

Wysocki v Kel-Tech Construction, Inc.

2005 NY Slip Op 30399(U)

April 8, 2005

Supreme Court, New York County

Docket Number: 603591/03

Judge: Jane S. Solomon

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

PRESENT: Hon. JANE S. SOLOMON

PART 55

Justice

Matakov

INDEX NO.

603591/03

MOTION DATE

1/24/05

MOTION SEQ. NO.

04

MOTION CAL. NO.

- v -
Kel-Tech Construction

The following papers, numbered 1 to 11 were read on this motion to/for Summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-10

11

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE
DATED:

J.S.C.

Dated: 4-8-05

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

J.S.
JANE S. SOLOMON
J.S.C.

FILED
APR 19 2005
NEW YORK
COUNTY CLERK'S OFFICE

JS Note: May 9 2005 @ noon, preliminary conference set at end of decision.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
JANUS WYSOCKI, VADYM MATAKOV and YAN DORAS,
individually and on behalf of all
other persons similarly situated who
are presently or were formerly
employed by KEL-TECH CONSTRUCTION, INC.
with respect to public works projects
awarded by the City of New York and
the New York City School Construction
Authority,

Plaintiffs,

INDEX NO. 603591/03

-against-

DECISION AND ORDER

KEL-TECH CONSTRUCTION, INC., IANELLI
CONSTRUCTION CO., INC., T.A. AHERN
CONTRACTORS CORP., FOURTH AVENUE
ENTERPRISES PIPING CORP., MERIS
CONSTRUCTION CORP., SANTA FE CONSTRUCTION,
INC., CALCEDO CONSTRUCTION CORP., SHROID
CONSTRUCTION, INC., SEABOARD SURETY CO.,
THE AMERICAN INSURANCE CO., LUMBERMANS
MUTUAL CASUALTY CO., THE MOUNTBATTEN
SURETY CO., INC., UNIVERSAL BONDING
INSURANCE CO., ST. PAUL FIRE AND
MARINE INSURANCE CO., UNITED STATES
FIDELITY AND GUARANTY CO., RELIANCE
INSURANCE CO., VINCENT KELLEHER, and
PHILLIP KELLEHER,

Defendants.

-----X
SEABOARD SURETY CO., LUMBERMANS MUTUAL
CASUALTY CO., UNIVERSAL BONDING INSURANCE
CO., ST. PAUL FIRE AND MARINE INSURANCE
CO., and UNITED STATES FIDELITY AND
GUARANTY CO.,

Third-Party Plaintiffs,

-against-

KEL-TECH CONSTRUCTION, INC., PHILIP
KELLEHER, JOSEPHINE KELLEHER, VINCENT
KELLEHER, YOLANDA KELLEHER, T.A. AHERN

* 3]
CONTRACTORS CORP., AHERN PAINTING
CONTRACTORS, INC., AHERN MAINTENANCE &
SUPPLY CORP., TIMOTHY AHERN, MERIS
CONSTRUCTION CORP., ELIAS MERIS, ELIZABETH
MERIS, SOFIA DEMONERIS, TOMMY DEMONERIS,
SANTA FE CONSTRUCTION, INC., LANDMARK
PROJECTS, INC., DESMOND EMANUEL, MAUVAREEN
BEVERLEY, CALCEDO CONSTRUCTION CORP.,
JOSEPH TOMEI, IANELLI CONSTRUCTION CO.,
INC., IANELLI CONSTRUCTION CO., ALFRED
IANELLI, VINCENT IANELLI, VINCENT IANELLI,
JR., and THOMAS IANELLI,

Third-Party Defendants.

-----X

JANE S. SOLOMON, J.

In this putative class action brought by construction workers to recover prevailing wages, benefits and overtime compensation allegedly not paid to them, defendant Kel-Tech Construction, Inc. ("Kel-Tech") moves for summary judgment. Defendant T.A. Ahern Contractors Corp. ("Ahern") cross-moves for summary judgment.¹ For the reasons set forth below, the motions are granted in part and denied in part.

Background

Plaintiffs Janusz Wysocki ("Wysocki"), Vadym Matakov ("Matakov") and Yan Doras ("Doras") are members of the Pointers, Cleaners and Caulkers, Local Union No. 1, New York, of the

¹ Ahern's motion is joined by third-party defendants Ahern Painting Contractors, Inc., Ahern Maintenance & Supply Corp., and Timothy Ahern, none of whom have standing to move to dismiss plaintiffs' complaint as they are not named defendants.

International Union of Bricklayers and Allied Craftsmen ("the Union"). Kel-Tech employed them to perform general contracting and other related work at various public works projects in New York City. Wysocki was hired on September 27, 2000 and continued there until October 23, 2003, with the exception of certain periods during which he collected unemployment. Similarly, Matakov was hired on September 28, 1999 and continued there until March 29, 2002, with the exception of certain period during which he collected unemployment; and Doras worked with the company full-time from September 27, 2000 to January 20, 2003.

Plaintiffs worked on the following projects, for which Kel-Tech was either the general contractor or a subcontractor: PS 107, PS 150, PS 180, PS 209, IS 263, the Middle School Annex of PS 274, Samuel J. Tilden High School, and the Automotive Trades Vocational High School in Brooklyn; PS 46, PS 89, PS 153, PS 161, D. Clinton High School, Truman High School, and Taft High School in the Bronx; PS 38 and PS 178 in Manhattan; PS 29, JHS 281, and Ralph McKee High School in Staten Island; and PS 14, PS 91, PS 95, PS 150, PS 206, PS 222, PS 223, and a New York City School Construction Authority ("NYCSCA") office in Queens.

Kel-Tech's work on these project was secured through "public works contracts" awarded by either the City of New York or the NYCSCA. Labor Law § 220 requires that all public works contracts executed by a municipal corporation contain a provision

that each laborer, workman or mechanic employed by a contractor or subcontractor be paid the prevailing wage and supplements. The construction contracts at issue here contained such prevailing wage provisions. Plaintiffs assert that they were not paid prevailing wages without indicating exactly what they were or should have been paid.

Because plaintiffs were union members and Kel-Tech and Ahern were employer signatories, the applicable prevailing wages were those set out in the Union's Collective Bargaining Agreement ("CBA"), effective from July 1, 2000 through June 30, 2004. The CBA included a provision for the redress of grievances. Article XXI (Arbitration) provides:

Section 1. All complaints, disputes or grievances between the parties hereto involving solely questions of interpretation or application of any clause of this Agreement shall be resolved as follows:

(a) The Employer or his representative shall first meet with the representative of the Union, and attempt to adjust the grievance on a job-level basis as promptly as possible, but in no event later than three (3) days after the grievance arose.

(b) If the parties cannot resolve the grievance within the three (3) day period, then the matter shall within seven (7) days be referred to a Joint Adjustment Board consisting of two (2) representatives appointed by the Employer and two (2) representatives appointed by the Union. The decision of the Joint Adjustment Board shall be final and binding.

(c) If the Joint Adjustment Board is unable to resolve the grievance within ten (10) working days after the final meeting of the Joint Adjustment Board, then the Joint Adjustment Board shall endeavor to agree upon an impartial arbitrator to whom the grievance shall be

submitted in writing, by either party.

(d) If an agreement is not reached by the Joint Adjustment Board as to the selection of an impartial arbitrator then the grievance shall be submitted in writing by either party to the American Arbitration Association for hearing and decision before an impartial Arbitrator selected from the Labor Panel of the American Arbitration Association. The decision of the Impartial Arbitrator shall be final and binding upon the parties. Costs shall be borne equally by the parties.

Plaintiffs allegedly complained to Kel-Tech and the Union about their wages, but the Union did not press a grievance for them. Specifically, Wysocki states that he, Matakov and Doras jointly spoke with a Union representative in November 2002, without result.

On or about December 8, 2003, plaintiffs filed the instant complaint on behalf of themselves and a putative class of other similarly situated individuals, alleging that Kel-Tech and other contractors and subcontractors working on the above-referenced public works projects, along with the sureties bonding payment of their wages, failed to pay them prevailing wages, supplemental benefits and overtime compensation to which they were statutorily and contractually entitled. In turn, the surety defendants have made their insureds third-party defendants.

Plaintiffs set forth causes of action for breach of contract; failure to pay overtime compensation under New York Labor Law § 655 and 12 NYCRR 142-3.2; fraud; quantum meruit; unjust enrichment; failure to timely pay wages under Labor Law §

[*7]
191, including liquidated damages and attorney's fees under Labor Law § 198; piercing the corporate veil so as to hold Vincent Kelleher and Phillip Kelleher ("the Kellehers") liable for Kel-Tech's conduct; and joint and several liability of the sureties.²

Discussion

Kel-Tech now moves, and Ahern cross-moves, for summary judgment dismissing plaintiffs' complaint. Movants contend that plaintiffs are obliged to follow the grievance procedure set forth in the CBA and may not sue until they exhaust their administrative remedies. Plaintiffs counter that their claims are outside the terms of the CBA and, in the alternative, that their unsuccessful complaints to Kel-Tech and the Union allow the court to hold, as a matter of law, that compliance with the CBA procedure would have been futile. With respect to Matakov, they argue that his claims arose before the CBA went into effect on July 1, 2000.

Prevailing wage statutes are "intended for the direct benefit of laborers." Fata v. S.A. Healy Co., 289 N.Y. 401, 405 (1943). The statutes, whether state or federal, are designed to ensure wage payments to laborers on government funded public works projects and to deter contractors from padding their

²Their claims brought under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., were withdrawn.

profits by underpaying workers. Section 220 of the Labor Law provides in part: "The wages to be paid for a legal day's work, as herein before defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as herein defined." It "has as its entire aim the protection of workingmen against being induced, or obliged, to accept wages below the prevailing rate" and "must be construed with the liberality needed to carry out its beneficent purposes." Bucci v. Village of Port Chester, 22 N.Y.2d 195, 201 (1968). By statute, prevailing wages are defined by reference to collective bargaining agreements reached by labor organizations. Labor Law § 220 (5) (a).

Similarly, section 220 also requires that laborers, workmen and mechanics be paid supplemental benefits at the prevailing rates. These are all forms of remuneration for employment paid in any medium other than cash, including but not limited to health, welfare and non-occupational disability insurance, retirement and vacation benefits, holiday pay and life insurance.

Movants' contention that plaintiffs must first press their prevailing wage claims under the CBA is without merit. The cases they cite in support are distinguishable, as they all call for the exhaustion of administrative remedies where plaintiffs seek to enforce the terms of the CBA. See, e.g.,

Tomlinson v. Board of Education, 223 A.D.2d 636 (2d Dep't 1996); Boags v. Port Authority of New York and New Jersey, 162 A.D.2d 245 (1st Dep't 1990). Here, plaintiffs are not suing under the rights guaranteed by the CBA, rather only as third-party beneficiaries of defendants' public works contracts. Wright v. Herb Wright Stucco, Inc., 50 N.Y.2d 837 (1980), overruling and adopting dissent, 72 A.D.2d 959 (4th Dep't 1979). As such, exhaustion of the administrative procedures set forth in the CBA is unnecessary. See Moses v. Rensselaer County, 262 A.D.2d 697 (3d Dep't 1997). Moreover, it is not clear how, without Union support, the grievance procedure of the CBA applies.

Notably, neither Labor Law § 220, which provides a statutory remedy for the recovery of prevailing wages, nor the Wright line of cases suggest that a plaintiff seeking to enforce such rights must first conform with the terms of a collective bargaining agreement. Implicit in Wright is plaintiffs' right to sue outside the terms of a CBA. Moreover, that Labor Law § 220 references collective bargaining agreements as determinative of prevailing wages in a given locale does not support the position that arbitration under the collective bargaining agreement governs individual wage claims.

Kel-Tech also moves for summary judgment on the fourth through ninth causes of action, which are addressed seriatim below.

The fourth cause of action alleges failure to pay overtime compensation under New York Labor Law § 655 and 12 NYCRR 142-3.2. Section 655 does not provide for a private right of action and the cited NYCRR section is applicable only to nonprofitmaking organizations. Moreover, plaintiffs' overtime claims are subsumed in their prevailing wage claims. Accordingly, the cause of action is dismissed.

As to the fifth and sixth causes of action, they also are dismissed. Plaintiffs allege fraud as to Kel-Tech's failure to inform them that they were to be paid the prevailing wage and overtime compensation. Specifically, Kel-Tech allegedly failed to post at its work sites a legible statement of prevailing wages, supplemental benefits and overtime compensation, and its failure to do so induced plaintiffs to work at less than the prevailing wage. To prevail on a cause of action for actual fraud, plaintiff must establish that defendant made "a representation of fact, which is either untrue and known to be untrue or recklessly made, and which [was] offered to deceive the other party and to induce [him] to act upon it, causing injury.'" Berner v. Moore Bus. Forms, 204 A.D.2d 1072, 1073 (4th Dept. 1994). Plaintiffs have failed to plead fraud with specificity. See CPLR § 3016 (b). Conclusory allegations are not sufficient. Dumas v. Fiorito, 13 A.D.3d 332 (2d Dep't 2004). Plaintiffs claims are further undermined by their Union membership, by which

they should have been aware of the prevailing wage rate and their related rights.

Given the existence of valid public works contracts on which plaintiffs can sue for breach, causes of action sounding in quasi-contractual relief are inappropriate. See Frydman & Co. v. Credit Suisse First Boston Corp., 272 A.D.2d 236 (1st Dep't 2000). As such, the seventh and eight causes of action, for quantum meruit and unjust enrichment, are dismissed.

Finally, the ninth cause of action alleges failure to timely pay wages in accordance with Labor Law § 191 and seeks attorney's fees and liquidated damages pursuant to Labor Law § 198. It is dismissed because the dispute here is over the amount to be paid, and not whether it was paid periodically as required by Labor Law § 191. Since no violation of a substantive provision of Article 6 of the Labor Law is alleged, there can be no claim for attorneys fees and liquidated damages under Labor Law § 198. Gottlieb v. Laub & Co., Inc., 82 N.Y.2d 457 (1993).

Accordingly, it is hereby

ORDERED that Kel-Tech's motion and the Ahern defendants' cross-motion are granted in part, and the fourth through ninth causes of action are dismissed as against all defendants, and the remaining claims are severed for trial; and it further is

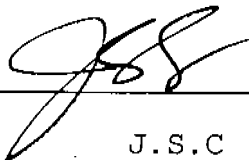
ORDERED that the Clerk of the Court is directed to

[* 12]
enter judgment accordingly; and it further is

ORDERED that the parties are to appear for a further preliminary conference at Part 55, 60 Centre Street, Room 432, New York, New York, at 12 noon on May 9, 2005.

Dated: April 8 , 2005

ENTER:



J.S.C
JANE S. SOLOMON

FILED
APR 19 2005
NEW YORK
COUNTY CLERKS OFFICE