10-6-2010

Order on Defendant Manhattan Construction Company's Motion for Summary Judgment as to Plaintiff's Claims (KENNESAW STATE UNIVERSITY FOUNDATION, INC.)

Alice D. Bonner
Superior Court of Fulton County

COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

KENNESAW STATE UNIVERSITY FOUNDATION, INC.,

Plaintiff,

v.

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,

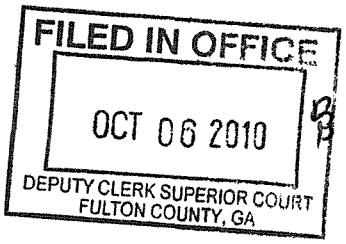
Counter/Cross-Defendants,

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.

Civil Action File No. 2008-CV-156905



ORDER ON DEFENDANT MANHATTAN CONSTRUCTION COMPANY'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIMS

On September 13, 2010, counsel appeared before the Court to present oral argument on Defendant Manhattan Construction Company's Motion for Summary Judgment as to Plaintiff's claims. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows:

In August 2003, Kennesaw State University Foundation ("KSUF") entered into a contract with Place Collegiate Development, LLC and Cecil Phillips (collectively "Place") to develop a student housing project consisting of two mid-rise dormitories on the Kennesaw State University campus ("the Project"). In turn, Place entered into a contract with Manhattan Construction Company ("Manhattan") to serve as general contractor and build the Project. Original Project plans called for a "building wrap" to be installed over the exterior sheathing and underneath the exterior cladding of the Project. However, building wrap was not used in the construction of the Project.

KSUF seeks damages against Place and Manhattan because alleged construction defects have allowed water infiltration in to the Project. Such flooding has caused damage to the interiors of the project including damage to carpeting, fixtures, furniture and, in some instances, personal property. As a result, some units of the dorms were completely uninhabitable.

Manhattan has filed a Motion for Summary Judgment against Plaintiff's claims premised on three arguments. First, Manhattan argues that KSUF cannot recover against Manhattan because there is no privity of contract between them and because Place has materially breached the contract. Second, Manhattan argues that KSUF's negligent construction claim is barred by the statute of limitations. Finally, Manhattan argues that

KSUF's claim concerning the absence of the building wrap is barred by the acceptance doctrine.

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the nonmovant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

In its first argument, Manhattan contends that there is no privity of contract between it and KSUF because the contract between Manhattan and Place expressly states that no contractual relationship is created between Manhattan and any other party. While the Court finds that KSUF was not a party to the Manhattan-Place contract, it was an intended third-party beneficiary that has standing to sue on that contract. O.C.G.A. § 9-2-20 (b) ("The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on the contract."); Alday v. Decatur Consol. Water Services, Inc., 289 Ga. App. 902 (2008) (finding residents of subdivision had standing as third-party beneficiaries of contract between water supply provider and developer of subdivision to challenge rates for water usage charged by provider).

As to whether a material breach by Place excuses Manhattan's performance and, therefore, bars KSUF's claim, the law in Georgia is that a substantial or material breach by one party excuses subsequent performance by the other party. McCoy v. Buckhead Clinic Profess. Ass'n, 123 Ga. App. 853 (1971). However, a breach which is incidental and subordinate to the main purpose of the contract, and which may be compensated in damages, does not warrant a rescission or termination, nor does a mere breach of contract not so substantial and fundamental as to defeat the object of the parties in making the

agreement. Mayor and City of Douglasville v. Hildebrand, 175 Ga. App. 434, 436 (1985). A determination of whether Place's failure to pay amounts due to Manhattan is a material breach is a question of fact for a jury and cannot be determined by summary judgment. Martin v. Rollins, Inc., 238 Ga. 119 (1977); Don Swann Sales Corp. v. Parr, 189 Ga. App. 222 (1988).

In its second argument, Manhattan contends that KSUF's negligent construction claim is barred by the statute of limitations. A negligent construction claim is an action for damages to realty, and must be brought within four years after the right of action accrues. O.C.G.A. § 9-3-30(a). Manhattan argues that the Project was substantially complete no later than September 10, 2004, when the Georgia Fire Safety and Insurance Commissioner's Office conducted an "80% Inspection" of the Project, and that because KSUF filed its claim on September 15, 2008, the four-year statute of limitations period had expired. In an action involving the construction of a building or other improvement to real property, the period of limitations for negligent construction commences on the date the work was substantially complete. Scully v. First Magnolia Homes, Inc., 268 Ga. App. 892, 893 (2004). O.C.G.A. § 9-3-50(2) holds that "'[s]ubstantial completion' means the date when construction was sufficiently completed, in accordance with the contract as modified by any change order agreed to by the parties, so that the owner could occupy the project for the use for which it was intended."

The Court finds that an 80% inspection report is not sufficient to establish that the Project was substantially complete. There are conflicting cases in Georgia about when substantial completion has occurred. Manhattan cites authority stating that legal occupation of the project is not required to achieve substantial completion. Colormatch Exteriors, Inc. v. Hickey, 275 Ga. 249, 251 (2002). Conflicting case law dictates that

substantial completion occurs when the premises receives a certificate of occupancy. Gropper v. STO Corp., 250 Ga. App. 820, 823 (2001); Scully v. First Magnolia Homes, 279 Ga. 336, 338 (2005). Given that the Project was intended to house several hundred students, it is not likely that the Project would have been deemed capable of being utilized as a dormitory until all proper fire safety precautions and standards had been met. The Court finds that because the temporary certificate of occupancy was issued on September 16, 2004, and students moved in shortly thereafter, KSUF's September 15, 2008, complaint was timely. Therefore, the statute of limitations does not bar KSUF's negligent construction claim, and summary judgment on this basis is not warranted.

Finally, Manhattan argues that KSUF's claim based on the lack of the building wrap is barred by the acceptance doctrine. The acceptance doctrine holds that when (1) a contractor does not hold itself out as an expert in design work, (2) performs its work without negligence, and (3) the work is approved and accepted by the owner or the one who contracted for the work on the owner's behalf, the contractor is not liable for injuries resulting from the defective design of the work. Bragg v. Oxford Construction Co., 285 Ga. 98, 98 (2009) citing David Allen Co. v. Benton, 260 Ga. 557, 558 (1990). If, however, the contractor is found to be negligent in the performance of the work, it is subject to liability regardless of whether the owner or the one who contracted for the work accepted it. Bragg v. Oxford Construction Co., 285 Ga. 98 (2009). Whether Manhattan was negligent is a question for the jury, especially where the record shows that two KSUF experts have taken the position that Manhattan's work did not meet the standards of good workmanship. KSUF has also provided evidence to show that the original design included a building wrap, and that Manhattan participated in the decision to forego it. The Court thus finds

that the acceptance doctrine does not bar KSUF's claim because questions of fact as to Manhattan's negligence exist.

For the foregoing reasons, Manhattan's Motion for Summary Judgment as to Plaintiff's claims is hereby **DENIED**.

SO ORDERED this 6th day of October, 2010.

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

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