MEHP Park Avenue Ownership LLC v DKS Contractors, Inc.
2006 NY Slip Op 30227(U)
June 29, 2006
Supreme Court, New York County
Docket Number: 0602382/2005
Judge: Richard B. Lowe
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SCANNED ON 6/30/2006
[* 1]

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

MENP Park Avenue

- v -

DKS Contractors

INDEX NO. 602382/05

MOTION DATE 10/7/05

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JUN 30 2006
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/29/06

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

---X

MEHP PARK AVENUE OWNERSHIP LLC,

Plaintiff,

- against -

Index No. 602382/2005

DKS CONTRACTORS, INC., doing business as DKS CONSTRUCTION, DOUGLAS CASTOLDI and STANISLAW PAUL,

Defendants.

---X

FILED
JUN 30 2006
NEW YORK
COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE, III:

In this action seeking repayment of a loan, plaintiff moves, pursuant to CPLR 3212, for summary judgment dismissing defendants' affirmative defenses and counterclaim, and granting judgment in plaintiff's favor on the complaint.

FACTUAL ALLEGATIONS

Plaintiff MEHP Park Avenue Ownership LLC (MEHP) and defendant DKS Contractors, Inc., doing business as DKS Construction (DKS), entered into a contract (the Construction Contract), pursuant to which DKS agreed to perform renovation work (the Work) on a hotel that is owned by plaintiff (the Hotel). Various disputes arose between MEHP and DKS, and certain subcontractors who had performed parts of the Work filed or asserted liens or lien claims, and one subcontractor commenced a legal action, against MEHP and/or the Hotel. MEHP and DKS entered into a settlement agreement, on or about February 14, 2005 (the Settlement Agreement), which provided for MEHP's payment of a final contract payment to DKS. In the Settlement Agreement, DKS warranted and represented that the final payment would be "sufficient to obtain from ... all Subcontractors and suppliers," inter alia, specified waivers and releases of liens, lien rights, and claims with respect to the Work, the Hotel, and MEHP (Settlement Agreement, ¶ 1).

On or about March 11, 2005, MEHP and DKS entered into an amendment to the Settlement Agreement (the Amendment). The recitals to the Amendment stated: that DKS had advised MEHP that the final payment made by MEHP pursuant to the Settlement Agreement would be "insufficient to obtain the waivers, releases and dismissals required under" that agreement; that DKS did not have

"sufficient funds to cover the shortfall"; that DKS had "requested that [MEHP] loan the shortfall to [DKS]"; and that MEHP had "agreed to advance an additional $232,382.53 as a loan to [DKS] in order to consummate the transaction contemplated by the [Settlement] Agreement" (Amendment, Background, ¶ B). The Amendment provided that MEHP would deposit $232,382.53 into an escrow account with an escrow agent, that the deposited amount would be "deemed loaned" by MEHP to DKS as of the date of the deposit, that the loan (the Shortfall Loan) would be utilized by DKS to fund the previously referenced shortfall, and that DKS would repay the Shortfall Loan, together with interest, on or before June 1, 2005 (Amendment, ¶¶ 3, 4). The Amendment also required DKS to deposit $25,000 (the Holdback Deposit) with the escrow agent, as security for DKS' performance of certain of its obligations under the Settlement Agreement and the Amendment.

On or about March 11, 2005, defendants Douglas Castoldi and Stanislaw Paul -- who had executed the Amendment as, respectively, DKS' president and secretary -- also executed a guaranty of DKS' obligation to repay the Shortfall Loan (the Guaranty).

MEHP allegedly deposited $232,382.53 into the escrow account on or about March 11, 2005, but DKS did not repay the Shortfall Loan on June 1, 2005, when it became due and owing. MEHP sent a written notice to defendants, dated June 21, 2005, which demanded immediate repayment of the loan, together with accrued interest. Defendants have not repaid the loan, and the complaint seeks judgment against defendants, jointly and severally, in the amount of $232,382.53 together with interest.

Defendants' answer to the complaint asserts two defenses and a counterclaim, which are predicated upon MEHP's alleged misconduct in connection with the $25,000 Holdback Deposit. The escrow agent had disbursed the Holdback Deposit to MEHP after DKS failed to timely satisfy certain contingencies specified in the Amendment. Defendants' first affirmative defense alleges that MEHP "has unclean hands based upon its conduct with regard to the Holdback Deposit" (Answer, ¶ 16). The second affirmative defense alleges that defendants have a right to "setoff as against the amount alleged to be due and owing ... based upon [the] Holdback Deposit" (*id.*, ¶¶ 17-18).

Defendants' counterclaim asserts a claim for breach of the Amendment, and demands $25,000 in damages, on the ground that MEHP improperly authorized the escrow agent to disburse the Holdback Deposit from escrow, and wrongfully took possession of the funds, "because ... the failure to pass an inspection for a Certificate of Occupancy ... was the fault of [MEHP] and/or [its] contractors" (*id.*, ¶¶ 22-23).

DISCUSSION

MEHP's motion for summary judgment dismissing defendants' two affirmative defenses and counterclaim, and granting judgment in MEHP's favor, is granted.

MEHP has made a prima facie showing of its entitlement to judgment as a matter of law: (1) as against DKS by submitting proof of DKS' execution of the Amendment -- containing DKS' promise to pay MEHP the amount of $232,382.53, together with interest, on or before June 1, 2005 -- and failure to make payment in accordance with the terms of the Amendment upon proper demand (*see e.g. Eastbank, N.A. v Phoenix Garden Rest., Inc.*, 216 AD2d 152, 12 [1st Dept 1995]); and (2) as against Castoldi and Paul by submitting proof of their execution of the unconditional Guaranty, and failure to make payment in accordance with the terms of the Guaranty upon proper demand (*see Kensington House Co. v Oram*, 293 AD2d 304, 304-305 [1st Dept 2002]). Defendants, in opposition to MEHP's motion, have failed to submit evidentiary proof sufficient to raise a triable issue of fact with respect to their asserted defenses and counterclaim which would preclude summary judgment (*see Eastbank, N.A. v Phoenix Garden Rest., Inc.*, 216 AD2d at 152).

Defendants have expressly waived their right to assert any affirmative defense or counterclaim in opposition to MEHP's claim for repayment of the Shortfall Loan and the accrued interest on that loan. Paragraph 4 of the Amendment provides that:

> [o]n or before June 1, 2005, [DKS] unconditionally promises to pay [MEHP] the amount of the Shortfall [Loan] plus interest as set forth below. [DKS'] obligation to repay the Shortfall [Loan] and all accrued interest is absolute and unconditional and is not subject to offset, defense or counterclaim of any kind.

The Guaranty provides that Castoldi and Paul (the Guarantors) "shall have the obligations" to "unconditionally guarantee the full, complete and punctual performance, payment and satisfaction

of obligations of [DKS] under Paragraphs 4 and 5 of the Amendment (i.e., the obligation to repay the [Shortfall Loan] and all accrued interest thereon as and when required in such Paragraphs)" "as if Guarantors executed the [Settlement Agreement and the Amendment] as [DKS] thereunder" (Guaranty, Preliminary Paragraph and ¶ 2). Thus, Castoldi's and Paul's guaranty of DKS' obligation to repay the Shortfall Loan, together with accrued interest, is also "absolute and unconditional and ... not subject to offset, defense or counterclaim of any kind."

As a general matter, a waiver of the right to assert a setoff, defense, or counterclaim "is not against public policy and will be enforced in the absence of fraud or negligence in the disposition of collateral" (*Fleet Bank v Petri Mech. Co.*, 244 AD2d 523, 524 [2d Dept 1997]; *see also Palm Beach Mtge. Mgt., LLC v Red Tulip, LLC*, 18 AD3d 379, 380 [1st Dept 2005]; *Raven El. Corp. v Finkelstein*, 223 AD2d 378, 378 [1st Dept 1996]; *Barclays Bank of New York, N.A. v Heady Elec. Co.*, 174 AD2d 963, 965-966 [3d Dept 1991]). Defendants' defenses and counterclaim do not allege fraud or negligence in the disposition of any collateral, and defendants have failed to identify any other circumstance which would render their waiver unenforceable or ineffective. Accordingly, defendants are barred from asserting the defenses and counterclaim which are pleaded in their answer as a basis for denying MEHP's motion for summary judgment.

Defendants' first affirmative defense is dismissed, additionally, because it asserts an equitable defense, unclean hands, which may not be invoked in this action exclusively at law, seeking only money damages (*see e.g. Manshion Joho Ctr. Co. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005]; *Hasbro Bradley, Inc. v Coopers & Lybrand*, 128 AD2d 218, 220 [1st Dept 1987]).

As previously stated, defendants cannot assert their claim based upon the Holdback Deposit (the Holdback Claim) as a counterclaim which would forestall judgment in MEHP's favor on its claim for repayment of the Shortfall Loan. However, the Holdback Claim arises apart from defendants' obligation to repay the Shortfall Loan, and is not inextricably intertwined with, or inseparable from, it. Moreover, although DKS agreed in the Amendment that "[DKS'] obligation

to repay the Shortfall [Loan] plus interest is ... not subject to offset, defense or counterclaim of any kind" (Amendment, ¶ 4), DKS did not agree, more broadly, that it would not assert any claim arising out of the Amendment. Thus, defendants' Holdback Claim, if it has merit, might be severed and permitted to proceed independently from MEHP's claim for repayment of the Shortfall Loan. However, MEHP has made a prima facie showing that defendants' Holdback Claim is without merit, and defendants, in response, have failed to raise an issue of fact precluding summary judgment dismissing the counterclaim.

Paragraph 11 of the Amendment provided that Paragraph 7 of the Settlement Agreement would be amended to state, in relevant part:

> ... [DKS] agrees that the Holdback [Deposit] shall be withheld in escrow until (i) the Work has been inspected and approved by the building department for issuance of the final certificate of occupancy for the Hotel; (ii) all punch list work has been completed in accordance with the Construction Contract; and (iii) each subcontractor listed on Exhibit B has furnished a final lien waiver and release in the amount specified for such subcontractor on Exhibit B or furnished such other proof of payment satisfactory to Owner. In the event that the contingencies described in clauses (i), (ii) and (iii) of the preceding sentence are not satisfied on or before May 15, 2005, then such $25,000 shall be disbursed by escrow company to [MEHP], but such disbursement shall not constitute liquidated damages or a limitation on [DKS'] liability for failure to perform such obligations under the Construction Contract.

MEHP has submitted an affidavit by Belinda Bail, in which she states: that she is the design and construction consultant for MEHP's investment advisor; that she is assisting MEHP in overseeing the renovation of the Hotel; that she has personal knowledge of the facts set forth in her affidavit; and that the escrow agent properly disbursed the Holdback Deposit to MEHP, because DKS failed to satisfy -- either by May 15, 2005, or even as of September 2, 2005, the date of her affidavit -- any of the three contingencies enumerated in the above-quoted paragraph (*see* Bail Affid., ¶¶ 1, 18-22). In support of her assertion that DKS failed to timely satisfy any of the three contingencies, Bail has also submitted, as exhibits to her affidavit, copies of schedules specifically enumerating: (i) items of Work which allegedly remain to be completed before the Work can be inspected and approved by the building department for a final certificate of occupancy for the Hotel; (ii) items of purported "punch list work" which have not been completed in accordance with the Construction Contract; and

(iii) eight subcontractors, who were listed on Exhibit B to the Amendment, and who have allegedly furnished neither a final lien waiver and release in the amount specified on Exhibit B, nor other proof of payment (*see* Bail Affid., Exs. F, G, H).

Defendants do not dispute that none of the three contingencies was satisfied by May 15, 2005, but assert that, insofar as the contingencies were not timely satisfied, the fault lies solely with MEHP. Defendants contend that "DKS faithfully performed its obligations to complete the Work" (Paul Affid., ¶ 13). However, according to defendants, MEHP insisted upon performing a substantial portion of the Work through subcontractors who MEHP contracted with directly, who were unrelated to DKS and not under DKS' control, and over whom MEHP retained direct control. Defendants assert that MEHP mismanaged the work of those other subcontractors, with the result that their work was deficient, defective, and delayed. Thus, defendants contend, it was MEHP's own "mismanagement of the work directly under its control ... which prevented DKS from being able to discharge its obligation to have the property inspected for a Certificate of Occupancy ... as per the Settlement Agreement's terms" (*id.*, ¶ 11).

Defendants' Holdback Claim is a claim for breach of contract, based upon the theory that "[MEHP] breached the [Settlement Agreement and/or the Amendment] first," by its own failure to timely and adequately complete the work which MEHP directly controlled, and that MEHP's "breach materially prejudiced DKS'[] ability to close out the Work" (*id.* [emphasis in original]; see also Answer, ¶ 23). Defendants do not identify any specific contractual provision that MEHP is alleged to have breached, and the Holdback Claim presumably means to allege a claim for breach of the implied covenant of good faith and fair dealing. However, defendants have failed to raise a triable issue of fact with regard to a claim against MEHP for breach of the implied covenant of good faith and fair dealing.

A covenant of good faith and fair dealing in the course of contract performance is implicit in every contract, which encompasses "an implied undertaking on the part of each party that he will not ***intentionally and purposely*** do anything to prevent the other party from carrying out the

agreement on his part" (*Tapps of Nassau Supermarkets, Inc. v Linden Blvd., L.P.*, 269 AD2d 306, 307 [1st Dept 2000] [emphasis added, citation and internal quotation marks omitted]). However, a claim for breach of the implied covenant of good faith and fair dealing is insufficient if it does not allege "that [the] plaintiff ***sought*** to prevent [the] defendant's performance of the contract[] or to withhold its benefits from defendant" (*Holmes Protection of New York, Inc. v Provident Loan Socy. of New York*, 179 AD2d 400, 400 [1st Dept 1992] [emphasis added]; *see also Dvoskin v Prinz*, 205 AD2d 661, 662 [2d Dept 1994]).

Defendants' Holdback Claim fails as a claim for breach of the implied covenant of good faith and fair dealing, first, because defendants do not assert that MEHP sought intentionally and purposely to prevent DKS from timely satisfying the contingencies, or preconditions to the return of Holdback Deposit. Rather, Paul states in his affidavit:

> It is as if [MEHP] had purposely tried to sabotage DKS'[] efforts to complete the project on time. But, in truth, upon information and belief, it was fully [MEHP's] incompetence, more than it was any purposeful design of [MEHP] to sabotage DKS'[] faithful performance of its work, to complete the project in accordance with the Settlement Agreement, that has caused this dispute between DKS and [MEHP].

(Paul Affid., ¶ 13.)

Moreover, although MEHP's alleged mismanagement of the work and subcontractors under its own direct control might arguably have been able to prevent DKS from timely satisfying the first and second contingencies, defendants have failed to offer any reasonable explanation as to how such mismanagement by MEHP could have prevented DKS from satisfying the third contingency. As previously indicated, the third contingency required that, by May 15, 2005, "each subcontractor listed on Exhibit B [to the Amendment] ... furnish[] a final lien waiver and release in the amount specified for such subcontractor on Exhibit B or furnish[] such other proof of payment satisfactory to [MEHP]" (Amendment, ¶ 11). The subcontractors "listed on Exhibit B [to the Amendment]" were presumably subcontractors who had contracted with DKS, rather than subcontractors who had contracted with MEHP directly -- who DKS claims were unrelated to DKS and not under DKS' control -- inasmuch as the recitals to the Amendment state that MEHP advanced the Shortfall Loan

to DKS: because "[DKS] ha[d] advised [MEHP] that the Final Payment deposited by [MEHP] ... [would] be insufficient to obtain the waivers, releases and dismissals [from subcontractors and suppliers] required under Paragraph 1 of the [Settlement] Agreement, and that [DKS did] not have sufficient funds to cover the shortfall"; and because "[DKS] ha[d] requested that [MEHP] loan the shortfall to [DKS]" for that purpose (Amendment, Third Paragraph). Thus, DKS has failed to raise a triable issue of fact regarding its contention that MEHP, by its own conduct, prevented DKS from satisfying the third contingency by May 15, 2005. Accordingly, since DKS' failure to timely satisfy even one of the three contingencies was a sufficient basis for the escrow agent's disbursement of the Holdback Deposit to MEHP, DKS has failed to raise an issue of fact precluding summary judgment dismissing its counterclaim.

Defendants raise several other arguments in opposition to MEHP's motion, each of which fails to raise an issue of fact precluding summary judgment in MEHP's favor on its claim for repayment of the Shortfall Loan. Defendants assert that Bail's affidavit is insufficient to support MEHP's motion for summary judgment, because she lacks the requisite personal knowledge of the matters in dispute in this action (*see* Paul Affid., ¶ 2). However, defendants' assertion concerning Bail is merely conclusory, and wholly unsupported by any factual allegation. Defendants contend that MEHP agreed orally, in negotiations between the parties, to extend the time within which DKS was required to repay the Shortfall Loan (*see id.*). However, such an oral agreement would be unenforceable, in any event, because the Amendment was merely an amendment to the terms of the Settlement Agreement, and because paragraph 12 of the Settlement Agreement specifically provides that "[t]his Agreement shall not be modified except by written agreement, duly executed by or on behalf of all parties." Defendants also assert: (1) that MEHP is pursuing this action against DKS because pressure is being exerted upon MEHP by its "client[s]/true owners" -- "which is/are, upon information and belief, the California Teachers Union Pension Fund and its Trustees" -- due to the lack of a certificate of occupancy, and because MEHP wishes to divert pressure and blame away from itself; and (2) that the work, even if it is not totally complete, was substantially completed by

or about July 25, 2004 (*id.*, ¶¶ 4-5, 8). However, even assuming the truth of both of those assertions, arguendo, defendants have failed to demonstrate their relevance to the instant motion.

Finally, with regard to interest on the Shortfall Loan, the Amendment provides that:

> The Shortfall [Loan] shall bear interest at a fixed rate of ten percent (10%) per annum from the date deposited by [MEHP] into escrow. In the event that [DKS] fails to pay to [MEHP] the Shortfall [Loan] and all accrued interest on or before June 1, 2005, [the amount unpaid and] due as of June 1, 2005[] shall bear interest at a default rate of eighteen percent (18%) per annum; such default rate shall apply starting as of June 2, 2005, and shall accrue ***both before and after judgment***.

(Amendment, ¶ 5 [emphasis added].) As a general rule, "a debt created by contract merges with a judgment entered on that contract, so that the contract debt is extinguished and only the judgment debt survives" (*Westinghouse Credit Corp. v Durso*, 371 F3d 96, 102 [2d Cir 2004] [citing *Marine Mgt., Inc. v Seco Mgt., Inc.*, 176 AD2d 252, 253 (2d Dept 1991), *affd* 80 NY2d 886 (1992)]). Thus, "contract language stating [merely] that a particular interest rate will accrue on a debt until the date of payment is interpreted as applying to the debt itself, and not to any judgment into which the debt is merged" (*Westinghouse Credit Corp. v Durso*, 371 F3d at 102 [citing *Marine Mgt., Inc. v Seco Mgt., Inc.*, 176 AD2d at 253]). However, inasmuch as the parties here have clearly, unambiguously, and unequivocally expressed their intent to override the general rule on merger, and to specify a post-judgment interest rate of 18% per annum, that intent will be given effect in the judgment (*cf. Banque Nationale De Paris v 1567 Broadway Ownership Assoc.*, 248 AD2d 154, 155 [1st Dept 1998]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff MEHP Park Avenue Ownership LLC and against defendants DKS Contractors, Inc., doing business as DKS Construction, Douglas Castoldi, and Stanislaw Paul, jointly and severally, in the amount of $232,382.53, together with interest at the rate of 10% per annum from the date of March 11, 2005 until the date of June 1, 2005, and together with interest on the entire foregoing amount at the rate of 18% per annum from the date of June 2, 2005 until the date of entry of judgment, as calculated by the Clerk, and thereafter at the rate of 18% per annum,

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together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: June 29, 2006

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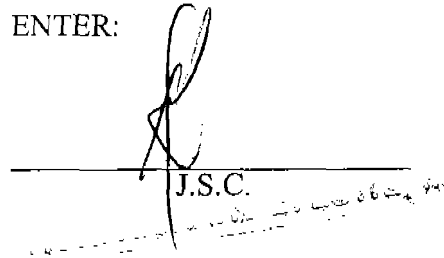

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