

Posillico Env'tl., Inc. v Hydraulital, Inc.

2010 NY Slip Op 32170(U)

July 8, 2010

Supreme Court, Suffolk County

Docket Number: 18401/2008

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXVI SUFFOLK COUNTY

PRESENT:**HON. PAUL J. BAISLEY, JR., J.S.C.**-----X
POSILLICO ENVIRONMENTAL, INC.,

Plaintiff,

-against-

HYDRAULITALL, INC. and JOSEPH EDGAR,

Defendants.
-----X

INDEX NO.: 18401/2008

CALENDAR NO.: 200902359CO

MOTION DATE: 5/13/2010

MOTION NO.: 004 MD

005 MD

PLAINTIFF'S ATTORNEY:

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Upon the following papers numbered 1 to 60 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-2; Notice of Cross Motion and supporting papers 23-29; Answering Affidavits and supporting papers 30-42; 43-47; Replying Affidavits and supporting papers 48-53; Other 54-56; 57-58; (~~and after hearing counsel in support and opposed to the motion~~) it is:

ORDERED that this motion (004) by the plaintiff, Posillico Environmental, Inc. et al, pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability in favor of plaintiff on its first, third, fourth, and fifth, and sixth causes of action, dismissing Hydraulitall, Inc.'s affirmative defenses and counterclaims is denied; and it is further

ORDERED that this cross-motion (005) by the defendant, Joseph Edgar, pursuant to CPLR 3212 for an order granting partial summary judgment in his favor dismissing all six causes of action set forth in the plaintiff's complaint as asserted against him is denied.

The complaint of this action sets forth that the plaintiff, Posillico Environmental, Inc. (Posillico), as contractor, entered into a contract with the Suffolk County Department of Public Works (SCDPW), as owner, wherein Posillico was to provide certain labor, materials, equipment and services for a construction project, SCDPW CP5200.438-Maintenance Dredging at Nissequogue River. On December 14, 2007, Hydraulitall entered into a subcontract agreement (Nissequogue subcontract) with the plaintiff whereby Hydraulitall agreed to provide certain materials, equipment and services relating to hydraulic dredging work at the Nissequogue project. Posillico alleges in its first cause of action that Hydraulitall breached the Nissequogue subcontract by failing and refusing to complete its work and to timely and properly perform its obligations under and in accordance with the terms of said subcontract and abandoned the Nissequogue project. Posillico asserts as a second cause of action that due to Hydraulitall's failure to supply the necessary equipment, Posillico rented certain equipment to Hydraulitall to use in connection with the Nissequogue project for which Hydraulitall agreed to pay plaintiff fair rental value for such equipment and that Hydraulitall breached the rental agreement by failing and refusing to make payments. In the third cause of action sounding in conversion, Posillico alleges that upon abandoning the Nissequogue project, Hydraulitall wrongfully removed from the site certain equipment owned by Posillico. In the fourth cause of action Posillico asserts that Hart Petroleum

assigned to Posillico all its rights, title and interest in and to any claims that it may have against Hydraulitall in connection with the Nissequogue project as it is subrogated to Hart Petroleum's right and remedies as beneficiary of the trust funds received by Hydraulitall for payments by Posillico for goods and/or materials supplied to Hydraulitall, pursuant to Lien Law §77(1). In the fifth cause of action, Posillico alleges that Hydraulitall, in violation of Lien Law §77, made unauthorized, illegal, unjustified and improper payments and diversions of the trust funds and applied them for purposes other than paying for labor, materials, equipment and services furnished in connection with the Nissequogue project. As a sixth cause of action the plaintiff alleges that Hydraulitall breached the subcontract entered into with Posillico for a construction project known as Dredging of Patchogue River (Patchogue project) and breached that subcontract by virtue of failing and refusing to complete its work and to timely and properly perform its obligations under the subcontract and abandoned the Patchogue project.

In the answer, the following affirmative defenses have been raised: a first affirmative defense for failure to state a cause of action; a second affirmative defense that the plaintiff is precluded from recovery for failure to comply with one or more conditions of the contract between the plaintiff and defendant; plaintiff engaged in conduct constituting a waiver of its rights under the contract excusing the defendant from further performance; a fourth cause of action in that the amount sought to be recovered is barred in whole or in part by the amount owing from plaintiff to defendant; a fifth affirmative defense states plaintiff failed to take appropriate steps to avoid and/or mitigate damages; and the sixth affirmative defense asserts the plaintiff is barred by the doctrines of equitable estoppel and unclean hands.

In the answer, the defendant has asserted a first counterclaim against the plaintiff claiming that Hydraulitall, Inc. performed all the terms and conditions of the Nissequogue project contract, and that although demanded by Hydraulitall the plaintiff has failed and neglected to perform its material obligations. A second counterclaim asserts that Hydraulitall, Inc. performed all the terms and conditions of the Patchogue project contract, and that although demanded by Hydraulitall, the plaintiff has failed and neglected to perform its material obligations. The third counterclaim asserts, inter alia, that although the plaintiff knew that the defendant was obligated under the contract to perform dredging services for Keyspan Corporate Services, LLC from May 15, 2008 until June 1, 2008, the plaintiff caused a motion to be filed for seizure of certain equipment and misrepresented that the equipment was converted by the defendant, that a temporary restraining order was issued prohibiting the defendant from using the equipment in the performance of its obligations to Keyspan, that a lien was filed on June 4, 2008 against the Keyspan properties resulting in the defendant being unable to complete its dredging contract. A fourth counterclaim asserts that the plaintiff interfered with the defendant's dredging contract with Keyspan.

In motion (004), Posillico seeks summary judgment on liability against Hydraulitall on the six causes of actions asserted in the complaint and dismissal of Hydraulitall's affirmative defenses and counterclaims.

In cross-motion (005), the defendant, Joseph Edgar, seeks partial summary judgment in his favor dismissing the complaint in its entirety as asserted against him as an individual defendant.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material

issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (004), the plaintiff has submitted, inter alia, the affidavit of Joseph K. Posillico, copies of the amended verified complaint, answer with six affirmative defenses and four counterclaims; copies of the subcontract agreements for the Nissequogue project and Patchogue project; Reply to counterclaims; various correspondence and invoices; a copy of the partial transcript of the examination before of Joseph Edgar; a copy of the order dated September 23, 2008 (Baisley, J.); an affidavit by Joseph Edgar; copy of the order dated September 23, 2008 (Baisley, J.); an itemized statement; Final Waiver and Release dated April 10, 2008; and response to demand for documents.

In support of cross-motion (005), the defendant Joseph Edgar has submitted, inter alia, an attorney's affirmation; copies of the amended verified complaint and answer with annexed copies of the relevant subcontracts; reply to counterclaims; and a partial copy of an examination before trial of Joseph Posillico. Based upon the foregoing, it is determined that this motion fails to comport with the requirements of CPLR 3212. It is unsupported with an affirmation of the moving defendant Joseph Edgar or a signed copy of his deposition transcript. It is additionally noted that the Note of Issue and Certificate of Readiness for this action was filed on November 13, 2009. Cross-motion (005) was served by defendant Edgar on April 20, 2010. CPLR 3212(a) provides in pertinent part that a motion for summary judgment shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown. The moving defendant did not make this cross-motion within the statutory 120 days and has made no application for leave of court on good cause shown to file this cross-motion beyond the statutory period, and in fact, has not submitted any reason for the delay (*see, Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). Based upon the foregoing, cross-motion (005) fails to comport with the requirements of CPLR 3212.

Accordingly, cross-motion (005) is denied.

By way of the decision and order dated September 26, 2008 (Baisley, J.), a motion brought by order to show cause was granted for seizure pursuant to CPLR 7102; and for contempt by

Joseph Edgar, as the individual defendant and as President of Hydraulital, premised upon the defendants' willful violation of the order of May 15, 2008, which order prohibited the defendants from using the equipment at issue. An order of attachment was denied although it was found the defendants removed the equipment from the Nissequogue River job site and transported it to a new job site to fulfill an independent contractual obligation to a third party KeySpan.

Joseph Posillico sets forth in his personal affidavit dated February 9, 2010 that he is the president and chief executive office of Posillico Environmental, Inc. and asserts that the defendant failed to complete work pursuant to two separate dredging contracts by abandoning the Nissequogue and Patchogue projects. Posillico claims that pursuant to the Lien Law that the defendant failed to maintain and produce books and records required by the Lien Law with respect to trust funds it received in connection with the Nissequogue project, and claims that the defendants improperly diverted those trust funds. He claims that Joseph Edgar failed to supply all of the equipment necessary to perform the work at the Nissequogue project, failed to timely and properly perform the work, failed to timely and properly meet the milestone deadlines, failed to mobilize the site no later than December 29, 2007 to commence dredging operations by January 12, 2008, and failed to complete dredging operations by March 14, 2008. Posillico asserts that the owner of the Nissequogue project, SCDPW and Posillico sent numerous letters detailing Hydraulital's failures and demanded that Hydraulital's productivity be substantially increased prior to the expiration of the permits. Posillico avers that Edgar dredged only 18,000 cubic yards of the 27,670 cubic yards required to be dredged pursuant to the Patchogue project and abandoned the job.

In the sporadic pages submitted concerning the testimony of Anthony Schneider on behalf of Posillico, it is noted that Schneider had conversations in which it was discussed that Hydraulital was not capable of advancing funds necessary to complete the job and needed assistance from Posillico. He stated that Edgar needed the mobilization moneys to start the Nissequogue dredging. He further testified that it was assumed that Hydraulital would buy all of the equipment when the project was done.

The plaintiff has submitted sporadic pages and an incomplete copy of the Joseph Edgar's transcript of his examination before trial creating factual issues in the moving papers to preclude summary judgment. It is noted that Mr. Edgar did testify to the effect that as of February 13, 2008 payment to him was approximately several hundred thousand dollars in arrears-\$230,000 to \$250,000. Edgar Hart Petroleum supplied fuel for the operation of the machines at Nissequogue and Posillico failed to make payments to Hart for fuel supply for the project. Hydraulital submitted weekly invoices to Posillico for reimbursement, but Posillico did not make payments. When Hart threatened to stop deliveries, Posillico then paid up to keep work going.

In his affidavit submitted in opposition to the plaintiff's motion, Edgar sets forth that Hydraulital did not abandon the Patchogue project as alleged and that plaintiff failed to pay what was due under the contract. He further claims that Hydraulital prepaid \$75,000 towards a dredge which was to belong to Hydraulital at the completion of the Patchogue project as agreed between the parties and that Posillico sold the dredge instead. Edgar further avers that the dredging relative to the Nissequogue project was delayed by Posillico as Posillico failed to follow the recommendations of Hydraulital that were necessary to perform the contract; failed to pay invoices; and failed to provide equipment on a timely basis. Edgar claims Hydraulital had to pay

advances of approximately \$260,000 as Posillico did not pay invoices for weekly labor and equipment costs in mid to late January 2008. He continued that although Posillico provided the spuds and swing winches for the dredging in the Nissequogue River, integral parts for the dredging operation, that Posillico never provided the equipment to make them work. Spuds were not delivered until January 2008 and delayed the dredging operation. Edgar states that the failure of Posillico to timely deliver the spuds necessary for the dredges to hold their ground in the river current substantially impaired the dredges' ability to dredge material. The swing winches necessary to stabilize the dredge in the current and wind were not made available until the second dredge arrived and at which time Edgar claims Posillico told him to stop dredging.

Based upon the foregoing, there are factual issues concerning whether financial issues and equipment availability hindered or delayed progress and impeded timely completion of the dredging projects. Such information cannot be determined based upon the evidentiary submissions and testimonies submitted, precluding summary judgment.

Accordingly, motion (004) by Posillico for an order granting summary judgment to the plaintiff and dismissing the affirmative defenses and counterclaims is denied in its entirety.

Dated: July 8, 2010

PAUL J. BAISLEY, JR.

J.S.C.

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