

York Hunter Constr. Servs., Inc. v El-Ad Skyview, Inc.

2007 NY Slip Op 32790(U)

August 30, 2007

Supreme Court, New York County

Docket Number: 0120872/2003

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 120872/2003
YORK HUNTER CONSTRUCTION
vs
EL-AD SKYVIEW
Sequence Number : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED
SEP 07 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Aug. 30, 2007

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
YORK HUNTER CONSTRUCTION SERVICES,
INC.,

Plaintiff,

-against-

EL-AD SKYVIEW, INC., H.G. SKYVIEW, INC.,
TITLE ASSOCIATES AGENCY, INC., and JOHN
AND JANE DOES 1 THROUGH 100, the names
John and Jane Doe being fictitious, representing
owners and holders of liens against the subject
premises, the true names of defendants being
currently unknown,

Defendants.
-----X

Decision/Order

Index No.: 120872/03
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

FILED
SEP 07 2007
NEW YORK
COUNTY CLERKS OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Pltf's motion [amend] w/SC affirm in support, exhs	1
Def's cross mot [psj] w/SJG affirm in support, MN affid, memo, exhs	2
Pltf's KC reply affid in further support/opp, SC affirm, exhs	3
Def's SJG reply affirm in further support/opp, memo, exhs	4

Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action was brought to foreclose on a mechanic's lien. Plaintiff York Hunter Construction Services, Inc. ("York Hunter") now moves to amend the complaint to add 68 individual condominium unit owners. CPLR § 3025(b); Lien Law § 44. Defendants El-Ad Skyview, Inc. and H.G. Skyview, Inc. (collectively herein referred to as "Skyview") oppose the motion and cross-move for partial summary judgment: (1) reducing York Hunter's breach of contract and lien foreclosure claims to \$2,516; and (2) dismissing York Hunter's claim for damages due to an alleged breach of a "last look agreement." Title

Associates Agency, Inc. has taken no position on either of these motions.¹

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief may be considered by the court. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

Skyview is the former owner of real property located at 151 West 17th Street, New York, New York (the "Premises"). Skyview purchased the Premises to convert it to residential condominium units. On August 3, 2000, pursuant to a written agreement, Skyview retained York Hunter as its construction manager for pre-construction work in connection with the Premises (the "Pre-Construction Contract"). Skyview agreed to compensate York Hunter at a rate of \$8,000 per month, plus the direct project-related costs of salaries and expenses. York Hunter claims that Skyview still owes it \$139,656 under the Preconstruction Contract.

Skyview then retained York Hunter to act as a general contractor for the foundation and excavation work, executing a second, separate contract for such work on December 5, 2000 (the "Contract"). It is undisputed that the original price of the Contract was \$1,795,000 and the final price was \$1,902,000. The difference between the original and final price reflects "extra work" which was expressly agreed to by the parties. Based on a spreadsheet, Skyview now claims that it agreed to pay York Hunter only a total of \$296,000 representing \$236,000 for general conditions and an additional fee of \$60,000. The balance of the original contract price of \$1,499,000 (\$1,795,000 less \$296,000) it claims was to go to Civetta. The express language of the contract, however, does not reflect this

¹Title Associates Agency, Inc. is also represented by counsel for Skyview.

arrangement. Instead it provides that Skyview will pay York Hunter and York Hunter will in turn pay Civetta.

York Hunter commenced work at the Premises pursuant to the Contract on December 19, 2000. On December 21, 2000, York Hunter entered into a subcontract with John Civetta & Sons, Inc. ("Civetta") for the performance of excavation and foundation work on the Premises, in the amount of \$1,499,000 (the "Sub-Contract").

Sometime in December 2000, Skyview entered into a third written contract with York Hunter. Skyview agreed to provide York Hunter the opportunity to review and match the lowest acceptable bid obtained by Skyview for the performance of additional construction work ("superstructure work") required at the Premises (the "Last Look Agreement").

While work on the contract was progressing, York Hunter sent Skyview monthly payment requisitions seeking payment under the Contract. Each payment requisition included an itemized breakdown of the amount of work performed by Civetta on the foundation and excavation work, as well as the amount of York Hunter's fees and reimbursable expenses for the specified period.

On January 29, 2001, Skyview made a payment of \$370,000 to York Hunter under the contract, which was to be allotted as follows: (1) York Hunter was to receive \$100,000; and (2) Civetta was to receive \$300,000, less a 10% "retainage" (the "retainage" was to be paid upon completion of the foundation and excavation work), leaving a net payment to Civetta of \$270,000. Sometime thereafter, York Hunter delivered \$270,000 to Civetta.

York Hunter claims that on February 22, 2001, it learned that Skyview had awarded the superstructure work to another contractor, Kreisler Borg Florman General Construction Co., Inc. ("KBF"), "without providing York Hunter the opportunity to review or match the bid,"

in violation of the Last Look Agreement. Skyview claims that it did show York Hunter the KBF's bid documents, but that York Hunter was unable to bid lower than KBF.

On February 27, 2001, Skyview made another payment to York Hunter under the contract in the amount of \$440,000. This payment was allotted as follows: (1) York Hunter was to receive \$35,640; and (2) Civetta was to receive \$439,000, less the 10% retainage, leaving a net payment to Civetta of \$395,100. York Hunter never delivered to Civetta the amount allotted under this second payment. York Hunter claims it withheld this payment due to Skyview's failure to pay under the Pre-Construction Contract.

Upon receipt of York Hunter's third payment requisition dated March 27, 2001, Skyview in turn withheld payment because York Hunter failed to pay Civetta in accordance with the February 27, 2001 payment. York Hunter and Civetta, however, continued working on the Premises.

On April 25, 2001, York Hunter demanded payment under the third payment requisition from Skyview and specifically stated that "payment terms with our subcontractor are not a prerequisite to payment." On April 27, 2001, Skyview informed York Hunter that the check for the third payment requisition would be sent as soon as York Hunter provided Skyview with proof of the outstanding payment owed to Civetta. Skyview also demanded that York Hunter's work be free of any liens, claims or other encumbrances on the owner's interest.

On May 1, 2001, York Hunter responded, again demanding payment and stating that it's work was, in fact, free from liens, claims and other encumbrances. York Hunter submitted another payment requisition dated May 1, 2001, which also went unpaid.

By letter dated May 7, 2001, Skyview maintained that all further payments would be

withheld under Paragraphs 14.1, 14.2 and 14.2.3 under the Contract, "due to York Hunter's failure to pay its subcontractor, Civetta." On May 14, 2001, York Hunter filed a Notice of Mechanic's lien in the amount of \$1,234,516 (the "Lien") on the Premises.

On May 24, 2001, Skyview provided York Hunter with a notice of default under the contract for "failing to pay its subcontractor with sums paid York Hunter by [Skyview] for work performed by said subcontractor." The default notice required York Hunter to pay Civetta within seven days or the Contract would be terminated.

On June 1, 2001, Skyview sent York Hunter a termination letter for failing to remedy the default. Skyview claims that York Hunter never returned to work after May 14, 2001, although York Hunter claims that it continued to work under the Contract, along with its subcontractors, until June 1, 2001 when it received the termination letter.

Meanwhile, on June 1, 2001, Skyview entered into a direct contract with Civetta to complete the work at the Premises for the sum of \$760,000 (the "Civetta-Skyview Contract"). Skyview claims that by this contract, Civetta granted Skyview a full release for all claims, even those still outstanding under the Contract with York Hunter.

York Hunter submitted its final payment requisition on June 20, 2001, claiming that 97% of the contract work had been completed. This final payment requisition also went unpaid.

After York Hunter's termination, York Hunter never made any further payments to Civetta. Therefore, Civetta brought a lawsuit against York Hunter, in 2002, entitled John Civetta and Sons, Inc. v. York Hunter Construction, Index No. 104140/02 ("Civetta Action"). Civetta obtained a judgment against York Hunter in the amount of \$469,000, together with interest at the rate of 9% per annum from the date of 5/24/01 (order, Gammerman, J. dated

3/20/03).

Arguments of the Parties

York Hunter now moves to amend its complaint to add 68 individual unit owners ("Unit Owners") as named defendants to this action. CPLR § 3025(b); Lien Law § 44. York Hunter argues that this relief should be granted because it filed its lien against the Premises before it was converted to condominiums and the current Unit Owners are now necessary parties to the lien foreclosure cause of action because of their ownership interests in the Premises. York Hunter contends that the Unit Owners cannot claim surprise at being named as defendants because the Unit Owners had constructive and actual notice of the Lien prior to purchasing the units.

Skyview opposes York Hunter's motion. It claims that since issue has been joined and discovery is almost complete, the addition of 68 new parties "can only serve to delay discovery and further proceedings." Skyview also contends that York Hunter's motion is untimely since it moved to amend its complaint three years after commencement of the underlying action.

Skyview also cross-moves for partial summary judgment. It claims that York Hunter has vastly overstated its claims arising from non-payment under the Contract on its first, second, third and fourth causes of action (for breach of contract, services rendered, account stated and lien foreclosure, respectively) and that York Hunter's maximum damages are \$2,516. Skyview also moves to dismiss York Hunter's claim for damages arising from Skyview's alleged breach of the Last Look Agreement (sixth cause of action). Skyview opposes York Hunter's interpretation of the "last look" proviso in the agreement and specifically claims that the Last Look Agreement did not require Skyview to provide

York Hunter with the other contractor's bid documents for the superstructure work, but rather, provides that York Hunter be afforded a last look at the bid itself. Skyview also claims that regardless, York Hunter was provided with KBF's documents related to its bid for the superstructure work. Skyview also contends that York Hunter cannot establish damages because it could not beat KBF's bid for the superstructure work.

Discussion

The Cross Motion for Summary Judgment

The court opts to consider the cross motion first, since its disposition may bear upon the motion in chief.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination."

Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

Two fundamental principles of contract construction are that: [1] agreements are to be construed in accordance with the parties intent; and [2] the best evidence of what the parties intend is what they provide in their writing. Greenfield v. Phillies Records, 98 NY2d 562 (2002); Van Kipnis v. Van Kipnis, __ AD3d __ (1st dept. 2007); 2007 Slip Op 06074. A written agreement that is complete, clear and unambiguous on its face, must be enforced according to the plain meaning of its terms. In this case, the court analyzes the contract according to its terms and rejects at the outset Skyview's contentions that the parties intended payment in a way other than as specified in the Contract.

Skyview argues that at most, it can only be liable to York Hunter for damages of \$542,656, to wit: (1) \$139,656 due under the Pre-Construction Contract; (2) \$236,000 for general conditions under the Contract; (3) \$60,000 for fees under the Contract; and (4) \$107,000 for extra work under the Contract. Skyview argues that the remaining \$1,499,000 due under the Contract was allotted for Civetta's work on the foundation and excavation work, and therefore, is due directly to Civetta.

The Contract provides that:

"ARTICLE 3 CONTRACT SUM

3.1 The Owner [defendant] shall pay the Contractor [plaintiff] the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be One Million Seven Hundred and Ninety Five Thousand Dollars (\$1,795,000), subject to additions and deletions as provided in the Contract Documents."

The plain meaning of Article 3 of the Contract is that Skyview agreed to pay \$1,795,000, plus an unspecified amount for additions, to York Hunter. The court rejects Skyview's assertion that Skyview should "hold" those funds due under the Contract and allotted for Civetta, as if it were the proper payee. This argument belies the plain meaning of the Contract. Further, York Hunter has its own obligations to Civetta under the Sub-Contract, and, in fact, has a judgment against as a result of the Civetta Action.

Skyview contends that by its subsequent contract with Civetta, a portion of the amount due under the Contract has already been discharged. York Hunter is not a signatory to the Civetta-Skyview Contract. The Civetta-Skyview Contract does not refer to the Contract, does not provide for a release of York Hunter's obligations under the Sub-Contract. Indeed, there is a judgment against York Hunter and in favor of Civetta as a result of the Civetta Action and there is no proof that Civetta is required to forebear enforcement of that judgment as a result of the Skyview-Civetta Contract.

Accordingly, Skyview's cross-motion for partial summary judgment on the first, second, third and fourth causes of action is hereby denied.

The court further finds that Skyview has not met its burden of proof on that branch of the cross-motion seeking partial summary judgment on the sixth cause of action related to the Last Look Agreement. Skyview claims that the Last Look Agreement merely required Skyview to provide York Hunter with a "last look" at other contractor's bids, as opposed to all the bidding documents.

The Last Look Agreement provides as follows:

"... (a) York Hunter will be one of the select group of bidders from which we will solicit bids for [the superstructure work],
(b) after receipt of all bids... we will afford York Hunter a

"last look" for such work, (c) *provided York Hunter has submitted the lowest price on an identical scope basis*, and (d) provided we are entitled to select York Hunter's personnel for the performance of this project, we will award the work to York Hunter. For this purpose, we shall afford York Hunter reasonable access to review the other contractor's bids" (emphasis added).

Skyview claims it complied with the Last Look Agreement in that it provided York Hunter with access to all other contractor's bids, including KBF. In support of this claim, Skyview has provided a one-page budget summary from both KBF and York Hunter, dated February 2 and February 6, 2001, respectively. According to these summaries, KBF had submitted a lower bid than York Hunter. York Hunter claims that the budget summaries were not the equivalent of a formal bid, and therefore, cannot reflect a final price. There exists a genuine triable issue of material fact as to whether York Hunter was given documents reflecting a final bid and further whether it submitted the lowest price on an identical scope basis.

Accordingly, Skyview's motion for partial summary judgment on the sixth cause of action is hereby denied.

The Motion to Amend

The court next turns to York Hunter's motion to amend the complaint to add as defendants the 68 Unit Owners. CPLR § 3025(b).

"Leave to amend a pleading is to be freely given where... there is no showing of prejudice or surprise to the nonmoving party, and the proposed amendment is not totally devoid of merit." Gjokaj v. Fox, 25 A.D.3d 759 (2d Dept. 2006).

There is no dispute that the Unit Owners are necessary parties to the lien foreclosure action [Lien Law § 44] and that at the time the lien was filed, construction was ongoing.

When York Hunter commenced this action, it named as defendants the "owners and holders of liens against the subject premises, the true names of defendants being currently unknown." York Hunter also filed a Notice of Pendency against each of the units.

Skyview argues that the court should deny this motion because it is untimely since the action was commenced in 2003 and York Hunter should have named and/or added the Unit Owners at that time. As an excuse for its delay, York Hunter claims that it now seeks to amend the complaint because it has recently learned the identities of the Unit Owners. The court finds this excuse tenable.

Skyview's other argument that since discovery is almost complete, the addition of the 68 Unit Owners will only serve to delay discovery, is also unavailing. The unit owner's interest in this dispute is relatively collateral to the main dispute between the presently appearing parties. The delay caused by any additional discovery can be blunted by a relatively expedited schedule to complete discovery. The court sets this as a condition to amendment. CPLR § 3025(b).

York Hunter shall file and serve the proposed Supplemental Summons and Amended Complaint (Exhibit "A" to its motion papers) on the 68 Unit Owners within 30 days. Service on appearing counsel shall be completed within 20 days.

The conference previously scheduled in this matter on September 20, 2007 at 9:30 a.m. is hereby rescheduled by the court for November 1, 2007 at 9:30 a.m. at 80 Centre Street, Room 122. At that time, the court will set an expedited discovery schedule for any new parties that have appeared. The note of issue is hereby extended to January 31, 2008.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion by plaintiff York Hunter Construction Services, Inc. to amend the complaint to add the 68 Unit Owners is hereby granted; and it is further

ORDERED that the cross motion by defendants El-Ad Skyview, Inc. and H.G. Skyview, Inc. for partial summary judgment is hereby denied in its entirety; and it is further

ORDERED that York Hunter Construction Services, Inc. shall file and serve the proposed Supplemental Summons and Amended Complaint (Exhibit "A" to its motion papers) on the 68 Unit Owners within 30 days. Service on appearing counsel shall be completed within 20 days; and it is further

ORDERED that the status conference in this matter previously scheduled for September 20, 2007 at 9:30 a.m. is hereby rescheduled by the court to November 1, 2007 at 9:30 a.m. at 80 Centre, Room 122. The note of issue is hereby extended to January 31, 2008.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
August 30, 2007

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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