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THE LIMITS OF THIRD-PARTY BENEFICIARY RIGHTS IN NEW YORK

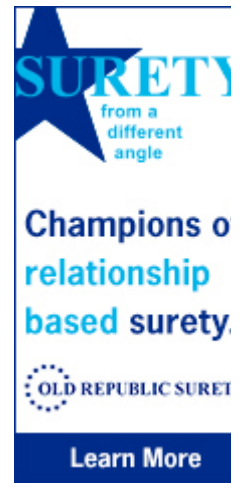
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RECOMMEND

By [Aman Kahlon](#) of [Bradley Arant Boult Cummings LLP](#)

On complex construction projects, there may be multiple contractors, subcontractors, vendors, suppliers, and sub-subcontractors working along side one another. With various entities working parallel there are substantial risks that one contractor's work will interfere with that of another contractor on the project. When the two parties have direct contracts with one another (e.g., owner and general contractor or general contractor and subcontractor), the non-interfering or non-breaching party can pursue whatever rights and remedies are available under the contract. However, it is trickier when two parties on the same job do not have contracts directly with one another (e.g., multi-prime projects or conflicts between different subcontractors). In those circumstances, lacking privity, a damaged party may attempt to pursue breach claims as a third-party beneficiary or common law tort claims.

In *Greg Beech, Logistics, LLC v. Cross Country Construction, LLC*, a New York appeals court signaled that such an approach is unlikely to have much success in the Empire State. The project in that case involved the construction of a 69-story condominium building in New York City. The project's construction manager, as an agent for the owner, hired various contractors to complete the work. The construction manager entered into a contract with Cross Country, the defendant, for the erection of the concrete superstructure for the building. The construction manager also hired a curtain wall contractor (Enclos). Grege Beeche (Beeche), the plaintiff,



executed a lease agreement with Enclose to provide scaffolding for the project.

Beeche alleged that Cross Country delayed the project more than 20 months because of its **NASBP** and dilatory performance. Beech sought recovery of millions in lost scaffolding rent and other damages associated with designing and engineering the scaffolding specific to the project. Beeche's complaint set forth causes of action for breach of contract, negligent misrepresentation, negligence, quantum meruit, and unjust enrichment.

In support of its contract claims, Beeche asserted it was an intended third-party beneficiary of Cross Country's contract with the construction manager. With regards to its negligent misrepresentation claim, Beech alleged that Cross Country "owed it a duty of care to supply reasonably accurate information regarding the time it would need to perform its concrete work and promptly update that information as needed, which [Cross Country] failed to do." Cross Country moved to dismiss the third-party breach claims and the negligent misrepresentation claim. The trial court agreed, and Beeche appealed.

The New York intermediate appellate court rejected Beeche's third-party beneficiary status and negligent misrepresentation claim. In upholding the trial court's decision, the appellate court noted that there was no language in Cross Country's agreement with the construction manager that expressly deemed Beeche an intended beneficiary of Cross Country's agreement with the construction manager or any other evidence supporting any right of Beeche to enforce that contract. In fact, the language in Cross Country's contract established the opposite: the agreement expressly provided that the only contractual relation created was between Cross Country and the construction manager. As an incidental beneficiary, Beeche was not entitled to pursue breach claims under Cross Country's contract with the construction manager.

The appellate court, likewise, upheld the dismissal of Beeche's negligent misrepresentation claim. The appellate court agreed with the trial court that Beeche was not a "known party" that Cross Country should have expected would rely on any allegedly negligent misrepresentation. Since reliance by a "known party" is one of the criteria for imposing liability for negligent misrepresentation in the absence of contractual privity, the appellate court held the trial court correctly dismissed that cause of action.

The *Greg Beeche* case underscores the importance of considering third-party risks at the contract negotiation phase on any construction project. Because a contractor or subcontractor may ultimately be limited by the terms of its agreement in pursuing relief, allocating risk of a third-party's default and or interference in the performance of the subject contract can be important to preserving rights and remedies once construction begins. In Beeche's case, it may have been better off negotiating directly with the curtain wall contractor for relief from any delays by other contractors or subcontractors on the project outside of its control.



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Aman Kahlon is a Partner with Bradley. He is a seasoned construction litigator with experience representing owners, contractors, and subcontractors on projects built throughout the United States. He has helped clients successfully navigate disputes on a diverse array of projects, including embassies, hospitals, environmental clean-up and remediation of toxic sites, fossil fuel power plants, solar farms, and battery energy storage facilities. He can be reached at akahlon@bradley.com or 205.521.8134.

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