

261 E. 78th Realty Corp. v Bernstein

2011 NY Slip Op 33878(U)

July 20, 2011

Sup Ct, New York County

Docket Number: 650107/2011

Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER J.S.C. Justice

PART 45

261 East 78 Street Realty Corp

INDEX NO. 650107/2011

MOTION DATE

- v - William N. Bernstein, Architects, PLLC, et al

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: [X] Yes [] No

Upon the foregoing papers, it is ordered that this motion by defendants William

N. Bernstein and William Bernstein Architects, PLLC to dismiss is GRANTED;

Motion by defendant Bernstein Associates to dismiss is DENIED;

Cross-motion by plaintiff to amend Complaint is GRANTED. Per the attached Decision Order

Dated: July 20, 2011

Melvin L. Schweitzer J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [] DO NOT POST [] REFERENCE

[] SUBMIT ORDER/ JUDG.

[] SETTLE ORDER/ JUDG.

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

capacity. Plaintiff charges that Bernstein Associates and Bernstein Architects breached the contract by, inter alia, failing to prepare proper and accurate plans and failing to complete the work in the time required by the contract.

Defendants Bernstein Architects , Associates, and William Bernstein

Defendants filed a motion to dismiss the complaint pursuant to CPLR § 3013 (insufficiently particular pleading) and CPLR Rules 3211 (a) (1) (defense founded on documentary evidence), 3211 (a) (3) (no legal capacity to sue) and 3211 (a) (7) (failure to state a cause of action). Defendants essentially argue that there is no contract between the plaintiff and *any* of the defendants in this action because there is an absence of privity of contract among the parties. Defendants also contend that plaintiff's cause of action for negligence/professional malpractice must be dismissed because it is premised on the same allegations as those underlying the causes of action for breach of contract. They argue that the claims against Mr. Bernstein in his individual capacity also must be dismissed because he is not a party to the contract (not having signed it), and furthermore, the contract contains a waiver of personal/individual liability.

Discussion

CPLR 3211(a) provides, in part, that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that (7) the pleading fails to state a cause of action”

Courts are instructed to construe a complaint liberally when determining if it withstands a motion to dismiss under CPLR 3211 (a) (7), accepting all allegations as true and giving the plaintiff the benefit of every favorable inference. *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). “[T]he sole criterion is whether the pleading states a

cause of action.” *Weiss v Cuddy & Feder*, 200 AD2d 665, 666-67 (2d Dept 1994) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). If allegations are discerned from the four corners of the complaint which, taken as a whole, state *any* cause of action recognized by law, a motion to dismiss under CPLR 3211 (a) (7) must be denied. *Id.*, 200 AD2d at 667; *Cooper v 620 Prop. Assoc.*, 242 AD2d 359, 360 (2d Dept 1997).

261 East 78th Realty Corp. is a Proper Plaintiff

Plaintiff 261 East 78th Realty Corp. contends that Mr. Lee Moncho executed the design and construction contract on behalf of 261 East 78th Realty Corp, a corporation that was to be formed. In connection with the execution of the contract, Mr. Moncho explained to Mr. Bernstein that he would be forming a corporation for the ownership and development of the project. According to the plaintiff, Mr. Bernstein agreed and Mr. Moncho understood that any rights/obligations that Mr. Moncho may have had under the contract were to be transferred to 261 East 78th Realty Corp. According to New York law, “[w]hen a promoter executes a contract on behalf of a nonexistent corporation, the promoter is presumed to be personally liable under that contract absent proof of the parties' contrary intent or until there has been a novation between the corporation and the other contracting party.” *Wieder v Stimler*, 18 Misc 3d 137 (A), 859 NYS2d 900 (N.Y. App. Term 2008).

On the other hand, there is some evidence here that defendants thought they were dealing only with 261 East 78th Realty Corp. There is, for example, correspondence from June 2010 between Mr. Moncho's attorney and defendants' attorney regarding the project. By letter dated June 15, 2010, Mr. Moncho's attorney sent defendants' attorney a letter that begins with the statement: “Please be advised that this firm represents 261 East 78 Realty Corp.” (Copy of this letter is annexed to Moncho affidavit as Exhibit 1). This letter does not refer to Mr. Moncho at

all. In a letter dated June 17, 2010, defendants' attorney responded to the June 15, 2010 letter and stated, "Bernstein & Associates, Architects, PLLC was summarily terminated by your client." (A copy of this letter is annexed to Moncho affidavit as Exhibit 2). These letters are evidence that defendants considered the parties to their contract to be 261 East 78th Realty Corp. and Associates.

Mr. Bernstein's certification for payment of the requisitions for payment during the course of the construction also shows that defendants believed 261 East 78th Realty Corp. was the party to the contract. Mr. Bernstein signed a certification for each requisition "certifying to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated." (Copies of three requisitions with architect's certification on the second page of each are annexed to Moncho affidavit as Exhibit 3). Again, the "Owner" on the requisitions is identified in each case as 261 East 78th Realty Corp.

The court is unconvinced of defendants' contentions that there is no privity of contract here with 261 East 78th Realty Corp. Mr. Moncho executed the contract on behalf of 261 East 78th Realty Corp. With regard to Mr. Bernstein's agreement, 261 East 78th Realty Corp. adopted, ratified and accepted the contract and it is therefore a proper party to the contract.

Bernstein Associates is a Proper Defendant

On the other side of the transaction, though, 261 East 78th Realty Corp. can sue only Bernstein Associates because it is the only party-defendant that signed the contract. Neither Bernstein Architects nor Mr. Bernstein are liable because they were not contracting parties. Only the party that signed the contract is the proper defendant.

In sum, then, plaintiff's first cause of action for breach of contract, which alleges that 261 East 78th Realty Corp. entered into a contract with Bernstein Architects, is an incorrect factual

assertion. As is evident from the contract itself, as independently corroborated by Mr. Bernstein, (*see* Bernstein Aff.), the contract on its face was signed *only* by Bernstein Associates. *See* exhibit 1 to the Bernstein Aff. The contract makes no mention of Bernstein Architects as a party signatory.

The complaint as against Mr. Bernstein in his individual capacity likewise must be dismissed. Mr. Bernstein was not a signatory, and the waiver of individual liability clause in the contract excludes his personal liability. The clause provides that: "Individual company owners, individual employees and/or individual consultants are not liable." *See* Exhibit 1 to the Bernstein Aff. at p. 3. Accordingly, all claims against Mr. Bernstein in his personal capacity also are dismissed.

This analysis leaves Bernstein Associates. The court is of the view that plaintiff has properly stated a breach of contract claim against Bernstein Associates. 261 East 78th Realty Corp. has pled the existence of a contract with Bernstein Associates to perform architectural and construction management services. In particular, 261 East 78th Realty Corp. has pled that defendant Bernstein Associates breached the contract by failing to complete the project and obtain a certificate of occupancy by March 1, 2008 as required by section 4.9 of the contract. 261 East 78th Realty Corp.'s allegations are thus sufficient to state a claim for breach of contract against Bernstein Associates under CPLR 3013 and 3211 (a) (7).

Accordingly, it is

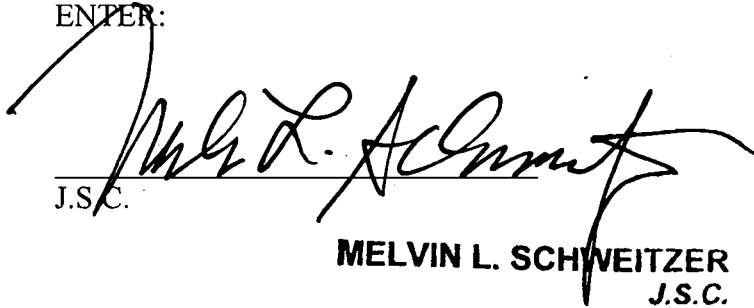
ORDERED that the motion by William N. Bernstein and William Bernstein, Architects, PLLC to dismiss the causes of action by 261 East 78th Street Realty Corp. as against them are granted; and it is further

ORDERED that defendant Bernstein Associates' motion to dismiss the cause of action against it is denied.

Plaintiff's motion to amend its complaint is granted.

Dated: July 20, 2011

ENTER:


J.S.C.
MELVIN L. SCHWEITZER
J.S.C.