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Order on Motions to Dismiss (KENNESAW
STATE UNIVERSITY FOUNDATION, INC.)

Alice D. Bonner
Superior Court of Fulton County

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COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

KENNESAW STATE UNIVERSITY
FOUNDATION, INC.,

Plaintiff,

v.

Civil Action File No. 2008 CV 156905

PLACE COLLEGIATE DEVELOPMENT,
LLC, CECIL M. PHILLIPS, and
MANHATTAN CONSTRUCTION
COMPANY,

Defendants,

MANHATTAN CONSTRUCTION
COMPANY,

Counter/Cross and
Third Party-Plaintiff,

v.

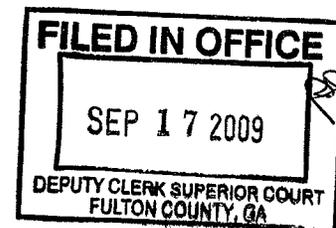
KENNESAW STATE UNIVERSITY
FOUNDATION, INC., PLACE
COLLEGIATE DEVELOPMENT, LLC,
and CECIL M. PHILLIPS,

Counter/Cross-Defendants,

and

CPD PLASTERING, INC., ST. PAUL
FIRE AND MARINE INS. CO., TC
DRYWALL AND PLASTER, INC., THE
GUARANTEE CO. OF NORTH
AMERICA USA, ATLANTA DRYWALL
AND ACOUSTICS, INC., AMERICAN
SOUTHERN INS. CO., METRO
WATERPROOFING, INC. and
WESTERN SURETY CO.,

Third-Party Defendants.



ORDER ON MOTIONS TO DISMISS

This case is before the Court on Plaintiff's motion to dismiss the counterclaim of Defendant Manhattan Construction Company and on Defendant Manhattan Construction Company's motion to dismiss the complaint. The Court has reviewed the briefs of the parties filed in connection with these motions and rules as follows:

Background

This case arises out of a dispute regarding the construction of dormitories at Kennesaw State University, and involves allegations of breach of contract and negligent construction. Plaintiff Kennesaw State University Foundation, Inc. ("KSUF") entered into a contract with Defendant Place Collegiate Development, LLC ("Place") to develop and build student housing at the university. Place also entered into a contract with Manhattan Construction Company ("Manhattan") to build the dormitories. The contract between KSUF and Place assigns the warranties between Place and its subcontractors (including Manhattan) to KSUF. There were problems with the construction of the buildings which resulted in this lawsuit. The complaint alleges breach of contract, breach of implied warranty and negligent construction against Manhattan. Manhattan's counterclaim alleges breach of contract and unjust enrichment against KSUF.

Analysis

As a preliminary matter, the Court notes that Manhattan does not oppose KSUF's motion to dismiss its counterclaim with regard to the claim for unjust enrichment, and so the Court does not consider the arguments made in support of the motion on that count of the counterclaim.

KSUF argues that it is entitled to dismissal of Manhattan's contractual claims because there exists no privity between those parties. Manhattan argues that the assignment of its warranties by Place to KSUF at least creates a question of fact as to the existence of a contract between it and KSUF. In its motion to dismiss Manhattan contends that Place's alleged initial material breach of its contract with Manhattan bars KSUF, as Place's assignee, from a claim of breach of contract against Manhattan. Alternatively, Place contends that the lack of privity between it and KSUF precludes an action for breach of contract and breach of implied warranty against it by KSUF. The central issue created by these arguments is the import and legal consequences of the assignment.

With regard to its motion to dismiss the count for negligent construction, Manhattan argues that the only duty it owed was to Place, and thus it cannot be held liable for breach of duty to KSUF. Manhattan contends that the fact that its contract with Place was executed before the KSUF/Place contract was executed is proof that its only relationship in this construction venture was with Place and that it had no independent relationship with KSUF.

Under Georgia law a subcontractor has no contractual relationship, no privity, with an owner with whom it has no contract. Hussey, Gay & Bell v. Georgia Ports Authority, 204 Ga. App. 504 (1992). Georgia law does allow parties to assign all or portions of their contractual rights to third parties. O.C.G.A. § 44-12-22. Manhattan does not allege that Place assigned its entire contract to KSUF, and does not dispute KSUF's contention that only the warranties were assigned. There is no evidence that KSUF intended to be

bound by any of the contractual obligations of Place simply by accepting the assignment of Manhattan's warranties from Place. See High Point Sprinkler Co. of Atlanta v. George Hyman Construction Co., 164 Ga. App. 706 (1982). The Court concludes, therefore, that no privity and therefore no contractual obligations existed between KSUF and Manhattan. See Kennesaw Flooring, Inc. v. Rector, 291 Ga. App. 704 (2008).

The Court is not persuaded by Manhattan's arguments that discovery is necessary for the development of evidence to support its contractual claims because there is no writing before the Court to show that KSUF assumed Place's obligations to Manhattan. On the contrary, the contract between KSUF and Place, which is before the Court is clear and unambiguous as to what contractual rights and obligations are assigned. That contract is thirty-one pages in length and covers the many facets of the contractual relationship between KSUF and Place. One provision of that contract assigns warranties given to Place by its subcontractors to KSUF as the owner of the property. Manhattan has not shown that KSUF expressly or impliedly assumed Place's obligations to Manhattan or that KSUF manifested any intention to be bound by Place's obligations. Central of Ga. R. Co. v. Woolfolk Chem. Works, Ltd., 122 Ga. App. 789 (1970).

With regard to Manhattan's claim that Place's alleged initial material breach of its contract with Manhattan should be attributed to KSUF, the Court finds that it is unable to consider this argument in a motion to dismiss because it of necessity relies on extrinsic evidence, and not merely on the allegations in the complaint, and is thus not appropriate for a motion to dismiss pursuant to

O.C.G.A. § 9-11-12(b)(6). For the same reason, the Court cannot consider Manhattan's claim of res judicata without considering evidence, not before it, as to whether the defects KSUF complains of were litigated in prior arbitration between Manhattan and Place.

Georgia law is clear that a negligent construction claim does not depend on privity of contract between the parties. “ ‘ [A] negligent construction claim arises not from a breach of contract claim but from the breach of a duty implied by law to perform the work in accordance with industry standards.’ “ Schofield Interior Contractors, Inc. v. Standard Building Co., 293 Ga. App. 812, 814 (2008). See also Stancliff v. Brown and Webb Builders, Inc., 254 Ga. App. 224 (2002).

When the allegations in a complaint (or counterclaim) disclose with certainty that the claimant would not be entitled to relief under any state of provable facts, and when the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint (or counterclaim) sufficient to warrant a grant of the relief sought, a dismissal should be granted. O.C.G.A. § 9-11-12(b)(6). Anderson v. Flake, 267 Ga. 498 (1997).

Pursuant to the foregoing discussion Plaintiff's motion to dismiss the counterclaim of Defendant Manhattan Construction Company is hereby **GRANTED**, and Manhattan's motion to dismiss the complaint is hereby **DENIED**.

SO ORDERED this 17 day of September, 2009.


ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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