

MLB Constr. Servs., LLC v Lake Ave. Plaza, LLC
2016 NY Slip Op 32823(U)
July 18, 2016
Supreme Court, Saratoga County
Docket Number: 2015-781
Judge: Robert J. Chauvin
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ORIGINAL

MLB CONSTRUCTION SERVICES, LLC,

Plaintiff,

-against-

LAKE AVENUE PLAZA, LLC; M&T BANK;
NGM INSURANCE COMPANY; WILLIAM DORROUGH
d/b/a DORROUGH CONSTRUCTION; PRO QUAL, LLC;
THE LIGHTING PLACE, INC.; NS ASSOCIATES, LTD;
BROOKSIDE FARMS, INC. a/k/a BROOKSIDE FARMS
NURSERY, INC. d/b/a/ BROOKSIDE NURSERY;
R.J. GRAVES CONSTRUCTION, INC.; ALLERDICE
BUILDING SUPPLY, INC.; PETER G. PALMIER d/b/a
COMFORT HVAC; UNICO FINISHING SYSTEMS, INC.;
PPG ARCHITECTURAL FINISHES, INC; MARJAM
SUPPLY CO., INC.; A.E. ROSEN ELECTRICAL CO., INC.;
EUROPEAN STUCCO AND STONE; ADVANCE GLASS,
INC.; JR BUILDERS SUPPLY CORP; D.S. SPECIALTIES,
LLC and LOUIS PETRACCIONE & SONS, INC.,

Defendants.

DECISION AND ORDER

**Index No: 2015-781
RJI No: 45-1-2015-0701**

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SARATOGA COUNTY
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FILED

A.D.W., INC.,

Plaintiff,

-against-

MLB CONSTRUCTION SERVICES, LLC and
LAKE AVENUE PLAZA, LLC,

Defendants

Appearances:

For Plaintiff: Michael L. Costello, Esq.
Tobin and Dempf LLP
515 Broadway
Albany, NY 12207

For Defendants: Joseph A. Churgin, Esq.
Savad Churgin Law Office
Attorneys for A.D.W., Inc.
55 Old Turnpike Road, Suite 209
Nanuet, NY 10954

Christopher M. McDonald, Esq.
Whiteman Osterman & Hanna LLP
Attorney Lake Avenue Plaza LLC
One Commerce Plaza
Albany, NY 12260

Earl T. Redding, Esq.
Roemer Wallens Gold & Mineaux LLP
Attorneys for M&T Bank
13 Columbia Circle
Albany, NY 12203

Neil B. Connelly, Esq.
Brown, Gruttadaro, Graujean & Prato LLC
Attorneys for NGM Insurance Company
1 North Broadway, Suite 1010
White Plains, NY 10601

Brendan R. Wolf, Esq.
Fox & Kowalewski LLP
Attorneys for William Dorrough d/b/a Dorrough Construction
4 Old Route 146, P.O. Box 958
Clifton Park, NY 12065

George Sitaras, Esq.
Marco & Sitaras, PLLC
Attorneys for Pro Qual LLC
33 Whitehall Street, 16th Floor
New York, NY 10004

Mark R. Gordon, Esq.
Attorney for NS Associates, Ltd.
46 Pettis Road, P.O. Box 310
Gansevoort, NY 12831

Joseph M. Walsh, Esq.
Walsh & Walsh LLP
Attorneys for Brookside Farms Inc., et al and Peter G. Palmier d/b/a Comfort HVAC
42 Long Alley
Saratoga Springs, NY 12866

Erika C. Browne, Esq.
Goldman Attorneys PLLC
Attorneys for R.J. Graves Construction, Inc.
210 Washington Square
Albany, NY 12203

John P. Mastropietro, Esq.
Mastropietro Law Group PLLC
Attorneys for Allerdice Building Supply, Inc.
63 Franklin Street
Saratoga Springs, NY 12866

Marc S. Brown, Esq.
Reeve Brown PLLC
Attorneys for Unico Finishing Systems, Inc.
3380 Monroe Avenue, Suite 200
Rochester, NY 14618

Colm P. Ryan, Esq.
Barclay Damon LLP
Attorneys for PPG Architectural Finishes, Inc.
80 State Street
Albany, NY 12207

Conor E. Brownell, Esq.
Ganz Wolkenbreit & Siegfeld LLP
Attorneys for A.E. Rosen Electrical Co., Inc.
One Columbia Circle
Albany, NY 12203

Anthony P. Adang, Esq.
King, Adang, Arpey, Strickland & Thompson LLPS
Attorneys for European Stucco and Stone
340 Broadway
Saratoga Springs, NY 12866

Mark W. Couch, Esq.
Couch Dale Marshall P.C.
Attorneys for Advance Glass, Inc.
29 British American Boulevard
Latham, NY 12110

Justin R. Meyer, Esq.
Stafford, Owens, Piller Murnane, Kelleher & Trombley PLLC
Attorneys for D.S. Specialties, Inc.
One Cumberland Avenue, P.O. Box 2947
Plattsburgh, NY 12901

Maria C. Tebano, Esq.
Tebano & Associates PLLC
Attorneys for Louis Petraccione & Sons, Inc.
26 Century Hill Drive, Suite 201
Latham, NY 12110

Before: Hon. Robert J. Chauvin, J.S.C.

By notice of motion dated March 15, 2016 defendant, M&T Bank (hereinafter referred to as M&T) seeks an order dismissing plaintiff's verified amended complaint and numerous cross claims as against said defendant pursuant to CPLR § 3211 (a) (1) and (7). In support of said motion M&T submitted the affirmation of Earl T. Redding, Esq. dated March 15, 2016 along with annexed exhibits "A" through "O" including copies of the summons with notice; the notice of appearance and demand for complaint of said defendant; the verified complaint; the amended verified complaint; a prior decision and order of this court; the underlying building loan agreement; and plaintiff's various replies to counterclaims. Said defendant also submitted a memorandum of law dated March 15, 2016.

By notice of cross-motion dated April 7, 2016 defendant, Lake Avenue Plaza, LLC (hereinafter referred to as Lake) seeks an order dismissing plaintiff's cross claims as against said defendant. In support of such motion defendant, Lake, submitted the affidavit of Christopher McDonald, Esq. dated April 7, 2016 along with annexed exhibit "A", copies of the various verified answers containing counterclaims and cross claims served on behalf of various

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defendants. Defendant, Lake, also submitted a memorandum of law dated April 7, 2016.

In opposition to defendant, M&T's, initial motion plaintiff, MLB Construction Services, LLC (hereinafter referred to as MLB) submitted the affidavit of Sarah Van Buren dated April 7, 2016 with annexed exhibits "A" through "S" including copies of various invoices; numerous items of correspondence; spreadsheets; and a notice of mechanics lien. Plaintiff also submitted the affidavit of James M. Dawsey dated April 7, 2016 with annexed exhibits "A" and "B", including copies of the underlying construction agreement and contractor's consent. Plaintiff also submitted a memorandum of law dated April 8, 2016.

In opposition to defendant, Lake's, cross motion plaintiff, MLB, submitted the affirmation of Michael L. Costello, Esq. dated April 14, 2016.

Finally, in reply, defendant M&T, submitted the further affirmation of Earl T. Redding, Esq. dated April 14, 2016.

The initial motion and cross-motion were both returnable April 15, 2016. However, due to numerous motions to consolidate, join and/or change venue of various actions the court adjourned the return date to May 13, 2016.

For purposes of the instant motions and as set forth in a prior decision and order of this court dated November 10, 2015, in or about July, 2012, plaintiff, MLB, and defendant, Lake, entered into a construction contract for the construction of The Pavilion Grand Hotel and related improvements on Lake Avenue and Henry Street in the City of Saratoga Springs. Pursuant to such agreement, plaintiff, MLB, acted as the general contractor and construction manager for defendant, Lake. In accordance with that contract and to advance this project, defendant, M&T Bank, provided the financing pursuant to a building loan agreement and other related security instruments issued by and between defendants, Lake and M&T Bank.

During the course of the construction project, purportedly during the spring and early summer months of 2014, significant issues developed concerning the course of conduct of the construction. It is undisputed that defendant, Lake, despite having been distributed funds from the building loan agreement, ceased making payments under and pursuant to the contract.

Plaintiff, MLB's, amended verified complaint sets forth three causes of action as against defendant, M&T. Two of the causes of action are premised upon some form of alleged breach by said defendant of the underlying building loan agreement, including a negligent breach of such contract. The remaining cause of action is premised upon an alleged breach of Lien Law § 71.

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Within such amended verified complaint plaintiff also set forth numerous causes of action as against defendant, Lake. Such causes of action include various claims premised upon said defendant's breach of the building loan agreement, including a negligent breach of contract, negligent misrepresentation and also a violation of Lien Law § 71.

It must be noted that each cause of action set forth in plaintiff's complaint as against defendant, M&T, was also brought as against defendant, Lake. However, by decision and order of this court dated November 10, 2015, this court dismissed various causes of action set forth in plaintiff's amended verified complaint as against defendant, Lake, premised upon alleged violations of the building loan agreement and the Lien Law. In so ruling the court determined that plaintiff was not a party to nor a third party beneficiary of the building loan agreement and thus lacked standing to interpose such claims premised upon a breach of such contract. In this regard the court also found that the allegation of a negligent breach of such contract was also insufficient as a matter of law, in that without some further legal duty independent of the contract itself, the simple breach of a contract cannot be considered as a tort on a theory of negligence.

The court also determined that as the complaint failed to set forth any allegation of a misappropriation of project funds that the cause of action premised upon a violation of the Lien Law was insufficient.

However, in its prior ruling, the court did not dismiss plaintiff's claim as against defendant Lake, premised upon contentions of negligent misrepresentation.

Further, by way of purported cross claims set forth in plaintiff's reply to various counterclaims brought by numerous defendants, plaintiff seeks indemnification from defendants, M&T and Lake, premised upon four bases: a breach of the building loan agreement; an alleged breach of a statutory duty of due care in the distribution of the funds of the building loan agreement as set forth in the Lien Law; negligent misrepresentation; and a violation of Lien Law § 71.

Now defendant, M&T, seeks an order dismissing plaintiff's complaint as against said defendant premised upon many of the same arguments set forth in the prior motion of defendant, Lake and M&T, and the court's prior determination thereof. Further, defendant M&T, likewise seeks dismissal of any and all purported cross claims set forth by plaintiff in its replies to the various counterclaims of numerous defendants.

Likewise defendant, Lake, seeks an order dismissing any and all purported cross claims set forth by plaintiff in its various replies to numerous counterclaims as against said defendant, again, premised upon many of the same arguments set forth in its prior motion, as well as, various procedural arguments in which defendant, Lake, contends that a cross claim is not properly plead within the confines of a reply to a counterclaim. In addition, defendant, Lake, argues that plaintiff cannot seek indemnification upon a claim wherein plaintiff is alleged to have breached an agreement with its subcontractor and/or materialmen.

As noted by the court in its prior decision and order, in so far as of the pending motions are, in part, brought pursuant to CPLR § 3211 (a) (1), in examining the sufficiency of the underlying documentary evidence such a motion must be made upon evidence which is documentary in nature and standing on its own is determinative of the factual issue(s) presented. Such evidence must “utterly refute” the allegations within the plaintiff’s complaint and definitively dispose of the allegations in the complaint (*Goshen v Mutual Life Ins. Co. of N. Y.*, 98 NY2d 314 [2002]; *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]).

Further, again as previously noted, the court is also cognizant that in considering a motion to dismiss pursuant to CPLR § 3211 (a) (7) the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide the plaintiff every possible favorable inference. Further, it has been held that the test to be applied in considering the adequacy of a complaint is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known in law can be discerned from its averments. (*JP Morgan Chase v J. H. Elec. of N. Y., Inc.*, 69 AD3d 802 [2d Dept. 2010].)

Defendant, M&T’s, motion to dismiss complaint.

First, defendant, M&T, seeks dismissal of plaintiff’s complaint as against said defendant. In this regard the court notes that it has consistently been held that in order to establish a claim as a third party beneficiary to a contract said beneficiary must be an intended beneficiary to such agreement and not merely an incidental beneficiary (*Lake Placid Club Attached Lodges v Elizabethtown Bldrs.*, 131 AD2d 159 [3d Dept. 1987]). Specifically, in factual matters as that involved herein, such is dependant upon whether the contract shows an intent to protect such persons by agreeing to ensure that they are paid and the intention of the parties manifested in the agreement is controlling (*National Wall Sys. v Bay View Towers Apts.*, 64 AD2d 417 [2d Dept.

1978]). In this regard it has specifically been held that contractual language that limits the conditions and benefits of a particular agreement to the contracting parties and which expressly excludes any third-party benefit or obligation does in fact defeat any action upon such a basis (*Howard Sav. Bank v Lefcon Partnership*, 209 AD2d 473 [2d Dept. 1994], *leave to appeal dismissed*, 86 NY2d 837 [1995]).

Further, above and beyond that set forth above concerning the lack of privity and/or third party beneficiary claim, the court notes that it has clearly been held that a simple breach of a contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

Finally, as previously noted by the court, the applicable provisions of the Lien Law concern funds held by an owner or contractor pursuant to a building loan agreement or contract for the improvement of real property and require such to be held and utilized only for payment of project expenses. Further, such provisions only prohibit the misappropriation of such funds or the use of such funds for nontrust purposes.

As noted by the court in its prior decision, in the present matter the underlying building loan agreement was by and between defendants, M&T and Lake, not the plaintiff, MLB. Further, although such agreement does include language and terms concerning the discretionary payment of the general contractor and subcontractors upon the project by the lender, the language contained within the contract concerning advances and payment of costs by the lender is referenced in terms of the protection of the lender's interests, not that of a third party. In addition, the court notes that the agreement, paragraph 7.7, wherein the lender is at liberty to make direct payments, is discretionary and not obligatory. Further the said agreement goes on, paragraph 7.8, to expressly state that nothing within said section shall be deemed to create any specific rights in favor of any third parties. Moreover, the court notes that the associated contractor's consent document actually states, paragraph 10, that nothing herein shall be construed to impose any obligation upon the lender to oversee, assure or verify the application of the proceeds of the building loan agreement. It specifically states that the contractor acknowledges that the lender's obligations under the associated building loan agreement is only to the owner. Based upon such documentary evidence the plaintiff was not a party to the contract nor a third party beneficiary and thus lacks standing to pursue a claim premised upon a breach of such agreement. Nor did defendant, M&T, owe any duty to plaintiff pursuant to such agreement.

Additionally, there was no duty independent of the underlying contract on the part of defendant, M&T, to the plaintiff, upon which any action in negligence could be premised.

Lastly the court notes that defendant, M&T, was neither an owner nor contractor upon the project nor is there any allegation of a misappropriation of project funds by said defendant, or any defendant. As such, there is no basis set forth in the complaint for any action based upon an alleged violation of the Lien Law by said defendant.

In this regard the court notes that, despite the arguments of plaintiff, the underlying contractors consent agreement and associated assignment referenced therein, in sum and substance, merely provides a basis upon which the lender, M&T, in its discretion could assume the rights and obligations of the owner, Lake, in the event of Lake's default and does not serve to automatically make defendant, M&T, a statutory trustee of the project proceeds. Again, the provisions thereof are discretionary and not obligatory and there has been no allegation that defendant, M&T, has assumed any such rights or obligations. Moreover, contrary to the authority relied upon by plaintiff, such contractor's consent agreement and assignment referenced therein, does not assign any right to receive funds upon the project to defendant, M&T. Rather, in accordance with that alleged in the complaint, they have merely remained the point of disbursement of funds to the owner upon the project.

As such, defendant, M&T's, motion to dismiss plaintiff's complaint as against said defendant is in all respects **GRANTED**.

Motion by defendants, Lake and M&T, to dismiss cross claims.

In accordance with that set forth above, as well as, the prior ruling of the court any and all cross claims seeking indemnification premised upon any violation of the underlying building loan agreement, negligent breach of such agreement and alleged violation of the Lien Law are subject to dismissal. In this regard the court specifically notes that the Lien Law does not establish any duty of care on the part of a lender, such as defendant, M&T, in regard to the distribution of funds pursuant to a building loan agreement.

Further, in regard to any claims of negligent misrepresentation, the court notes that such a cause of action requires that there be some form of privity-like or other special relationship alleged by and between the parties (*Mandarin Trading Ltd. V Wildenstein*, 16 NY3d 173 [2011]; *Kimmell v Schaefer*, 89 NY2d 257 [1996]). In this action, although such a relationship may be found within the allegations between defendant, Lake, and the plaintiff, there is no basis within

the allegations contained within the so called cross claims to establish such a basis as between defendant, M&T, and plaintiff.

Moreover, as argued by defendant, Lake, a reply is only to address counterclaims set forth within an answer and not to set forth a cross claim.

Finally, the court notes that the plaintiff has a direct action as against defendant, Lake, premised upon negligent misrepresentation presently pending.

As such, both defendant's motions to dismiss any and all cross claims as set forth in plaintiff's replies to any counter claims is in all respects **GRANTED**.

This memorandum shall constitute the decision and order of the court. The original decision and order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this decision and order and the delivery of this decision and order to the Saratoga County Clerk shall not constitute notice of entry under CPLR § 2220, and the parties are not relieved from the applicable provisions of that rule regarding service of notice of entry.

DATED: July 18, 2016
Ballston Spa, NY 12020
Craig A. Hayner
Craig A. Hayner
Saratoga County Clerk

Robert J. Chauvin
HON. ROBERT J. CHAUVIN
SUPREME COURT JUSTICE

The following papers were read and considered:

1. Notice of Motion dated March 15, 2016;
2. Affirmation of Earl T. Redding, Esq. dated March 15, 2016 with attached exhibits "O" through "O";
3. Memorandum of Law dated March 15, 2016;
4. Notice of Cross Motion dated April 7, 2016;
5. Affidavit of Christopher M. McDonald, Esq. dated April 7, 2016 with attached exhibits "A";
6. Memorandum of Law dated April 7, 2016;
7. Affidavit of Sarah Van Buren dated April 7, 2016 with attached exhibits "A" through "S";
8. Affidavit of James M. Dawsey, Esq. dated April 7, 2016 with attached exhibits "A" and "B";
9. Memorandum of Law dated April 8, 2016;
10. Affirmation of Michael L. Costello, Esq. dated April 14, 2016; and
11. Reply Affirmation of Earl T. Redding, Esq. dated April 14, 2016.

SARATOGA COUNTY CLERK'S OFFICE BALLSTON SPA, NY 2016 JUL 19 PM 3:29

ENTERED