SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48EFM

----------X

STEADFAST INSURANCE COMPANY,

Plaintiff,

- v -

ALLAN BRITEWAY ELECTRICAL CONTRACTORS, INC.,

Defendant.

INDEX NO. 654546/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

----------X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 35, 37, 38, 39, 40, 41

were read on this motion to/for DISMISSAL.

In motion sequence number 001, third-party defendants Cooper Robertson & Partners Architects LLP i/s/h/a Cooper Robertson & Partners, Jaros, Baum & Bolles i/s/h/a Jaros Baum & Blum and Ove Arup & Partners P.C. d/b/a/ Over Arup & Partners Consulting Engineers i/s/h Over Arup & Partners (collectively, Design Defendants) move to dismiss the third-party complaint pursuant to CPLR 3211 (a) (1) and (7). (NYSCEF Doc. No. 15 at 2.) Defendant and third-party plaintiff Allan Briteway Electrical Contractors, Inc. (ABE) opposes and cross-moves to amend the third-party complaint pursuant to CPLR 3025 (b)[1].

Background

This matter arises from the design and construction (Project) of the Whitney Museum of Art (Whitney). ABE was a subcontractor while third-party defendant Turner Construction Company (Turner) was the general contractor. Plaintiff Steadfast

[1] However, ABE fails to submit an amended complaint.

Insurance Company (Steadfast) issued a subcontractor default insurance policy to Turner in connection with the Project pursuant to which Steadfast paid proceeds to Turner as a result of ABE's alleged default under the subcontract.

Turner entered into a construction management contract with the Whitney on July 1, 2010. (NYSCEF Doc. No. 4 at ¶ 9). ABE alleges that the Design Defendants had the responsibility to produce a complete set of plans, specifications, general conditions and addenda, which detailed all the work required for the Project, and if followed, would result in an acceptable, code compliant electrical system. (Id. ¶¶ 3, 10). On May 7, 2012, ABE entered into a subcontract with Turner to perform the electrical work on the Project for $24.5 million. (*Id.* ¶11). ABE's scope of work on the project generally included the electrical power distribution, electrical fit out, fire alarm system, security conduit, telecom and audio-visual work required per the plans and specifications. (*Id.* ¶ 12). What was initially a $24.5 million subcontract exploded to over $35 million, to complete the electrical work on the Whitney. (*Id.* ¶ 29). ABE complains that the contract documents upon which it relied to price the work did not define the work that ABE actually completed. (*Id.* ¶¶ 59-60). ABE insists that it "knows how to read plans and specifications" and "understands how to estimate the cost of a project and prepare a bid accordingly." (*Id.* at ¶ 21).

In its October 19, 2018 third-party complaint, ABE alleges that the Design Defendants negligently abused the construction process, misused architect's supplemental instructions (ASI) and essentially redesigned the entire electrical system during the construction. (*Id.* ¶ 37). Against the Design Defendants, ABE asserts a first

cause of action for negligence, a fourth cause of action for unjust enrichment, and a fifth cause of action for intended third-party beneficiary.[2] (*Id.* ¶¶ 63, 94,100).

Discussion

CPLR 3211 (a) (7) provides that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action." A motion made pursuant to CPLR 3211, requires the court to give the pleadings a liberal construction and accept the facts alleged as true. (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) The court will accord plaintiff the benefit of every possible favorable inference to determine if the facts as alleged in the complaint fit within any cognizable legal theory. (*Id.* at 87-88.) The court's analysis of plaintiff's claims is "limited to the four corners of the pleading." (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015].) In "circumstances where legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference," and "the criteria becomes whether the proponent of the pleading has a cause of action, not whether she has stated one." (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] [internal quotation marks and citations omitted.)

"[B]efore a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentation[,] there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity." (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer &*

[2] In its memorandum of law, ABE voluntarily discontinued its fourth and fifth causes of action against the Design Defendants. (NYSCEF Doc. No. 39). Therefore, the fourth and fifth causes of action of the Third-Party Complaint are dismissed.

Wood, 80 NY2d 377, 382 [1992].) "[A] relationship approaching privity requires that: (1) defendant have an awareness that his or her statement is for a particular purpose; (2) a known party relies on the statement in furtherance of that purpose; and (3) there is some conduct linking defendant to the relying party and evincing its understanding of that reliance." (*Sykes v RFD Third Ave. 1 Associates, LLC*, 67 AD3d 162, 167 [1st Dept 2009].); *see also Beck v Studio Kenji, Ltd.*, 90 AD3d 462, 462-463 [2011] ["For a plaintiff to state a cause of action for negligent misrepresentation based on the existence of the functional equivalent of privity, three conditions must be satisfied ..."].) In addition to the existence of this special or privity-like relationship imposing a duty on the defendant to impart correct information to plaintiff, to maintain a negligent misrepresentation claim, the plaintiff must show that the information was incorrect and reasonable reliance on the information. (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

For instance, in *Ossining Union Free School District v Anderson LaRocca Anderson* (73 NY2d 417, 419-420 [1989]), a school district sued its architect and the engineering consultant retained by the architect for negligent misrepresentations that had been made regarding the structural integrity of a high school annex. Although the school district did not have privity of contract with the engineering consultant, the court denied the consulting engineer's motion to dismiss on the ground that the relationship was so close as to approach that of privity (i.e., "functional equivalent of contractual privity"). (*Id.*).

Here, ABE states classic negligent misrepresentation in a project to construct a building. ABE alleges that the Design Defendants had the responsibility to produce a complete set of plans, that if followed, would result in an acceptable code compliant

electrical system. (NYSCEF Doc No. 4 at ¶ 10). ABE sufficiently alleges, the Design Defendants knew or should have known that their plans were to be used for the purpose of creating a code compliant electrical system. (*Id.* at ¶ 54; *Ove Arup Contract* NYSCEF Doc. No. 24 at 5.4 ["The Plans shall be the property of Owner whether or not the Project is built or completed"]; *see IFD Const. Corp v Corddry Carpenter Dietz and Zack* 253 AD2d 89, 93 [1st Dept 1999] ["the engineers were aware of the purpose of their design plans"]). ABE alleges that it had a construction obligation to rely on these plans in preparing its bid to produce the code compliant electrical system. (NYSCEF Doc. No. 4 at ¶ 53). Indeed, ABE "was part of a definable class that would rely on the bid documents." (*IFD Const. Corp v Corddry Carpenter Dietz and Zack*, 253 AD2d at 95.) ABE further alleges conduct linking it to the Design Defendants, evincing the Design Defendants' understanding of ABE's reliance because "[i]n many instances, the Design [Defendants] ... changed the plans and specifications after ABE completed installation" and therefore, "ABE had to tear out previously contract compliant work and reinstall work ... ." (NYSCEF Doc. No. 4 at ¶ 59; *see also* NYSCEF Doc No. 24 at 1.2 ["Engineer ... shall maintain close communication and coordination with Owner's other ... contractors as reasonably practicable while this Agreement is in effect"]). The Design Defendant' reliance on *Beck v Studio Kenji, Ltd* (90 AD3d 462 [1st Dept 2011]) is misplaced. There, plaintiff failed to establish that the architect of record had the functional equivalent of privity with the design architect where plaintiff failed to adequately allege that the design architect intended for the architect of record to rely on the design architect in determining whether the plans complied with building codes. (*Id.*). The court also rejects the Design Defendants' reliance on *Yonkers Contracting*

Company, Inc. v The County of Westchester (63929/2015 [Sup Ct, Westchester County 2018]) where the plaintiff only alleged that "all of the contracting and subcontracting parties are working toward the same goal ... and that each contracting party's job performance may affect other contracting parties' job performances;" which was insufficient to establish the functional equivalence of privity. (*Yonkers Contracting Company, Inc. v The County of Westchester* (63929/2015 [Sup Ct, Westchester County [2018], NYSCEF Doc. No. 21 at 8.) In any case, this court is not bound by that decision. Therefore, ABE has sufficiently alleged a relationship approaching privity.

ABE also sufficiently alleges the final two elements of negligent misrepresentation. ABE alleges that Design Defendants' plans, on which ABE relied, did not accurately define the work to be performed to the tune of $10.5 million in excess of the bid price. (NYSCEF Doc. No. 19 ¶ 29). Although ABE fails to use the magic words "reasonable reliance", the court accepts the facts alleged as true and infers that ABE's reliance was reasonable because ABE could only estimate prices for its bid using the plans created by the Design Defendants. In this manner, *IFD Const. Corp v Corddry Carpenter Dietz and Zack* is distinguishable because the bidder there was "under a duty to inspect the work site and soil conditions." (253 AD2d at 94.) Such independent inspection is not possible here, where a building is to be constructed and the design team creates the universe of labor, materials, and specifications. Nor could ABE have known that the Design Defendants would significantly change the plans after ABE's bid was accepted. Indeed, holding otherwise would create a perverse incentive in the industry to contract out of liability for design or architectural plans leaving contractors with no assurances that the information given to prepare their bids is reliable

information. Unlike *IFD*, here ABE cannot create its own plans; it must rely on Design Defendants.

Furthermore, the cases on reliance cited by the Design Defendants are easily distinguished. In *Marcellus Constr. Co. v Vill. of Broadalbin* (302 AD2d 640, 642 [3d Dept 2003], the "bidders' instruction unequivocally advised bidders that they were required to conduct their own investigation concerning site conditions," while here such a site inspection was not possible. Here, the problem is with the plans to build a building, not site conditions that can be independently observed. In *Schultz Constr, Inc. v Franbilt, Inc.* (14 AD3d 895, 898 [3d Dept 2005]), unlike here, the contract provided that "the inspections were solely for the benefit of the Authority," and thus Franbilt could not assert reliance. This court is confounded as to how contractors could bid on a project without relying on anything other than the design and architectural plans.

Nevertheless, the court is compelled to grant the motion to dismiss because ABE's claim is barred by the statute of limitations. (*See A.H.A. Gen. Constr., Inc. v Edelman Partnership*, 291 AD2d 239, 240 [1st Dept 2002]). The statute of limitations for negligence is three years. (CPLR 214[6]; *A.H.A. Gen. Constr., Inc.*, 291 AD2d at 240 ["Concerning the negligence causes of action, assuming in plaintiff's favor that its relationships ... were such as to approach privity, such causes of action must ... be dismissed as barred by the three-year statute of limitations"].). ABE entered into the subcontract in May 2012. (NYSCEF Doc. No. 19 at ¶ 11). Therefore, this claim filed in 2018 was barred after May 2015. Here, *IFD Const. Corp v Corddry Carpenter Dietz and Zack*, 253 (AD2d 89, 93 [1st Dept 1999]) is instructive. "[T]he gravamen of the wrong complained is that IFD calculated its bid price on the basis of documents and

specifications prepared by the defendant engineers, who negligently misrepresented the soil conditions ... Thus, IFD was injured ... at least by the time IFD ... entere[d] into a construction contract ... more than three years before ... commencement of this action." Likewise, this court is compelled to dismiss ABE's third-party complaint since ABE was injured in May 2012 when it relied on the Design Defendants' plans and Abe's bid was accepted.

ABE's cross motion for leave to amend is denied as no amendment could save this pleading problem.

Accordingly, it is

ORDERED that the motion to dismiss is granted; and it is further

ORDERED that the motion for leave to amend is denied; and it is further

ORDERED, that the parties shall appear for a preliminary conference on May 16, 2019 at 10 a.m.

5/9/19
DATE

HON. ANDREA MASLEY
ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE