

Structure Tone Inc. v Thomas Niland & Cook, Hall & Hyde, Inc.
2012 NY Slip Op 33545(U)
October 17, 2012
Supreme Court, New York County
Docket Number: 150735/12
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13

STRUCTURE TONE INC.,

INDEX NO. 150735/12MOTION DATE 09-05-2012MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

THOMAS NILAND AND COOK, HALL & HYDE, INC.,

The following papers, numbered 1 to 5 were read on this petition to stay arbitration.

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-23-45Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is ordered that this motion for an Order pursuant to CPLR §3211 (a) (1) and (7) dismissing the complaint in its entirety on documentary evidence and for failure to state a cause of action is granted, the complaint is dismissed.

Plaintiff is a General Contractor and construction manager that made a bid for a construction project with the Pennsylvania State System of Higher Education (PASSHE), to build modular student housing at the Cheyney University Campus. Plaintiff alleges that it placed a \$31 Million dollars bid on the project based on the representations of the defendants that Sub-contractor Kullman Buildings Corp., (KBC) would receive a bond on the sub-contract in the amount of \$20 million dollars. The complaint alleges that defendant Thomas Niland in a letter dated December 3, 2009 addressed to Mr. Avi Teylas of KBC, misrepresented that KBC had a bonding capacity of \$20 Million Dollars, that plaintiff relied on that representation and entered into a contract with PASSHE with KBC as sub-contractor, that KBC subsequently defaulted and as a result of KBC's default plaintiff sustained losses of at least \$8 Million Dollars. Plaintiff alleges that defendants made material misrepresentations to plaintiff who relied on those misrepresentations to its detriment and sustained damages.

Plaintiff alleges that had it known KBC would be unable to obtain a bond in the necessary amount it would not have placed the bid on the project with KBC as sub-contractor. That it placed the bid in reliance on defendants' representation and that defendants should be held liable for its having to obtain a bond in the required amount for the project.

Defendants move to dismiss on various grounds, most importantly as to defendant Niland on the ground that he acted as an employee and on behalf of a corporation and should not be held personally liable. As to both defendants on the grounds that they didn't make any representations to the plaintiff and that there is no

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

special relationship between plaintiff and defendants.

Defendants annex a copy of the December 3, 2009 letter which is addressed to KBC, not to plaintiff, as documentary evidence. The letter states in its second paragraph:

"At the present time, HCC Insurance Company provides a \$20 Million program to Kullman Buildings Corp., As always, HCC Insurance Company reserves the right to perform normal underwriting at the time of any bond request, including, without limitation, prior review and approval of relevant contract documents, bond forms, and project financing. We assume no liability to the Obligee or its affiliates if for any reason we do not execute such bonds..."

Following issuance of this letter on December 4, 2009 Plaintiff made the bid on the construction project. By letter dated March 22, 2010 addressed to plaintiff, defendant Niland informed plaintiff that KBC had a bonding capacity of \$5 Million Dollars.

Plaintiff claims that defendant discussed the status and size of KBC's bonding program in multiple conference calls with plaintiff's principals Christopher Koutsokoumis and Stephen D. Neeson, its regional financial controller and vice president of operations respectively, and that on February 25, 2010 Mr. Niland "verbally reconfirmed that Kullman had a \$20 Million dollar bonding program with HCC Insurance Company."

"In order to prevail on a cause of action sounding in negligent misrepresentation a plaintiff is required to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff, (2) that the information was incorrect; and (3) that there was reasonable reliance on the information."(Ramsarup v. Rutgers Casualty Insurance Company, 98 A.D. 3d 494, 949 N.Y.S. 2d 436 [2nd. Dept. 2012] neither insurance broker nor its president liable to homeowner on theory of negligent misrepresentation for conveying incorrect information as to effective date of insurance policy where they were not in special relationship with homeowner which approached privity; Silvers v. State, 68 A.D. 3d 668, 893 N.Y.S. 2d 12 [1st. Dept. 2009] SIF not liable to plaintiff for incorrect statements made by field representative where there was no privity of contract or special relationship imposing a duty to convey correct information; Trizzano v. Allstate, 7 A.D. 3d 783, 780 N.Y.S. 2d 147 [2nd. Dept. 2004]).

It is not disputed that defendants conveyed the information to KBC's principal Mr. Teylas, any subsequent conveyance of this incorrect information during any of the conference calls with plaintiff still would not make them liable under a theory of negligent misrepresentation. More is required than what the facts here have established to find privity or that there exists a special relationship imposing a duty to convey correct information.

In Kimmel v. Schaefer, 89 N.Y. 2d 257, 675 N.E. 2d 450, 652 N.Y.S. 2d 715 [1996] the court found the existence of a special relationship where "defendants efforts sought to induce plaintiffs to invest in a project by providing projections which misrepresented the potential rate of return on the project, meeting with plaintiff personally and representing that the project would generate income, urging plaintiff to review and rely on the projections, representing that updated

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projections were reasonable, and earning a commission from plaintiff's investment on the project." The court found liability for negligent misrepresentation because defendant possessed unique or specialized expertise and was in a special position of confidence and trust with the plaintiff such that reliance on the negligent misrepresentation was justified.

However no special relationship is found where plaintiff has not made a specific request to defendant for the information, where defendant is not receiving compensation from the transaction or the imparting of the information and plaintiff has not delegated the decision making responsibility to defendant (Hoffend & Sons, Inc. V. Rose & Kiernan, Inc., 7 N.Y. 3d 152, 851 N.E. 2d 1149, 818 N.Y.S. 2d 798[2006]). Here defendants conveyed the information in writing to KBC, not to plaintiff, the information conveyed was equivocal at best and is unreasonable for plaintiff to have relied on it. The verbal information supposedly conveyed on February 25, 2010 came after plaintiff had placed the bid on the project, which was done on December 4, 2009. It cannot be said that plaintiff relied on that verbal communication in making the bid.

The relationship between plaintiff and defendants falls short of what is required for a special relationship (Western Building Restoration Company Inc., v. Lovell Safety Management Safety Company, LLC., 61 A.D. 3d 1095, 876 N.Y.S. 2d 733 [3rd. Dept. 2009]). There is no special relationship imposing on Defendants a duty to impart correct information to plaintiff, the information imparted was not to plaintiff but to a third party (KBC), and it was unreasonable for plaintiff to rely on the information imparted.

Accordingly, it is ORDERED that the motion to dismiss is granted and the complaint as against all defendants is dismissed, and it is further

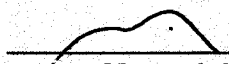
ORDERED that the clerk is directed to enter judgment dismissing the action with prejudice.

Enter:

Dated: October 17, 2012

MANUEL J. MENDEZ

J.S.C.


Manuel J. Mendez

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE