

Mercado v ESCO Constr.

2007 NY Slip Op 33375(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0604294/2001

Judge: Barbara Kapnick

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

PRESENT: BARBARA R. KAPNICK
J.S.C. Justice

PART 12

Index Number : 604294/2001
MERCADO, DANIEL
vs
ESCO CONSTRUCTION
Sequence Number : 002
REARGUMENT/RECONSIDERATION

INDEX NO. 604294/01
MOTION DATE: _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____
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
OCT 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/15/07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

BARBARA R. KAPNICK
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X

DANIEL MERCADO, ANTHONY RUIZ, ELROY CUSTODIO, JESUS ROLDAN and RENALDO HOUSE individually and on behalf of all other persons similarly situated who were employed by ESCO CONSTRUCTION, J. WALTER ENTERPRISES, INC., RIVERVIEW ARCHITECTURAL PRODUCTS, INC. and KEYSTONE WINDOW INSTALLERS, INC. with respect to certain Public Works Projects awarded by the NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, the CITY OF NEW YORK and the STATE OF NEW YORK,

Plaintiffs,

- against -

ESCO CONSTRUCTION, J. WALTER ENTERPRISES, INC., RIVERVIEW ARCHITECTURAL PRODUCTS, INC., KEYSTONE WINDOW INSTALLERS, INC. NEELAM CONSTRUCTION CORP., ULICO CASUALTY INSURANCE COMPANY and RELIANCE INSURANCE COMPANY who furnished labor and material bonds on the Public Works Projects awarded by the NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, the CITY OF NEW YORK and the STATE OF NEW YORK,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

This action is brought by a class of trade laborers who allege that they were not paid the prevailing wage and/or did not receive the prevailing supplemental benefits for their work on certain public projects, as required by Labor Law § 220.

DECISION/ORDER
Index No. 604294/01
Motion Seq. No. 002

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Defendants Neelam Construction Corp. ("Neelam"), the general contractor on certain public work projects performed for the New York City School Construction Authority, and Reliance Insurance Company ("Reliance"), the surety for the projects, previously moved (under motion sequence number 001) to dismiss the complaint on various grounds.

By Decision/Order dated September 11, 2006, this Court found, inter alia, that "consistent with the liberal construction which is to be afforded Labor Law § 220 ... plaintiffs are not precluded from claiming that they are third-party beneficiaries of the prime contracts merely because they were employed by sub-subcontractors", and thus denied that portion of the motion seeking to dismiss plaintiffs' third cause of action against defendant Neelam for breach of contract.

However, this Court also found that "[i]n contrast, the bond that Reliance signed expressly limits its potential liability to those 'having a direct contract with [Neelam] or with a Subcontractor of [Neelam].'" Finding that none of the plaintiffs alleges to have had a direct contract with either Neelam or Neelam's subcontractor, Riverview Architectural Products, Inc. ("Riverview"), who was engaged to supply and install windows at two

of the projects, this Court dismissed the Complaint against defendant Reliance.

Plaintiffs now move for an order pursuant to CPLR § 2221(d) granting them leave to reargue the prior Decision/Order of this Court. Notwithstanding the contractual provision limiting Reliance's potential liability to persons having a direct contract with either the general contractor or one of its direct subcontractors, plaintiffs argue that they still have a right to sue the surety under State Finance Law § 137 and Labor Law § 220-g.¹

State Finance Law § 137 provides, in relevant part, as follows:

3. *Every person* (emphasis supplied) who has furnished labor or material, to the contractor or to a subcontractor of the contractor, in the prosecution of the work provided for in the contract and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was performed or material was furnished by him for which the claim is made, shall have the right to sue on such payment bond in his own name for the amount, or

¹ In addition, plaintiffs argue that it is unknown at this stage of the litigation, prior to the depositions of either Neelam or Riverview, with what entities the class members had employment relationships (i.e., "contracts"). They further contend that a 'direct contract' between Neelam (and Riverview) and the plaintiffs was established because plaintiffs supplied labor on the construction project.

the balance thereof, unpaid at the time of commencement of the action;...

Defendants, however, contend that barring plaintiffs from bringing this action against Reliance would not conflict with this statute since section 137 refers only to persons who have furnished labor or material "to the contractor or to a subcontractor of the contractor".

Defendants further argue that the statute should not be interpreted to grant persons who furnished labor or material to 'sub-subcontractors' a right to sue and that this Court should adhere to its prior Decision precluding plaintiffs from bringing the types of 'attenuated' claims barred under the terms of the bond.

However, it has been held that "[w]here, as here, the bond was issued pursuant to State Finance Law § 137, 'the statutory text is to be read into the instrument' (citations omitted). Although the contract limited the remedy to those who had a direct contract with the subcontractor, the statute requiring the bond had no such limitation." Scaffold-Russ Dilworth Ltd. v. Shared Management Group, Ltd., 289 A.D.2d 932, 934-935 (4th Dep't 2001).

Thus, section 137 - which must be read into the bond issued by Reliance - permits persons, such as plaintiffs, who furnished labor or material on public construction projects to 'sub-subcontractors', to bring claims against the payment bond.

In addition, section 220-g of Article 8 of the Labor Law provides, in relevant part, as follows:

For the purpose of enforcing this article, *the affected employee* may bring an action to recover from the bond which is required by section one hundred thirty-seven of the state finance law, of the contractor, the subcontractor or both, unpaid wages and supplements, including interest as provided for in subdivision eight of section two hundred twenty of this article, due to persons furnishing labor to either the contractor or subcontractor. *Said action may be brought against the contractor, the subcontractor, or the issuer of such bond, without prior notice, within one year of the date of the last alleged underpayment, or within one year of the date of the filing of an order by the commissioner or other fiscal officer determining a wage or supplement underpayment...* (emphasis supplied).

The Appellate Division, First Department, has held that "the public policy implemented by article 8 of the Labor Law, seeking to ensure payment of prevailing wages on public construction contracts, is paramount to the surety's interest in avoiding liability for obligations imposed upon it without its consent."

Sullivan v. International Fidelity Insurance Company, 255 A.D.2d 128 (1st Dep't 1988).

Notwithstanding this holding, defendants Neelam and Reliance argue that the plaintiffs may not rely on Labor Law § 220-g because the Complaint does not assert any claim for prevailing wages under that provision.

However, plaintiffs' sixth cause of action does allege, inter alia, that "Reliance assumed joint and several liability with Neelam to pay plaintiffs ... any and all wages and supplemental benefits due and owing to them which the Subcontractor-Employers failed to pay for work performed on the Public Works Projects" and that, therefore, Reliance is "required to make payment to Plaintiffs and members of the putative class in an amount to be determined at trial.

Therefore, this Court finds that plaintiffs' Complaint does set forth the elements of a claim under section 220-g of the Labor Law. See, Mercado v. Excel Group, Inc., 7 Misc.3d 1007(A) (Sup. Ct., N.Y. Co. 2004).

Accordingly, based on the papers submitted and the oral argument held on the record on March 28, 2007, plaintiffs' motion

for leave to reargue this Court's prior Decision/Order is granted, and, upon reargument, that portion of the original motion seeking to dismiss plaintiffs' Complaint against defendant Reliance is denied and this Complaint against Reliance is reinstated.

All parties are directed to appear for a status conference in IA Part 12, 60 Centre Street, Room 341 on November 14, 2007 at 9:30 a.m. in order to coordinate all outstanding discovery.

This constitutes the decision and order of this Court.

Date: October 15, 2007


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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