

**Local Union No. 1 of United Assn. of Journeymen &
Apprentices of Plumbing & Pipe Fitting Indus. of
U.S. & Can. v St. Paul Fire & Mar. Ins. Co.**

2007 NY Slip Op 30251(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0107744

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

LOCAL UNION NO. 1 of the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA for and on behalf, of ROGER ADAMS, ERVIN HANCLE, MICHAEL FALMMIA, individually and on behalf of all persons similarly situated,

Index No.: 107744/05
Motion Date: 11/21/06
Motion Seq. No.: 02
Motion Cal. No.: 84

Plaintiffs,

- v -

ST. PAUL FIRE AND MARINE INSURANCE COMPANY and SEABOARD COMPANY,

Defendants.

The following papers, numbered 1 to 4 were read on this motion to amend the complaint.

FILED

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits
Answering Affidavits - Exhibits
Replying Affidavits - Exhibits

1, 2
3
4

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall in this order consider together the defendants' motion for summary judgment (Motion Seq. No. 1) and the plaintiffs' motion to amend the complaint (Motion Seq. No. 2).

The legal issue presented on defendants' motion for summary judgment is whether the plaintiffs have standing under State

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

Finance Law §137 to recover alleged unpaid wages and benefits. Defendants assert that the plaintiffs, employees of Tradeline Contracting Corp., are not entitled to seek relief under the bond issued by defendants in connection with the project at issue because, according to defendants, Tradeline is not a "contractor or [a] subcontractor of the contractor" within the meaning of the statutory bond. Defendants argue that they assumed the obligation to complete the project as surety after the default of the general contractor, Excel Group, and that the defendants then hired JPR Mechanical, Inc., who in turn contracted with Tradeline. Defendants therefore assert that they are sureties to Excel and not to JPR and therefore the plaintiffs cannot be beneficiaries of the surety.

Plaintiffs counter that because no court order discovery has been undertaken in this action it is only upon the filing of this motion that they became aware of the contract between JPR and the defendants. Plaintiffs now seek to amend their complaint to add JPR as a party and to assert appropriate third-party beneficiary claims.

The court shall grant the plaintiffs' motion to amend the complaint and deny the defendants' motion for summary judgment as premature under CPLR 3212 (f). Plaintiffs' third-party beneficiary claims may be legally cognizable under prevailing law. As stated by the First Department in a similar context

Plaintiffs' claim that they were denied prevailing wages and benefits--even in the absence of a Labor Law violation--is not foreclosed simply because they were not parties to the contracts. Indeed, the Labor Law is not the exclusive remedy to recover prevailing wages. If it were, as the Court of Appeals has explained, plaintiffs would be left with no legal remedy, a result the Legislature clearly did not intend.

De La Cruz v Caddell Dry Dock & Repair Co., Inc., 22 AD3d 404, 405 (1st Dept 2005). Because the plaintiffs' claims in this action turn upon the contractual relationship between the defendants, Excel, JPR and Tradeline, "facts essential to justify opposition . . . but cannot [now] be stated" are in possession of the defendants and the plaintiffs are entitled to assert the claims in the amended complaint and seek discovery thereupon. Therefore the court shall grant this motion to amend the complaint (Motion Seq. No. 2) and for the reasons herein deny defendants' motion for summary judgment without prejudice by separate order of this same date (Motion Seq. No. 1).

Accordingly, it is

ORDERED that the plaintiff's motion for leave to amend the summons and complaint is GRANTED and the amended complaint in the proposed form annexed to the moving papers shall be served, with a copy of this Order with notice of entry thereof, upon all defendants and added defendant JPR MECHANICAL, INC., in accordance with the CPLR with 20 days of entry of this Order; and it is further

ORDERED that defendants shall serve an answer to the amended complaint within such time delineated in the CPLR; and it is further

ORDERED that the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon defendants upon service of a copy of this order with notice of entry thereupon; and it is further

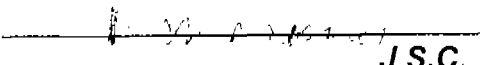
ORDERED that the plaintiff shall serve a copy of this Order with notice of entry upon the Clerk of the County and the Clerk of the Trial Support Office, Room 158, 60 Centre Street, who are directed to amend their records to reflect that JPR MECHANICAL, INC., is added as a first-party defendant; and it is further

ORDERED that the parties are directed to attend a preliminary conference on April 24, 2007, in IAS Part 59, Room 1254, 111 Centre Street, at 9:30 A.M.

This is the decision and order of the court.

Dated: March 5, 2007

ENTER:


DEBRA A. JAMES
J.S.C.

FILED

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