

Model Iron Works, Inc. v Tiago Holdings, LLC

2011 NY Slip Op 31152(U)

May 2, 2011

Supreme Court, New York County

Docket Number: 600857/2010

Judge: Jeffrey K. Oing

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

PRESENT: JEFFREY K. OING
J.S.C.

PART 48

Index Number : 600857/2010

MODEL IRON WORKS, INC.

vs.

TIAGO HOLDINGS, LLC

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

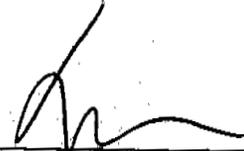
Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the annexed decision & order of the court.*

FILED

MAY 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/2/11


JEFFREY K. OING J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x

MODEL IRON WORKS, INC.

Plaintiff,

-against-

TIAGO HOLDINGS, LLC, et al.

Defendants.

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DECISION AND ORDER

-----x

JEFFREY K. OING, J.:

Plaintiff, Model Iron Works, Inc. ("MIW"), moves, pursuant to CPLR 3211(b), to dismiss defendant's, Tiago Holdings, LLC ("Tiago") first, second, fourth, fifth, sixth and seventh affirmative defenses.

Tiago contracted MIW to install metal stairs in a mixed-use retail residential project between 116th and 119th Street and the FDR Drive in Manhattan (the "property") known as the East River Plaza Project (the "project"). A February 5, 2009 letter from Tiago to MIW terminated the April 2007 Trade Contract for Metal Stairs (the "contract"). On April 27, 2009, MIW filed a mechanic's lien against the property claiming \$103,464.67 due for work in connection to the project.

On April 5, 2010, MIW commenced this action. In a decision and order, dated September 7, 2010, the Court (Justice Marilyn G. Diamond) dismissed plaintiff's third (unjust enrichment), fourth (quantum meruit), fifth (book account) and sixth (account stated)

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causes of action. The remaining causes of action are foreclosure of the mechanic's lien (first) and breach of contract (second).

On a motion to dismiss the affirmative defenses the issue is whether there is any legal or factual basis for the assertion of the defense (Matter of Ideal Mutual Ins. Co. v. Becker, 140 AD2d 62, 67 [1st Dept 1988]). Thus, unless the allegations are not sufficiently particular to notify the court and parties of the subject matter of the controversy, pleadings should not be dismissed or ordered amended (Foley v. Agostino, 21 AD2d 60, 63 [1st Dept 1964]).

Defendant's first affirmative defense alleges that, "the Complaint fails to state a cause of action" (Aff. Schwartz, Ex. F). Although such a defense is "mere" surplusage because it may be asserted at any time even if not pleaded, inclusion of such a defense in an answer is not prejudicial because it serves to give notice to plaintiff that defendant may at some future time move to assert it (Riland v. Frederick S. Todman & Co. et al., 56 AD2d 350 [1st Dept 1977]). Accordingly, plaintiff's motion to dismiss the first affirmative defense is denied.

Defendant's second affirmative defense asserts that, "[p]laintiff's claims are barred in whole or in part by the equitable doctrines of waiver, estoppel and/or unclean hands" (Aff. Schwartz, Ex. F). The principle is well settled that a waiver is "the voluntary abandonment or relinquishment of a known

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right" and there must be an intent to waive the right (Bono v. Cucinella, 298 AD2d 483, 484 [2d Dept 2002]). The doctrine of equitable estoppel serves to preclude a person from asserting a right after having led another to develop a reasonable belief that they did not intend to assert the right (Matter of Shondel J. v. Mark D., 7 NY3d 320, 326 [2006]). The party alleging unclean hands must establish that the party charged be "guilty of immoral or unconscionable conduct directly related to the subject matter" (Citibank, N.A. v. American Banana Co., Inc., 50 AD3d 593, 594 [1st Dept 2008]).

Absent here is any showing, documentary or otherwise, that plaintiff intended to waive any right, that plaintiff asserted a right that defendant then relied, or that plaintiff acted in an immoral or unconscionable manner. As such, defendant's second affirmative defense is dismissed.

Defendant's fourth affirmative defense alleges that "the purported mechanic's liens filed by Plaintiff and/or the service thereof fails to comply with the requirements of the New York Lien Law" (Aff. Schwartz, Ex. F). Tiago terminated its contract with MIW by letter on February 5, 2009. On or about April 27, 2009, plaintiff filed a mechanic's lien against the property. Defendant relies on Article 8.1 of the contract, but does not set forth any allegations as to how plaintiff failed to follow the requirements to file and/or serve the mechanic's lien under New

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York's Lien Law. As such, the fourth affirmative defense is dismissed.

Defendant's fifth affirmative defense purports that, "Plaintiff has been paid in full for the fair and reasonable value of any work, labor, materials, services and equipment furnished" (Aff. Schwartz, Ex. F). Here, defendant alleges that at the time the contract was terminated plaintiff was "paid in excess of the fair and reasonable value of any work, labor, materials, services and equipment furnished" (Id.). As such, given plaintiff's cause of action is rooted in the foreclosure of a mechanic's lien, these allegations are sufficiently pleaded. Accordingly, plaintiff's motion to dismiss the fifth affirmative defense is denied.

Defendant's sixth affirmative defense maintains that, "each and every claim of the Plaintiff as against defendant Tiago is barred by one or more of the provisions of the Contract entered into by the parties, whether or not such provision is set forth below" (Aff. Schwartz, Ex. F). In so much as defendant merely seeks to reassert affirmative defenses, and in the absence of any specific allegations referable to the parties' contract, defendant's sixth affirmative defense is dismissed.

Defendant's seventh affirmative defense alleges that Tiago terminated the contract on February 5, 2009 and the action was commenced by filing the Summons and Complaint on April 5, 2010,

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more than one year after the termination. Defendant further alleges that Article 15.2 of the General Conditions of the Contract ("Article 15.2") provides, in pertinent part:

No action or proceeding shall ... be maintained by Contractor against Owner ... upon any claim arising out of or based upon the Contract Documents or by reason of any act or omission or any requirements relating to the giving of notices or information ... if this Contract is earlier terminated, within one (1) year following the date of such earlier termination.

Plaintiff argues Article 15.2 is void as against public policy because it creates an invalid waiver of its right to enforce a valid mechanic's lien. Lien Law § 34 provides:

Notwithstanding the provision of any other law, any contract ... whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy and wholly unenforceable. This section shall not preclude a requirement for a written waiver of the right to file a mechanic's lien executed and delivered by a contractor ... simultaneously with or after payment for the labor performed or the material furnished has been made to such contractor ... nor shall this section be applicable to a written agreement to subordinate, release or satisfy all or part of such a lien made after a notice of lien has been filed.

Here, there is no dispute that plaintiff properly filed the mechanic's lien on or about April 27, 2009. Defendant contends, however, that plaintiff cannot enforce the mechanic's lien pursuant to the provisions in Article 15.2. Thus, the question is whether Article 15.2 is enforceable. Accordingly, that branch of the motion to dismiss the seventh affirmative defenses is denied.

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ORDERED plaintiff's motion to dismiss is granted to the extent of dismissing the second, fourth and sixth affirmative defenses, and they are hereby dismissed; and it is further

ORDERED that counsel are directed to appear in Part 48 on June 17, 2011 at 10:00 a.m. for a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/2/11



HON. JEFFREY K. OING, J.S.C.

FILED
MAY 03 2011
NEW YORK
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