

Leon Cosgrove, LLC v Ironshore Indem., Inc.

2020 NY Slip Op 33785(U)

November 13, 2020

Supreme Court, New York County

Docket Number: 656248/2017

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**LEON COSGROVE, LLC and MITCHELL,
SILBERBERG & KNUPP, LLP**

Plaintiffs,

**DECISION AND ORDER
Index No.: 656248/2017**

- v -

**Motion Sequence
No.: 001 & 002**

IRONSHORE INDEMNITY, INC.,

Defendant.

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O. PETER SHERWOOD, J.:

Plaintiffs are law firms which formerly represented non-party Ariel Quiros (Quiros) in various matters related to allegations of fraud and operating a Ponzi scheme. Quiros was an insured on a directors of officers insurance policy (D&O Policy) issued by defendant Ironshore Indemnity, Inc. (Ironshore). Ironshore denied coverage at a time that Quiros' assets were frozen. Quiros engaged Leon Cosgrove LLC (LC) to pursue an insurance recovery claim against Ironshore (the Florida Action). To prevent plaintiffs from withdrawing from their representation of Quiros and facing a bad faith claim by its insured, Ironshore entered into an Interim Funding Agreement (IFA) with Quiros (see Doc. 96, ¶ 2)¹. The IFA which is dated January 13, 2017, named plaintiffs as "Approved Firms". The IFA provides that "Ironshore agrees to pay any invoices of the Approved Firms for work performed or costs incurred, subsequent to December 1, 2016 and prior to the occurrence of a Termination Event" (*id.*, ¶ 5). The purpose of the IFA was to prevent plaintiffs' withdrawal. Plaintiffs then continued to work on Quiros matters and presented their invoices to Ironshore. Ironshore has refused to pay, claiming that plaintiffs are not third party beneficiaries of the IFA and therefore lack standing.

¹ References to "Doc." followed by a number, refers to documents filed in this case in the New York State Courts Electronic Filing System (NYSCEF).

The Florida Action subsequently settled pursuant to a settlement agreement (the Settlement) which purported to cancel the IFA and sought a bar order from the District Court, which that court granted. The bar order was vacated by the United States Circuit Court of Appeals for the 11th Circuit. Plaintiffs have asserted a claim for breach of contract and a claim for quantum meruit. Motion Sequence 001 is a motion for partial summary judgment by plaintiffs on the issue of liability. Motion Sequence 002 is a motion by defendant for summary judgment dismissing both causes of action, breach of contract and quantum meruit. The motions largely mirror each other.

In Motion Sequence 001 plaintiffs move for summary judgment, arguing that Ironshore has a contractual obligation under the IFA to pay plaintiffs who are third-party beneficiaries of that agreement, that the obligation is not modified by the Florida Action, and that Ironshore has no valid defense. Ironshore argues plaintiffs are not third-party beneficiaries, thus have no standing to sue here.

“A third party may sue as a beneficiary on a contract made for its benefit, *Dormitory Authority v Samson Construction Co.*, 30 NY3d 704, 70 NYS3d 893, 94 NE3d 456 (2018) (purported beneficiary not named in contract). However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contract, *id.* One who seeks to maintain an action for breach of contract as a third party beneficiary must establish that 1) there is an existing valid and binding contract between the signatories, 2) the contract was intended for the third party's benefit, and 3) the benefit to the third party is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate that party if the benefit is lost, *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 919 NYS2d 465, 944 NE2d 1104 (2011); *Mendel v Henry Phipps Plaza West, Inc.*, 6 NY3d 783, 811 NYS2d 294, 844 NE2d 748 (2006); *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 464 NYS2d 712, 451 NE2d 459 (1983); see *Roosevelt Islanders for Responsible Southtown Development v Roosevelt Island Operating Corp.*, 291 AD2d 40, 735 NYS2d 83 (1st Dept 2001) (applying Restatement 2d of Contracts, § 302(1)(a) and (b)). Additionally, it must be established that no one other than the third party can recover if the promisor breaches the contract or that the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party,

Dormitory Authority v Samson Construction Co., supra; Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc., 66 NY2d 38, 495 NYS2d 1, 485 NE2d 208 (1985); Artwear, Inc. v Hughes, 202 AD2d 76, 615 NYS2d 689 (1st Dept 1994); Oursler v Women's Interart Center, Inc., 170 AD2d 407, 566 NYS2d 295 (1st Dept 1991). Courts are generally reluctant to construe an intent to benefit a third party in the absence of clear contractual language evincing such an intent, LaSalle Nat. Bank v Ernst & Young LLP, 285 AD2d 101, 729 NYS2d 671 (1st Dept 2001)”

(N.Y. Pattern Jury Instr.--Civil 4:1).

The existence and validity of the IFA are not disputed. Ironshore argues plaintiffs are not named as beneficiaries of the IFA or as parties to the Florida Action, and they had not made any prior claims to Ironshore or threatened to sue. Ironshore relies on *Miller & Wrubel, P.C. v Todtman, Nachamie, Spizz & Johns, P.C.* (106 AD3d 446 [1st Dept 2013]). In that case, the court held the “[p]laintiff lacked standing to bring the instant action as it was an incidental beneficiary to its client's malpractice insurance policy with a nonparty insurer. There was no language in the subject insurance policy that identified plaintiff as an intended third-party beneficiary of such policy, or that indicated that plaintiff would be the lone third party that would have an interest in the retention amount sought to be paid under the insurance agreement” (*id.*). The case is distinguishable. The D&O Policy is not at issue in this case, the IFA is. Plaintiffs are referenced expressly in the IFA where Ironshore agreed to pay any invoices of the Approved Firms “for work performed ...subsequent to December 1, 2016” (Doc. 96, ¶ 5). It also agreed to pay invoices presented to its designated vendor “on behalf of” Quiros (*id.*, ¶ 4). This shows plaintiffs were intended beneficiaries of the IFA and that Ironshore be bound to pay plaintiffs for their work on behalf of Quiros.

Ironshore argues Quiros' consent is required to submit bills to be paid, and plaintiffs have not shown they had his consent. That is not what the IFA says. Submission on his behalf is all

that is required. As far as Ironshore argues that Quiros had objected to certain bills, alleging overbilling and malpractice, that goes to the amount of fees due, not whether Ironshore is liable at all (*see* Opp 001, NYSCEF Doc. No. 114 at 15-16).

Ironshore also argues plaintiffs could not have relied on the IFA to their detriment because there was no unconditional guarantee, plaintiff MSK's retainer agreement specified Quiros would remain obligated to pay MSK, Quiros' permission would be needed to receive payment from anyone else, which permission he revoked, and, if plaintiffs had standing, they would first have to resolve their fee disputes with Quiros, who claims plaintiffs overbilled and committed legal malpractice (Opp 001 at 17-19).

Plaintiffs counter that they relied on the IFA by continuing to perform legal work for Quiros, so Ironshore may not now avoid its obligations (Opp 002, Doc. 117, at 9). The IFA contains no requirement for Quiros' approval, only for submission on his behalf, which was done (*id.*). Also, the MSK engagement agreement provides that Quiros consented to MSK getting paid by any third party which Quiros directed to pay on his behalf, and the IFA indicates that consent (*id.* at 10). As to the arguments about alleged malpractice, the alleged malpractice occurred between 2013 and mid-2016. The IFA covers work for the period December 2016-March 2017 (*id.*). Nor did the settlement agreement in the Florida Action affect the plaintiffs' claims.

The court agrees that plaintiffs are third party beneficiaries to the IFA and have standing to bring suit. Plaintiffs' motion for partial summary judgment on the first cause of action on the issue of liability shall be granted.

Ironshore moves to dismiss the quantum meruit claim as barred by the existence of a valid, enforceable contract (Memo 001, Doc. 79, at 21-22). It adds that even without a contract,

the claim must fail because the services were not performed for and accepted by defendant Ironshore (*id.* at 22). The court agrees this claim must be dismissed because it is duplicative of the breach of contract claim.

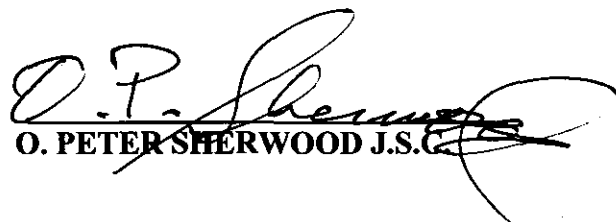
Accordingly, it is hereby

ORDERED that the motion for partial summary judgment of plaintiffs on the issue of liability (Motion Sequence 001) is **GRANTED**; and it is further

ORDERED that the motion for partial summary judgment of defendant is **GRANTED** to the extent that the second cause of action alleging quantum meruit is **DISMISSED** and otherwise **DENIED**.

DATED: November 13, 2020

ENTER,


O. PETER SHERWOOD J.S.C.