

126 Lessee LLC v RJB Contr. Carting Corp.

2025 NY Slip Op 32706(U)

July 18, 2025

Supreme Court, New York County

Docket Number: Index No. 155338/2024

Judge: David B. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

126 Lessee LLC

Plaintiff,

- v -

RJB Contracting Carting Corp.

Defendant.

-----X

INDEX NO. 155338/2024

MOTION DATE 11/11/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 23, 24

were read on this motion to/for DISMISS.

Defendant moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the amended complaint. Plaintiff opposes.

A. BACKGROUND FACTS AND PROCEDURAL POSTURE

This action arises out of a partial wall collapse at a construction site located at 126 Lafayette Street in Manhattan (premises), owned by plaintiff.

According to the amended complaint, prior to March 7, 2023, plaintiff retained defendant to perform demolition work at the subject premises, including interior demolition and wrecking of the entire structure (NYSCEF Doc. 12). Plaintiff alleges that, on or about March 7, 2023, after demolition had proceeded that day, a section of a side wall abutting the neighboring property at 257 Canal Street partially collapsed (*id.*). Plaintiff attributes the collapse to defendant's negligent performance of demolition work (*id.*).

As a result of the collapse, plaintiff alleges that the New York City Department of Buildings issued an immediate stop-work order (*id.*).

The amended complaint asserts two causes of action: the first, for negligence, alleging that defendant was negligent in the “interior demolition” and “wrecking of the entire structure” at the subject premises (*id.*). The second, for breach of common-law duties, alleging that defendant failed to properly and professionally undertake the “interior demolition” and “wrecking of the entire structure” in a good and workmanlike manner in accordance with common-law principles, thereby creating a hazardous condition that resulted in a collapse and substantial project delays (*id.*). Plaintiff seeks damages in excess of \$3.6 million (*id.*).

The Contract (NYSCEF Doc. 8)

The written agreement between the parties (Contract) identifies plaintiff as the Owner of the premises and defendant as the Vendor responsible for furnishing demolition and related services at the premises (Project). Section 1.2 of the Contract states that the Vendor “accepts the relationship of trust and confidence established with Owner by this Contract and covenants with Owner to exercise the highest degree of skill, care and judgment in the performance of the Work.”

The scope of the Vendor’s obligations is described as consisting of the following items: “interior demolition, wrecking of entire structure, waterproofing adjacent structures, dust and noise mitigation,” among other duties and tasks not relevant here.

The Contract further provides that Vendor complete the work in a “good and workmanlike manner” and in full compliance with all applicable laws and municipal regulations.

Procedural Background

Plaintiff commenced this action on June 10, 2024, by filing a summons and complaint asserting a single cause of action for negligence against defendant. On August 23, 2024, prior to

answering, defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) (NYSCEF Doc. Nos. 5–10).

On October 15, 2024, plaintiff filed an amended complaint as of right under CPLR 3025(a) (NYSCEF Doc. No. 12), which superseded the original pleading and added a second cause of action for breach of common-law duties. In response, the parties entered a stipulation deeming the original motion to dismiss moot (NYSCEF Doc. No. 13).

Defendant then timely filed the instant motion to dismiss the amended complaint on November 11, 2024 (NYSCEF Doc. Nos. 14–21).

B. PARTY CONTENTIONS

In the amended complaint, plaintiff alleges that defendant owed both contractual and common-law duties to perform demolition work in a safe and professional manner, and that defendant breached those duties by negligently performing demolition work and deviating from agreed-upon plans, resulting in a partial wall collapse and substantial project delays.

Defendant moves to dismiss the amended complaint, arguing that all work performed was governed by the Contract, which defines the scope of work and the standard of care to be applied. Defendant argues that where, as here, the parties are in privity and the contract expressly governs the work performed, plaintiff may not recast alleged contractual breaches as tort claims without identifying a separate legal duty.

Plaintiff opposes, arguing that it has sufficiently pled both a contractual and a common-law duty of care. Plaintiff contends that defendant owed a duty, independent of the Contract, to perform demolition work in a safe and professional manner consistent with good and accepted practice, and that defendant breached that duty, proximately causing damages. Plaintiff also argues that, at this stage, the pleadings must be liberally construed in its favor and that the

existence of a contract does not preclude tort liability where a common-law duty exists. Lastly, plaintiff contends that defendant's motion is procedurally improper or moot due to the filing of the amended complaint.

In reply, defendant reiterates that the contract sets forth the full scope of its obligations and that plaintiff has failed to identify any duty of care not already encompassed therein. Defendant argues that, in the absence of such an independent duty, plaintiff's tort claims are not legally cognizable and must be dismissed.

C. LEGAL ANALYSIS AND CONCLUSIONS

On a motion to dismiss under CPLR 3211(a)(7), the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013], quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). Dismissal under CPLR 3211(a)(1) is warranted only where the documentary evidence submitted “conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88).

Where a plaintiff files an amended complaint, the “moving party has the option to decide whether its motion should be applied to the new pleadings” (*Sage Realty Corp. v. Proskauer Rose*, 251 A.D2d 35, 39 [1st Dept 1998] [citations omitted]). An amended pleading does not automatically render an earlier motion moot (*French v NYS Dept. of Labor*, 231 AD3d 620, 621 [1st Dept 2024]; *Fownes Bros. & Co., Inc. v JPMorgan Chase & Co.*, 92 AD3d 582, 582 [1st Dept 2012]). Courts may address the original motion where it was fully briefed or where the amended complaint was filed so late in the motion practice that it would unfairly prejudice the moving party (*Fownes Bros.*, 92 AD3d at 583). Conversely, if the defendant elects to submit a

new motion directed to the amended pleading, the motion is properly before the court so long as the plaintiff is allowed adequate time to respond (*Sage Realty*, 251 AD2d at 39).

As a threshold matter, plaintiff filed an amended complaint as of right under CPLR 3025(a), and defendant thereafter withdrew its original motion and filed a new motion directed to the amended pleading. As plaintiff had notice and responded to that renewed motion, it is properly before the Court (*see Fownes Bros. & Co., Inc. v JPMorgan Chase & Co.*, 92 AD3d 582 [1st Dept 2012]; *Sage Realty Corp.*, 251 AD2d at 39).

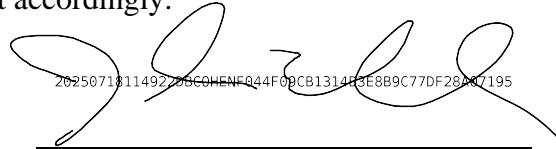
It is well settled that “[a] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). To avoid dismissal, a plaintiff must allege facts demonstrating the existence of a duty that is “extraneous to, and not constituting elements of, the contract” (*id.*). A tort claim may lie in the contractual context where the plaintiff pleads: (1) a legal duty independent of the contract; (2) tortious conduct separate and apart from the breach; or (3) special damages not recoverable under the contract (*see Dormitory Auth. v Samson Constr. Co.*, 30 NY3d 704, 711–712 [2018]; *New York Univ. v Cont’l Ins. Co.*, 87 NY2d 308, 316 [1995]).

Here, the Contract between the parties defines the scope of demolition work and the standard of performance and requires defendant to perform tasks such as interior demolition and wrecking of the structure “with the highest degree of skill, care and judgment” and in accordance with “generally accepted standards of construction management and supervision.” Plaintiff’s allegations mirror this contractual language and assert that defendant failed to perform the work as agreed.

Allegations that merely restate the contract's requirements, framed in the language of negligence, do not transform a contract claim into a tort (*see Board of Mgrs. of Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 582 [1st Dept 2010]). Plaintiff does not allege any duty that arises from common-law or public policy and is independent of the contract. Nor does the complaint allege tortious conduct separate and apart from the breach or special damages not recoverable under the Contract. Therefore, plaintiff's claims are not legally cognizable.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted in its entirety, and the complaint is dismissed, and the clerk is directed to enter judgment accordingly.



2025071811492205COHEN044F09CB131403E8B9C77DF28007195

7/18/2025
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: