Lambco Erecting Co., Inc. v Port Auth. of N.Y. & N.J.
2014 NY Slip Op 32427(U)
September 18, 2014
Supreme Court, New York County
Docket Number: 650809/2013
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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LAMBCO ERECTING COMPANY, INC.,

Plaintiffs,

-against-

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Defendants.

AND

DCM ERECTORS, INC.,

Third Party Plaintiff,

-against-

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Third Party Defendant.

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DECISION AND ORDER
Motion Sequence Nos: 003-006, and 008

Index No.: 650809/2013

O. PETER SHERWOOD, J.:

In motion sequence number 003, plaintiff Lambco Erecting Company, Inc. ("Lambco") moves for summary judgment on its claims against defendant DCM Erectors, Inc. ("DCM").[1] In motion sequence number 004, third-party defendant Port Authority of New York and New Jersey (the "Port Authority") moves to stay the third party action and compel arbitration, or in the alternative to dismiss it. In motion sequence number 005, the Port Authority moves to dismiss the Amended Complaint or alternatively to compel arbitration. In motion sequence 008, Lambco moves by order to show cause for a preliminary injunction enjoining the Port Authority from distributing

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[1] After filing its motion for summary judgment, Lambco amended its complaint and, in motion sequence 006, seeks to have its summary judgment motion proceed on the amended complaint.

$839,192.02 from funds that are due or to become due to DCM. For the following reasons, the court will grant motion sequence 005 dismissing claims in the amended complaint against the Port Authority, grant motion sequence 004 staying the third party action and compelling arbitration with regard to the third party complaint against the Port Authority, denying motion sequence 003, and deny motion sequence 008 seeking a preliminary injunction against the Port Authority.

I. BACKGROUND[2]

This action arises from the construction of the World Trade Center Transportation Hub (the "Project"). The Port Authority owns the World Trade Center and is responsible for its reconstruction. Plaintiff Lambco was a subcontractor on the Project, responsible for performing welding services. DCM was the general contractor for the Project.

Lambco alleges that it (1) entered into a purchase order with DCM (the "Purchase Order") for work valued at $2,500,000 to perform welding services for the Project; and (2) was directed to perform an additional work valued at $389,192.07 on change orders (the "Change Order Work"). Lambco submitted invoices for all work, along with certified payrolls supported by daily reports signed by a DCM representative. According to Lambco, DCM accepted Lambco's invoices with the certified payrolls, and the Port Authority accepted DCM's applications for payment that included Lambco's invoices and certified payrolls.

Starting on May 5, 2011, the Port Authority assumed responsibility to make payments to Lambco. Although the Purchase Order was executed by Lambco and DCM (acting as the Port Authority's agent), only one $100,000 payment of the $2,050,000 ultimately paid to Lambco was received directly from DCM. All eleven other payments were made by the Port Authority. The last Port Authority payment was made by wire transfer on November 3, 2011. As of that date, $450,000 remained due under the Purchase Order and $389,192.07 was due for Change Order Work, for a total of $839,192.07. Lambco asserts that it is entitled to judgment in that amount plus costs and interest from September 24, 2011.

In January 2012, Lambco contacted DCM and the Port Authority regarding payment. The Port Authority assured Lambco that the final payment under the Purchase Order was being

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[2] The facts are drawn from the amended complaint and documentary evidence submitted by the parties.

processed and that the payment for the Change Order Work was being reviewed. On April 3, 2012, Vincent Yuen of the Port Authority sent Lambco an email requesting a number of documents, which Lambco provided. Lambco again contacted the Port Authority on April 16, 2012 and was told that the Port Authority expected to complete its audit of DCM by the end of April 2012. On April 23, 2012, Lambco emailed Alan Reiss at the Port Authority regarding the overdue payments. Reiss allegedly assured Lambco that payment would be forthcoming.

On May 11, 2012, the Port Authority sent Lambco a letter requesting that it confirm the amount due as of May 3, 2012. Lambco confirmed the amount due and was allegedly assured that payment would be made once the audit was completed.

On June 27, 2012, Lambco received a copy of a letter sent by DCM to Tishman Turner JV ("TTJV") confirming the balance due under the Purchase Order, and requesting a change order so that the Change Order Work could be paid. Lambco then followed up with the Port Authority and allegedly was asked to wait for the audit of DCM to be completed. On July 6, 2012, Lambco emailed Eddie Ho of Turner Construction, confirming that Lambco had completed its participation in the audit process and asking when Lambco could expect payment in full.

On August 3, 2012, Lambco sent a letter to Alan Reiss of the Port Authority again confirming the amount due. On August 23, 2012, Lambco's attorney, Howard Blum, sent DCM a letter demanding the full amount due. A copy of the letter was forwarded to the Port Authority by email.

Subsequently, Lambco retained new attorneys, Bittiger Triolo P.C. On December 10, 2012, the firm sent the Port Authority a letter stating that "despite repeated requests, the balance due has not been paid and no further communications have been received. Please accept this letter as our notice of intent to commence suit" (Lambert Aff. Ex. K).

On December 17, 2012, Lambo sent its last email to DCM and the Port Authority, attaching affidavits and waivers of lien for the balance due under the Purchase Order and for the Change Order Work. Attached to the email is a letter to DCM which states that if full payment is not made by December 31, 2012, "I am authorizing my attorney to start suit" (Lambert Aff. Ex. L).

Lambco claims that in May of 2013, it discovered for the first time the existence of a settlement agreement dated August 24, 2012 between DCM and the Port Authority (the "Settlement

Agreement"). Lambco asserts that pursuant to this agreement, the Port Authority and DCM agreed to an arrangement to pay all of the subcontractors on the Project, including Lambco.

A. Procedural History

Lambco commenced this action against DCM and the Port Authority on March 7, 2013, asserting eight causes of action: (1) breach of contract (against the Port Authority); (2) unjust enrichment (against the Port Authority); (3) account stated (against the Port Authority); (4) services provided and accepted (against the Port Authority); (5) breach of contract (against DCM); (6) a claim under the UCC (against DCM); (7) unjust enrichment (against DCM); and (8) account stated (against DCM). DCM answered the complaint and asserted cross-claims against the Port Authority. The Port Authority moved to dismiss the complaint for lack of subject matter jurisdiction for failure to serve a notice of claim. By Decision and Order dated August 9, 2013, the court granted the motion in which it also *sua sponte* dismissed DCM's cross-claims also for failure to file a notice of claim. DCM then moved to dismiss the complaint for failure to join a necessary party, namely the Port Authority but withdrew the motion after serving a notice of claim against the Port Authority and filing a third-party summons and complaint against it.

On April 21, 2014, Lambco moved for summary judgment (motion sequence number 003). On April 25, 2014, Lambco filed the amended complaint, purporting to add the Port Authority as a defendant. In response to DCM's arguments that the subsequent filing of the amended complaint renders the previously filed summary judgment motion a procedural nullity, Lambco filed a motion to permit the summary judgment motion to proceed under the caption of the amended complaint (motion sequence number 006). On May 8, 2014, the Port Authority moved to compel arbitration or, in the alternative, to dismiss the third-party action (motion sequence number 004).[3] On May 30, 2014, DCM answered the amended complaint. On June 13, 2014, the Port Authority moved to dismiss the amended complaint or, alternatively, to compel arbitration (motion sequence number 005). On August 28, 2014, Lambco filed a motion bought on by order to show cause seeking a temporary restraining order and preliminary injunction enjoining the Port Authority from distributing

[3] DCM did not respond to the motion. Instead it entered into a stipulation of discontinuance with prejudice, dated September 12, 2014, as to all of its claims against the Port Authority (NYSCEF Doc. No. 173).

$839,192.02 (the amount it seeks in damages) to DCM during the pendency of this action. The motion also seeks to require DCM to hold the same amount in escrow for the same period.

II. DISCUSSION

A. The Port Authority's Motion to Dismiss the Amended Complaint (Mot. Seq. 005)

For the reasons that follow the claims in the amended complaint against the Port Authority must be dismissed and the dispute referred to arbitration. Additionally, Lambco's cross motion to sever the claims against the Port Authority from the amended complaint and to allow them to proceed under a new index number fails.

1. Law of the Case

In a Decision and Order dated August 9, 2013, the Court dismissed Lambco's claims based on Lambco's failure to properly serve a notice of claim. The court also noted that "an attempt by Lambco to serve a new notice of claim on the Port Authority followed by a motion to add the Port Authority as a defendant would be futile" (Decision and Order Dated August 9, 2013, p.5). The order dismissing the claims against Port Authority under the original complaint is law of the case and requires dismissal of Lambco's revived claims under the guise of amended complaint (*see Carmona v Mathisson*, 92 A.D.3d 492 at 493 [1st Dept 2012] [holding that "parties or their privies are preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue"] [quotations omitted]).

Lambco nonetheless contends that the law of the case doctrine does not apply as the prior dismissal was not on the merits.[4] Lambco therefore contends that CPLR 205(a) would permit a new action on the merits after it remedied any filing defects. The court disagrees. Dismissal of a suit against the Port Authority based upon the failure to comply with a condition precedent to suit is a dismissal on the merits (*see Yonkers Constr. Co. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, 378-79 [1999][holding that in a suit against the Port Authority, plaintiff's failure to comply with a condition precedent to suit is fatal to the plaintiff's attempted invocation of CPLR 205(a)]).

[4] Additionally, Lambco argues that the law of the case doctrine is inapplicable as the amended complaint is based upon a "new matter." This argument also fails for the reasons set forth in section A.2 below.

[* 6]

Accordingly, the earlier dismissal in this action of claims against the Port Authority was on the merits, and the law of the case doctrine applies.

2. Time Bar Claims Against the Port Authority

The claims against the Port Authority are also time barred. The Port Authority, as a New York State governmental agency, enjoyed sovereign immunity at common law (*see id*). The state legislature has now consented to suits against the Port Authority (Uncons Laws § 7101), but only upon compliance with jurisdictional conditions precedent, including commencement of suit within one year of accrual of the action (*id.* at § 7107). "In New York, a breach of contract cause of action accrues at the time of the breach" (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). A "claim for unjust enrichment accrues upon the occurrence of the alleged wrongful act giving rise to restitution" (*Kaufman v Cohen*, 307 AD2d 113, 127 [1st Dept 2003]). Similarly, an action based on an account stated or services provided "accrues on the date of the last transaction in the account" (*Elie Intl., Inc. v Macy's W. Inc.*, 106 AD3d 442, 443 [1st Dept 2013]).

Lambco's notice of claim provides that its claims accrued in December of 2012. Lambco alleges that it performed the work between January 3, 2011 and September 24, 2011 and that it is entitled to payment of the balance owed plus interest from September 24, 2011. However, Lambco failed to bring suit under the Amended Complaint until April 2014, nearly 15 months after December 2012 and over two and a half years after the date it alleges its cause of action accrued. Accordingly, the statute of limitations expired and the claims by Lambco against DCM are time barred.[5]

In an attempt to avoid this conclusion, Lambco argues that the date of accrual provided in the notice of claim is incorrect. Instead, it argues that its claims accrued in May 2013 when it discovered the presence of the Settlement Agreement between DCM and the Port Authority. This argument is unpersuasive. As more fully developed below, if the date of accrual listed on the notice of claim is incorrect, that notice of claim is ineffective: it fails to provide notice to the Port Authority of the claims asserted in this action (Uncons Laws § 7108 [providing that a notice of claim must set

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[5]Although it has not raised the issue, Lambco cannot rely on the relation-back doctrine to avoid this result because "[t]he requirement to bring an action within one year under Unconsolidated Laws § 7107 is ... a condition precedent to suit, which cannot be tolled under CPLR 205(a)" (*Yonkers Constr. Co.*, 93 NY2d at 378).

forth, *inter alia*, "the time when, the place where and the manner in which the claim arose"]). Thus, Lambco would need to file a new notice of claim. Any new action that is filed based on that new notice of claim would be time barred.

By recasting of its claims as arising under the Settlement Agreement between the Port Authority and DCM, Lambco seeks to avoid the inevitable result that follows from its failure to properly commence a suit against the Port Authority. Lambco's original complaint sought damages in the amount of $839,192.07 arising from DCM and the Port Authority's failure to pay it for work it performed as a subcontractor on the Project. The amended complaint now seeks damages for the same work but attempts to argue that such damages flow exclusively from a Settlement Agreement to which it is not a party, under which it performed no work, and is not an independent basis for any damages Lambco suffered.[6] Lambco's new theory notwithstanding, Lambco's amended complaint plainly seeks damages resulting from work it did for DCM pursuant to the DCM Contract.

3. The Notice of Claim

Finally, Lambco's notice of claim which was served in advance of filing of the amended complaint is defective. As noted above, the Port Authority, as a New York State governmental agency, enjoyed sovereign immunity at common law (*Yonkers Constr. Co.*, 93 NY2d at 378-79). As a condition precedent to suit, claimants must serve the Port Authority with a notice of claim at least sixty days prior to commencing suit (Uncons Laws § 7107). Compliance with the notice of claim provision "is mandatory and jurisdictional. The failure to satisfy this condition will result in withdrawal of defendant's consent to suit and compels the dismissal of the action for lack of subject matter jurisdiction" (*Lyons v Port Auth. of N.Y. & N.J.*, 228 AD2d 250, 251 [1st Dept 1996]; *see also Belpasso v Port Auth. Of N.Y. & N.J.*, 103 AD3d 562, 562 [1st Dept 2013]; *City of New York v Port Auth. of N.Y. & N.J.*, 284 AD2d 195, 195 [1st Dept 2001]). Indeed, "[t]he fact that the Port Authority may not have been prejudiced by [a] plaintiff's failure to comply with the statute is immaterial, since the requirement is jurisdictional and must be strictly construed" (*Lyons*, 228 AD2d at 251).

[6] Lambco's effort to sue under the terms of the Settlement Agreement on a third party beneficiary theory must fail for the additional reason that the Settlement Agreement states at ¶ 11 that "[t]his Agreement does not create any right on the part of any subcontractor on the Project to receive payment from the Port Authority" (NYSCEF Doc. No. 23).

"Substantial compliance" with the statute is insufficient to confer subject matter jurisdiction (*Matter of New York City Asbestos Litig.*, 106 AD3d 617, 618 [1st Dept 2013]).

As noted above, Lambco porports to bring suit based on a claim accruing in May of 2013 when it first became aware of the Settlement Agreement. However, the Settlement Agreement is dated September 24, 2012, nineteen months before the amended complaint was filed. Further, Lambco's own notice of claim states that its claims accrued in December of 2012 which is also over a year before the amended complaint was filed. (*see* Sebti Affirm., Exh. F). While implicitly acknowledging that the notice of claim fails to comply with the statute, Lambco nonetheless contends that it complied with the statute's purpose. This argument is unpersuasive. The requirement is jurisdictional and must be strictly construed (*Port Auth. of N.Y. & N.J. v Barry*, 15 Misc 3d 36, 38 [N.Y. Sup. App. Term 2007] [holding that "[f]ailure to comply with the notice of claim requirement withdraws the consent to suit and, thus, deprives the court of subject matter jurisdiction"]. The court lacks power to waive strict compliance with the requirement, even if the Port Authority is not prejudiced by the defect (*see id.* [finding that "[t]he court is without power to fashion a remedy based upon substantial compliance within an action over which it lacks subject matter jurisdiction"]).

Accordingly, the claims against the Port Authority must be dismissed for the additional reason that the notice of claim is defective.

4. Lambco's Cross Motion to Sever

As a last resort, Lambco cross-moves to sever its claims against the Port Authority from this action and to allow it to proceed under a new index number. To do so would be futile for the same reasons enunciated above. First, even accepting, Lambco's view that its claims accrued in May 2013, any new action would be time barred as of May 2014 (*see* Uncons Laws § 7107 [imposing the requirement that suits against the Port Authority "shall be commenced within one year after the cause of action therefor shall have accrued"). Second, as this court noted in its Decision and Order dated August 9, 2013, the notice of claim statute requires the notice of claim to be served "at least sixty days *before* such suit, action or proceeding is *commenced*" (*id.*) (emphasis added). An action asserting the claims that Lambco wishes to sever was commenced by the filing of a summons and complaint (CPLR 304 [a]). Accordingly, an attempt to serve a new notice of claim on the Port

Authority in advance of severing the claims would be futile. Severing the claims would be ineffective to cure the defects suffered by the current notice of claim and it does not avoid the statute of limitations bar.

Accordingly, the Port Authority's motion to dismiss the claims against it in the Amended Complaint must be granted and Lambco's cross-motion to sever must be denied.

B. The Port Authority's Motion to Compel Arbitration or Dismiss the Third-Party Action

In motion sequence 004, the Port Authority moves to compel arbitration or to dismiss the third-party complaint. DCM concedes that the dispute must be referred to arbitration and therefore DCM does not oppose the motion (*see n. 3, supra*).

Article 27 of the Port Authority's contract with DCM governing the Project (the "DCM Contract") provides that the Chief Engineer is to decide all disputes "of any nature whatsoever" "arising out of, under, or in connection with, or in any way related to or on account of" the DCM Contract (*see* Sebti Affirm., Exh. C - DCM Contract). Contractual arbitration provisions granting the Chief Engineer authority to decide contractor disputes are regularly enforced (*see, e.g., Laquila Constr., Inc. v New York City Transit Auth.*, 282 AD2d 331, 332 [1st Dep't 2001] ["[I]t has been clear since at least 1993 that the contract clause providing for dispute resolution by defendant's Chief Engineer is not against public policy, is enforceable and requires dismissal of this complaint."]).

The claims that DCM asserts against the Port Authority clearly fall within the plain language of the arbitration clause of the DCM Contract. Claims for contribution and indemnity (including contractual indemnity) stemming from the DCM Contract clearly fit within the broad language of the arbitration provision. Accordingly, as a valid and enforceable arbitration agreement exists, and as the claims asserted by DCM clearly fall within the terms of that arbitration agreement, DCM's claims must be dismissed in favor of arbitration pursuant to CPLR 7503.

C. Lambco's Motion for Summary Judgment as Against DCM

In motion sequence 003, Lambco moves for summary judgment on its claims against DCM. The motion must be denied and the matter referred to arbitration.

As a preliminary matter, DCM argues that summary judgment is inappropriate given the procedural posture of this case. Subsequent to filing its motion for summary judgment, Lambco filed

an amended complaint. DCM argues that the summary judgment motion on the original complaint is a procedural nullity (*see Healthcare I.Q., LLC v Tsai Chung Chao*, 118 AD3d 98, 98 [1st Dept 2014] ["Once plaintiff served the Amended Complaint, the original complaint was superseded, and the Amended Complaint became the only complaint in the action. The action was then required to proceed as though the original pleading had never been served."] [internal quotations omitted]). However, the amended complaint as against DCM asserts exactly the same claims as the original complaint, and it is on those claims that Lambco seeks summary judgment. Additionally, as noted above, Lambco has brought a motion to allow the summary judgment motion to proceed under the caption of the amended complaint (motion sequence 006). DCM failed to object to that motion in apparent abandonment of its argument. The court will address the motion.

Although DCM has not formally cross-moved to compel arbitration, DCM has raised the issue of the arbitrating Lambco's claims (*see* Fusco Affirm., ¶¶ 26-27). In this respect, Lambco references the Port Authority's arguments with regard to compelling arbitration in motion sequence 004 (*see id.*). New York State public policy favors the enforcement of arbitration agreements which reflect the informed negotiation and consent of the parties (*Westinghouse Elec. Corp. v New York City Transit Auth.*, 82 NY2d 47, 53 [1993]). "Once the courts have performed the 'initial screening process', determining that the parties have agreed to arbitrate the subject matter in dispute, their role has ended and they may not proceed to decide whether particular claims are tenable" (*M/O Praetorian Realty Corp. (Prudential Towers Residence)*, 40 NY2d 897 [1976]). Although the court has no formal motion before it to compel arbitration of Lambco's claims against DCM, the court may direct the parties to arbitration *sua sponte* (*see Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y.*, 45 NY2d 735, 738-39 [1978] [compelling arbitration even where respondent had not made formal motion]).

Here, Lambco asserts claims against DCM that arise from a demand for payment for work performed on the Project as DCM's subcontractor. Lambco acknowledges that the filing of its amended complaint does not change the nature of these claims (*see* Bittinger Affirm., ¶ 6 ["The claims against DCM Erectors Inc. did not change with the filing of the Amended Complaint."]). Lambco's breach of contract claims seek to enforce the Port Authority contracts with DCM and DCM's subcontracts with Lambco. Such claims are specifically enumerated within the alternative

dispute resolution provision in the DCM Contract (*see* Sebti Affirm Exh. C- DCM Contract, Art. 27 [providing that the parties agree to arbitration of "any dispute arising out of or relating to [the DCM Contract], *or the breach thereof*] [emphasis added]). Each of Lambco's alternative claims arise from the same facts and circumstances, and similarly fall within the scope of the arbitration agreement. Indeed, Lambco's fifth claim for relief expressly asserts that it is a "third-party beneficiary" to a contract between the Port Authority and Lambco. A third party beneficiary is bound by the terms of the entire contract, which in this case includes the DCM Contract dispute resolution provisions (*see Buhler v French Woods Festival of Performing Arts*, 154 AD2d 303, 304 [1st Dept 1989]; *Rector v Calamus Group, Inc.*, 17AD3d 960, 962 [3d Dept 2005]). Moreover, Article 27 of the DCM Contract requires that DCM include the arbitration provision in all subcontracts. Thus, by agreeing to become a subcontractor to DCM under the DCM Contract, Lambco agreed to the arbitration provision contained in the DCM contract.

Additionally, as outlined above, the third party dispute between DCM and the Port Authority is subject to arbitration. For this reason and, in the interest of judicial economy and efficiency, Lambco's claims against DCM should be sent to arbitration alongside the third party dispute. The motion of Lambco for motion for summary judgment against DCM shall be denied and its claim against DCM is referred to arbitration.[7]

D. Lambco's Order to Show Cause (Mot. Seq. 008)

In motion sequence 008, Lambco seeks to require both the Port Authority and DCM to escrow during the pendency of this action the full amount of damages it is seeking. The issuance of a preliminary injunction is governed by CPLR 6301, which provides, in pertinent part:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits,

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[7] Dismissal will not leave Lambco without a remedy. DCM has indicated a willingness to submit the dispute to arbitration (*see* Fusco Affirm., ¶ 4 ["DCM has no objection to dismissal in lieu of an alternative dispute resolution as long as DCM is similarly dismissed [from the Amended Complaint]"]).

danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts" (*id.*).

Lambco argues that all of the elements necessary for issuance of a preliminary injunction have been satisfied. With regard to the "probability of success on the merits prong," Lambco contends that its documentary evidence definitively establishes that it is entitled to payment for the balance remaining under the Purchase Order as well as the Change Order Work. As to the "danger of irreparable injury," Lambco asserts that "[u]nless restraints are in place for the preservation of funds . . . , there is the real and palpable possibility that the funds will be dissipated rendering any judgment ineffectual." Finally, with respect to the "balance of the equities" prong, Lambco argues that "[w]ith the pending criminal charges against the principal of a Canadian company [DCM], the equities weigh in favor of the Plaintiff for preserving the funds" (NYSCEF Doc. No. 152, p. 7). Lambco has failed to meet its burden.

Lambco has not satisfied the "danger of irreparable injury" prong. Lambco's application stems from its concerns over the indictment of an officer of DCM on criminal charges, and ongoing negotiations between the DCM and Port Authority regarding termination of DCM from work on the Project. Lambco argues that DCM undoubtedly "will no longer exist after the final monies are paid to it by the Port Authority." Lambco's concerns notwithstanding, "[i]t is basic law, however, that injunctive relief may not be ordered to secure recovery in what amounts to a breach of contract action" (*Robjudi Corp. v. Quality Controlled Products, Ltd.*, 111 A.D.2d 156, 157 [1985] [Titone, J. dissenting]; *Halmar Distribs. v Approved Mfg. Corp.*, 49 AD2d 841, 841 [1st Dept 1975]). "The reason, of course, is that plaintiff has an adequate remedy at law, a remedy which is not made inadequate because the alleged insolvency of the corporate defendant may render a subsequent judgment unenforceable" (*Robjudi Corp.*, 111 AD2d at 157). Accordingly, Lambco has not advanced any convincing argument that the factual circumstances surrounding DCM's negotiation with Port Authority to terminate its employment on the Project or the indictment of a principal of DCM would render a judgment in this case ineffectual. Indeed, "[i]t is the ability to bring an action

at law and recover judgment that determines the adequacy of the legal remedy, not the ability to collect on the judgment" (*id.*).

Moreover, Lambco has not demonstrated a probability of success on the merits as to the Change Order Work. At a minimum, a genuine issue of material fact exists with regard to the Change Order Work. Specifically, paragraph 4 of the Purchase Order provides that no change work orders could be issued to Lambco without DCM's prior written approval (*see* Fusco Affirm, Exh. C - Purchase Order, ¶ 4). Without such approval, "DCM shall have no liability for any charges for extra services or materials relating to such change" (*id.*). Lambco argues that DCM approved and consented to the Change Order Work (*see* Lambert Aff., ¶¶ 7-10). In support thereof, Lambco provides several documents: a letter from DCM dated June 27, 2012, a "Final Affidavit and Waiver of Lien" and several invoices. However, these documents themselves raise an issue of fact as to whether they constitute sufficient evidence of DCM's prior written consent to the Change Order Work. The language of the June 27th letter referencing the Change Work Order reads: "As for the excess amount of $340,449.75, [the Port Authority through its agent] TTJV would need to issue to us a change order for the value that Lambco Erecting exceeded his purchase order then we will not have any objections to Lambco Erecting receiving payment for the amount in excess of the purchase order (sic)" (Lambert Aff., Exh. B). The conditional nature of this language creates an issue of fact as to whether DCM provided the necessary approval of the Change Work Order sufficient to carry Lambco's burden to show a probability of success on the merits. Similarly, the Final Affidavit and Waiver of Lien was provided by Lambco to DCM and thereby cannot constitute DCM's prior written approval of the work. In fact, the cover letter to the Final Affidavit and Waiver indicates that DCM disputes liability for the Change Order Work. Finally, the fact that Lambco provided invoices as requested under the June 27th Letter again does not establish that DCM provided its prior written approval of the Change Order Work.

Given that Lambco cannot satisfy two of the prongs required for issuance of a preliminary injunction, the Court need not address the "balance of the equities." In any event, the court finds that Lambco has not satisfied this third element. Accordingly, the motion for a preliminary injunction is DENIED.

Accordingly, it is hereby

ORDERED that the Port Authority's motions (1) to dismiss the Amended Complaint (motion sequence number 005) and (2) to compel arbitration of DCM's third party complaint (motion sequence number 004) are GRANTED; and it is further

ORDERED that the motions of Lambco for summary judgment (motion sequence number 003) and for a preliminary injunction (motion sequence number 008) are DENIED; and it is further

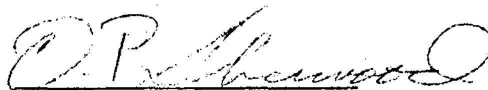
ORDERED that the motion of Lambco for leave to have its motion for summary judgment (motion sequence number 003) proceed on the amended complaint (motion sequence number 006), is DENIED AS MOOT; and it is further

ORDERED that Lambco is directed to proceed to arbitration of its claims under the terms of the DCM Contract; and it is further

ORDERED that the amended complaint and the third party complaint are hereby DISMISSED and the Clerk of the Court is directed to enter judgment accordingly on the amended complaint against Lambco in favor of DCM and the Port Authority and on the third party complaint against DCM in favor of the Port Authority all without costs.

This constitutes the decision and order of the court.

DATED: September 18, 2014 **E N T E R,**



O. PETER SHERWOOD

J.S.C.