Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC
2015 NY Slip Op 31258(U)
July 16, 2015
Supreme Court, New York County
Docket Number: 652680/14
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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SKANSKA USA BUILDING INC.,

Plaintiff,

-against-

ATLANTIC YARDS B2 OWNER, LLC; FOREST CITY RATNER COMPANIES, LLC; ABC COMPANIES, LLC, and JOHN DOES #'s 1-25 (names being fictitious and unknown),

Defendants

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DECISION AND ORDER

Index No. 652680/14
Motion Seq. Nos. 002, 003

SALIANN SCARPULLA, J.S.C.:

In this breach of contract action, defendants Atlantic Yards B2 Owner, LLC ("B2 Owner") and Forest City Ratner Companies, LLC ("FCRC") move, pursuant to CPLR 3211, to partially dismiss plaintiff Skanska USA Building Inc.'s ("Skanska") second and third causes of action, as well as portions of the first cause of action (motion seq. no. 002). In a separate motion, Skanska moves to disqualify counsel for B2 Owner and FCRC (motion seq. no. 003). The motions are consolidated for disposition.

Background

In October 2012, Skanska entered into a construction management agreement ("CM Agreement") with B2 Owner, under which Skanska agreed to manage the construction of a high-rise residential building ("the B2 tower") using prefabricated

modular units ("the modules") assembled at a factory, and later erected at a site adjacent to the Barclays Center in the area formerly known as Atlantic Yards. According to the complaint, B2 Owner is a single purpose entity formed to construct the B2 tower, and an affiliate of FCRC. Skanska alleges that it entered into the CM Agreement with B2 Owner, based on FCRC's representations that it possessed innovative modular building technology, and that the B2 tower would be the first of a series of buildings to be constructed with this new technology.

Under the CM Agreement, Skanska agreed to fabricate, deliver, and erect the modules, and perform construction management services for the B2 tower. In connection with the CM Agreement, Skanska Modular LLC (a Skanska affiliate) and FCRC Modular LLC (an FCRC affiliate) entered into an agreement to form a limited liability company, FC+Skanska Modular, LLC, to fabricate the modules for the B2 tower ("the LLC Agreement"). The intellectual property relating to the modules was then transferred to FC+Skanska Modular, LLC, pursuant to an IP Transfer Agreement.

Progress on the B2 tower was slower than the parties anticipated. In December 2013, FCRC and its affiliates sold 70% of their interest in the project to develop the Atlantic Yards area to Greenland Holding Group Co. Ltd., excluding the B2 tower. Skanska alleges that by June 2014, FCRC announced to the media that the next building in the Atlantic Yards project – the B3 building – would be built using conventional construction methods, rather than modular technology.

On August 8, 2014, Skanska sent a termination notice to B2 Owner, which specified several breaches of the CM Agreement by B2 Owner. The notice further informed B2 Owner that Skanska intended to terminate all work on the project if the breaches were not cured. Shortly thereafter, Skanska commenced this action against B2 Owner and FCRC. In the amended complaint, Skanska asserted three causes of action: (1) breach of the CM Agreement seeking $30 million in damages under the contract's termination provisions; (2) breach of the CM Agreement seeking $30 million in common law damages; and (3) piercing the corporate veil. Skanska further alleges in the complaint that it properly terminated the CM Agreement on September 23, 2014.

In the first cause action, Skanska asserts that B2 Owner materially breached the CM agreement in seven ways: (1) by providing an incomplete building design that contained errors (subparts a and b); (2) by failing to issue change orders and directed changes for items of additional work, extensions of time, and increases to the contract price for force majeure and owner-caused delay events (subpart c); (3) by repeatedly failing to make timely payments and repudiating its obligation to make timely payments (subpart d); (4) failing to provide reasonable evidence that sufficient funds were available for disbursement to fulfill its obligations under the CM Agreement (subpart e); (5) failing to provide security for payment under section 5 of the Lien Law (subpart f); (6) failing to properly and timely fund or administer the Imprest Account (subpart g); and (7) failing to timely provide a factory and factory workers with skills sufficient to enable Skanska to perform the CM Agreement (subpart h).

The defendants argue that: the first cause of action, for breach of contract, should be partially dismissed based on documentary evidence and for failure to state a claim; that the second cause of action, for breach of contract, should be dismissed as duplicative of the first; and that the third cause of action for piercing the corporate veil should be dismissed for failing to state a cause of action.

Discussion

I. Defendants' Motion to Dismiss

A. First Cause of Action for Breach of Contract

B2 Owner argues that five of the alleged breaches should be dismissed, without making any arguments as to subparts d and g, which relate to B2 Owner's alleged failures to make timely payments and to properly fund or administer the imprest account. I will therefore only review those subparts that B2 Owner moves to dismiss.

1. B2 Owner's alleged breach relating to insufficient and incorrect design (subparts a and b)

B2 Owner argues that subparts a and b of the first cause action should be dismissed because these claims are insufficiently pled and refuted by documentary evidence. B2 Owner asserts that the complaint fails to put them on notice of any actual defects in the design of the B2 tower.

In the complaint, Skanska alleges that B2 Owner "breached the CM Agreement as numerous design errors and omissions exist in the B2 design, including but not limited to, errors and omissions affecting the modules, the steel frames of the modules, the vertical

alignment of modules in the field, the facade panels and their alignment, and/or the process of handling and assembling modules and other components." These allegations as to the defective design of the B2 tower are sufficiently specific to give the court and the defendants notice of Skanska's claim. CPLR § 3013; *Mee Direct, LLC v Automatic Data Processing, Inc.*, 102 AD3d 569, 569 (1st Dep't 2013). This is especially true where 38 pages of Skanska's termination letter was dedicated to a detailed discussion of these alleged defects.

B2 Owner claims that Skanska waived any design defect claim by representing in the CM Agreement that it had "no reason to believe that the B2 design is insufficient." This statement by Skanska, however, does not act as a waiver of its claim because B2 Owner also represented in the CM Agreement that the B2 design was sufficient, and that it would be liable for any increased costs resulting from its own "fault, neglect or other negligent or wrongful act or failure to act," or any such acts by its design professionals. CM Agreement, Section 5.4(b), (f).

B2 Owner also contends that it did not provide any design warranty to Skanska because the IP Transfer Agreement contained an express disclaimer of warranty. While the disclaimer in the IP Transfer Agreement states that "the High-Rise Modular IP is transferred . . . without any representation or warranty of quality," the disclaimer goes on to state that this does not affect any representations or warranties "expressly set forth in . . . any other agreement by or among Skanska or its Related Parties and FC or its Related Parties." B2 Owner fails to conclusively demonstrate that it has no contractual obligation

with respect to the B2 design based on the disclaimer of warranty in the IP Transfer Agreement.[1] For the above reasons, I deny B2 Owner's motion seeking dismissal of subparts a and b of the complaint.

In its opposition papers, Skanska sought to cross-move for summary judgment as to subparts a and b. While I find that Skanska adequately alleges a breach of subparts a and b of the CM Agreement, Skanska failed to meet its burden to show that it is entitled to summary judgment on this portion of its claim.[2]

2. B2 Owner's alleged breach relating to a failure to issue change orders or directed changes for additional work, time, and contract price (subpart c)

Section 15.4(a) of the CM Agreement provides that Skanska must comply with two notice requirements in order to obtain a change order. First, Skanska must provide written notice within 5 days after Skanska has "knowledge of the circumstances or conditions giving rise to such change." Second, Skanska must provide "a reasonably

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[1] Further, B2 Owner fails to conclusively demonstrate that Skanska waived its rights under the CM Agreement by failing to issue a material flaw notice as contemplated by the LLC Agreement. The material flaw provision in the LLC Agreement expressly stated that if a material flaw notice was not delivered by the specified time, the parties would have no further rights under that provision. This provision does not affect Skanska's claim that B2 Owner breached the CM Agreement by providing an insufficient and incorrect design.

[2] Although Skanska moves for partial summary judgment in its memorandum of law, Skanska did not file a formal notice of motion. However, I exercise my discretion to address Skanska's summary judgment arguments to the extent that they were raised.

detailed, written claim" within 45 days after its first notice, or 45 days after the condition giving rise to the change ends, whichever is later.

B2 Owner argues that Skanska fails to state a breach with respect to the lack of change orders because it does not plead that it complied with the notice provision. Additionally, B2 Owner argues that it did not breach the CM Agreement because it has no obligation to issue change orders, only the right to do so. In opposition, Skanska argues that it has adequately pleaded compliance with the notice provision, or alternatively that it is not required to plead notice as it is a condition precedent under CPLR § 3015(a).

To prevail on subpart c of its first cause of action, Skanska must show that that it complied with the notice provision. Skanska, however, is not required to plead notice in the complaint because it is a condition precedent under CPLR § 3015(a). As this basis for dismissal is procedurally premature, the branch of defendants' motion seeking dismissal of subpart c of the first cause of action is denied.

Further, B2 Owner's argument that it had no obligation to issue change orders is unavailing. Under Sections 5.4 and 15.4 of the CM Agreement, Skanska is entitled to a change order to the extent that delays are caused by "Owner-Caused" events "that adversely impact activities on the critical path of the Contractor's Schedule." *See* Section 5.4(c).

3. B2 Owner's alleged breach in failing to provide reasonable evidence that it has made financial arrangements to fulfill its obligations under the CM contract (subpart e)

Section 4.3 of the CM Agreement provides, in relevant part, that after work commenced, Skanska could request in writing that B2 Owner "provide reasonable evidence that [it] has made financial arrangements to fulfill . . . [its] obligations under the Agreement." Section 4.3 also provides that Skanska may make receipt of such "reasonable evidence" a condition precedent to the continuation of work, if Skanska's request is made because B2 Owner "fails to make payments" as required, or "a change in the Work materially increases the Contract Price."

B2 Owner contends that Skanska failed to state a breach of subpart e because its obligation to provide financial assurances was never triggered, or alternatively that it provided adequate financial assurances as required under the CM Agreement.

I find here that Skanska adequately alleges a breach of subpart e based on its allegation that B2 Owner failed to pay Skanska, which if true would have triggered B2 Owner's obligation to provide financial assurances. B2 Owner fails to conclusively demonstrate that it provided financial assurances as required under Section 4.3 of the CM Agreement. Accordingly, B2 Owner's motion to dismiss subpart e is denied.

4. B2 Owner's alleged breach in failing to provide security for payment (subpart f)

New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC"), a state governmental agency, owns the land on

which the B2 tower is being constructed. Pursuant to a lease agreement, ESDC leased the land to FC Atlantic Yards B2, LLC ("FC Atlantic Yards").

In the complaint, Skanska alleges that B2 Owner breached the CM Agreement by failing to post a bond as required under Section 5 of the Lien Law. In support of this claim, Skanska submits copies of the development and lease agreements between ESDC and FC Atlantic Yards. B2 Owner argues that this claim should be dismissed because it has no contractual duty to post a bond under Lien Law § 5.

Section 5 of the Lien Law provides that:

> Where no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement.

Here, I grant B2 Owner's motion to dismiss subpart f of the first cause of action. Skanska fails to allege the existence of any contractual provision that requires B2 Owner to comply with the bond provision set forth under Lien Law § 5. Although the lease agreement between ESDC and FC Atlantic Yards states that FC Atlantic Yards, as tenant, "shall also satisfy all requirements of Section 5 of the New York State Lien Law," there is no corresponding contractual provision in the CM Agreement that requires B2 Owner to comply with Lien Law § 5 by posting a bond. As no such contractual requirement

exists, Skanska may not assert a breach of contract claim against B2 Owner for failing to post a bond under Lien Law § 5, and I dismiss subpart f of the first cause of action.[3]

5. B2 Owner's alleged breach in failing to timely provide a factory and for failing to provide factory workers with sufficient skills (subpart h)

Skanska further alleges that B2 Owner breached the CM Agreement by failing to deliver a sufficient factory and labor force in a timely manner. Section 5.1 of the CM Agreement states that B2 Owner "shall not issue, and [Skanska] shall have no obligation to accept, the Notice to Proceed" before several requirements are met. Among those requirements are the provision of a union agreement, under subsection f, and the provision of a lease, under subsection g. Subsection f sets forth the requirement that:

> "[B2 Owner's] Affiliate has provided FC+S Modular with Union Agreements (as that term is defined in the LLC Agreement), in accordance with the criteria set forth in Exhibit R and otherwise on terms reasonably acceptable to FC+S Modular or Contractor as applicable. This condition will be deemed satisfied by Union Agreements that are (i) fully executed or (ii) if not fully executed, they are fully negotiated as to material terms, operable, and honored by Owner's Affiliate and the Building and Construction Trades Council of Greater New York and Vicinity, in the same manner as if they were fully executed." CM Agreement, § 5.1 (f).

Subsection g also requires that B2 Owner's "Affiliate has conveyed a fully executed lease to FC+S Modular for the Manufacturing Facility substantially in accordance with the draft lease set forth in Exhibit S and otherwise on terms reasonably acceptable to FC+S Modular." CM Agreement, § 5.1(g).

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[3] Skanska requested summary judgment on this portion of its first cause of action. This request is denied for the above stated reasons.

B2 Owner argues that the requirements of section 5.1(f) were met because its affiliate provided a fully executed union agreement. In support, B2 Owner submits a collective bargaining agreement between FC + Skanska Modular LLC and "Building and Construction Trades of Greater New York and Vicinity and Maintenance and Modular Construction Division Affiliates" ("the CBA") executed on December 19, 2012.

Similarly, B2 Owner argues that the requirements of section 5.1(g) were met because B2 Owner's affiliate provided an executed lease. In support, B2 Owner submits a lease between FC + Skanska Modular LLC and the Brooklyn Navy Yard Development Corporation ("the Lease") executed on June 17, 2013.

In opposition, Skanska does not refer to any specific portion of the CM Agreement. It does allege that the Lease was delivered late because it was executed on June 17, 2013, while the notice to proceed was issued on December 14, 2012. While Skanska had no obligation to accept the notice to proceed before the Lease was executed, it did so. B2 Owner argues that this constitutes a waiver.

Skanska's opposition mainly consists of allegations as to the quality of the factory and the quality of the workers at the factory. Skanska fails to tie these allegations to any breach the CM Agreement. Here, the allegations as to the quality of the factory and the workforce must be dismissed as they do not relate to any affirmative obligation placed on B2 Owner by the CM Agreement. While B2 Owner may have breached the CM Agreement by issuing the notice to proceed before the Lease was executed, that is not what is alleged in subpart h. Instead, Skanska claims that B2 Owner breached the CM

Agreement by failing to timely provide a factory and workforce adequate for Skanska to carry out the CM Agreement. Nowhere in the CM Agreement is B2 Owner required to make such provisions. Thus, there is no basis for subpart h of Skanska's first cause of action, and the branch of defendants' motion seeking its dismissal is granted.

B. Second Cause of Action for Breach of Contract

The second cause of action for breach of contract alleges that "Skanska has made demand for payment and extensions of time under the CM Agreement and [B2 Owner] has failed and refused to remit payment and grant extensions of time." Similarly, subpart c of the first cause of action alleges that B2 Owner has failed "to issue change orders and directed changes to Skanska for items of additional work and/or extensions of time and increases to the contract price for Force Majeure and Owner-Caused delay Events."

B2 Owner argues that the second cause of action should be dismissed because it is duplicative of the first cause of action, and the damages sought are identical. In opposition, Skanska contends that the second cause of action is not duplicative because it states an alternative theory of recovery. Specifically, Skanska contends that the first cause of action seeks damages under Article 14 of the CM Agreement, entitled "Suspension or Termination," whereas the second cause of action seeks common-law damages for breach.

Skanska might have simply made this alternative remedial claim within its first cause of action, but it makes little practical difference. As the second cause of action presents a different theory of damages, it is not entirely duplicative of the first cause of

action. Accordingly, the branch of defendants' motion seeking dismissal of the second cause of action is denied. *Volt Sys. Dev. Corp. v Raytheon Co.*, 155 A.D.2d 309, 309 (1st Dep't 1989) (noting that "the clear mandate of CPLR §§ 3014 and 3017 [] permit, and in fact, encourage pleading of claims and remedies in the alternative").

C. Third Cause of Action for Piercing the Corporate Veil

Skanska's third cause of action is for piercing the corporate veil as to FCRC and its affiliates. Specifically, Skanska alleges that FCRC and its affiliates dominated and controlled B2 Owner in order to perpetrate a wrong against Skanska, and that B2 Owner is undercapitalized and has no assets from which it could pay a judgment. FCRC and its affiliates argue that this cause of action should be dismissed because: (1) Skanska fails to allege fraud or malfeasance; (2) the allegations are too conclusory to be sustained; and (3) there is no separate cause of action to pierce the corporate veil.

Generally, a plaintiff seeking to pierce the corporate veil must show that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Conason v Megan Holding, LLC*, 25 N.Y.3d 1, 18 (2015) (internal quotation marks omitted). "While fraud certainly satisfies the wrongdoing requirement, other claims of inequity or malfeasance will also suffice." *Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dep't 2014). For example: "Allegations that corporate funds were purposefully diverted to make it

judgment proof . . . [are] sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory." *Id.* at 407-408.

Here, Skanska has sufficiently pled its cause of action for piercing the corporate veil. Using underfunded subsidiaries or related single-purpose entities as a shield from liability arising from a construction contract is conduct that may support a claim for piercing the corporate veil. *Matter of East 91st St. Crane Collapse Litig.*, 115 A.D.3d 610, 611 (1st Dep't 2014) (finding a triable issue of fact as to a corporate veil claim where "the companies had the same chief executive officer . . . at least some of the companies shared the same mailing address, and . . . the alleged subsidiaries were created to distance Mattone from the subject construction project"). This is precisely what Skanska alleges that Forest City did with its affiliates to shield itself from any liability from the B2 project. Thus, the conduct alleged is sufficient to support a claim for piercing the corporate veil.

As to the relative specificity of the allegations, a claim for piercing the corporate veil is subject to the standard of notice pleading under CPLR § 3013. As such, Skanska need only give "fair notice of the nature of the claim and its grounds." *Vig v. New York Hairspray Co., L.P.*, 67 A.D.3d 140, 175 (1st Dep't 2009). Here, Skanska provides such notice by alleging that B2 Owner was undercapitalized, was used interchangeably with other Forest City entities with overlapping ownership, personnel and addresses; and Skanska alleges that defendants manipulated the LLC form to perpetrate a wrong against Skanska.

Finally, while a piercing the veil claim is generally dependent on another cause of action that establishes the plaintiff's right to recovery, it may nonetheless be stated as an independent cause of action. *Shisgal v. Brown,* 21 A.D.3d 845, 848 (1st Dep't 2005). As Skanska has successfully done so, the branch of defendants' motion seeking dismissal of the third cause of action is denied.

II. Plaintiff's Motion to Disqualify

Skanska separately moves to disqualify defendants' counsel Troutman Sanders, LLP on two grounds. First, Skanska argues that Troutman's representation violates Rule 1.7 because the firm represents two other Skanska affiliates in other matters. Troutman, through its Richmond office, currently represents Skanska Civil Southeast Inc. – a wholly-owned subsidiary of Skanska USA Civil, Inc. ("Skanska Civil") – in connection with two joint ventures involving a light rail transit project in Maryland and a highway improvement project in Florida.[4] Skanska claims that no distinction should be made between Skanska and Skanska Civil for conflict of interest purposes because they have the same parent company, Skanska USA Inc.; they operate on the same computer network; and they share services such as human resources, financial services, environmental health and safety, and ethics compliance.

[4] For purposes of this motion, the parties treat Skanska Civil Southeast Inc. as its parent entity, Skanska Civil.

Second, Skanska argues that Troutman should be disqualified because its representation of FCRC is adverse to one of Skanska Civil's directors – Richard Kennedy – who is a defendant in a related action surrounding the construction of the B2 tower, *FCRC Modular LLC v. Skanska Modular LLC and Richard A. Kennedy*, Index No. 652721/14 (Sup. Ct. New York County). Although Troutman has not entered an appearance in the action against Richard Kennedy, Skanska alleges that Troutman is collaborating and directing strategy with counsel of record, Kramer Levin, Naftalis & Frankel.

"A movant seeking disqualification of an opponent's counsel bears a heavy burden," as "[a] party has a right to be represented by counsel of its choice, and any restrictions on that right must be carefully scrutinized." *Mayers v. Stone Castle Partners, LLC*, 126 A.D.3d 1, 5-6 (1st Dep't 2015) (internal quotation marks and citation omitted). The question of "whether to disqualify an attorney rests in the sound discretion of the Court." *Harris v Sculco*, 86 A.D.3d 481, 481 (1st Dep't 2011); *see also S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 440 (1987) (noting that a party's ability to choose its own attorney is a "valued right").

Rule 1.7 of the Rules of Professional Conduct provides that, except under certain conditions, a lawyer shall not represent a client where "the representation will involve the lawyer in representing differing interests" or where "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected." 22 N.Y.C.R.R. 1200.0. In cases where a lawyer represents a corporation, the lawyer is

required to obtain consent to represent a party adverse to the corporation's affiliates only in certain circumstances such as where "the affiliate should also be considered a client of the lawyer." Comment 34 to Rule 1.7.

The determination of whether a corporate affiliate should be considered a client is a fact-intensive inquiry and may depend on: "(i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation; (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate."[5] Comment 34A to Rule 1.7.

Here, Skanska bears the heavy burden of demonstrating that Troutman has a "corporate affiliate" conflict that disqualifies Troutman from representing the defendants in this action. Skanska contends that it should be considered Troutman's client because it

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[5] The Association of the Bar of the City of New York has laid out a similar framework for analyzing whether a corporate family conflict exists, which includes factors such as whether:

"(a) the firm's dealings with the affiliate during the firm's representation of the current corporate client, the overlap between that client and the affiliate in personnel and infrastructure, or other facts that would give rise to an objectively reasonable belief on behalf of the client that the law firm represents the affiliate; (b) there is a significant risk that the law firm's representation of either the current corporate client or the client in the adverse representation would be materially limited by the law firm's responsibilities to the other client; and (c) during its representation of the current corporate client, the law firm learned confidences and secrets from either the current client or the affiliate that would be so material to the adverse representation as to preclude the firm from proceeding. If any of these conditions obtain, the law firm must obtain informed consent before proceeding." The Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Opinion 2007-03.

shares common support systems and the same parent company as Skanska Civil. However, Skanska and Skanska Civil do not have such an overlapping structure that Skanska should be considered a client of Troutman. It is undisputed that Skanska and Skanska Civil are independent corporate entities with separate presidents and separate general counsels. As Skanska and Skanska Civil each employ their own in-house counsel, there is unlikely to be any risk that Troutman would be required to "negotiate in the morning on behalf of the same person whom the attorney is cross-examining in the afternoon" – a situation that would give rise to a reasonable belief that Troutman represented Skanska. New York City Bar Association, Formal Opinion 2007-03.

Further, there is no indication that Troutman will be materially limited in its representation of Skanska Civil in unrelated matters, or that Troutman will be materially limited in representing the defendants in the present action. Nor is there any evidence that Troutman's representation of Skanska Civil could somehow yield confidences or secrets that would relate to Skanska's present action against FCRC and B2 Owner. "Corporate affiliation, without more, does not transform all of a current corporate client's affiliates into clients of the law firm." *Id.*

As none of the conditions for a corporate affiliate conflict are met, there is no basis for disqualification. *Brooklyn Navy Yard Cogeneration Partners, L.P. v PMNC,* 174 Misc 2d 216 (Kings Co. 1997), *aff'd* 254 A.D.2d 447 (2d Dep't 1998) (holding that disqualification is inappropriate where there was no realistic or plausible threat that legal work done for the defendant's subsidiary by plaintiff's attorneys would give an unfair

advantage over defendant). Moreover, because there is no corporate affiliate conflict, Troutman was not obligated to obtain Skanska's informed consent to represent FCRC. Accordingly, Skanska's motion to disqualify counsel is denied.

In accordance with the foregoing, it is

ORDERED that defendants Atlantic Yards B2 Owner, LLC and Forest City Companies, LLC's motion to dismiss is granted only to the extent that subpart f and subpart h of plaintiff's first cause of action are dismissed (motion seq. no. 002); and it is further

ORDERED that plaintiff's motion to disqualify counsel (motion seq. no. 003) is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 60 Centre Street, Room 208 on September 30, 2015 at 2:15pm.

This constitutes the decision and order of the Court.

Date: New York, New York
July 16, 2015

ENTER:

Saliann Scarpulla, J.S.C.