

Tutor Perini Bldg. Corp. v Port Auth. of N.Y. & N.J.
2019 NY Slip Op 31902(U)
July 1, 2019
Supreme Court, New York County
Docket Number: 156211/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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TUTOR PERINI BUILDING CORP.,

Plaintiff,

- v -

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, STV INCORPORATED

Defendant.

INDEX NO. 156211/2018

MOTION DATE 03/22/2019,
03/22/2019

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 23, 25, 26, 27, 28, 34, 37, 38, 39, 40

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 30, 31, 33, 35, 36

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

Plaintiff Tutor Perini Building Corp., the general contractor, initiated this action on July 2, 2018 against defendants The Port Authority of New York and New Jersey (PANYNJ) and STV Incorporated (STV), the project architect, arising from the \$183.2 million renovation of the George Washington Bridge Bus Station (the Project) for delays and extra costs. (NYSCEF Doc. No. [NYSCEF] 1, Complaint). Both defendants filed pre-answer motions to dismiss. (NYSCEF 4, PANYNJ motion 01; NYSCEF 13, STV motion 02).

The Project was undertaken as a public-private partnership between the PANYNJ, the property owner, and non-party George Washington Bridge Bus Station

Development Venture LLC (the Developer). (NYSCEF 1, Complaint, ¶¶ 5, 7). On May 18, 2010, the Developer entered into a contract with STV to prepare the drawings, plans and specifications for the Project and other contract documents detailing the scope and nature of the construction. (*Id.*, ¶ 14). After the Board of Commissioners for the PANYNJ approved the Project on June 30, 2011, the PANYNJ entered into a lease agreement with the DV in July 2011 (the Lease Agreement) under which the parties set forth the terms for the renovation of the Project and the use of the Project in future years. (*Id.*, ¶¶ 5-6). Under the Lease Agreement, the PANYNJ retained certain portions of the Project for use by the PANYNJ as a bus terminal (the Reserved Premises) while allowing the Developer to use and operate portions of the Project as retail space (the Leased Premises). (*Id.*, ¶¶ 6). On June 26, 2013, the Developer entered into a contract (the Contract) with plaintiff under which plaintiff was to serve as general contractor for the demolition and abatement portions of the existing structure for the bus terminal and the reconstruction and certain remodeling work of the Project. (*Id.*, at ¶ 12).

Plaintiff alleges: (1) professional negligence against STV (*Id.*, ¶¶ 17-36); (2) negligent misrepresentation against STV (*Id.*, ¶¶ 37-47); (3) breach of contract against the PANYNJ as the functional equivalent of privity with the non-party Developer (*Id.*, ¶¶ 48-60); and (4) alternatively, unjust enrichment against PANYNJ. (*Id.*, ¶¶ 61-64). Plaintiff seeks damages of \$120 million. (*Id.*, ¶¶ a-d at p.11).

On a motion to dismiss pursuant to CPLR 3211, a court must give the pleadings a liberal construction, accept the facts alleged in the complaint as true, afford the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83

[1994]). The 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, then a motion for dismissal will fail. (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] (citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977])). A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Where the documentary evidence, such as a contract, does not clearly refute the allegations in the complaint, the action will not be dismissed. (See *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 154 [2002]. The contract must not be ambiguous, otherwise a defense is not conclusively established as a matter of law. (*Weston v Cornell Univ.*, 56 AD3d 1074, 1074 [3d Dept 2008]). A contract is ambiguous if its provisions “lack a definite and precise meaning and provide a reasonable basis for a difference of opinion.” (*Id.* [citations omitted]).

PANYJ moves pursuant to CPLR 3211(a)(7) to dismiss plaintiff’s claims for breach of contract and unjust enrichment for failure to state a claim and insists that plaintiff’s remedy is to be found in plaintiff’s arbitration against the Developer. Plaintiff and PANYNJ are not parties to a contract. Rather, plaintiff argues that they have a relationship that is the functional equivalent of contractual privity. First, PANYNJ argues that plaintiff’s claim for breach of contract is doomed for failure to assert a claim for negligent misrepresentation against it. However, the doctrine of the “functional equivalent of privity” also applies in the contract context under the theory that the

parties' relationship is so close as to be the "functional equivalent of privity." (*City School Dist. of Newburgh v Hugh Stubbins & Assoc.*, 85 NY2d 535, 538 [1995]). For instance, in *Brownell Steel, Inc.*, the Third Department held that the functional equivalent of privity existed between a contractor and a second-tier subcontractor when the second-tier subcontract (1) incorporated the terms of the first tier subcontract; (2) provided that the second-tier subcontractor was to assume the responsibilities of the first-tier subcontractor on the first-tier subcontract; and (3) named the contractor as the intended beneficiary. (*Brownell Steel, Inc. v Great Am. Ins. Co.*, 28 AD3d 842, 843 [3d Dept 2006]).

PANYNJ next argues that the contract between the Developer and plaintiff precludes plaintiff from asserting this claim. Article 5 of the Lease is excerpted as Exhibit 3 to the Contract. Section 5.7 of the Lease provides:

"(b) Nothing contained in this Agreement shall grant or be deemed to grant any contractor, architect, supplier, subcontractor or any other Person engaged by the Lessee or any of its contractors in the performance of any part of the Construction Work any right of action or claim against any Port Authority Indemnified Party with respect to any work any of them may do in connection with the Construction Work. Nothing contained herein shall create or be deemed to create any relationship between the Port Authority and any such contractor, architect, supplier, subcontractor or any other Person engaged by the Lessee or any of its contractors in the performance of any part of the Construction Work and the Port Authority shall not be responsible to any of the foregoing for any payments due or alleged to be due for any work performed or materials purchased in connection with the Construction Work."

(NYSCEF 8, The Contract at p. 44 a/k/a p. 12/36). PANYNJ's reliance on this lease provision is misplaced. In the context of construction agreements, blanket incorporation by reference provisions are not enough to bind contractors to an incorporated agreement except as to scope, quality, character and manner of work to be performed

by the contractor. (*Beys Gen. Constr. Corp. v Hill Intl., Inc.*, 92 AD3d 407 [1st Dept 2012]). Moreover, Section 1.1 of the Contract provides:

“To the extent set forth in this Agreement, Contractor shall assume to the Owner the same obligations and responsibilities expressly and only relating to the scope of work, quality of work, time and schedule requirements, or character of work as are assumed by the Lessee to the Port Authority under the referenced sections in Articles 2, 3, 5, 5a and 8 of the Lease, which provisions are attached hereto as Exhibits 1 through 5 respectively, and are incorporated herein by reference.”

(NYSCEF 8, Contract §1.1)(emphasis added).

To state a claim for breach of contract, plaintiff must allege “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiff alleges that the PANYNJ maintained on-site staff which directed plaintiff, participated in meetings, reviewed, approved, and modified construction drawings and plans. (NYSCEF 1, Complaint, ¶¶49-58). For example, PANYNJ allegedly directed plaintiff to perform work that was outside the scope of the Contract such as performing work in subway tunnels; and directed plaintiff to use certain equipment, but not other equipment, e.g. jackhammers instead of milling machine even where the Developer approved otherwise. (NYSCEF 40, February 22, 2019 Transcript, (Tr.) 10:1-13). PANYNJ’s interference allegedly breached the Contract, in the following ways:

“[B]y (1) failing to properly finance the Project, and failing to providing for a developer who was qualified and properly fund the Project, (2) failing to deliver design documents in a timely manner, and failing to control the faulty design provided by the developer, (3) failing to provide accurate and buildable design documents, (4) making unreasonable design and other changes to the Project, which resulted in hundreds of pending change order requests, request for information and other direction, (5) failing to manage the Project design, access to the Project site and other necessary elements, (6) failing to respond to design

and other inquiries with accuracy and in a timely manner, (7) subjecting Plaintiff to differing site conditions, (8) not properly staffing the Project with qualified and available personnel, and (9) failing to properly place financial controls to protect the project funds for the benefit of Plaintiff. (NYSCEF 1, Complaint ¶ 58).

Plaintiff states a claim for breach of contract against the PANYNJ. Therefore, PANYNJ's motion to dismiss the third cause of action is denied.

PANYNJ objects to plaintiff's unjust enrichment claim as precluded by the existence of the Contract. In order to adequately plead such a claim, the plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [brackets and internal quotation marks and citations omitted]). In its fourth cause of action, plaintiff alleges unjust enrichment based upon the PANYNJ's active role in the Project and commandeering presence and direction on the Project. Plaintiff asserts that since the PANYNJ directed and compelled plaintiff to perform work that was outside the scope of the Contract and benefitted from that work at plaintiff's expense, plaintiff is entitled to be compensated for that work. "Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded." (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). However, PANYNJ disputes the existence of a contract between plaintiff and PANYNJ. Under these circumstances, it is premature to dismiss the fourth cause of action. (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208 [2d Dept 2008]).

STV moves to dismiss plaintiff's first cause of action for professional negligence and second cause of action for negligent misrepresentation based on the economic loss doctrine which prohibits recovery for economic losses unless there is privity of contract or the functional equivalent of contractual privity. To successfully state a tort claim against STV, plaintiff must allege: (1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendants linking them to the party or parties and evincing defendant's understanding of their reliance. (*Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]). STV insists that plaintiff cannot satisfy these requirements because plaintiff was not and could not have been a "known party" when STV was engaged to prepare the Construction Documents three years earlier.

To state a claim for professional negligence or malpractice, a plaintiff need only allege that there was "a departure from the accepted standards of practice and that the departure was a proximate cause of the injury." (*D.D. Hamilton Textiles v Estate of Mate*, 269 AD2d 214, 215 [1st Dept 2000]). Plaintiff alleges that STV prepared the Construction Documents that were incorporated into the Contract with the intent that the Construction Documents would be used and relied upon by the Developer and the contractors in the construction of the Project. (NYSCEF 1, Complaint, ¶¶ 18-20, 32). Second, plaintiff alleges that STV owed a duty to plaintiff to perform this work in a non-negligent manner, consistent with the standard of care exercised by similarly situated architects. (*Id.*, ¶¶ 22, 31-32). Finally, plaintiff alleges STV breached its duty by failing to act with diligence and due care in accordance with the applicable code of conduct for

architects by preparing Construction Documents that contained errors, omissions and misrepresentations regarding the existing conditions of the Project (e.g., STV blatantly misrepresented with detail the elevations of existing steel members and the existence of utilities, wiring and conduit on the Project such plaintiff was required to essentially redesign certain portions of the Project in the field to overcome avoidable conflicts), all of which caused damage to plaintiff. (*Id.*, ¶¶ 23-28, 29, 33-35).

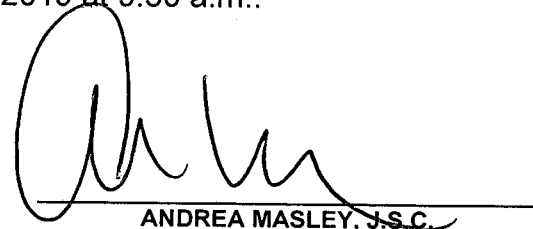
To state claim for negligent misrepresentation, plaintiff must allege “(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 180 [citation and internal quotation marks omitted]).

Plaintiff asserts that the functional equivalent of privity exists between plaintiff and STV which imposed a duty upon STV to impart correct information to Tutor Perini in connection with the Project. (Complaint, ¶¶ 40-43). Specifically, plaintiff alleges that the Construction Documents prepared by STV “contained misstatements in that they provided precise locations, elevators and sizes of new and existing steel members and connection details, which were not accurate.” (*Id.*, ¶ 39). Plaintiff also alleges that it was reasonable for it to rely upon those details because that was STV’s intent, the Construction Documents were being incorporated into plaintiff’s contract with the Developer, STV represented the details as accurate, and plaintiff did not have an independent duty, time, access or permission to survey the details set forth by STV in the Construction Documents. (*Id.*, ¶¶ 23-26, 43).

Plaintiff's allegations that STV knew that contractors, including plaintiff, would use STV's Contract Documents to bid on the project and that the winning contractor, here plaintiff, would use the Contract Documents to perform under the Contract, are sufficient to survive STV's motion. (See *Ossining Union Free School Dist. v Anderson LoRocca Anderson*, 73 NY2d 417, 425 [1989][motion to dismiss denied where owner sued engineer engaged by owner's architect for allegedly defective report regarding structural soundness of owner's building; owner and engineer had no contract]). The possibility of the functional equivalent of privity exists where the preparer of bid documents designs a project not knowing the name of the winning contractor, but knowing there will be a winning contractor eventually who will rely on those documents. (See *Pile Found. Constr. Co. v Berger, Lehman Assoc.*, 253 AD2d 484 [2d Dept 1998]). The architect need not know the name of the winning contractor while designing the bid documents. Indeed, such a requirement is impossible. Likewise, the time between STV's engagement to draft the Contract Documents and plaintiff's selection as the winning bidder is a red herring. The court also rejects STV's insistence that plaintiff prove its case at this early stage exemplified by STV's reliance on summary judgment decisions and demand for facts to support plaintiff's claim.

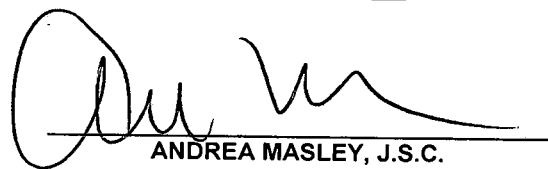
Accordingly, it is
 ORDERED, that PANYNJ's motion to dismiss is denied; and it is further
 ORDERED, that STV's motion is denied; and it is further
 ORDERED, that defendants shall answer within 20 days and the parties shall
 appear for a preliminary conference on August 6, 2019 at 9:30 a.m..

Motion Seq. No. 01:
7/11/19
 DATE


 ANDREA MASLEY, J.S.C.

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

Motion/Seq. No. 02:
7/11/19
 DATE


 ANDREA MASLEY, J.S.C.

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