Executive Constr. Servs., Inc. v MKXT LLC
2006 NY Slip Op 30785(U)
March 8, 2006
Supreme Court, New York County
Docket Number: 109932/05
Judge: Martin Shulman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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EXECUTIVE CONSTRUCTION SERVICES, INC.,

Plaintiff,

Index No.: 109932/05

-against-

DECISION/ORDER

MKXT LLC, MARKET XT, OMAR SHARIF AMANAT, AMPEX CORPORATION, 135 EAST 57TH STREET LLC, COHEN BROTHERS REALTY CORPORATION, and GREENWICH INSURANCE COMPANY,

Defendants.

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Defendants Ampex Corporation ("Ampex") and Greenwich Insurance Company ("Greenwich") move to dismiss the first, second and sixth causes of action alleged in plaintiff Executive Construction Services, Inc.'s ("plaintiff" or "ECS") verified complaint pursuant to CPLR 3211 (the "motion"). Defendants 135 East 57th Street LLC ("135 LLC") and Cohen Brothers Realty Corporation ("CBRC") join in Ampex's and Greenwich's motion and cross-move for an order pursuant to CPLR 3211 dismissing plaintiff's first and sixth causes of action (the "cross-motion"). Plaintiff opposes the motion and cross-motion, which are consolidated for disposition.

Plaintiff's complaint (motion at Exhibit G) seeks to foreclose a mechanic's lien filed on or about July 25, 2003 against the premises known as and located at 135 East 57th Street, New York, New York (the "premises" or "building") based upon work, labor, services and materials which plaintiff furnished to defendant MKXT LLC a/k/a Market XT[1] ("MKXT") for the improvement of the twentieth floor of the building. Plaintiff alleges

[1] Although MKXT LLC and Market XT are named as separate defendants, it is alleged that MKXT LLC was also known as Market XT (complaint at ¶ 5) and that plaintiff contracted with MKXT LLC a/k/a Market XT (complaint at ¶ 15).

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that it is owed a balance of $49,237.69, the amount of its mechanic's lien, on its contract with MKXT in connection with its performance of such improvements. *Id.* at ¶15. Ampex, a tenant at the premises, subleased the twentieth floor of the premises to MKXT (McKibben Aff. at ¶¶ 3 and 4). 135 LLC is the owner of the building and CBRC is the building's managing agent (Itkowitz Aff. at ¶¶ 3 and 4).

Ampex, 135 LLC and CBRC argue that the first cause of action to foreclose the mechanic's lien must be dismissed against them for failure to state a cause of action since the mechanic's lien was not timely filed and is thus invalid. Greenwich argues that the second cause of action against it as surety on an undertaking filed by Ampex to discharge the mechanic's lien[2] must be dismissed for the same reason. The basis of the movants' contention with regard to the timeliness of the mechanic's lien is MKXT's vacatur of the premises on June 23, 2003, approximately one month before plaintiff filed the mechanic's lien.

ECS denies that its mechanic's lien was untimely and opposes the dismissal of the first cause of action, arguing that mechanic's liens attach to the property and not against the leasehold interest of a vacating tenant; issues with respect to the timeliness of filing the mechanic's lien must be reserved for trial; the lien is valid on its face; and discovery is needed to resolve issues pertaining to the moving defendants' knowledge and consent to plaintiff's performance.

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[2] In connection with a proceeding which Ampex commenced against ECS before this court under index number 116993/03, Ampex filed an undertaking in the amount of the mechanic's lien upon which Greenwich is the surety. Upon filing the undertaking, the mechanic's lien was discharged (McKibben Aff. at Exhibits D-F).

Lien Law §3 states that "[a] contractor, subcontractor, laborer, materialman, . . . who performs labor or furnishes materials for the improvement of real property **with the consent or at the request of the owner** thereof, or of his agent . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . ." (emphasis added). As defined in Lien Law §2(3), an "owner" may include "the owner in fee of real property", such as 135 LLC, or its agent CBRC. Also included in Lien Law §2(3)'s definition of "owner" is "a lessee for a term of years", such as Ampex.

While the moving defendants claim that ECS's mechanic's lien should be dismissed since it was not filed timely, Lien Law §19 "specifies the only grounds upon which an application may be based for the discharge of a mechanic's lien. . ." See *J. Fried Plumbing & Heating Corp. v. 245 Glenmore Ave. Corp.*, 55 A.D.2d 945, 391 N.Y.S.2d 142 (2nd Dept. 1977). With respect to plaintiff's argument that the mechanic's lien is valid on its face as regards the timeliness of its filing, Lien Law §19(6) provides in relevant part:

> Where it appears from the face of the notice of lien that the claimant has no valid lien . . . or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply . . . for an order summarily discharging of record the alleged lien.

In *J. Fried Plumbing & Heating Corp. v. 245 Glenmore Ave. Corp.*, *supra*, the Second Department found that it was error to grant a defendant's motion to dismiss the complaint in a mechanic's lien foreclosure action for failure to state a cause of action:

> The notice of lien in question is valid upon its face, specifically in that it clearly states that it was filed within four months after the completion of the contract. . . . "It has been consistently held that

> objections to a notice of lien which do not involve matters appearing on the face of the lien, raise issues of fact for disposition upon trial rather than upon motion to vacate the lien." (*Matter of Miller*, 133 NYS2d 421, 422).

Id., 55 A.D.2d at 946.

Lien Law §10 provides in relevant part that a notice of lien "may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished . . ." Here, ECS's mechanic's lien (Catanzaro Opp. Aff. at Exhibit A) facially indicates that it was filed within the foregoing eight month period. With the lien being sufficient on its face, the motion of Ampex and Greenwich and the cross-motion of 135 LLC and CBRC to dismiss the first and second causes of action of the complaint as against them must be denied.

The moving defendants correctly argue that a mechanic's lien extends "to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien . . ." Lien Law §4(1). However, the argument that no lien can exist as to the moving defendants since MKXT no longer had an interest in the premises at the time of filing presupposes that Ampex, 135 LLC and CBRC are not "owners" who consented to plaintiff's improvement of the premises within the meaning of Lien Law §3. The complaint's allegations with respect to such consent, though scant (and presumed to be true and accorded every favorable inference as is the standard on a CPLR 3211 motion to dismiss), state a cause of action for foreclosure of ECS's mechanic's lien as against the moving defendants sufficient to withstand a motion to dismiss. See *Morone*

v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980)(on a motion to dismiss a complaint, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory).

The moving defendants urge that, if the court considers extrinsic evidence on a CPLR 3211 motion such as affidavits and exhibits the complaint's allegations should not be deemed true and accorded every favorable inference. *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 80-81, 692 N.Y.S.2d 304 (1st Dept. 1999), affd., 94 N.Y.2d 659, 709 N.Y.S.2d 861 (2000). The consent required under Lien Law §3 cannot be "mere acquiescence and benefit . . ." (*Valsen Const. Corp. v. Long Island Racquet & Health Club, Inc.*, 228 A.D.2d 668, 669, 645 N.Y.S.2d 317 [2nd Dept. 1996]) from the alleged improvements, but must be established by some affirmative act or course of conduct on the part of the moving defendants. *Id.* At this juncture, the record before this court is insufficient to support any finding of the owner's/agent's consent for the improvements.

Ampex, 135 LLC and CBRC further argue that the sixth cause of action for unjust enrichment and quantum meruit must be dismissed since plaintiff's contract with MKXT precludes such a claim; performance by plaintiff was not rendered to the moving defendants; and any consent to the work performed does not render such defendants liable to plaintiff. ECS does not specifically oppose the dismissal of the sixth cause of action other than to argue that the moving defendants consented to plaintiff's work and have benefitted from the improvements to the building.

"A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a

party's unjust enrichment." *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653 (1987). "It is well settled that in order to recover under a theory of quasi contract, a plaintiff must be able to prove that performance was rendered for the defendant, resulting in its unjust enrichment." *Metropolitan Electric Mfg. Co. v. Herbert Const. Co., Inc.*, 183 A.D.2d 758, 759, 583 N.Y.S.2d 497, 498 (2nd Dept. 1992).

Here, plaintiff concedes having contracted only with MKXT (complaint at ¶15). However, plaintiff fails to allege, and there is nothing in the record to establish, that any of the moving defendants were in privity of contract with ECS or that they assumed an obligation to pay plaintiff. *Id.* See also, *Amana Elevation Corp. v. Ydrohoos-Aquarius, Inc.*, 244 A.D.2d 371, 372, 664 N.Y.S.2d 88 (2nd Dept. 1997), lv. to app. den., 91 N.Y.2d 806, 668 N.Y.S.2d 561 (1998) (unjust enrichment claim against lessor/owner dismissed where plaintiff contracted only with tenant and lessor/owner assumed no obligation to pay); *Graystone Materials, Inc. v. Pyramid Champlain Co.*, 198 A.D.2d 740, 604 N.Y.S.2d 295 (3rd Dept. 1993). Moreover, even if the moving defendants consented to the improvements provided by ECS and accepted the benefit of same, such consent does not render them liable to plaintiff under a quasi contract claim. *Metropolitan Electric Mfg. Co.*, *supra*; *Amana Elevation Corp.*, *supra*; *Graystone Materials, Inc.*, *supra*.

Finally, the existence of an express contract between plaintiff and MKXT precludes ECS from maintaining a cause of action sounding in quasi contract against the moving defendants. *Metropolitan Electric Mfg. Co.*, *supra*. Accordingly, plaintiff fails

to state a cause of action against Ampex, 135 LLC and CBRC for unjust enrichment and the sixth cause of action is dismissed as to said defendants.

Accordingly, it is hereby

ORDERED that those branches of the motion and cross-motion to dismiss the first cause of action as against Ampex, 135 LLC and CBRC are hereby denied; and it is further

ORDERED that the branch of the motion seeking to dismiss the second cause of action as against Greenwich is hereby denied; and it is further

ORDERED that those branches of the motion and cross-motion to dismiss the sixth cause of action as against Ampex, 135 LLC and CBRC are hereby granted.

Pursuant to CPLR 3211(f), Ampex, Greenwich, 135 LLC and CBRC shall serve answers to the verified complaint within twenty (20) days of the date of this decision and order. Counsel for the parties are directed to appear before this court for a preliminary conference on April 11, 2006 at 10:00 a.m., 111 Centre Street, Room 1127B, New York, New York. Plaintiff's counsel shall notify those defendants (other than the moving defendants) who have appeared in this action of the scheduled conference date.

The foregoing constitutes the Decision and Order of this Court. Courtesy copies of this Decision and Order have been provided to counsel for plaintiff and the moving defendants.

Dated: New York, New York
March 8, 2006

Hon. Martin Shulman, J.S.C.