

**Michael Anthony Contr. Corp. v Queens N.Y. Realty
LLC**

2020 NY Slip Op 35787(U)

January 28, 2020

Supreme Court, Nassau County

Docket Number: Index No. 604986-14

Judge: Jerome C. Murphy

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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

MICHAEL ANTHONY CONTRACTING CORP.,

Plaintiff,

- against -

**QUEENS N.Y. REALTY LLC, MIDRE CONTRACTING
CORP., ACTION STORE FRONTS INC., ROMAN IRON
WORKS INC., MAX HOROWITZ & SON INC.,
PRIME LIGHT ELECTRICAL CONSTRUCTION
MAINTENANCE INC., and SURETEC INSURANCE
COMPANY,**

Defendants

**QUEENS N.Y. REALTY LLC, on behalf of itself and as
subrogee of all other persons similarly situated as trust
fund beneficiaries of Lien Law Trusts of third-party
defendant Michael Anthony Contracting Corp., and
Benjamin Mason, M.D.,**

Third-Party Plaintiffs,

- against -

**MICHAEL ANTHONY CONTRACTING CORP.,
MICHAEL PERNA, HYMAN HAYES ASSOCIATES,
LLC, MYLES HYMAN, M/E ENGINEERING, P.C.,
F. JOSEPH STRAUB, P.E., HIG SERVICES, INC.,
LONG ISLAND CONCRETE INC., HART ROOFING
& WATERPROOFING, INC., ACTION STORE
FRONTS INC, ROMAN IRON WORKS, INC.,
MAX HOROWITZ & SON INC., and
JOHN DOES #1-10, inclusive, as those persons**

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Sequence Nos.: 011

**MOD
DECISION AND ORDER**

and entities having an interest in the trust funds received, or to be received by Michael Anthony Contracting Corp., for the improvement of the property located at 105-12 101st Avenue, Queens County, New York (a/k/a Block 9423, Lot 6 on the Land and Tax Map of Queens County, New York),

Third-Party Defendants.

The following papers were read on this motion:

Sequence No. 011 also read with Motion Sequence No. 013 papers:

Notice of Motion, Affirmation and Exhibits.....	1
Affidavit in Opposition and Exhibits.....	2
Memorandum of Law of Third-Party Defendants in Reply to Opposition.....	3
Sur Reply.....	4

PRELIMINARY STATEMENT

Third-party defendants, Hyman Hayes Associates, LLC (“HHA”) and Myles Hyman (“Hyman”) move pursuant to CPLR §3212, for dismissal of the Third-party Complaint of Queens N.Y. Realty LLC (“QNYR”) and Benjamin Mason, M.D. (“Mason”) against them as well as the dismissal of all cross-claims.

BACKGROUND

Michael Anthony Contracting Corp. (“MACC”) entered into a contract with Queens N.Y. Realty, LLC (QNYR”) dated July 23, 2013, for construction of the Mason Eye Surgery Center. Among the provisions of the Contract (Exh. A[1]) were that (1) MACC waived claims “. . . for principal office expenses of personnel stationed there . . .” (Exh. A[1] General Conditions § 15.1.6.2); (2) MACC was required to obtain signatures of the owner and HHA on all Change Orders: “A Change Order shall be based upon agreement among Owner, Contractor and Architect . . .” (Exh. A[1], General Conditions § 15.1.5); and (3) MACC was required to obtain prior written notice of claims for additional time with an estimate of cost (Exh. A[1], General

Conditions § 15.1.5).

HHA entered into a contract with Mason dated August 15, 2013 (Exh. A[2]). With respect to Change Orders, HHA's Standard Contract at Exh. A[2], Standard Contract Terms, at p. 3, reads as follows:

In the event the Client consents to, allows, authorizes or approves of changes to any plans, specifications or other construction documents, and these changes are not approved in writing by Hyman Hayes Associates, the Client recognizes that such changes and the results thereof are not the responsibility of Hyman Hayes Associates from any liability arising from the construction, use or result of such changes.

The Contract also limits HHA's liability at Exh. A[2] at p. 4 as follows:

... the total aggregate liability of Hyman Hayes Associates and his or her sub-consultants to all those named shall not exceed the greater of \$50,000 or the amount of fees paid under this contract. It is intended that this limitation apply to any and all liability or cause of action however alleged or arising unless otherwise prohibited by law.

The amount paid to HHA was \$176,251.65.

The Contract also precludes any claim by any party other than by HHA's client, Dr. Benjamin Mason:

Nothing contained in this agreement shall create a contractual relationship with or a cause of action in favor of a third-party against either the contract of Hyman Hayes Associates, Hyman Hayes Associates' services under this agreement are being performed solely for the Client's benefit, and no other entity shall have any claim against Hyman Hayes Associates because of this agreement or the performance or non-performance of services hereunder.

Dr. Mason states in his Affidavit, that he received the Standard Contract Terms in January 2013. HHA furnished him with a Contract dated August 15, 2013, which referenced the Standard Contract Terms, but a copy was not attached to the Contract. Dr. Mason signed the Contract upon receipt so as to provide it to the lender.

The Third Amended Third-Party Complaint (Exh. "G") for the first time includes

Benjamin Mason, M.D. as a plaintiff, and asserts twenty-seven causes of action, the first four of which are against HHA and Hyman as follows:

FIRST: Breach of Contract by failing to, *inter alia*, (a) prepare Design Documents that were complete, free of defects and errors, and in compliance with applicable codes, rules, and regulations, (b) periodically observe, inspect and review the performance and completion of the construction work, (c) correct, amend and modify defects in the Design Documents and/or respond to QNYR and/or Mason's and its contractors' requests for clarifications, (d) assist Plaintiff in implementing methods of minimizing or mitigating damages resulting from the defective, erroneous and/or incomplete Design Documents, (e) review and certify contractor payment applications in a timely and competent manner, (f) certify substantial and final completion of the Project, and (g) conduct bidding in the interests of QNYR and/or Mason.

SECOND: Negligence/Professional Malpractice.

THIRD: Negligent Misrepresentation in their failure to exercise the requisite duties of care, competence, skill and diligence, thereby providing to QNYR and/or Mason and its representatives and contractors erroneous, incompetent, inaccurate, incorrect and deficient Design Documents, instructions, responses, guidances, information and advice, which constitute negligent misrepresentations by HHA and Hyman.

FOURTH: Contribution and Indemnification with respect to any award to MACC.

DISCUSSION

The HHA Contract and Standard Contract Terms are annexed as Exhibit "1" to Exh. "A", the Affidavit of Myles Hyman. The Contract is dated August 15, 2013, and is signed by Myles Hyman on behalf of Hyman Hayes Associates, and by B. Mason on behalf of Dr. Benjamin Mason. Queens N.Y. Realty, LLC is not a party to the contract.

Among the Standard Contract Terms are provisions for Limitation of Liability, Indemnification, Mediation/Arbitration, Third Party Claims, and Change Orders, which provide as follows:

LIMITATION OF LIABILITY

In recognition of the relative risks and benefits of the project to both the Client and Hyman Hayes Associates, the risks have been allocated such that the Client agrees, to the fullest extent permitted by the law, to limit the liability of Hyman Hayes Associates and his sub-consultants to the Client and to all construction contractors and subcontractors on the project for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, including attorneys' fees and costs and expert witness fees and costs, so that the total aggregate liability of Hyman Hayes Associates and his or her sub-consultants to all those named shall not exceed the greater of \$50,000.00 or the amount of fees paid under this contract. It is intended that this limitation apply to any and all liability or cause of action however alleged or arising, unless otherwise prohibited by law.

INDEMNIFICATION

Hyman Hayes Associates agrees, to the fullest extent permitted by law, to indemnify and hold the Client harmless from any damage, liability or cost (including reasonable attorneys' fees and costs of defense) to the extent caused by Hyman Hayes Associates' negligent acts, errors or omissions in the performance of professional services under this Agreement and those of his or her sub-consultants or anyone for whom Hyman Hayes Associates is legally liable.

The Client agrees, to the fullest extent permitted by law, to indemnify and hold Hyman Hayes Associates harmless from any damage, liability or cost (including reasonable attorneys' fees and costs of defense) to the extent caused by the Client's negligent acts, errors or omissions and those of his or her contractor's, subcontractors or consultants or anyone for whom the Client is legally liable, and arising from the project that is the subject of this Agreement.

MEDIATION/ARBITRATION CLAUSE

All claims, disputes, and controversies arising out of or in relation to the performance, interpretation, application, or enforcement of this Agreement, including but not limited to breach thereof, shall

be referred to mediation under the then current Construction Industry Mediation Rules of the American Arbitration Association prior to any recourse to arbitration or a judicial forum.

THIRD PARTY CLAIMS

Nothing contained in this agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or Hyman Hayes Associates. Hyman Hayes Associates' services under this agreement are being performed solely for the Client's benefit, and no other entity shall have any claim against Hyman Hayes Associates because of this agreement or the performance or nonperformance of services hereunder.

CHANGE ORDERS

In the event the Client consents to, allows, authorizes or approves of changes to any plans, specifications or other construction documents, and these changes are not approved in writing by Hyman Hayes Associates, the Client recognizes that such changes and the results thereof are not the responsibility of Hyman Hayes Associates. Therefore, the Client agrees to release Hyman Hayes Associates from any liability arising from the construction, use or result of such changes.

The Contract in question is between HHA and Benjamin Mason, M.D. The fact that Queens N.Y. Realty, LLC's name is on the contract as addressee, does not change the fact that they are not a party to the contract. The Third Amended Third-Party Complaint on behalf of Queens N.Y. Realty, LLC is dismissed for failure to state a cause of action and based upon documentary evidence.

The First Cause of Action, on behalf of Dr. Mason, alleges breaches of contract by HHA. To the extent that the document refers to "Hayes" as a defendant, such claims are dismissed as failing to state a cause of action and are barred by documentary evidence, as there is no "Hayes" with whom Dr. Mason contracted.

As it relates to the Second, Third and Fourth Causes of action by Queens N.Y. Realty, LLC against Hyman Hayes Associates LLC., and Myles Hyman, dismissal of those Causes of

Action are denied. Given the facts presented, including the expert affidavit of Victor K. Han, questions of fact have been raised that duties in tort exist which preclude the granting of summary judgment. The facts raised include claims for failure to exercise reasonable care.

“ ‘It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated’ ” (*Dormitory Authority v. Samson Construction Co.*, 30 N.Y. 3d 704, 711, quoting *Clark-Fitzpatrick, Inc. v. Long Is. R. R. Co.*, 70 N.Y. 2d 382, 389[1987]). The Court further noted that “[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties’ relationship’ and that several types of defendants-including professionals-can be held liable in tort ‘for failure to exercise reasonable care, irrespective of their contractual duties’ ” (id., quoting *Sommer v. Federal Signal Corp.*, 73 N.Y.2d 540, 551[1992]).

The finding of an independent duty, separate and apart from any contractual obligations typically occurs based upon a close relationship between the parties, and the obligations of the party sought to be held liable for negligence, had a duty of due care, such as an architect or project manager, and that these duties can reasonably be said to inure to the benefit of subcontractors as well as the owner, for the former are ‘members of a limited class’ whose reliance upon the ability of the alleged tortfeasor is clearly foreseeable (*James McKinney & Son, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 92 A.D. 2d 991[2d Dept. 1983], quoting *White v. Guarente*, 43 N.Y. 2d 356, 362 [1977]).

The Court further dismisses the claims in the first Four Causes of action brought by Benjamin Mason, M.D. Dr. Mason is not a defendant in this action, thus will not be liable for monetary damages to the plaintiff. Given that, he has no reason to maintain, and he cannot maintain in this case, a claim as a third party plaintiff against the Hyman defendants. Dr. Mason’s claims against the Hymans, third-party defendants, are dismissed.

As it relates to the cross-claims brought by M/E Engineering, P.C. and F. Joseph Straub P. E., there are also unresolved questions of fact relating to these claims that bar the dismissal of these cross-claims.

Any cross-claims between other third-party defendants against the Hyman third-party

defendants are dismissed, since dismissal of those claims has not been opposed.

To the extent that requested relief has not been granted it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York

January 28, 2020

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED
FEB 03 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE