

Mayflower Bus. Group, LLC v Poon

2025 NY Slip Op 30924(U)

March 20, 2025

Supreme Court, New York County

Docket Number: Index No. 150351/2024

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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MAYFLOWER BUSINESS GROUP, LLC,

Plaintiff,

- v -

PETER F. POON, PETER F. POON ARCHITECT,
P.C., OUTSOURCE CONSULTANTS, INC.

Defendant.

-----X

INDEX NO. 150351/2024

MOTION DATE 03/29/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 37, 38, 39

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after oral argument, which took place on January 7, 2025, where Kevin K. Tung, Esq. appeared for the Plaintiff Mayflower Business Group, LLC, (“Plaintiff”), Uri Carni, Esq. appeared for Defendants Peter F. Poon (“Poon”) and Peter F. Poon Architect, P.C. (the “Architect”) (collectively “Poon Defendants”), and James F. O’Brien, Esq. appeared for Defendant Outsource Consultants, Inc., (“Outsource”) (collectively “Defendants”), Outsource’s motion to dismiss Plaintiff’s Complaint and all crossclaims asserted against it pursuant to CPLR 3211(a)(1), (a)(3), (a)(5), and (a)(7) is granted in part and denied in part. Plaintiff’s cross motion seeking leave to amend its Complaint is denied without prejudice.

I. Background

In Fall of 2015, Plaintiff was considering purchasing property located at 317-319 West 35th Street, New York, New York (the “Property”) to construct a Hilton Garden Inn Hotel (the “Project”). On January 21, 2016, Plaintiff entered a professional service agreement with Peter F. Poon Architect, P.C. to assist with the Project. The Architect’s responsibilities included assessing

the project's feasibility prior to Plaintiff's acquisition of the Property. The Architect was also required to obtain the requisite approvals for the Project.

Plaintiff alleges that on February 3, 2016, at the Architect's recommendation, it contracted Outsource to review the architectural plans and ensure compliance with applicable laws and regulations. After alleged representations from Defendants that the plans complied with applicable laws and regulations, Plaintiff purchased the Property. However, sometime in mid-2016, shortly after demolition began, Plaintiff received a stop work order from the Department of Buildings due to the Project's violation of zoning regulations. Plaintiff alleges as a result, Plaintiff had to alter materially its Project resulting in financial damages. Now, Plaintiff sues Defendants. Outsource responds with a pre-answer motion to dismiss. Plaintiff cross-moves seeking leave to amend to include Crosscity Construction as a Plaintiff.

II. Discussion

A. Plaintiff's Cross Motion

Plaintiff's cross motion is denied. The requirements of CPLR 3025(b) are clear: "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." The use of the word "shall" means including the proposed pleadings is mandatory (*AJW Partners, LLC v Admiralty Holding Co.*, 93 AD3d 486 [1st Dept 2012]); *Pollak v Moore*, 85 AD3d 578, 579 [1st Dept 2011]; *Fletcher v Boies, Schiller & Flexner, LLP*, 75 AD3d 469, 470 [1st Dept 2010]).

Plaintiff did not attach a copy of the proposed pleadings. Plaintiff had ample time to remedy this defect after Outsource highlighted Plaintiff's procedural mistake. However, Plaintiff has still not filed proposed pleadings. Pursuant to precedent and the mandatory language of CPLR 3025(b), the Court denies Plaintiff's cross motion, without prejudice. As the Court denies leave to amend

based on a procedural technicality it does not reach the merits of the proposed amendment. Plaintiff may renew its cross motion with the proper papers.

B. Outsource's Motion to Dismiss

i. Breach of Contract

Outsource's motion to dismiss Plaintiff's cause of action alleging breach of contract against it is granted. A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). It is axiomatic that to state a claim for breach of contract, a party must adequately allege the existence of a contract (*Markov v Katt*, 176 AD3d 401, 401 [1st Dept 2019]).

Although Plaintiff alleges there exists a contract between it and Outsource, this is flatly contradicted by the documentary evidence. In opposition, Weihong Hu, Plaintiff's principal officer states "I remember that in or about February 2017, Crosscity Construction Corp. and [Plaintiff] entered a service contract with Defendant Outsource Consultants, Inc." and her affidavit refers directly to NYSCEF Doc. 14. However, the agreement cited to by Ms. Hu directly contradicts her statement. The only parties to that contract are Crosscity Construction Corp. and Outsource. Although Ms. Hu represents that both Plaintiff and Crosscity share the same owner and are affiliated, they are distinct corporate entities and nowhere in the contract does it state Plaintiff is

to be considered an affiliate with rights equivalent to Crosscity as the signatory (*see, e.g. Tutor Perini Building Corp. v Port Auth. of New York and New Jersey*, 191 AD3d 569, 570-571 [1st Dept 2021]).

Further, the February 26, 2017 contract contains an “Entire Agreement” clause which states:

“[t]his agreement constitutes and embodies the full and complete understanding and agreement of the parties with respect to the services to be provided by Outsource. This agreement supersedes all prior understandings and agreements, if any, whether oral or written, and shall not be amended, modified or changed except by an instrument in writing executed by both parties hereto.” (NYSCEF Doc. 14, General Conditions ¶ 9).

Thus, based on the undisputed documentary evidence, there was no contract between Plaintiff and Outsource, and the breach of contract claim is dismissed.

ii. Malpractice

Outsource’s motion to dismiss Plaintiff’s malpractice claim is granted. As stated by the Court of Appeals, “malpractice is professional misfeasance toward one’s client” (*Chase Scientific Research, Inc. v NIA Group, Inc.*, 96 NY2d 20, 24 [2001]). Thus, privity or some form of client relationship is required to allege malpractice. In opposition to the motion, Plaintiff’s counsel confirms that “[i]n the contract between Crosscity Construction and Outsource, Outsource continued to perform as a filing representative....” (NYSCEF Doc. 22 at ¶ 16). As the signed contract and Plaintiff’s own motion papers show Outsource was in privity with Crosscity Construction and not Plaintiff, it follows that Plaintiff does not have a malpractice claim against Outsource. Further, the contract explicitly states “Outsource does not offer or provide architectural or engineering services. If the scope of work includes any professional services, they shall be provided by a licensed professional” The contract also reads that “Stop Work Order

Resolution” is “specifically excluded from the scope of our work.” Therefore, the malpractice claim is dismissed.

iii. Crossclaims

Outsource’s motion to dismiss the Poon Defendants’ crossclaims is granted in part and denied in part. When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Because Plaintiff is seeking purely economic damages, a claim for common-law contribution is unavailable (*Children’s Corner Learning Center v A. Miranda Contracting Corp.*, 64 AD3d 318, 323 [1st Dept 2009]). The Complaint makes clear Plaintiff does not seek damages for injury to property, but economic damages flowing from the alleged breach of contract and malpractice. CPLR 1401 does not list economic injury as an instance where a contribution claim is permitted. Therefore, the contribution crossclaim is dismissed.

However, the common law indemnification claim survives, as there remains an issue of fact as to whether the Poon Defendants’ alleged malpractice and breach of contract resulted solely from the negligent acts of Outsource in failing to file properly the architectural plans and applications for various permits (*Children’s Corner, supra* at 423-424). After further discovery

Outsource may renew its application. Thus, the motion to dismiss the common law indemnification crossclaim is denied without prejudice.

Likewise, the Court cannot dismiss the Poon Defendants' crossclaims for contractual indemnification or failure to procure insurance. Accepting the Poon Defendants' allegations as true, Outsource has not met its burden of negating conclusively the existence of any contractual agreement to indemnify the Poon Defendants. Nor has Outsource contradicted definitively the Poon Defendants' allegations that it agreed to procure insurance to indemnify them. Because this is a pre-answer motion to dismiss, and the parties and the Court do not have the benefit of a record more fully developed through discovery, Outsource's application to dismiss the crossclaims for contractual indemnification and failure to procure insurance is denied, without prejudice.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion seeking leave to amend its Complaint is denied, without prejudice, with leave to renew with the proper motion papers; and it is further

ORDERED that Defendant Outsource Consultants, Inc.'s motion to dismiss Plaintiff's Complaint alleging breach of contract and malpractice against it is granted, and Plaintiff's causes of action alleging breach of contract and malpractice against Defendant Outsource Consultants, Inc. are hereby dismissed; and it is further

ORDERED that Defendant Outsource Consultants, Inc.'s motion to dismiss the Poon Defendants' crossclaim for contribution is granted, and the crossclaim for contribution asserted against Defendant Outsource Consultants, Inc. is dismissed; and it is further

ORDERED that Defendant Outsource Consultants, Inc.'s motion to dismiss the Poon Defendants' crossclaims for common law and contractual indemnification, and breach of contract

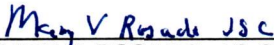
for failure to procure insurance are denied, without prejudice, with leave to renew upon further discovery; and it is further

ORDERED that within twenty days of entry of this Decision and Order, Defendant Outsource Consultants, Inc. shall serve a reply to the surviving crossclaims asserted against it by the Poon Defendants; and it is further

ORDERED that the parties shall meet and confer and submit a preliminary conference order to the Court as soon as possible via e-mail to SFC-Part33-Clerk@nycourts.gov, but in no event shall the preliminary conference order be submitted later than June 23, 2025. If the parties cannot agree to a proposed preliminary conference order, they shall appear for an in-person preliminary conference in on June 25, 2025 at 9:30 a.m. in Room 442, 60 Centre Street, New York, New York; and it is further

ORDERED that within ten days of entry, counsel for Defendant Outsource Consultants, Inc. shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

<u>3/20/2025</u> DATE	 <u>HON. MARY V. ROSADO, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION		
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE