

McGlynn, Hays & Co., Inc. v 3 E. 89 Holding LLC

2022 NY Slip Op 31879(U)

June 9, 2022

Supreme Court, New York County

Docket Number: Index No. 657188/2021

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

MCGLYNN, HAYS & CO., INC.

Plaintiff,

- v -

3 EAST 89 HOLDING LLC AND F&S CONTRACTING GROUP, INC.,

Defendant.

-----X

INDEX NO. 657188/2021

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 48, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 101, 102

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for DISQUALIFY COUNSEL.

Upon the foregoing documents, Defendant's, 3 East 89 Holding LLC, motion to dismiss is granted.

Plaintiff's, McGlynn, Hays & Co. Inc's ("McGlynn"), cross-motion seeking to disqualify the Kalina & Mattia law firm as counsel for both defendants, to amend their complaint to add two additional claims against defendant 3 East 89 Holding LLC, and seeking an order directing an immediate trial is denied in its entirety.

Facts

F&S, as contractor, and McGlynn, as subcontractor, entered into a written subcontract agreement dated February 14, 20201 (the "Subcontract"), whereby McGlynn was to provide materials, equipment and labor relating to the installation of a new passenger elevator located at

3 East 89th Street in Manhattan as part of a renovation of an existing building at that location, housing a contemporary art and design gallery known as “Salon 94” (the “Project”). F&S had a contract with Project owner 3 East (the “General Contract”)². McGlynn had a Subcontract with F&S. On the very first page of that Subcontract, it states that “Contractor has heretofore entered into a Contract (hereinafter designated as the “General Contract”) with 3 East 89 Holding LLC . . .” The Subcontract specifically incorporates the General Contract by reference. The Subcontract placed McGlynn in privity of contract only with F&S, not 3 East. Also, 3 East is not a signatory to the F&S/McGlynn Subcontract.

Plaintiff’s Cause of Action for Breach of Contract Against Owner

Defendant 3 East 89 Holding LLC brought a motion to dismiss the Plaintiff’s, McGlynn, Hays & Co. Inc’s (“McGlynn”) first cause of action and second cause of action against them pursuant to CPLR § 3211 (a)(1) and (a)(7).

Pursuant to CPLR § 3211(a)(1), dismissal of a complaint is proper where the documentary evidence and undisputed facts negate or dispose of the claims in the complaint or establish a defense. See *Alvarado v. Beth Israel Medical Center*, 60 A.D.3d, 981, 982-83 (2nd Dep’t. 2009). A contract qualifies as documentary evidence for purposes of a motion to dismiss.

In the context of construction litigation, it is well-settled that a subcontractor cannot state a claim against an owner for breach of contract due to the absence of privity. *Perma Pave Contracting Corp. v. Paerdegat Boat & Racquet Club, Inc.*, 156 A.D.2d 550, 551 (2nd Dep’t. 1989); *IMS Engineers-Architects, P.C. v. State*, 51 A.D.3d 1355, 1357 (3rd Dep’t. 2008); *E. States Elec. Contractors, Inc. v. William L. Crow Const. Co.*, 153 A.D.2d 522, 523 (1st Dep’t.1989); *Delta Elec., Inc. v. Ingram and Greene, Inc.*, 123 A.D.2d 369, 370 (2nd Dep’t 1986); *Sky-Lift Corp. v. Flour City Architectural Metals, Inc.*, 298 A.D.2d 214, 215 (1st Dep’t.

2002); *Faist v. Garship Const. Corp.*, 220 A.D.2d 718 (2nd Dep't. 1995); *Data Elec. Co. v. Nab Const. Corp.*, 52 A.D.2d 779 (1st Dep't. 1976) . It is clear to the Court that there is no privity between subcontractor McGlynn and the Owner because the Owner was not a party to the Subcontract. Further, “regardless of whether the intermediary was a construction manager or a general contractor”, a subcontractor may not bring a claim against an owner where, as here, the various provisions of the prime contract are incorporated by reference in the subcontract and expressly disclaim liability to subcontractors. *Kaback Enterprises, Inc. v. Time Inc.*, 27 A.D.3d 279 (1st Dep't. 2006)

The Court disagrees with the argument that F&S purportedly entered into the subcontract with McGlynn as an alleged “agent” for the Owner. Whether or not a construction manager is an “agent” depends on the substantive provisions of the governing contracts. Here, Plaintiff is unable to point to any specific language in the contract documents showing that F&S was an “agent” of the Owner. McGlynn’s conclusory assertion of the alleged agency relationship is contradicted by the plain language of the Subcontract and McGlynn’s admissions. There is no language in the Subcontract that F&S signed that agreement “as agent” for the Owner, or that F&S was merely acting as agent for the Owner. The documentary evidence clearly establishes F&S was not an agent of the Owner under the Subcontract. Thus, Plaintiff’s assertion that there exists no known dispositive writing as to the roles filled by each party is incorrect.

At this stage of the case, it therefore is possible to determine the party’s roles or liabilities. The Court is of the opinion that no amount of discovery can change the clear terms of the Subcontract and the General Contract, or the fact that Plaintiff cannot sue for breach of contract for non-payment against an Owner with whom it had no privity.

Plaintiff’s Motion to Amend

The Court denies the Plaintiff's motion to amend to add causes of action against the Owner as the proposed causes of action are palpably improper and insufficient as a matter of law. The proposed unjust enrichment cause of action is insufficient as a matter of law because it is well settled that a subcontractor cannot assert an "unjust enrichment" or "quasi contract" claims against an owner of the project to whom it is not in privity. *Sears Ready Mix, Ltd. v. Lighthouse Marina, Inc.*, 127 A.D.3d 845, 846 (2nd Dep't. 2015). The proposed tortious interference claim is also insufficient as a matter of law because the Plaintiff merely restates the basic elements of the claim without alleging any specific facts at all. Plaintiff merely alleges that Owner took steps to intentionally interfere with the agreement, resulting in breaches thereof and damages. However, Plaintiff fails to state what those purported steps were. In addition, Plaintiff fails to allege that "but for" owner's alleged wrongful conduct, that F&S's alleged breach would not have occurred

Plaintiff's Motion for Disqualification

The Court denies Plaintiff's motion to disqualify Defendants' counsel as moot due to one of the Defendants being dismissed from this case. However, even assuming both Defendants were still parties to the action, the Court would decline to order such disqualification as each Defendant has given informed consent to joint representation, confirmed in writing, permitted by Rule 1.7(b) and have waived any conflict after a full discussion of any potential conflict. Moreover, the Court was told that F&S has agreed to indemnify Owner this lessening further any possible conflict.

The Court has reviewed the remaining contentions and finds them unavailing. It is therefore

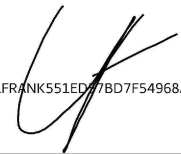
ORDERED that the motion of defendant 3 EAST 89 HOLDING LLC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant;

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office 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).


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LYLE E. FRANK, J.S.C.

6/9/2022
DATE

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: