

Argumedo v USA Gen. Contr. Corp.

2008 NY Slip Op 30144(U)

January 14, 2008

Supreme Court, New York County

Docket Number: 0100118/2007

Judge: Marylin G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

MARLON ARGUMEDO and LUIS OBANDO et al.,

Plaintiffs,

-against-

USA GENERAL CONTRACTORS CORP., GMP
CONTRACTING CORP., MICHAEL DIMEDICI
and NICK SARAVETTA,

Defendants.

INDEX NO. 100118/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

FILED
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NEW YORK
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Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Plaintiffs are construction workers who were employed to work on various public works projects in New York and New Jersey. They allege that they were employed by the defendants USA General Contractors Corp. ("USA") and/or GMP Contracting Corp. ("GMP") and that the defendants failed to pay them wages at the prevailing rate of pay for these public works projects, as required by New York and New Jersey law and by the separate public works contracts entered into in both New York and New Jersey ("New York public works contracts" and "New Jersey public works contracts"). USA is alleged to be a construction company that performs roofing and related construction work and was the general contractor on the projects which are the subject of this proceeding. Defendant GMP was a subcontractor on the same projects in New York and New Jersey. Defendants Michael DiMedici and Nick Saravetta are alleged to be officers and/or principals of USA.

The complaint asserts thirteen causes of action. The first and second causes of action are asserted against all of the defendants. The first alleges a failure to pay New York's statutory wages, as required under the New York Labor Law. The second alleges a failure to pay overtime wages, as also required under the New York Labor Law. The third cause of action is against defendants DiMedici and Saravetta and alleges an unlawful diversion of a Lien Law trust. The fourth cause of action seeks to pierce USA's corporate veil so as make DiMedici and Saravetta individually liable for USA's conduct. The fifth cause of action is against USA and GMP for breach of the New York public works contracts. The sixth cause of action is against USA and GMP for unjust enrichment. The seventh cause of action is against USA and GMP for quantum meruit. The eighth cause of action is against USA and GMP for a failure to pay New Jersey's statutory prevailing wages. The ninth cause of action is against USA and GMP for failure to pay overtime, as required under New Jersey law. The tenth cause of action is against USA and GMP for a violation of New Jersey's "Statutory Trust." The eleventh cause of action is against USA and GMP for breach of fiduciary duty. The twelfth cause of action is against USA and GMP for breach of the New Jersey public works contracts. The thirteenth cause of action is against DiMedici and Saravetta for failure to pay New Jersey's statutory prevailing wage. USA and the two individual defendants now move to dismiss the entire complaint against them with the exception of the eighth cause of action, pursuant to both CPLR 3211(a) and New Jersey law, for failure to state a cause of action and for untimeliness under the applicable statute of limitations. After this motion was filed, the plaintiffs voluntarily withdrew the ninth and thirteenth causes of action.

Discussion

1. Prevailing Wages Under Labor Law §220 – The first cause of action alleges that the defendants violated section 220 of the New York Labor Law by failing to pay the plaintiffs the agreed upon prevailing wage and overtime compensation rates for the work they performed during the period when such wages were due. Labor Law § 220(3) mandates the inclusion in all public works contracts of a provision requiring the payment of prevailing wages and wage supplements. It is well settled that the employer’s obligation to pay prevailing wages and wage supplements is enforceable by the employee as a third-party beneficiary of the contract between the employer and the public authority or municipality in charge of the project and that the employee may therefore assert a claim against the employer to recover damages for breach of contract if the employer fails to pay the prevailing wage. *See Maldonado v. Olympia Mechanical Piping & Heating Corp.*, 8 AD3d 348, 350 (2nd Dept. 2004). *See also Fata v. Healy Co.*, 289 NY 401 (1943); *Pesantez v. Boyle Envtl. Servs.*, 251 AD2d 11 (1st Dept. 1998).

In moving to dismiss this cause of action, the defendants argue that the plaintiffs were required to first file a complaint with the Department of Labor alleging underpayment of prevailing wages and that any private right of action pursuant to Labor Law §220 for underpayment of wages does not exist until there has been an administrative determination pursuant to Labor Law §220(8) that has either gone unreviewed or been affirmed in the employees’ favor. The court agrees. It is well settled that a private cause of action for failure to pay prevailing wages cannot be brought under Labor Law §220 until there has been an administrative determination by the Department of Labor. *See Brandy v. Canea Mare Contracting, Inc.*, 34 AD3d 512, 514 (2nd Dept.2006); *Pesantez v. Boyle Envtl. Servs.*, 251 AD2d at 11. Here, there is no evidence that either of the two plaintiffs filed a complaint with the Department of Labor before bringing this action and the complaint does not allege that any such filing was made. The plaintiffs are thus barred from bringing an action to recover prevailing wages pursuant to Labor Law §220 and the first cause of action must therefore be dismissed.

2. Overtime – The second cause of action alleges that the defendants violated section 663 of the Labor Law, as well as 12 NYCRR §§142-2.2 and 142-2.4, by failing to pay the plaintiffs the requisite overtime compensation for the work they performed. This statute and the two cited regulations provide, *inter alia*, that employers must pay overtime at one and one-half times an employee’s regular rate, subject to any exceptions contained in federal law. *See e.g., Anderson v. Ikon Office Solutions, Inc.*, 38 AD3d 317 (1st Dept. 2007); *Ballard v. Community Home Care Referral Service, Inc.*, 264 AD2d 747, 747-48 (2nd Dept. 1999). In moving to dismiss this claim, the defendants mistakenly treat the second cause of action as having been brought pursuant to Labor Law §220 and again argue that such a cause of action is precluded by the plaintiffs’ failure to first file a complaint with the Department of Labor. However, since the second cause of action is based on other provisions which, unlike Labor Law §220, do not require that a complaint first be filed with the Department of Labor as a condition precedent for seeking judicial relief, the defendants’ motion to dismiss this cause of action must be denied.

3. Lien Law Trust Fund – Plaintiffs’ third cause of action seeks to hold DiMedici and Saravetta personally liable for alleged unlawful diversions from a Lien Law trust fund. Article 3-A of the Lien Law creates a trust fund out of certain construction payments in order to ensure that all subcontractors, workers, engineers and suppliers receive the payments to which they are entitled. *See Lien Law §§ 70, 71.* The Lien Law establishes that certain designated funds received by owners and/or contractors in connection with the improvements of real property are trust assets and that a trust begins “when any asset thereof comes into existence, whether or not there shall be at that time any beneficiary of the trust.” Lien Law §70 (1),(3). *See also Aspro Mech. Contr. v. Fleet Bank*, 1 NY3d 324, 328 (2004). In this respect, “the use of trust assets for a nontrust purpose - that is, a purpose outside the scope of the cost of improvement – is deemed ‘a diversion of trust assets,’ whether or not there are trust claims in existence at the time of the transaction, and if the diversion occurs by the voluntary act of the trustee or by his consent, such act or consent is a breach of trust.” *Id.* at 329. The complaint alleges that USA and GMP received funds for improving the

property that should have been held as Lien Law trust funds but were, instead, diverted by DiMedici and Saravetta for other, improper uses.

On their motion to dismiss, the defendants argue that the third cause of action is time-barred under the applicable one-year statute of limitations, which begins to run from the completion of the particular improvement project. *See* Lien Law §77(2). According to the defendants, the latest date of completion for any of the New York public projects was June, 2005. The plaintiffs, however, did not purchase their index number until more than 18 months later, on January 3, 2007. Despite the apparent untimeliness, the plaintiffs nevertheless argue that they cannot confirm the completion date of all of the New York projects because that information is in the exclusive knowledge of the defendants and that the third cause of action should not be dismissed before they have had the opportunity to conduct meaningful discovery in this action. The court agrees that, pursuant to CPLR 3211(d), the plaintiffs should be allowed to obtain discovery as to the completion dates of the various projects and that dismissal is therefore inappropriate at this time. If, after the completion of discovery, it is apparent that plaintiffs' Lien Law claims are time-barred, the defendants may renew their motion to dismiss.

4. Piercing the Corporate Veil – The fourth cause of action seeks to pierce USA's corporate veil so as to hold the individual defendants, DiMedici and Saravetta, personally liable for the wages allegedly owed to plaintiffs by the company. In their complaint, the plaintiffs allege that DiMedici and Saravetta "blatantly disregarded the corporate form" of USA and used it to their personal advantage by underreporting the hours that the plaintiffs worked and by failing to pay plaintiffs the required prevailing wage and overtime rates, while representing to the government entities involved that they were complying with all laws and regulations. Plaintiffs also allege that the individual defendants exercised complete control and domination over USA and utilized that domination to commit the unlawful acts alleged herein. In determining whether a complaint is sufficient to withstand a motion to dismiss for failure to state a cause of action, the court must accept all of the facts alleged as true and determine only whether the facts alleged fit into any cognizable legal theory. *See Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). Here, the plaintiffs have adequately pled a cause of action for piercing the corporate veil and holding the individual defendants liable for USA's alleged wrongdoing. *See Matter of Morris v. New York State Dept. Of Taxation & Fin.* 82 NY2d 135, 141-143 (1993). Although the defendants claim that USA never actually hired any of the plaintiffs to work on the projects, the plaintiffs have submitted affidavits in which they describe the projects they worked on and the time period and hours during which they worked. They have also submitted documents, such as identification badges and W2's, which indicate that they were employed by USA. The defendants' motion to dismiss the fourth cause of action must therefore be denied.

5. Breach of Contract – The fifth cause of action is for breach of the New York public works contracts. Plaintiffs allege that the public works contracts entered into by USA and GMP set forth the prevailing wages and benefits to be paid to the plaintiffs and that USA and GMP breached the contracts by willfully failing to pay the plaintiffs the specific prevailing wages and benefits set forth therein. Plaintiffs claim the right to sue the defendants for breach of contract based on their status as third-party beneficiaries.

As already noted, workers on publicly-financed construction projects may bring a common law breach of contract claim against their employers to enforce a provision in the job contracts which requires the payment of prevailing wages. *See Wright v. Herb Wright Stucco, Inc.*, 50 NY2d 837, 838 (1980); *Fata v. Healy Co.*, 289 NY 401 (1943); *Maldonado v. Olympia Mechanical Piping & Heating Corp.*, 8 AD3d at 350. Although the defendants argue that the plaintiffs lack privity to sue for breach of contract, this argument is entirely without merit in view of the fact that the complaint alleges that the contracts contained a provision requiring the payment of the prevailing rate of wages and supplemental benefits to all workers and that the contracts obligated the defendants to pay the wages at the rate listed on the schedule of prevailing wages and benefits attached to the public works contracts. The defendants' motion to dismiss the fifth cause of action must therefore also be denied.

6. Unjust Enrichment and Quantum Meruit – The sixth and seventh causes of action are against USA and GMP for unjust enrichment and quantum meruit. The court agrees with the defendants that these causes of action are duplicative of plaintiff's breach of contract action and should be dismissed since, as here, the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract or unjust enrichment for occurrences or transactions arising out of the same matter. See *Goldman v. Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 (2005); *Clark-Fitzpatrick v. Long Island Railroad*, 70 NY2d 382, 388 (1987). The defendants' motion to dismiss the sixth and seventh causes of action must therefore be granted.

7. New Jersey's Statutory Trust Fund Statute – The tenth cause of action is against USA and GMP and alleges that the defendants failed to pay plaintiffs' the prevailing wages on the New Jersey public works projects, thereby violating New Jersey's Statutory Construction Trust Fund statute. See N.J.S.A. 2A:44-148 Defendants contend that this cause of action should be dismissed because, under New Jersey law, a prime contractor such as USA cannot be held liable under New Jersey's trust statute if it demonstrates that it paid all of the subcontractors with whom it had direct contractual relations. This argument is premature. Since there has been no discovery in this case, there is no evidence before the court which would establish as a matter of law that, in fact, USA paid all of its subcontractors. The defendants' motion to dismiss the tenth cause of action must therefore be denied.

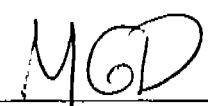
8. Breach of Fiduciary Duty – The plaintiffs' eleventh cause of action is for breach of fiduciary duty. Although the claim appears to be based on New Jersey law, none of the parties has cited to any case which outlines the elements needed to establish breach of fiduciary duty in New Jersey. Under this claim, plaintiffs allege that USA improperly diverted monies which should have been used to pay them prevailing wages, as required under the New Jersey public works contracts. The court is persuaded that this cause of action should be dismissed. It is duplicative of the plaintiffs' breach of contract claim. Moreover, plaintiffs have not cited to any case or New Jersey statute which even suggests that these allegations would support a cause of action for breach of fiduciary duty under New Jersey law.

9. Breach of the New Jersey Public Works Contracts – The twelfth cause of action is for breach of the New Jersey public works contracts. The defendants again argue, as they did with respect to the New York public works contracts, that the plaintiffs never directly contracted with USA or GMP and are not third-party beneficiaries of the New Jersey public works contracts. However, as in New York, New Jersey's Prevailing Wage Act specifically requires the inclusion of a provision requiring the payment of prevailing wages and wage supplements in any public works contract and, because the purpose of the act is to protect employees on public projects, the employees are deemed to be third-party beneficiaries of any such contractual provision. See N.J.S.A. 34:11-56.25, 56.27 and 56.28; *Triose v. Excel Communications*, 784 A2d 748, 752 (N.J.Super.A.D.2001). The defendants' motion to dismiss the twelfth cause of action must therefore be denied.

Accordingly, the defendants' motion to dismiss the complaint is granted to the extent that the first, sixth, seventh and eleventh causes of action are hereby dismissed. The motion is otherwise denied. The defendants shall serve an answer to the complaint within 20 days of service upon them of a copy of this order with notice of entry. The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on February 20, 2008 at 10:00 a.m. for a preliminary conference.

ENTER ORDER

Dated: 1/14/08



MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION