Mac Felder, Inc. v Emerald Green Group, LLC,
2016 NY Slip Op 30630(U)
April 13, 2016
Supreme Court, New York County
Docket Number: 155046/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MAC FELDER, INC.,

Plaintiff,

Index No. 155046/2015

-against-

DECISION/ORDER

THE EMERALD GREEN GROUP, LLC,
DAVID SALAMA, JAMES CAIOLA and
NORCO CONSTRUCTION INC.,

Defendants.

---x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : ______________________________

Papers	Numbered
Notice of Motion and Affidavits Annexed..................................	1
Answering Affidavits...	2
Replying Affidavits...	3
Exhibits..	4

Plaintiff Mac Felder, Inc. commenced the instant action against defendants Norco Construction Inc. ("Norco"), The Emerald Green Group, LLC ("Emerald") and two individuals associated with Emerald, David Salama ("Salama") and James Caiola ("Caiola"), to recover damages stemming from defendants' alleged failure to pay plaintiff for its provision of construction services, asserting causes of action for breach of contract against Norco and Emerald, quantum meruit against Emerald and improper diversion of trust fund assets against Emerald, Salama and Caiola. Defendants Emerald, Salama and Caiola (the "Emerald Defendants") now move for an Order pursuant to CPLR §§ 3211 (a)(1) and (7) dismissing plaintiff's complaint and Norco's cross-claims as asserted in its answer. The Emerald Defendants' motion is resolved as set forth below.

The facts asserted in the complaint are as follows. Emerald obtained a license from the

City of New York allowing it to operate a restaurant at Tavern on the Green in Central Park (the "premises"). Emerald hired Norco as a general contractor to perform renovation work at the premises. On or about August 8, 2013, Norco hired plaintiff as a subcontractor to provide plumbing materials and services. Norco agreed to pay $259,979.54 for plaintiff's provision of materials and services and Emerald consented to this agreement. From August 22, 2013 to April 17, 2014, plaintiff performed pursuant to the subcontract by providing materials and services. Emerald paid all of Norco's subcontractors directly, including plaintiff, leading plaintiff to believe that Emerald had "assumed all obligations and guaranteed payments to all subcontractors." Moreover, Emerald agreed to pay "all outstanding invoices generated" by plaintiff. Plaintiff has not been paid $29,137.09 it was due pursuant to its agreement with Norco, and both Norco and Emerald have refused to pay this sum.

Plaintiff further claims that Emerald had obtained a loan to complete the renovation work and that Emerald, Salama and Caiola prioritized payments to certain preferred subcontractors and misappropriated the funds from the loan for their personal benefit. Norco also claims that Salama and Caiola diverted trust fund assets, intended for the payment of the services rendered by Norco and the subcontractors, including plaintiff.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any

cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (*citing Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

The court first considers the portion of the Emerald Defendants' motion to dismiss plaintiff's cause of action for breach of contract against Emerald. To sufficiently state a cause of action for breach of contract, a complaint must allege (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2nd Dept 2010). "It is well settled that a subcontractor may not assert a cause of action to recover damages for breach of contract against a party with whom it is not in privity." *Perma Pave Contr. Corp. v. Paerdegat Boat & Racquet Club*, 156 A.D.2d 550, 551 (2nd Dept 1989).

In the present case, the Emerald Defendants' motion to dismiss plaintiff's cause of action for breach of contract against Emerald is granted as plaintiff has not alleged facts showing the existence of a contract between Emerald and plaintiff.

Plaintiff's argument that Emerald had guaranteed payments due from Norco to its subcontractors by making payments directly to the subcontractors and by orally agreeing to pay the subcontractors itself is without merit. An agreement by an owner to pay sums owed to a subcontractor based on a subcontract between the subcontractor and a general contractor, rather than the owner, is "a special promise to answer for the debt, default or miscarriage of another person" pursuant to the Statute of Frauds, and therefore must be in writing and subscribed by the owner to be enforceable. General Obligations Law § 5-701(a)(2); *I.S. Design v. Gasho of Japan, Intl.*, 269 A.D.2d 150, 151 (1st Dept 2000).

In the present case, as it is undisputed that there is no written, subscribed agreement

whereby Emerald promised to pay the sum due to plaintiff pursuant to its subcontract with Norco, the alleged implied and oral agreements are unenforceable pursuant to the Statute of Frauds.

Moreover, although an owner's oral agreement to pay sums owed to a subcontractor is enforceable under an exception to the Statute of Frauds "where the plaintiff can prove that the oral promise was supported by new consideration benefitting the promisor [owner] and that the promisor has become primarily liable on the debt," plaintiff has not alleged that the agreement was supported by new consideration. *See CDJ Bldrs. Corp. v. Hudson Group Const. Corp.*, 67 A.D.3d 720, 722 (2nd Dept 2009). Plaintiff merely alleges that it performed its duties under its subcontract with Norco, which plaintiff was already bound to do. *See Tierney v. Capricorn Investors, L.P.*, 189 A.D.2d 629, 631 (1st Dept 1993) ("Neither a promise to do that which the promisor is already bound to do, nor the performance of an existing legal obligation constitutes valid consideration").

Plaintiff's argument that Emerald was a third-party beneficiary of the subcontract, and thereby obligated to pay plaintiff, is without merit. Although a "non-party may sue for breach of contract...if it is an intended, and not a mere incidental, beneficiary," a non-party cannot be held liable for breach of a contract it did not enter. *See LaSalle Natl. Bank v. Ernst & Young*, 285 A.D.2d 101, 108 (1st Dept 2001); *Perma Pave Contr. Corp.*, 156 A.D.2d at 551.

Plaintiff's argument that Emerald is obligated to pay plaintiff because Emerald and plaintiff had a relationship close to privity is also without merit as plaintiff has failed to cite any binding authority holding defendants liable for a cause of action for breach of contract where there is only a relationship close to privity. *Cf. Ossining Union Free School Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 425 (1989) (holding that a plaintiff may assert a claim for

negligent misrepresentation where "there is actual privity of contract between the parties or a relationship so close as to approach that of privity").

Plaintiff's argument that the course of conduct between Emerald and plaintiff created a binding contract between Emerald and plaintiff is also without merit. An owner and subcontractor may form a contract through a course of conduct evidencing their intent to contract, as where the owner directly pays the subcontractor, but only where the contract is supported by consideration. *See Brown Bros. Elec. Contrs. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 401 (1977). In *Brown Bros.*, an owner agreed to directly pay a subcontractor for its performance of electrical work, even though the general contractor was obligated to pay the subcontractor pursuant to the subcontract. *Id.* It was uncertain whether the general contractor would continue working on the project and paying the subcontractor, and the general contractor in fact later departed the project. *Id.* The Court of Appeals held that the agreement between the owner and subcontractor was enforceable, despite the existence of the subcontract obligating the general contractor to pay the subcontractor. *Id.* The Court found that, because of the uncertainty regarding whether the general contractor would continue its work, the subcontractor's continued performance of its work was valid, new consideration. *Id.* Thus, the agreement of the owner to pay the subcontractor served both parties' interests, by giving the owner "greater assurance" that the subcontractor would continue its work and making the subcontractor "more certain of receiving payment." *Id.* *See also Concordia General Contracting v. Peltz*, 11 A.D.3d 502, 504 (2nd Dept 2004) ("[T]he plaintiff's promise to complete the work despite the general contractor's prior default constituted new consideration flowing the defendant, as owner, and beneficial to him personally").

In the present case, plaintiff has failed to state a cause of action for breach of contract against Emerald based on the course of conduct between Emerald and plaintiff whereby Emerald directly paid plaintiff as plaintiff has not alleged that there was any new consideration for the alleged contract. Plaintiff merely alleges that it performed its duties under its subcontract with Norco. Unlike *Brown Bros.*, wherein the subcontractor's continued performance of its work was new consideration because of the uncertainty regarding the general contractor's ability to uphold its obligations, in the present case, Norco had not departed the project, nor has plaintiff alleged that Emerald's agreement to pay plaintiff directly was the result of any expectation that Norco would depart the project or be unable to pay plaintiff. Thus, plaintiff's continued performance of its duties could not serve as consideration for an independent agreement with Emerald. Therefore, plaintiff has failed to state a cause of action for breach of contract against Emerald.

The court now considers the portion of the Emerald Defendants' motion to dismiss plaintiff's cause of action for quantum meruit against Emerald on the ground that such cause of action is precluded by the existence of plaintiff's subcontract with Norco. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987). *See also Metropolitan Elec. Mfg. Co. v. Herbert Constr. Co.*, 183 A.D.2d 758, 759 (2nd Dept 1992) (holding that the existence of an express contract between a subcontractor and supplier governing the subject matter precluded the plaintiff from maintaining a quasi contract cause of action against the general contractor or owners).

In the present case, the Emerald Defendants' motion to dismiss plaintiff's cause of action

for quantum meruit against Emerald is granted as it is undisputed that a contract between Norco and plaintiff provided for the payment by Norco for plaintiff's performance of work. Thus, as the contract with Norco governed the subject matter of plaintiff's cause of action for quantum meruit, plaintiff is precluded from stating a cause of action for quantum meruit against Emerald.

Plaintiff's argument that it is not precluded from stating a cause of action for quantum meruit against Emerald because it had a contract with Norco, not Emerald, is without merit as courts have held that the existence of an express contract between two parties governing the subject matter precludes a plaintiff from stating a cause of action for quantum meruit against a non-party to the contract. *See Bellino Schwartz Padob Advertising, Inc. v. Solaris Marketing Group, Inc.*, 222 A.D.2d 313 (1st Dept 1995); *Metropolitan Elec. Mfg. Co.*, 183 A.D.2d at 759 (2nd Dept 1992) (holding that the existence of an express contract between a subcontractor and supplier governing the subject matter precluded the plaintiff from maintaining a quasi contract cause of action against the general contractor or owners).

The court now considers the portion of the Emerald Defendants' motion to dismiss plaintiff's cause of action for improper diversion of trust fund assets against Emerald, Salama and Caiola. Article 3-a of the Lien Law creates "trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction." *Aspro Mech. Contr. v. Fleet Bank*, 1 N.Y.3d 324, 328 (2004). The purpose of Article 3-a is "to ensure that 'those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor' receive payment for the work actually performed." *Id.* When an owner, contractor or subcontractor receives funds in connection with real property improvements,

that entity must hold the funds in trust to pay the "cost of improvement," including the claims of subcontractors, engineers, suppliers, workmen and the like. *Id.* However, pursuant to Lien Law § 71(3)(a), an owner is only liable for the claims "for which the owner is obligated." "The basis of such liability is an existing obligation, such as one imposed by contract or as the result of a mechanic's lien." *Quantum Corporate Funding v. L.P.G. Assoc.*, 246 A.D.2d 320, 322 (1st Dept 1998) (stating that a subcontractor that has not received payment for work performed for a contractor is a beneficiary of trust assets received by the contractor, but that "the statute does not make the owner 'a guarantor of payment to the creditors of the contractor'").

In the present case, plaintiff cannot state a cause of action based on a violation of Article 3-a of the Lien Law against Emerald, Salama and Caiola as plaintiff has not alleged facts showing that Emerald was obligated to pay plaintiff for its work. Plaintiff has not claimed that it has filed a mechanic's lien, and, as discussed above, there is no contract between Emerald and plaintiff. Further, as plaintiff merely asserts that Salama and Caiola are liable for a violation of Article 3-a of the Lien Law based on Emerald's alleged liability, plaintiff cannot state a cause of action against Salama and Caiola. Therefore, the portion of the Emerald Defendants' motion to dismiss plaintiff's cause of action for improper diversion of trust fund assets against Emerald, Salama and Caiola is granted.

The court now considers the portion of the Emerald Defendants' motion to dismiss Norco's cross-claim for improper diversion of trust fund assets against Salama and Caiola on the ground that Norco's cross-claim is barred by a settlement agreement between Emerald and Norco. An agreement to release claims is interpreted pursuant to principles of contract law. *Johnson v. Lebanese American University*, 84 A.D.3d 427, 428 (1st Dept 2011). "When parties set down

their agreement in a clear, complete document, their writing should ... be enforced according to its terms." *Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 474 (2004).

In the present case, the Emerald Defendants' motion to dismiss is denied as Norco has stated a claim for improper diversion of trust fund assets against Salama and Caiola that is not barred by the settlement agreement. The agreement only releases Emerald from all claims "related to and arising from the reconstruction and renovation of the Tavern on the Green restaurant." Thus, the agreement does not release Salama and Caiola from liability for claims against them related to the reconstruction and renovation of the Tavern on the Green restaurant.

Moreover, Norco has stated a claim for improper diversion of trust fund assets against Salama and Caiola based on its allegations that Salama and Caiola received construction loan funds and other funds for the payment of Norco's services and for labor, materials and equipment provided by contractors and subcontractors, and that Salama and Caiola "received and knowingly diverted and/or consented to the diversion" of these trust fund assets. Where the officers of a corporate trustee "have converted trust funds for their own use, or knowingly participated in a diversion," they may be held individually liable to the beneficiary pursuant to Article 3-a of the Lien Law. *South Carolina Steel Corp. v. Miller*, 170 A.D.2d 592, 595 (2nd Dept 1991).

The portion of the Emerald Defendants' motion to dismiss Norco's cross-claim for common-law indemnification against Salama and Caiola is granted as plaintiff only asserts a cause of action for breach of contract against Norco, not any claim sounding in vicarious liability. "Common-law indemnification is predicated on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine.'" *Edge Management Consulting, Inc. v. Blank*, 25

A.D.3d 364, 357 (1st Dept 2006) (holding that an entity was barred from obtaining common-law indemnification as it was under a contractual and statutory duty to maintain premises, and thus fault would have been demonstrated if the entity was found liable in the underlying action). *See also Richards Plumbing & Heating Co., Inc. v. Washington Group Intern., Inc.*, 59 A.D.3d 311, 312 (1st Dept 2009) (holding that a claim for common-law indemnification was properly dismissed where there were only claims for breach of contract, not vicarious liability).

Accordingly, the Emerald Defendants' motion to dismiss is resolved to the extent described herein. This constitutes the decision and order of the court.

Dated: 4|13|16

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C