

Fast Track Construction, Inc. v Strickland

2007 NY Slip Op 34212(U)

December 12, 2007

Supreme Court, New York County

Docket Number: 0601439/2007

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.**

PART _____

Justice

Index Number : 601439/2007

FAST TRACK CONSTRUCTION

vs.

STRICKLAND, CAROL

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 601439-07

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

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

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

Dated: 12/12/07

JUDITH J. GISCHE, J.S.C.

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----X
Fast Track Construction, Inc.,
Capital Emte Construction, Inc.,
R. March Management, Inc.,
Forte Express Plumbing and Heating,

Plaintiffs,

-against-

Carol Strickland and 80 CPW
Apartments Corp. *et al*,

Defendants
-----X

Decision/Order

Index No.: 601439/07

Seq. No.: 001

Present:

Hon. Judith J. Gische, J.S.C.

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

Papers	Numbered
Def CS's n/m (3211) w/ CS affid, BJM affirm, exhs	1
Pltff's opp w/JW affirm, exhs	2
CS reply w/BJM affirm, exhs	3

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.;

This is an action to foreclose a mechanic's lien and related relief. The court has before it the motion of defendant Carol Strickland ("Ms Strickland" at times "defendant") who seeks the pre-answer dismissal of this action pursuant to CPLR 3211 (a) (1), (3), (7) and (10). Neither of the other defendants have thus far appeared or answered the complaint. They have taken no position on Ms. Strickland's motion, though due proof of service on them has been filed. Plaintiff opposes the motion in all respects.

On a motion to dismiss, the pleadings are afforded a liberal construction, and the facts as alleged by the plaintiff are accepted as true unless disproved by documentary evidence. The following facts and claims are considered by the court in connection with this motion:

Facts and arguments

Ms. Strickland is the shareholder and proprietary lessee of apartment 6C, a coop apartment ("the apartment") located at 80 Central Park West in New York County. The building is owned by

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defendant 80 CPW Apartments Corp. In September 2005, defendant undertook renovations to the apartment. The plaintiffs, all contractors who are in the construction business, contend they provided services, including labor, equipment and materials, to Ms. Strickland, but she did not pay for them. Consequently, they filed mechanic's liens against the apartment, recorded against the building.

Plaintiff Fast Track Construction, Inc. ("Fast Track") contends it filed a mechanic's lien in the amount of \$18,529.47 on April 25, 2006, which it extended on March 22, 2007. Plaintiff Capital Emte Construction, Inc. ("Capital") alleges it filed a mechanic's lien under the name "Capital Elite Construction, Inc." in the amount of \$14,312 on March 31, 2006, which it extended on February 26, 2007. Plaintiff R. March Management, Inc. ("March") filed its lien on May 12, 2006 in the amount of \$6,044.46; it did not require extension. Plaintiff Forte Express Plumbing and Heating ("Forte") contends it filed a mechanic's lien in the amount of \$3,967.74 on May 1, 2006, which it extended on April 13, 2007. The plaintiffs filed a single Notice of Pendency of Action in the amount of \$42,853.67 on May 12, 2007. This action was commenced with the filing of the summons and complaint on May 1, 2007. Defendant was served with the pleadings on May 17, 2007.

Plaintiffs contend that Capital had a direct oral agreement with defendant to provide her with construction services and that Capital used the other three named plaintiffs to perform certain specialized parts of the project. While plaintiffs do not deny that another company by the name of Darryl Brown Incorporated ("DBI") was involved in the project, they deny DBI is their employer or the general contractor. They contend that DBI is a construction management company, as its letter head provides, and that all DBI did was provide overall supervision of the project. Plaintiffs further contend that Mr. Brown is actually one of defendant's employees.

Defendant contends that this action must be dismissed for a number of reasons, which are as follows:

First, she contends that she hired DBI as the general contractor to supervise and conduct the renovation of her apartment. She admits this was an oral agreement. She contends further that the liens that were filed were in excess of the amount she was for. The bill was for \$41,407.49 and this action seeks to foreclose liens totaling \$42,853.67. Ms. Strickland alleges the work performed was sub-par, cost more than she agreed to, and she never had any direct contact with the plaintiffs, but only with Mr. Brown, the principal of DBI. She contends that neither DBI nor Mr. Brown is a party to this action, and they should be. She also contends she is entitled to monetary offsets for what she expended to have the work improperly done by plaintiffs subsequently fixed.

Defendant also contends the mechanic's liens were improperly filed, or had expired by the time she was served with the complaint which was on May 17, 2007. Defendant contends further that because the plaintiffs are all subcontractors of DBI, they were required by law to serve DBI/Mr. Brown with the mechanic's liens. Lien Law § 11-b. Defendant contends that because there is no proof of service, the plaintiffs have failed to state a cause of action, and this case must be dismissed.

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Defendant has also performed electronic searches of these plaintiffs in the Department of Consumer Affairs' data base online. Based upon this research, she concludes that the plaintiffs are all unlicensed, and therefore, barred from seeking recovery from her under breach of contract principles.

Finally, defendant contends that because she bonded two of the liens, the claim of the lienors she bonded (Fast Track and March) for foreclosure of their liens is now academic.

Discussion

Affording the complaint its most expansive reading, and accepting the factual allegations therein, the plaintiffs have stated causes of action against defendant under the Lien Law, for breach of contract and in equity, for *quantum meruit*.

While there may be a number of factual disputes, at this stage of this case, plaintiffs' burden is far lighter than it would be once issue has been joined and dispositive motions are made, or at trial. Thus, while defendant contends that DBI is the general contractor of this renovation project, and the plaintiffs were required to serve copies of their liens on DBI, in compliance with Lien Law §11-b, plaintiffs have presented facts to support their claims, that they had a direct contractual relationship with defendant, and DBI was simply a construction manager. Although defendant also presents certain documents and invoices, none of them conclusively establishes defendant's defenses as a matter of law, such that the plaintiffs' complaint must be dismissed. Goshen v. Mutual Life Insurance Co., N.Y., 98 N.Y.2d 314 (2002); Zannett Lombardier, Ltd. v. Maslow, 29 A.D. 3d 495 (1st Dept 2006). Whether DBI was, or was not, the general contractor on this particular project remains to be decided. See: Fane v. Armani Plumbing and Mechanical, 168 A.D. 2d 143 (3rd Dep't 1991).

Although defendant acknowledges she was served with the mechanic's liens asserted by Fast Track, March, and Forte, she nonetheless denies they were properly filed. Based upon the facts presented by these three plaintiffs, they have factually supported their claims against Ms. Strickland, at this time, defeating this motion to dismiss at the pleading stage.

Plaintiff Capital, however, filed a mechanic's lien under a different name – "Capital Elite Construction, Inc." Moreover, that lien identifies the recipient of services, labor, etc., as "Darryl Brown," an individual who is not a named party to this action. More importantly, and fatal to Capital's claims, is that defendant Carol Strickland is not named the person to whom services were provided. Further, the plaintiffs concede that DBI/Mr. Brown is not licensed to provide home improvement work in this state. Thus, under these circumstances, Ms. Strickland has proved – and it is undisputed – that the lien defendant Capital seeks to foreclose upon is defective. Capital raises no arguments that would rescue that lien or the claims that are based on that defective filing. That lien, originally filed March 31, 2006 and extended on February 26, 2007, must be, and hereby is, terminated and discharged. Further, the claims by defendant Capital to foreclose that lien are hereby severed and dismissed. Capital's other contract and quasi-contract based claims, however, survive.

Further claims by defendant, that the liens are for a greater amount than she was billed for, state defenses that Ms. Strickland can assert in her answer, and after issue has been joined, she can prove that the plaintiffs deliberately and intentionally exaggerated the lien amount, if that is her claim. Lien Law § 38; J. Sackaris & Sons, Inc. v. Terra Firma Constr Mgmt, 14 A.D. 3d 538 (2nd Dep't 2005). Similarly, although defendant contends the plaintiffs are not licensed to perform home improvement in New York, the database search she did is not documentary evidence that conclusively disproves plaintiffs' claims that they are, in fact, licensed. Each plaintiff has provided its New York City License number to support this factual claim.

Finally, although defendant contends that this action was commenced on May 17, 2007, the day she was served with the pleadings, in Supreme Court an action is commenced upon the filing of the summons and complaint, or a summons with notice. CPLR § 304. Based upon the facts presented by plaintiffs, all the liens asserted were effective on May 1, 2007, the commencement date of this action.

Defendant has bonded the Fast Track and March liens, as Lien Law § 19 provides, in a sum equal to 110% of the disputed lien amounts. Plaintiffs have not addressed defendant's motion for an order terminating and discharging these two liens for that reason. These bonds are substitutes for the liens. White Plains Sash & Door Co. v. Doyle, 262 NY 16 (1933). Thus, a mechanics lien may be discharged and the encumbrance against the real property may be released without discharging the claim itself. Bernardo v. Steelco, 115 Misc2d 1020 (Sup Ct, Nassau Co. 1982) (citing Yonkers Builders Supply Co v. Luclano & Son, Inc., 269 N.Y. 171 [1935] and John R. Blair v. Seadco Bldg Corp, 136 Misc 204 [App Term 2d Dept 1929]). Since there is proof of bonding, and plaintiffs have not opposed this branch of defendant Strickland's motion, it is hereby GRANTED, only to the extent that the Fast Track Construction Inc and R. March Management Inc. liens, each bonded on June 1, 2007, are discharged, conditioned upon the bonds having been filed as represented to the court, and their still being in effect.

The court has considered the remaining arguments presented by defendant as to why other claims of the plaintiffs must be dismissed. Such arguments include defendant's contention, that plaintiffs or any one of them, have not complied with the mandates of GBL § 771, which sets forth the requirements of home improvement contracts. This argument does not prevent any of these plaintiffs from pursuing claims for the value of their services. Thus, this branch of defendant's motion is also denied.

Defendant shall answer the complaint within Ten (10) Days of being served with a copy of this decision/order with notice of entry.

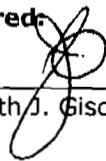
This case will appear in Part 10, 80 Centre Street, Room 122 on January 31, 2008 at 9:30 a.m. for the preliminary conference.

Any relief requested but not expressly addressed is hereby denied.

Settle order on notice.

Dated: New York, New York
December 12, 2007

So Ordered:



Hon. Judith J. Gische, JSC