

202 Eighth Ave. LLC v Trinchese Constr., Inc.

2022 NY Slip Op 30877(U)

March 14, 2022

Supreme Court, New York County

Docket Number: Index No. 654621/2021

Judge: Sabrina B. Kraus

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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202 EIGHTH AVENUE LLC

Plaintiff,

- v -

TRINCHESE CONSTRUCTION, INC.,

Defendant.

-----X

INDEX NO. 654621/2021

MOTION DATE 03/04/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISSAL.

BACKGROUND AND ALLEGED FACTS

Plaintiff is the owner of the real property located at 202 Eighth Avenue, New York, NY 10011 (Subject Premises).

Luigi Trinchese (LT) is the president of defendant Trinchese Construction, Inc. a licensed contracting company that specializes in the reconstruction of fire damaged premises. LT was also the president of American Emergency Services, Inc. (AES) a restoration company that performed emergency mitigation services to fire and water-damaged properties.

On or about May 30, 2016, there was a fire at the Subject Premises. At that time the Subject Premises was owned by Robert Malta (Malta).

On or about, June 8, 2016, Malta and defendant entered into a written contract whereby defendant agreed to make repairs to the Subject Premises after the same was damaged by fire. Malta transferred ownership of the Subject Premises to plaintiff on or about September 12, 2016.

Plaintiff commenced this action for breach of contract alleging that defendant failed to timely finish the work and for negligence alleging that the work was not performed in a “good and workmanlike manner.”

There are two related actions pending involving the building and the fire. On November 21, 2017, AES filed suit against Malta and plaintiff, in Civil Court, New York County, under Index. No. 26447/17. Malta and plaintiff counterclaimed for breach of contract, fraudulent inducement, and deceptive business practices, and instituted a third-party suit against Luigi Trinchese, personally, and defendant.

On November 22, 2017, defendant commenced an action against Malta and plaintiff, in this court, under Index No. 160397/2017. Malta and plaintiff counterclaimed against defendant for breach of contract, fraudulent inducement, and deceptive business practices and joined AES and LT as third-party defendants. Pursuant to a decision and order dated May 20, 2021 the court (Saunders, J) dismissed all claims against AES and defendant based on the court’s finding that a third-party action was not properly commenced.

PENDING MOTION

On March 4, 2022, defendant moved for an order dismissing the action asserting numerous grounds including lack of capacity or standing on the part of plaintiff to sue.

Defendant also moves for sanctions for alleged frivolous conduct.

On that date, the motion was fully briefed and marked submitted and the court reserved decision.

For the reasons stated below, the motion is granted, and the action is dismissed.

DISCUSSION

Plaintiff Lacks Standing to Sue For Breach of Contract as It Was Not A Party to The Contract

CPLR§ 3211(a)(3) provides for dismissal of an action on the ground that the party asserting the cause of action lacks the legal capacity to sue. An objection to standing has been traditionally treated as the procedural equivalent of a CPLR§ 3211(a)(3) lack of "capacity to sue," *Gilman v. Abagnale*, 235 AD2d 989 [3rd Dept 1997].

A plaintiff lacks standing if it does not have a sufficiently cognizable stake in the outcome of the litigation. *Community Board 7 of the Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148 (1996). Where standing is put into issue, a plaintiff must prove its standing if it is to be entitled to relief (*see TPZ Corp. v Dabbs*, 25 AD3d 787, 789, [2d Dept 2006]; *see also Society of Plastics Indus v County of Suffolk*, 77 NY2d 761, 769 [1991] [*standing "is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation."*])

In order to have standing to enforce a contract, the plaintiff must be a party thereto or a third-party beneficiary thereof (*see Bd of Educ of the Northport-E Northport Union Free Sch Dist v Long Is Power Auth*, 60 Misc 3d 1222[A] (*citing NY Mtge Trust, Inc v Dasdemir*, 37 Misc 3d 1226[A]).

In the case at bar, the complaint incorrectly alleges that "the parties" entered into a written contract to repair the Subject Premises after it was damaged by a fire. In fact, the plaintiff was not a party to the construction contract at bar, Malta was. This is not disputed by plaintiff in the motion papers.

Plaintiff alleges the right to sue for breach of the contract because:

.... the gravamen of the complaint is that Plaintiff suffered significant damages by virtue of its tenant breaching its lease and vacating the Building due to Defendant's failure to complete its work within the time specified for performance in the contract. As the assignee of the subject lease where the tenant vacated who was paying \$35,000.00 per

month in rent due to Defendant's breach in failing to supply gas to the Building for seven (7) months, Plaintiff has legal standing to sue Defendant.

Plaintiff cites no legal authority for this position.

The Court of Appeals has specifically limited a third-party's right to enforce a contract to two situations: (1) when the third party is the only one who can recover for the breach of contract or (2) when it is otherwise clear from the language of the contract that there was an intent to permit enforcement by the third party (*see Dormitory Auth of the State of NY v Samson Constr Co*, 30 NY3d 704 [2018].) Plaintiff meets neither of these standards.

In the related Supreme Court case, *Trinchese v. Malta*, Index No. 160397/17, the Court (Ling Cohen, J) had previously held that Raul Escarza, who executed the subject contract on behalf of Malta, had acted as an agent of a disclosed principal and could not be held personally liable under the facts of the case. Malta, the principal upon whose behalf the subject contract was signed and who claimed its breach, clearly has standing upon the contract, and there is nothing in the language of the contract to indicate it is assignable by any party, or that a third party may enforce it (*see E Coast Athletic Club, Inc v Chicago Tit Ins Co*, 39 AD3d 461, 463 [2d Dept 2007]) (*a non-party may sue for breach of contract only if it is an intended beneficiary, and the parties' intent to benefit the third party must be apparent from the face of the contract*).

As held by the Appellate Division First Department:

It is old law that a third party may sue as a beneficiary on a contract made for his benefit. (*Lawrence v. Fox*, 20 NY 268; 17A CJS, Contracts, § 519 [3]; 10 NYJur, Contracts, § 237.) However, an intent to benefit the third party must be shown. (*Beveridge v. New York El R.R. Co.*, 112 NY 1, 26 [19 N.E. 489]; *Cerullo v. Aetna Cas. & Sur. Co.*, 41 AD2d 1 [341 N.Y.S.2d 767]), and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts. (*Associated Flour Haulers & Warehousemen v. Hoffman*, 282 NY 173, 180 [26 N.E.2d 7]; *Moch Co. v. Rensselaer Water Co.*, 247 NY 160 [159 N.E. 896]; *Simpson Contracts*, § 117.) (*Port Chester Electrical Construction Corp. v. Atlas*, 40 NY2d 652, 655 [389

N.Y.S.2d 327, 357 N.E.2d 983].)

Crown Wisteria, Inc. v. F.G.F. Enterprises Corp., 168 A.D.2d 238, 241–42 (1990).

Based on the foregoing, defendant’s motion to dismiss the first cause of action is granted.

***The Cause of Action for Negligence Must Be Dismissed
As the Claim Is Governed by A Written Contract***

In determining a motion to dismiss, the court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002]).

The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]).

On a motion to dismiss made pursuant to CPLR § 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs 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, 87-88 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232[1st Dept], *lv denied* 89 NY2d 802 [1996], and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

As the underlying claims are governed by a written contract between Malta and defendant, the cause of action for negligence does not stand. It is well settled 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" (*Brown v Wyckoff Hgts Med Ctr*, 28 AD3d 412, 413 [2d Dept 2006], quoting *Clark-Fitzpatrick, Inc v Long Is RR Co*, 70 NY2d 382, 389[1987]).

Plaintiff fails to allege any legal duty owed to it by defendant independent of the contractual duties to Malta, based on the foregoing the cause of action for negligence must be dismissed (*see, e.g., Sargent v New York Daily News, LP*, 42 AD3d 491 [2d Dept 2007] *Benjamin v City of New York*, 99 AD2d 995 [1st Dept 1984), *affd* 64 NY2d 44 [1984] ; *Heffez v L & G Gen Constr, Inc*, 56 AD3d 526 [2d Dept 2008].)

CONCLUSION

Based on the foregoing, defendant's motion to dismiss the complaint is granted and the action is dismissed. The court does not find a basis to impose sanctions in this matter.

WHEREFORE it is hereby

ORDERED that defendant's motion to dismiss the action is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further


ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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3/14/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE