

**National Envtl. Safety Co., Inc. v Dormitory Auth. of
the State of N.Y.**

2016 NY Slip Op 32959(U)

April 13, 2016

Supreme Court, Albany County

Docket Number: 901328-15

Judge: Richard M. Platkin

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STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

NATIONAL ENVIRONMENTAL SAFETY
COMPANY, INC.,

Plaintiff,

-against-

DECISION & ORDER

DORMITORY AUTHORITY OF THE STATE
OF NEW YORK and TDX CONSTRUCTION
CORP.,

Defendants.

Index No.: 901328-15

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Defendant TDX Construction Corporation (“TDX”) moves pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint filed against it by plaintiff National Environmental Safety Company, Inc. (“NESCO”).

This action arises out of a construction contract dated June 3, 2009 (“Prime Contract”), by which defendant Dormitory Authority of the State of New York (“DASNY”), as owner, retained NESCO as the general construction contractor for work to be performed at the City University of New York, Bronx Community College (“Project”). By separate contract, DASNY retained TDX to provide construction management services (“CM Contract”).

Plaintiff commenced this action in or about May 2015.¹ The complaint contains a single cause of action, alleging that defendants breached the Prime Contract. As is relevant here, the complaint alleges that TDX: (1) failed to timely review and process requests for payment; (2) failed to arrange payment for work performed; and (3) improperly attempted to reject claims for payment (¶¶ 97, 99, 102-103).

Dismissal is warranted under CPLR 3211 (a) (1) if documentary evidence conclusively establishes a defense as a matter of law (*Haire v Bonelli*, 57 AD3d 1354, 1356 [3d Dept 2008], citing *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Angelino v Michael Freedus, D.D.S., P.C.*, 69 AD3d 1203 [3d Dept 2010]). “Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the

¹ This action was commenced in Queens County (Index No. 705085-15). By an Order on consent dated January 7, 2016, venue was transferred to Albany County.

contents of which are essentially undeniable” (*Ganje v Yusef*, 133 AD3d 954 [3d Dept 2015] [internal quotation marks and citations omitted]).

On a motion to dismiss made pursuant to CPLR 3211 (a) (7), “the Court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference” (*EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The Court’s “sole criterion is whether the pleading states a cause of action, and[,] if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail” (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001] [internal quotations omitted]). However, the Court need not “accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence” (*1455 Washington Ave. Assoc. v Rose & Kiernan, Inc.*, 260 AD2d 770, 771 [3d Dept 1999] [internal quotation marks and citation omitted]).

A. Prime Contract

TDX argues that the Prime Contract conclusively demonstrates the absence of a contractual relationship with NESCO, thereby defeating the claim for breach of contract. While the complaint does allege that “all parties” entered into the Prime Contract (¶ 5), plaintiff’s opposition to the motion appears to recognize that the Prime Contract did not establish a direct contractual relationship between TDX and NESCO (*Hopwood Aff.*, ¶ 3). Indeed, the Prime Contract unambiguously states that “[t]here shall be no contractual relationship, express or implied, between [NESCO] and [TDX] pursuant to [the Prime Contract]” (Supplemental General Conditions, § 1.04 [B]).

Inasmuch as TDX is not a party to the Prime Contract, it is not bound by its terms, and it cannot be held liable for breach thereof (*see Delaware County v Leatherstocking Healthcare, LLC*, 110 AD3d 1211, 1213 [3d Dept 2013]; *Pacific Carlton Dev. Corp. v 752 Pac., LLC*, 62 AD3d 677, 678 [2d Dept 2009]). Accordingly, any claim premised upon TDX's breach of the Prime Contract must be dismissed.

B. CM Contract

The complaint does not specifically refer to the CM Contract between DASNY and TDX, but it does generally allege that "TDX was engaged by DASNY to provide Construction Management services at the project" (¶ 8). NESCO's opposition to the motion argues that the CM Contract provides a basis for it to pursue contractual remedies against TDX. According to plaintiff, NESCO and the other prime contractors on the Project were the intended third-party beneficiaries of the CM Contract, and issues of fact exist as to whether TDX "purposefully and negligently failed to perform its responsibilities to DASNY and therefore caused damages to [NESCO]" (Plaintiff's Memo of Law, at 3).

TDX objects to plaintiff's "newly minted" and unpleaded allegations regarding the CM Contract. However, in evaluating the "motion to dismiss for facial insufficiency, the court must consider . . . any accompanying affidavits submitted in opposition to the motion" (*Fischer v KPMG Peat Marwick*, 195 AD2d 222, 224 [1st Dept 1994]). Thus, plaintiff may rely upon its submissions made in opposition to the motion "to remedy any defects in the complaint" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

As plaintiff is not a party to the CM Contract or an expressly named beneficiary, NESCO cannot assert rights under that contract unless it is an intended third-party beneficiary (*see IMS Engineers-Architects, P.C. v. State of New York*, 51 AD3d 1355, 1356-1357 [3d Dept 2008]). NESCO must establish “that the [CM C]ontract was intended for [its] benefit and . . . the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by [DASNY and TDX] of a duty to compensate [NESCO] if the benefit is lost” (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006], quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]; *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). New York has adopted the Restatement (Second) of Contracts’ standard for third-party beneficiary status (*see Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc.*, 66 NY2d 38, 44 [1985]), which requires the alleged intended third-party beneficiary to demonstrate that “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance” (Restatement [Second] of Contracts, ch 14, § 302 [2]).

In alleging third-party beneficiary status, NESCO relies upon Article XII of the CM Contract (Hopwood Aff., ¶ 19), by which TDX “assume[d] entire responsibility and liability for any and all damage or injury of any kind or nature whatsoever . . . to all persons, whether employees of [TDX] or otherwise, and to all property, caused by, resulting from, arising out of, or occurring in connection with the negligent or alleged negligent execution of the Work” (CM Contract, Art. XII [C] [1] [c]).² In addition, plaintiff points to the provisions of the CM Contract

² The “Work” is contractually defined as services performed by TDX pursuant to “all Articles of [the CM Contract] and all Services enumerated in Appendix ‘A’, entitled ‘Scope of Services’” (CM Contract, Art. I). The Scope of Services to be provided by TDX includes making recommendations regarding “Payments to Contractors” and “[i]mplement[ing] and enforc[ing] [DASNY’s] procedure for processing of Change Orders” (Appx. A, §§ 8, 9).

by which TDX agreed to hold DASNY harmless against “all claims arising out of the negligent acts, alleged negligent acts, or failure to act” by TDX (*id.*, Art. XIII).

There is nothing in the contractual provisions cited by plaintiff, however, that manifests an intention on the part of TDX or DASNY to benefit NESCO (*see Perfetto v CEA Engrs., P.C.*, 114 AD3d 835, 836 [2d Dept 2014]). Rather, the pertinent language of the CM Contract simply makes clear that, as between TDX and DASNY, responsibility for liability and damages resulting from TDX’s negligent execution of the contracted work falls to TDX, not DASNY.

The plain meaning of the CM Contract is confirmed by the terms of the Prime Contract. In executing the Prime Contract, NESCO expressly acknowledged the absence of any contractual relationship with TDX (*see* Supplemental General Conditions, § 1.04 [B]). Moreover, it is apparent from the face of the Prime Contract that it was the obligation of DASNY, not TDX, to make payments to NESCO and the other prime contractors (*see* Article 17). The CM Contract limits TDX’s role to reviewing invoices and other payment requests and making recommendations to DASNY (Appx. A, § 8) – all in furtherance of DASNY’s payment obligations to NESCO under the Prime Contract.

Based on the foregoing, the Court concludes that the complaint, as amplified by NESCO’s submissions in opposition to the motion, “fail[s] to set forth sufficient allegations that [NESCO] was an intended third-party beneficiary” of the CM Contract (*Griffin v DaVinci Dev., LLC*, 44 AD3d 1001, 1003 [2d Dept 2007]). Accordingly, the claim for breach of contract must be dismissed as against TDX.³

³ While not asserted as a separate cause of action, plaintiff alleges in the Complaint that “defendants have been improperly unjustly enriched” (¶¶ 103-104) as a result of their alleged failure to pay plaintiff the amount it alleges is contractually owed to it. However, unjust enrichment is not an available theory of recovery where, as here, a valid and enforceable contract governs the events giving

C. Professional Negligence

Finally, NESCO argues that, even in the absence of contractual duties, it may recover against TDX for alleged breaches of “a [professional] duty of care which is extraneous to, and exists independently of, [TDX’s] contractual obligations” to DASNY. In support of its contention that TDX rendered professional services with respect to the Project, NESCO cites, among other things, a provision in the CM Contract stating that TDX “provided Design Consulting Services during the Design Phase of the Project” (¶ 4).

In opposition, TDX argues that, even if NESCO properly had pleaded a claim of professional negligence, the claim fails as a matter of law due to the absence of a legal duty independent of the parties’ contractual obligations. According to TDX, plaintiff’s allegations “do no more than assert that TDX (and DASNY) did not live up to the terms of DASNY’s agreement with [plaintiff]” (Reply Memorandum of Law, at 4-5).

A breach of contractual duties cannot be considered tortious “unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract” (*Clark-Fitzgerald, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987] [internal citations omitted]). “[T]he court is to look at the nature of the injury and whether the plaintiff is merely seeking the benefit of its agreement. Where the plaintiff is merely seeking the benefit of its agreement, it is limited to a contract claim”

rise to plaintiff’s claims (*see Kosowsky v Willard Mtn., Inc.*, 90 AD3d 1127, 1128 [3d Dept 2011]; *see also Clark-Fitzgerald, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 387 [1987]). In any event, there are no allegations of an evidentiary nature showing that TDX was in any way benefitted or enriched by NESCO’s performance of its work pursuant to the Prime Contract with DASNY (*see Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC*, 31 AD3d 983, 988 [3d Dept 2006]).

(*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 2016 NY Slip Op 1546, *3-4 [1st Dept 2016], citing *Sommer v Federal Signal Corp.*, 79 NY2d 540, 551-552 [1992]; see *Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 293-295 [1991]).

NESCO has failed to allege facts of an evidentiary nature establishing that TDX breached a duty independent of the relevant contract obligations. Indeed, the complaint specifically cites TDX's failure to perform in accordance with its alleged obligations under the Prime Contract, and NESCO's opposition relies upon alleges deficiencies in TDX's performance under the CM Contract. It also is clear from the measure of damages sought in the complaint – the amount allegedly owed under the Prime Contract – that NESCO seeks the benefit of its contractual bargain with DASNY.

Finally, this is not a case where any alleged failure of TDX to “perform competently [had] catastrophic consequences”, such that tort liability may attach (*Samson Constr.*, *supra*). Indeed, the only harm alleged by NESCO is economic in nature, which can be fully remedied through enforcement of the Prime Contract.⁴

Accordingly, it is

ORDERED that TDX's motion to dismiss the complaint against it is granted, and plaintiff's complaint is dismissed as against TDX in all respects; and it is finally

⁴ Any claim of professional negligence also fails for the absence of privity or near-privity (*Perfetto*, 114 AD3d at 836). There is no privity between NESCO and TDX, and the allegation of “continuous and ongoing contacts between TDX and [plaintiff]” during the course of the Project falls well short of alleging a bond sufficiently close as to qualify as the functional equivalent of privity (*Hopwood Aff.*, ¶ 3; Plaintiff's Memo of Law, at 11).

ORDERED that, within thirty (30) days from the date of this Decision and Order, plaintiff shall confer with DASNY, and the remaining parties shall either: (i) stipulate to a scheduling order with respect to disclosure and the filing of a note of issue, which shall be submitted to the Court for approval; or (ii) request a conference with the Court for the purpose of establishing a scheduling order.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to counsel for defendant TDX Construction Corp. and all other papers are being transmitted to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule.

Dated: Albany, New York
April 13, 2016



RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Documents Nos. 19-33