SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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VINEYARD SKY, LLC and ALLCO REALTY, LLC,

Plaintiffs,

-against-

IAN BANKS, INC. and EVEREST NATIONAL INSURANCE COMPANY, PCF STATE RESTORATION INC. and ENDURANCE AMERICAN INSURANCE COMPANY,

Defendants.

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EVEREST NATIONAL INSURANCE COMPANY,

Third-party Plaintiff,

-against-

THOMAS MELONE and BROWN HARRIS STEVENS,

Third-party Defendants.

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Index No.: 650392/12
Subm. Date: Dec. 07, 2016
Motion Seq. Nos.009 and 010

DECISION AND ORDER

For Plaintiff:
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Papers considered in review of Mot. Seqs. 009 and 010:

	Papers	Numbered
Seq. 009	PCF's Notice of Motion	1
	PCF's Affirmation and Exhibits in Support	2
	Plaintiffs' Memo in Opposition	3
	PCF Affirmation in Reply	4
Seq. 010	Plaintiffs' Notice of Motion	5
	Plaintiffs' Memo, Affidavits, and Exhibits in Support	6
	PCF's Opposition	7

ELLEN M. COIN, A.J.S.C.:

In a case involving allegations that rain water infiltration caused property damage, defendant PCF State Restoration Inc. (PCF) moves for summary judgment dismissing the complaint as against it (motion seq. No. 009). Conversely, plaintiffs Vineyard Sky, LLC (Vineyard Sky) and Allco Realty, LLC (Allco) move for partial summary judgment as to liability against PCF (motion seq. No. 010). The motions are consolidated for disposition.

BACKGROUND

This is a case involving water damage to condominium units within a building located at 43 West 64th Street in Manhattan. The building, built in 1881 as a storage warehouse, was converted into condominium units by nonparty the Athena Group in 2003. According to Thomas Melone, managing member of Vineyard Sky and Allco, Vineyard Sky purchased unit 14A and Allco purchased unit 12A in the building in September 2006 (Affidavit of Thomas Melone, sworn to July 22, 2016, ¶¶ 3,4,6). Melone described both units as "raw space" upon purchase (*id.*, ¶ 5). Unit 14A is on the top floor of the building, with 12A directly below it (Affidavit of Ian Banks, sworn to July 14, 2016, ¶ 2).

On September 29, 2006, Vineyard Sky and Allco entered into a contract with defendant Ian Banks, Inc. (IBI) to serve as construction manager for "most but not all" of the construction work Melone planned for the two units (Melone Aff., ¶ 6). Plaintiffs hired architects, structural engineers, and ventilation engineers to draw up plans for the renovation of both units (*id.*, ¶ 8). Melone described the way in which plaintiffs contracted out the work after the plans were drawn up:

> Plaintiffs (i) directly engaged a kitchen and cabinetry subcontractor to provide the full kitchen cabinetry and countertops, bathroom cabinetry and countertops, decorative ceiling and wall mouldings in the kitchen, (ii) directly engaged the wood floor subcontractor to install wood floors throughout the units, (iii) directly engaged a subcontractor to re-route various building water and HVAC lines that were located in the Units, (iv) directly engaged a plumbing supply contractor to supply all the finished fittings for the project and (v) engaged IBI to act as construction manager of most, but not all, other aspects of the project

(*id.*, ¶ 9).

Defendant PCF State Restoration Inc. (PCF) was the roofing subcontractor (*id.*, ¶ 12). PCF's selection was pre-ordained by the building's condominium association, which had a 20-year warranty for work PCF did during the initial condo conversion (*id.*). Melone stated that he approved the IBI/PCF contract, and that "it required, among other things, for PCF to provide temporary waterproofing for the duration of the project" (*id.*, ¶ 15).

The roof work involved an enlargement of the roof's bulkhead. Ian Banks (Banks), the principal of IBI, stated that the goal of the bulkhead-enlargement was "to make it useable as a room" (Banks Aff., ¶ 2).[1] This "required enlarging an opening in the concrete roof deck so that a wider staircase leading to the newly enlarged roof bulkhead could be installed" (*id.*). The existing opening was approximately 95 square feet, while the enlarged opening is 165 feet.

As to PCF's obligation to provide temporary waterproofing, which is in the scope of work exchanged between IBI and PCF prior to their execution of a work order, Banks stated that he notified PCF's president, Stanley Nowowiejski (Nowowiejski), of PCF's responsibility to perform this work:

> At the end of May, 2008 or early June, 2008, I met with Stanley Nowowiejski on the roof of the units to discuss the planned enlargement of the concrete roof deck.

[1] While Banks is now providing an affidavit supportive of plaintiffs' claims against PCF, this action began with a summons and complaint directed solely at IBI and Banks personally.

> I reviewed the layout with him and showed him where the existing hole would be enlarged. I specifically pointed out the need for temporary waterproofing to be installed as soon as the existing hole was enlarged

(Banks Aff., ¶ 7).

As discussed further below, Nowowiejski contends that PCF was not notified of the need to provide temporary waterproofing. On June 10, 2008, a demolition contractor enlarged the opening in the concrete roof deck. Banks stated that two PCF employees, a foreman and a project manager, were present during this work (*id.*, ¶ 9). Banks claims that he not only reminded the foreman and the project manager of PCF's waterproofing obligations (*id.*, ¶ 10), but that in the days between the demolition work, on June 10, 2008, and the day of the leak, June 14, 2008, he called Nowowiejski, "several times," to "remind him of his firm's obligation to provide temporary waterproofing for the enlarged opening" (*id.*, ¶ 11).

Banks noted that on June 14, 2008, "water from heavy rains infiltrated the interior of the Units through the enlarged opening in the roof because of the absence of waterproofing," and attributed the damage to PCF's failure to perform "the temporary waterproofing work that it was required to perform under the accepted Purchase Order" (*id.*, ¶ 12).

Plaintiffs filed their complaint seeking damages from IBI and Banks personally for the water damage to their units on February 10, 2012, more than three years after the leaks occurred on June 14, 2008. PCF and its insurer, Endurance American Insurance Company (Endurance), as well as IBI's insurer, Everest National Insurance Company (Everest) were later added as defendants. In May 2012, IBI and Banks made a pre-answer motion to dismiss the claims against them. However, before the motion was decided, IBI and Banks applied for a stay based

on an arbitration pending before the American Arbitration Association entitled *Ian Banks, Inc. v Thomas Melone, Vineyard Realty LLC and Allco Realty LLC* (13-527-01186-10).

Plaintiffs discontinued their claims against Banks by stipulation dated February 20, 2013. IBI, in turn, withdrew its motion to dismiss against plaintiff on the same date. These stipulations apparently stemmed from settlement of the arbitration.

PCF and Endurance also moved to dismiss pursuant CPLR 3211 and to disqualify Thomas Melone as plaintiffs' attorney. By decision and order dated October 3, 2013, the Court denied the disqualification motion as premature and dismissed as time-barred plaintiffs' negligence claims against PCF and Endurance, retaining only contractual claims. [2]

On appeal, the Appellate Division, First Department held:

> The portion of the motion seeking dismissal of the plaintiff's second cause of action for breach of contract based on PCF's failure to pay for losses and damages resulting from the failure to adequately cover the building's roof during the renovation was properly denied. The allegations, along with the submission of a sworn affidavit from plaintiffs' attorney/managing agent, and an insurance letter indicating that there is a factual basis for potentially finding, *inter alia*, the functional equivalent of privity between PCF and plaintiffs, and that plaintiffs were covered by a hold harmless provisions in the PCF subcontract, were not conclusively refuted by the documentary evidence

(*Vineyard Sky, LLC v Ian Banks, Inc.*, 123 AD3d 461, 462-463 [1st Dept 2014])

As to Endurance, the First Department held that all claims as against it should have been dismissed, reasoning that "plaintiffs may not maintain a direct action against Endurance absent proof that they obtained a judgment against PCF, the insured" (*id.* at 462). Thus, all that remains in this action is plaintiffs' contractual claims against PCF. PCF argues that it has no contractual obligations to plaintiffs, who claim to be third-party beneficiaries of PCF's contract with IBI.

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[2] No appeal was taken from denial of the motion to disqualify.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], *affd* 15 NY3d 297 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Third-Party Beneficiary Status

New York courts have long held that a party need not be specifically named in a contract to establish third-party beneficiary status (*see Newin Corp. v Hartford Acc. & Indem. Co.*, 37 NY2d 211 [1975]). Instead, parties "asserting third-party beneficiary rights under a contract must establish (1) the existence of a valid and binding contract between other parties; (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost" (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006] [internal quotation marks and citation omitted]).

Courts look to surrounding circumstances in determining whether a party was intended to be a third-party beneficiary of an agreement, and "the intention which controls . . . is that of the promisee" (*MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313 [1st Dept 1992]); *see also*

Encore Lake Grove Homeowners Assn., Inc. v Cashin Assoc., P.C., 111 AD3d 881, 883 [2d Dept 2013]). While courts look to the intention of the promisee, they also look to whether, under the circumstances, reliance by the third-party was "both reasonable and probable" (*City of New York (Dept. of Parks & Recreation-Wollman Rink Restoration) v Kalisch-Jarcho, Inc.*, 161 AD2d 252, 253 [1st Dept 1990]).

In the context of construction subcontractors, the Appellate Division has held: "It is almost inconceivable that [subcontractors] who render their services in connection with a major construction contract would not contemplate that the performance of their contractual obligations would ultimately benefit the owner of the development" (*id.*, quoting *Key Intl. Mfg. v Morse/ Diesel, Inc.*, 142 AD2d 448, 455 [2d Dept 1988]). The First Department also noted in *Kalisch-Jarrcho* that "a subcontractor is free to insist upon a contractual clause expressly negating enforcement of the contract by third parties" (*id.*), and its absence implies intent to benefit third-parties. "Thus, courts have generally refused to dismiss breach of contract causes of action asserted by property owners against subcontractors who performed construction services on their property" (*Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 94 AD3d 1466, 1469 [4th Dept 2012]).

Here, there is no reason for deviation from this general pattern. Plaintiffs have established all the requirements for third-party beneficiary status. First, there was a valid and binding contract between PCF and IBI. Second, the contract was intended for plaintiffs' benefit, as the agreement contemplated work on plaintiffs' properties. Third, the benefit to plaintiffs of PCF's promise to do roof work on plaintiffs' properties, especially work to prevent leaks, was sufficiently immediate to indicate the assumption by PCF of a duty to compensate plaintiffs if the

benefit were lost. Thus, the next question is whether PFC breached its contract with IBI in failing to construct requisite waterproofing.

Breach

ICI and PCF entered into a purchase order dated July 11, 2007.[3] The order listed 11 items, including flashing,[4] but the term "temporary waterproofing," does not appear in the purchase agreement. However, a scope of work underpinning the purchase agreement, sent by ICI to PCF on May 22, 2007, described the bulkhead work as requiring "temporary water proofing for duration of project." Moreover, after PCF responded to the scope of work with cost proposals, ICI wrote back urging PCF to "make sure" that certain items, including "[t]emporary waterproofing as needed during construction" were "included in your price" (Melone Aff., Ex. 2). The purchase agreement also contains a rider with an indemnification provision that states that PCF will indemnify IBI for any damages caused by its negligence.

PCF does not argue that it had no duty under the agreement with ICI to provide temporary waterproofing. Instead, it argues that it did not breach its duty, because ICI did not notify PCF that it needed to perform temporary waterproofing on the hole leading to the subject leak. PCF claims that it did provide waterproofing after the bulkhead was initially removed, but that the leak was caused by ICI's failure to ask PCF to do temporary waterproofing after ICI enlarged the hole to accommodate the new bulkhead. PCF relies on the following excerpt from Nowowiejski's deposition:

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[3] The purchase order was not fully executed until July 13, 2017.

[4] The purchase agreement provided that PCF would do the following work: "1. Preparation for new bulkhead, 2. 14th Floor window opening, 3a. Four (4) slab penetrations for steel, 3b. Two (2) beam pockets, 4. New roof system, 5a. Stucco and flashing north walls, 5b. Stucco and flashing south wall, 6. Relocate roof drain, 7. 36' x 30' hole by chimney, 8. New pad for grease fans, 9. Two (2) concrete pads, 10a. Remove door and block up, 10b. New masonry opening and door, 11. Patch holes 2 existing fans south of chiller."

"Q: So your company did not know he was going to cut the slab?
A: Just remember one thing, just not only this situation, whole entire industry. GC have, have obligation to control all entire project. He was hired over there to be in and out, depends how project goes. In other words, I cannot have policeman to watch what Ian Banks or you do over there. Basically, that's my statement.

Q: Right. But I need you to answer my question.

A: It is, it was.

Q: Are you saying that no one at PCF knew that Ian Banks was cutting this slab?

A: Yes.

Q: And are you also saying when you say that the area was watertight before he cut the slab that you had done whatever you needed to do in terms of waterproofing before he cut the slab?

A: Whatever Ian Banks ask me to do I done . . ."

(Nowowiejski Tr. at 22:19–23:18).

This testimony is at odds with Banks' statements that two PCF employees were present when the slab was enlarged, that he notified them that PCF was required to install temporary waterproofing after the enlargement, and that he followed up several times by phone in the days between the enlargement and the leak to notify PCF of that requirement (Banks aff, ¶¶ 10-11).

Plaintiffs try to support their version of events with an email, apparently sent by Nowowiejski on June 12, 2008, defending his employees from allegations of smoking at the worksite. Although Nowowiejski's email identifies the two PCF workers that Banks described at the job site, it does not pinpoint the timing of their presence. Plaintiffs do not include the email from the nonparty complaining about smoking to clarify the timing, without which it is mere speculation as to whether these were the two workers whom Banks instructed regarding

waterproofing. Nowowiejski, asked about this email at his deposition, testified that he did not remember when the work referred to in the smoking email was done (Nowowiejski tr at 33-35). Thus, this email does not conclusively resolve the parties' differing version of events. The remaining issues of fact warrant denial of both motions.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant PCF State Restoration Inc. for summary judgment dismissing the complaint (motion seq. No. 009) is denied; and it is further

ORDERED that the motion of plaintiffs Vineyard Sky, LLC and Allco Realty, LLC for partial summary judgment as to liability (motion seq. No. 010) is also denied.

Dated: July 18, 2017

ENTER:

Hon. ELLEN M. COIN, A.J.S.C.