

Unicco Serv. Co. v Jet Project Mgt. Inc.
2008 NY Slip Op 31638(U)
June 13, 2008
Supreme Court, New York County
Docket Number: 0108559/2007
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JANE S. SOLOMON

Justice

PART 55

UNICCO SERVICE COMPANY

- v -

JET PROJECT MANAGEMENT, INC.

INDEX NO. 108559 / 2007
MOTION DATE 4 - 7 - 2008
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1 - 4

5 - 6

7 - 8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided together with the motion made under Sequence 002 and in accordance with the annexed memorandum decision and order.

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

FILED

JUN 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6-13-08

J.S.C.

JANE S. SOLOMON

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
UNICCO SERVICE COMPANY,

INDEX NO. 108559/2007

Plaintiff,

-against-

JET PROJECT MANAGEMENT INC.,

Defendant.

FILED DECISION and ORDER

-----X
JANE S. SOLOMON, J.

SEP 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

Defendant Jet Project Management Inc. ("JPM") was the general contractor for a project in the State of New Hampshire at a site owned by non-party The Walking Company d/b/a The Walking Company_Big Dog ("Walking Company" or "Owner"). JPM accepted bid proposals dated July 7, 2006, July 12, 2006 and August 14, 2006, from plaintiff Unicco Service Company ("Unicco") for Unicco's work as a subcontractor at the project. The bid proposals list Unicco's price for its services and state "Net Due 15 Days upon receipt of invoice."

On August 22, 2006, Unicco and JPM entered into a formal written contract (the "Contract") for Unicco's services as a subcontractor. The Contract is governed by New York law, and page 2, paragraph 2 of the Contract provides:

Payments to the subcontractor for satisfactory performance of work shall be made only [sic] receipt by the GC of payment by the Owner for the subcontractor's work. The subcontractor agrees that the GC shall not be liable for payment to the subcontractor except to the extent that

[*3]
payment is received by the GC from the Owner
for the subcontractors work . . .

Unicco alleges that on or about October 3, 2006, it provided JPM with an invoice in the amount of \$28,202.75 for the goods it sold and delivered and the services it performed between July and October 2006, under the Contract and several change orders later executed between the companies. It contends that, assuming JPM received the notice within 5 days, it had until October 23, 2006, to make payment (as accepted in the bid proposals), but that JPM failed to do so, and that JPM refuses to pay this amount.

This action ensued, wherein Unicco seeks the \$28,202.75 due under the Contract, plus interest from October 23, 2006. JPM's Answer denies Unicco's claims, and contains three affirmative defenses -- (1) the Complaint fails to state a claim; (2) the good sold and delivered were not fit for the purpose intended and not of the quality agreed to; and (3) Unicco failed to perform the services in a workman like and timely manner.

Under Motion Sequence 001, Unicco moves for summary judgment against JPM for the relief demanded in the Complaint and to dismiss JPM's affirmative defenses. JPM's opposition papers restate its affirmative defenses and draw the court's attention to the "pay-when-paid" provision in the Contract. JPM alleges that it has not been paid by the Walking Company since Unicco performed its work, and it claims that the Walking Company currently owes it

[* 4]
\$400,000.

Upon becoming aware of the Contract's pay-when-paid provision, Unicco moved, under Motion Sequence 002, to add the Walking Company as a co-defendant. Unicco argues that although JPM has not proven that it is still owed money by the Walking Company, if the allegation is true, then the Walking Company is a necessary party to this action. The Walking Company appears and opposes the motion, arguing (1) that it was only listed as "Owner" in the Contract and is not in privity with Unicco, (2) that the allegation that it did not pay JPM is only speculative, (3) echoing JPM's affirmative defenses, that Unicco's work may have been unsatisfactory, relieving it of any payment obligation; (4) that a request to add the Walking Company as a co-defendant is inconsistent with there being no disputed factual issues in Unicco's summary judgment motion against JPM; (5) that JPM failed to include the Walking Company's non-payment as an affirmative defense, and the defense has been waived; and (6) that Unicco need not add the Walking Company as a defendant in order to determine through discovery whether it paid JPM. The Walking Company also requests attorneys fees and costs for having to oppose the motion.

Discussion

Pleadings "without supporting facts are insufficient" to defeat summary judgment, and a defense "that a complaint does not state a cause of action cannot be interposed in an answer."

[*5]
Glenesk v. Guidance Realty Corp., 36 A.D.2d 852, 853 (2nd Dep't 1971). As pleaded, JPM's affirmative defenses are merely conclusory allegations, and JPM has failed to submit any evidence to support those allegations or that it objected to Unnico's work before this action was commenced.

As to JPM's defense raised under Motion Sequence 001 that it has not yet been paid by the Owner, under New York law:

a pay-when-paid provision which forces the subcontractor to assume the risk that the owner will fail to pay the general contractor is void and unenforceable as contrary to public policy set forth in the Lien Law § 34. By contrast, a pay-when-paid provision which merely fixes a time for payment does not indefinitely suspend a subcontractor's right to payment upon the failure of an owner to pay the general contractor, and does not violate public policy as stated in the Lien Law. West-Fair Elec. Contrs. v. Aetna Cas. & Sur. Co., 87 N.Y.2d 148, 158 (1995).

The Contract's pay-when-paid provision clearly forces Unnico to assume the risk that the Walking Company will not pay JPM, and the provision is therefore void as against public policy and unenforceable.

Therefore, JPM is indebted to Unnico for its work under the Contract regardless of whether JPM has been paid by the Walking Company, and Unnico is entitled to summary judgment on its claim.

With respect to adding the Walking Company as a co-defendant, the motion is denied as moot for the reasons described above, but also because a subcontractor's sole remedy for breach

[*6]
of contract lies against a general contractor, and an owner is not liable for the work done by a subcontractor unless it has, in some way, agreed to pay therefor. See Sybelles Carpet & Linoleum, Inc. v. East End Collaborative, Inc., 167 A.D.2d 535 (2d Dep't 1990). Here, the Walking Company was not a party to the Contract, and there is no evidence that it consented to be liable to Unicco for its work. Thus, the motion to add the Walking Company as a co-defendant is denied, but the court declines to award the Walking Company its attorney's fees and costs as requested in its opposition papers.

Accordingly, it hereby is

ORDERED that the motion filed under Sequence 002 is denied; and it further is

ORDERED that the motion filed under Sequence 001 is granted, Unicco is entitled to judgment against JPM for \$28,202.75 under the Contract, plus interest at the statutory rate from October 23, 2006, and the Clerk is directed to enter judgment accordingly, together with costs and disbursements as taxed.

Dated: June 13, 2008



J.S.C.

FILED
JANE S. SOLOMON

JUN 17 2008

COURT CLERK'S OFFICE
NEW YORK