, VII.2). In April of 2009, the parties became embroiled in a dispute when a demolition subcontractor retained by Sand Hill, SWR Unlimited, Inc. ["SWR"], removed shingles allegedly containing asbestos without the requisite asbestos removal license, and later (together with Sand Hill) received violation notices from the New York State Department of Labor.

Subsequent to the asbestos incident, the plaintiffs directed Sand Hill and SWR to cease all work and allegedly “terminated” the contract with Sand Hill, after which they retained a new contractor to perform the work. Shortly thereafter, in May of 2009, the plaintiffs commenced the within action against Sand Hill, Sand Hill’s president, Gordon S. Hecht, SWR, and Felicioni Development Corp. an entity retained by Sand Hill to disconnect the water and sewer service prior to the demolition of the house (Felicioni Aff., ¶¶ 2-4 *see*, Viscount Aff., ¶¶ 10-11).

The plaintiffs’ verified complaint contains six causes of action made applicable to stated defendants. The first, second, third and fifth causes of action are grounded on repletion, breach of contract and fraud, and interposed against Sand Hill and Hecht, individually; the fourth, breach of contract cause of action, has been pleaded as against SWR, while the sixth cause of action is also based on a breach of contract/third party beneficiary theory and is interposed solely against Felicioni.

Significantly, the plaintiffs’ fraudulent inducement cause of action, as pleaded, is based in substance on averments that Hecht and Sand Hill induced the plaintiffs into entering into the building contract by representing, *inter alia*, that Sand Hill and any subcontractors it retained would be properly licensed and that Sand Hill would be able to timely perform the contract work (Cmplt., ¶¶ 51-54).

The defendants have answered, denied the material allegations of the complaint, and interposed various affirmative defenses and counterclaims. Discovery has been conducted and the parties now move and cross move for summary judgment on their respective claims. The parties’ motions are denied in part and granted in part.

Upon the papers submitted, Gordon S. Hecht has established his *prima facie* entitlement to judgment as a matter of law dismissing the complaint insofar as interposed individually against him (*e.g.*, *Sarafolean v. Accomplice New York*, 74 A.D.3d 1310, 1311, 904 N.Y.S.2d 223 (2d Dept., 2010); *Heffez v. L & G Gen. Constr., Inc.*, 56 A.D.3d 526, 527, 867 N.Y.S.2d 198 [2d Dept., 2008]). Specifically, Hecht has demonstrated: (1) that the plaintiffs’ contracts were exclusively with Sand Hill; (2) that he neither acted in his individual capacity nor dominated Sand Hill by committing a fraud or wrong against the plaintiffs through misuse of the corporate form (*e.g.*, *TNS Holdings, Inc. v. MKI Securities Corp.*, 92 N.Y.2d 335, 338-339, 703 N.E.2d 749, 680 N.Y.S.2d 891 (1998); *Kallman v. Pinecrest Modular Homes, Inc.*, 81 A.D.3d 692, 916 N.Y.S.2d 221 (2d Dept., 2011); and (3) that he did not commit fraudulent or tortious conduct otherwise supporting the imposition of personal liability arising out of the performance of the parties’ contracts (*Kallman v. Pinecrest Modular Homes, Inc.*, *supra*; *Meyer v. Martin*, 16 A.D.3d 632, 792 N.Y.S.2d 178 (2d Dept., 2005); *Sarafolean v. Accomplice New York*, *supra*; *Bernstein v. Starrett City*, 303 A.D.2d 530, 532, 758 N.Y.S.2d 658 [2d Dept., 2003]).

With respect to the underlying claim that Hecht and/or Sand Hill engaged in fraudulent conduct by allegedly inducing the plaintiffs to enter into the building contract, the plaintiffs' complaint does not allege, and the evidence does not establish, that Hecht's purported misstatements relating to, *inter alia*, the timely completion of the job or the retention of qualified personnel were deliberately and falsely made with the requisite scienter and/or that Hecht or Sand Hill had no intention of performing the contract at the time the disputed statements were made (*Weinstein v. Natalie Weinstein Design Associates, Inc.*, 86 A.D.3d 641, ___ N.Y.S.2d ___ (2d Dept., 2011); *Freiman v. JM Motor Holdings NR 125-139, LLC*, 82 A.D.3d 1154, 1156, 920 N.Y.S.2d 189 (2d Dept., 2011); *Hylan Elec. Contr., Inc. v. MasTec N. Am., Inc.*, 74 A.D.3d 1148, 1149, 903 N.Y.S.2d 528 (2d Dept., 2010) *see*, *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318, 662 N.E.2d 763, 639 N.Y.S.2d 283 (1995); *Venables v. Sagona*, 85 A.D.3d 904, 925 N.Y.S.2d 578 (2d Dept., 2011); *Yenrab, Inc. v. 794 Linden Realty, LLC*, 68 A.D.3d 755, 892 N.Y.S.2d 105 (2d Dept., 2009); *Heffez v. L & G Gen. Constr., Inc.*, *supra*; *cf.*, *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 956, 502 N.E.2d 1003, 510 N.Y.S.2d 88 [1986]).

At best, the plaintiffs' fraud allegations comprise nonactionable promissory statements regarding future performance of the parties' contract (*Venables v. Sagona, supra*; *Mendelovitz v. Cohen*, 37 A.D.3d 670, 671, 830 N.Y.S.2d 577 (2d Dept., 2007), which have been impermissibly based on alleged violations of Sand Hill's contractual duties and then recast as fraud and/or tort theories of recovery (*Freiman v. JM Motor Holdings NR 125-139, LLC, supra*; *Kallman v. Pinecrest Modular Homes, Inc., supra*; *Yenrab, Inc. v. 794 Linden Realty, LLC, supra*; *Heffez v. L & G Gen. Constr., Inc., supra*; *see generally, Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389-390, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]).

In any event, the contract does not contain any specific or unconditional guarantee with respect to the completion of the project and the attached schedule, which the defendants claim was not part of the parties' agreement, refers to the dates referenced therein as "preliminary" only (*see*, Definition of "Contract Documents" *see also*, Agreement, §§ I, VII 6.1.[1], 1.2). The plaintiffs' reliance upon, *inter alia*, Ingrid Husek's inconclusive assertions that Hecht orally guaranteed that she would "be in her house" at a specific date does not generate an issue of fact with respect to the assertion that Hecht or Sand Hill fraudulently induced the plaintiffs to execute the Agreement (*see also*, I. Husek Aff., ¶¶ 6-7).

Accordingly, the motion by Gordon S. Hecht to dismiss the complaint insofar as interposed as against him individually, is granted. Further, and for the reasons mentioned above, that branch of Sand Hill's separate motion, which is to dismiss the same fraudulent inducement (fifth) cause of action is similarly granted.

That branch of the Sand Hill's motion, which is to dismiss the second, (breach of contract) cause of action is granted as well. Insofar as relevant, the second cause of action essentially repeats the plaintiffs' contractual "completion guarantee" claim and then supplements this averment with an oblique allegation that "under the principles of construction law, a contractor is permitted no more than a 30-day deviation from the dates proposed" in a contract (Cmplt., ¶ 41). The complaint further alleges that Sand Hill breached this alleged construction law "principle" by failing to complete the project "in the time specified in the Contract" (Cmplt., ¶¶ 41-42).

Sand Hill has demonstrated, however, that the parties' written contract contains no specific date by which construction was to be unconditionally completed. Moreover, the purported oral guarantee claim lacks substantiation in the record as a binding representation or oral modification of the parties' written agreement. It bears noting in this respect that the parties' underlying building agreement provides in relevant part that any amendment or modified thereto must be in writing (Agreement § VII. 6., 1.2, at 6).

The plaintiffs' opposing submissions are conclusory and do not provide legal authority supporting the existence of a purported, 30-day contractor "deviation principle," as pleaded in the complaint (Sobel [June 24, 2011] Aff., ¶¶ 10-11, 15). Nor have the plaintiffs identified the specific provision of the written agreement by Sand Hill, which unconditionally guaranteed completion of the work by a stipulated date. It is settled that "[i]n order to state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached" (*Barker v. Time Warner Cable, Inc.*, 83 A.D.3d 750, 751, 923 N.Y.S.2d 118 (2d Dept., 2011); *Woodhill Elec. v. Jeffrey Beamish, Inc.*, 73 A.D.3d 1421, 1422, 904 N.Y.S.2d 232 [3d Dept., 2010]).

With respect to the first cause of action, the claim advanced is styled as one sounding in "replevin," but in essence, effectively alleges that Sand Hill breached certain separately executed (by Ingrid Husek only), pre-construction retainer agreements. The complaint avers that Sand Hill is still improperly holding or declining to return funds, which had been advanced by the plaintiffs to cover start-up, permit and other job costs and expenses (Cmplt., ¶¶ 37-38). Upon the parties' conflicting submissions, and whether the subject claim is viewed as based on a replevin or breach of contract theory, the Court finds that disputed issues of fact exist respect to, *inter alia*, whether and how Sand Hill disposed of the funds advanced by the plaintiffs.

Similarly, issues of fact exist with respect to the plaintiffs' third (breach of contract) cause of action insofar as interposed against Sand Hill. In sum, the third cause of action alleges that Sand Hill was responsible for performing demolition work; that Sand Hill violated its contractual duties by retaining an unlicensed entity (*i.e.*, SWR) to perform

demolition and/or asbestos removal at the demolition; and that SWR performed the work in violation of stated regulatory code requirements, which later required costly remediation (Cmplt., ¶¶ 43-44).

There are, however, unresolved factual issues with respect to whether, among other things: (1) the shingles removed by SWR actually contained asbestos; and (2) whether, *inter alia*, SWR's conduct in removing the asbestos shingles proximately caused the alleged contamination, which the plaintiffs claim existed (Cmplt., ¶¶ 31-32). More specifically, although the Department of Labor issued violation notices, which state that SWR improperly removed asbestos shingles from the site without a license (Sobel [May 17, 2011] Aff., Exh., "D"), the plaintiff's own privately commissioned environmental testing report contains findings, which suggest that neither the shingles nor the top soil (which the plaintiffs claim was contaminated as well), contained asbestos (*see*, Asbestos Report, at 11, 15 [Sobel Aff., Exh., "E"]).

Notably, the plaintiffs' reply papers contain a document generated by the same private testing entity which does, in fact, find that certain shingles contained asbestos (Sobel [June 24, 2011] Aff., ¶ 6; Exh., "B"). It is unclear and unexplained, however, why this apparently self-contained and separately paginated document was not included with, or attached to the original asbestos report submitted by the plaintiffs with their main motion papers (*cf.*, *Barrera v. MTA Long Island Bus*, 52 A.D.3d 446, 859 N.Y.S.2d 483 [2d Dept., 2008]).

With respect to codefendant SWR, that movant has *prima facie* established its entitlement to summary judgment dismissing the plaintiffs' fourth (breach of contract/third party beneficiary) cause of action (Cmplt., ¶¶ 43-46).

It is settled that "[p]arties 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" (*Mendel v. Henry Phipps Plaza West, Inc.*, *supra* at 786, *quoting from, Burns Jackson Miller Summit & Spitzer v. Lindner*, *supra* at 336; *Alicea v. City of New York*, 145 A.D.2d 315, 316-317, 534 N.Y.S.2d 983 (1st Dept., 1988) *see, Mid-Valley Oil Co., Inc. v. Hughes Network Systems, Inc.*, 54 A.D.3d 394, 396, 863 N.Y.S.2d 244 [2d Dept., 2008]).

"Generally, a subcontractor is in privity with the general contractor on a construction project and is not in privity with the owner, even if the owner benefitted from the subcontractor's work" (*see, Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp.*, 64 A.D.3d 85, 104, 878 N.Y.S.2d 97 (2d Dept., 2009);

Logan-Baldwin v. L.S.M. Gen. Contrs., Inc., 31 Misc.3d 174, 180, 914 N.Y.S.2d 617 [Sup. Ct., Monroe Co., 2011]). Moreover, “a party claiming to be a third party beneficiary has the burden of demonstrating an enforceable right” under the subject agreement (*Alicea v. City of New York, supra* at 316-317).

Here, SWR has shown, *inter alia*, that it was retained by, and exclusively dealt with, Sand Hill relative to the performance of its work at the site and that there was no written contract between SWR and Sand Hill (*see, Simplex Grinnell v. Ultimate Realty, LLC*, 38 A.D.3d 600, 832 N.Y.S.2d 244 [2d Dept., 2007]). Nor does the record support the assertion that the parties’ oral demolition arrangement was “immediately”, as opposed to “incidentally”, intended to benefit the plaintiffs (*Breen v. Law Office of Bruce A. Barket, P.C.*, 52 A.D.3d 635, 637, 862 N.Y.S.2d 50 (2d Dept., 2008); *BDG Oceanside, LLC v. RAD Terminal Corp.*, 14 A.D.3d 472, 787 N.Y.S.2d 388 (2d Dept., 2005), or that the parties effectively intended to permit the plaintiffs to enforce its provisions (*Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 45, 485 N.E.2d 208, 495 N.Y.S.2d 1 [1985]). *see, Mendel v. Henry Phipps Plaza West, Inc., supra* at 786; *Pile Foundation Const. Co., Inc. v. Berger, Lehman Associates, P.C.*, 253 A.D.2d 484, 486, 676 N.Y.S.2d 664 [2d Dept., 1998]).

If anything, the underlying building contract between Sand Hill and the plaintiff negates any such intent, since it provides in part that, “[t]he contract documents shall not be construed to create a contractual relationship of any kind between the Owner [the plaintiffs] and (1) a sub-contractor; (2) a sub-sub contractor or (3) between any persons or entities other than the Owner and the Builder” (Agreement, VII. 6. 1.2, at 6) (*Mendel v. Henry Phipps Plaza West, Inc., supra* at 786; *IMS Engineers-Architects, P.C. v. State of New York*, 51 A.D.3d 1355, 1357, 858 N.Y.S.2d 486 (3d Dept., 2008); *Pile Foundation Const. Co., Inc. v. Berger, Lehman Associates, P.C., supra* at 484; *Edward B. Fitzpatrick, Jr. Const. Corp. v. Suffolk County*, 138 A.D.2d 446, 449-450, 525 N.Y.S.2d 863 [2d Dept., 1988]).

The Court disagrees with the plaintiffs’ alternative and unpleaded assertion grounded upon tort, *i.e.*, that by removing the asbestos without a license, SWR, *inter alia*, launched “a force or instrument of harm” (*Stiver v. Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 878 N.E.2d 1001, 848 N.Y.S.2d 585 (2007), *quoting from, Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 168, 159 N.E. 896, 62 A.L.R. 1199 (1928) *see, Church v. Callanan Indus.*, 99 N.Y.2d 104, 111, 782 N.E.2d 50, 752 N.Y.S.2d 254 (2002); *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002); *Jaikran v. Shoppers Jamaica, LLC*, 85 A.D.3d 864, 925 N.Y.S.2d 596 (2d Dept., 2011); *Bono v. Halben's Tire City, Inc.*, 84 A.D.3d 1137, 924 N.Y.S.2d 497 (2d Dept., 2011); *Hartsock v. Scaccia*, 84 A.D.3d 1697, 922 N.Y.S.2d 699 [4th Dept., 2011]).

With respect to the sixth cause of action interposed exclusively as against Felicioni,

the plaintiffs have advised that the action as to Felicioni is apparently to be settled through the exchange of mutual releases in the form annexed to the plaintiffs' opposition papers (Sobel Aff., Exh., "F"). In any event, upon the papers submitted, the defendant Felicioni has established its *prima facie* entitlement to judgment by demonstrating, *inter alia*, that it never entered into any contractual agreement with the plaintiff and that the parties to the Felicioni agreement did not intend to confer a direct or immediate benefit upon the plaintiffs. Nor does the record otherwise support the imposition of liability on a third-party beneficiary basis, as alleged in the complaint (Cmplt., ¶¶ 57-50) (*Mendel v. Henry Phipps Plaza West, Inc.*, *supra* at 786).

Lastly, the Court agrees that the remaining, breach of contract and replevin causes of action sustained by the Court as against Sand Hill, may not be prosecuted on behalf of co-plaintiff David Husek, since he was not a signatory to either the building contract or the applicable, retainer agreements (*see, Simplex Grenfell v. Ultimate Realty, LLC, supra; M. Paladino, Inc. v. Lucchese & Son Contr. Corp.*, 247 A.D.2d 515 669 N.Y.S.2d 318 [2d Dept., 1988]). It is settled that "[I]iability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties" (*Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp.*, *supra* at 104).

The Court has considered the parties' remaining contentions and concludes that they do not support an award of relief in excess of that granted above.

Accordingly, it is,

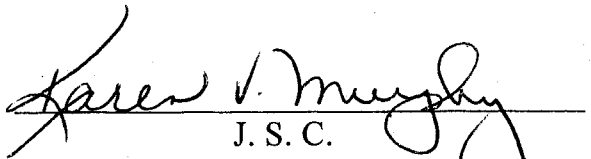
ORDERED that the motions by the defendants Gordon S. Hecht, Felicioni Development Corp. and SWR Unlimited, Inc., for summary judgment dismissing the complaint insofar as interposed against them, is granted, and it is further,

ORDERED the motion by the plaintiffs John J. Husek, Ingrid Husek, and David Husek for summary judgment on their third and fourth causes of action, is denied, and it is further,

ORDERED that the motion by the defendant Sand Hill Development Corp. for summary judgment is granted with respect to the second and fifth causes of action, and the motion is otherwise denied.

The foregoing constitutes the Order of this Court.

Dated: August 17, 2011
Mineola, N.Y.


J. S. C.

ENTERED
AUG 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE