

<b>Mercado v Esco Construction</b>
2002 NY Slip Op 30055(U)
May 6, 2002
Supreme Court, New York County
Docket Number: 0602877/2000
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERNAN CAHN

Justice

PART 49

Daniel Mercado

- v -

Asco Construction

INDEX NO. 602877/00  
MOTION DATE 8/20/01  
MOTION SEQ. NO. 002  
MOTION CAL. NO. 13

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

SCANNED  
MAY 09 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

Dated: 5/6/02

[Signature]

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
DANIEL MERCADO, ANTHONY RUIZ, ELOY CUSTODIO,  
JESUS ROLDAN and RENALDO HOUSE individually and on  
behalf of other persons similarly situated who were employed by  
ESCO CONSTRUCTION, AKW SYSTEMS, INC., J. WALTER  
ENTERPRISES, INC., EMCO TECH CONSTRUCTION CORP.,  
RIVERVIEW ARCHITECTURAL PRODUCTS, INC.,  
KEYSTONE WINDOW INSTALLERS, INC. and PIONEER  
WINDOWS, INC. with respect to certain Public Works Projects  
awarded by the NEW YORK CITY SCHOOL CONSTRUCTION  
AUTHORITY, THE CITY OF NEW YORK and THE STATE OF  
NEW YORK,

Plaintiffs,

-against-

Index No. 602877/00

ESCO CONSTRUCTION, AKW SYSTEMS, INC.,  
J. WALTER ENTERPRISES, INC., EMCO TECH  
CONSTRUCTION CORP., RIVERVIEW ARCHITECTURAL  
PRODUCTS, INC., KEYSTONE WINDOW INSTALLERS, INC.  
and PIONEER WINDOWS, INC., M&G WATERPROOFING, INC.,  
CITNALTA CONSTRUCTION CORP., WDF, INC., CALCEDO  
CONSTRUCTION CORP., EXCEL GROUP, INC., IANNELLI  
CONSTRUCTION CO., INC., NEELAM CONSTRUCTION  
CORP., ALPS MECHANICAL, INC., EMPIRE STATE  
RENOVATION CORP., RSG CAULKING &  
WATERPROOFING INC., V.P. PEGASUS ASSOCIATES, INC.,  
DILLON CONTRACTING CORP., DEDE CONSTRUCTION  
CORP., HOMERIC CONTRACTING CO., INC.,  
INTERNATIONAL FIDELITY INSURANCE COMPANY, ST.  
PAUL MERCURY INSURANCE COMPANY, CAROLINA  
CASUALTY INSURANCE COMPANY, SEABOARD SURETY  
COMPANY, ULICO CASUALTY INSURANCE COMPANY,  
HARTFORD FIRE INSURANCE COMPANY, U.S. FIDELITY &  
GUARANTY COMPANY, FRONTIER INSURANCE  
COMPANY, INSURANCE COMPANY OF THE STATE OF  
PENNSYLVANIA, RELIANCE INSURANCE COMPANY, RLI  
INSURANCE COMPANY and STAR INSURANCE COMPANY  
who furnished labor and material bonds on the Public Works  
Projects awarded by the NEW YORK CITY SCHOOL  
CONSTRUCTION AUTHORITY, THE CITY OF NEW YORK  
and THE STATE OF NEW YORK,

Defendants.

-----X  
CAHN, J.:

In Motion Sequence numbers 001 and 002, respectively, defendants WDF, Inc. ("WDF") and Pioneer Windows, Inc. ("Pioneer") move to dismiss the complaint. The motions are consolidated for disposition.

This is an action to recover for the alleged underpayment of wages in violation of section 220 of the Labor Law, that mandates payment at the prevailing rate of wages and benefits as established by the Comptroller of the City of New York. Plaintiffs claim: (1) violation of the New York State Constitution, Article 1 §17; (2) breach of contract, against subcontractors; (3) breach of contract, against WDF and the prime contractor defendants; (4) unjust enrichment, against subcontractor and prime contractor defendants; (5) entitlement on a quantum meruit theory, against subcontractor and prime contractor defendants; and (6) entitlement to a bond payment, against the surety defendants.

Plaintiffs worked on various public works projects throughout New York City (the "Public Works Contracts") awarded by the New York City School Construction Authority. WDF is a prime contractor. WDF entered into several Public Works Contracts to perform work on a number of schools. In connection therewith, WDF entered into 14 lump sum window installation subcontracts with J. Walter Enterprises, Inc. and Pioneer. Plaintiffs were employees of the subcontractors.

Defendants contend that plaintiffs' first cause of action should be dismissed because there is no private right of action under Article 1, section 17 of the New York State Constitution.

Article 1, section 17 provides that:

Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. No laborer, worker or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public work, shall be

permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall he or she be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used. Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

Courts have held that, "[o]n its face, section 17 does not create a cause of action for damages," but merely formulates policy of guaranteeing prevailing wage rate to those working on any public work. McGovern v Local 456, 107 F Supp 2d 311, 319 (SDNY 2000), citing Domanick v Triboro Coach Corp., 18 NYS2d 650 (Sup Ct, NY County 1940). Furthermore, plaintiffs fail to cite, nor is the court aware of any, authority that supports the existence of such private claim.

Instead, the cause of action for non-payment of prevailing wages is specifically provided for in section 220 (3) of the Labor Law which provides:

The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined. ... The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be paid the wages herein provided.

Section 220 of the Labor Law further provides for an administrative determination of whether the contractor or subcontractor paid the prevailing rate of wages. Labor Law, § 220 (8). Only after such an administrative determination has been rendered does the complainant, or any person affected, have a private right of action to obtain the difference between the wages paid and the

prevailing wage, under section 220 of Labor Law. Pesantez v Boyle Environmental Servs., 251 AD2d 11, 12 (1<sup>st</sup> Dept 1998). Therefore, even if this court were to consider plaintiffs' first cause of action as sounding under Labor Law § 220, plaintiffs' claim would fail as premature since the administrative proceeding is pending. The first cause of action is dismissed.

The second and third causes of action are for breach of the Public Works Contracts and subcontracts. Plaintiffs allege that the Public Works Contracts and the subcontracts entered into in connection therewith, "contained schedules of the prevailing rates of wages and supplemental benefits to be paid Plaintiffs and members of the putative class for work performed on the sites of the Public Works Projects," (First Amended Class Action Complaint, ¶¶ 69, 74), and that, those "prevailing rates of wages and supplemental benefits were made a part of the [contracts] for the benefits of Plaintiffs and members of the putative class for work performed on the sites of the Public Works Projects" (id., ¶¶ 70, 75). Defendants argue that plaintiffs' claims fail, because they were not third-party beneficiaries, or at least not intended beneficiaries of WDF's Public Works Contracts. Although the section 220 claim is not presently available, plaintiffs may maintain a common law claim for breach of contract. Pesantez v Boyle Environmental Servs., supra, at 12.

In order to state a cause of action for breach of contract, a third-party beneficiary must show that the contract was intended to benefit the third-party beneficiary, and that the benefit is sufficiently immediate so as to indicate that the parties assumed a duty to compensate the third-party beneficiary if the benefit is lost. State of California Pub. Empls. Retirement Sys. v Shearman & Sterling, 95 NY2d 427, 434-45 (2000). The primary purpose of section 220, is to directly benefit laborers by insuring that those who work on public projects receive an adequate

wage. Fata v S.A. Healy Co., 289 NY 401, 405 (1943); Onondaga-Cortland-Madison Bd. of Co-op Educ. Servs. v McGowan, 285 AD2d 36, 38-39 (3d Dept 2001); Brang Co., v State Univ. Constr. Fund., 47 AD2d 178, 180 (3d Dept 1975). However, a laborer may not enforce such provision as a third-party beneficiary based merely on the insertion of the provision in the contract, pursuant to the requirement of section 220(3) of Labor Law, because where such provision is inserted, "pursuant to the command of the statute [only] no such voluntary intent can be inferred." Fata v S.A. Healy Co., *supra*, 406. However, where the agreement specifically provides for wages at rates fixed in accordance with the Labor Law and sets the specific rates in a schedule which is part of the contract, the obligation is more than a mere incorporation of the provision as mandated by the statute, and the intent to confer a benefit to laborers may be present. Pesantez v Boyle Environmental Servs., *supra*, 251 AD2d, at 12.

Defendants' cited authorities are not on point. The plaintiffs in those cases were not laborers on public works projects, and, as such, they did not enjoy a similar protection of Section 220 of Labor Law. International Assn. of Bridge, Structural and Ornamental Ironworkers, Local Union No. 6, AFL-CIO v State, 280 AD2d 713 (3d Dept 2001) (union that did not represent employees on the public works project did not have standing to sue under section 220 of Labor Law); Yerry v Goodsell, 4 AD 395 (3d Dept 1957), *affd* 4 NY2d 999 (1958) (union that did not represent employees and individuals not employed on the public works did not have standing); Brian Hoxie's Painting Co. v Cato-Meridian Cent. School Dist., 76 NY2d 207 1990) (contractors that underbid because of failure to consider the schedule of prevailing wages were not allowed to recover the difference for wages paid at the prevailing rate after the project was complete); Brang Co. v State Univ. Constr. Fund., *supra* (underbidding contractor was not

work, labor or services performed, as an alternative to a breach of contract claim. Randall v Guido, 238 AD2d 164, 164 (1<sup>st</sup> Dept 1997); Joseph Sternberg, Inc. v Walber 36<sup>th</sup> St. Assocs., 187 AD2d 225, 227 (1<sup>st</sup> Dept 1993). It is not certain at this stage whether the agreements cover the issue of underpayment of wages and whether plaintiffs, as third-party beneficiaries, may recover under the agreements. Thus, dismissal of plaintiffs' claim for unjust enrichment and quantum meruit is not warranted.

Accordingly, it is hereby

ORDERED that the motions are granted only to the extent that the first cause of action is dismissed; and it is further

ORDERED that defendants are directed to serve their answers to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: May 6, 2002

ENTER:

  
\_\_\_\_\_  
J.S.C.