

Nelson Air Device Corp. v Nova Cas. Co.
2008 NY Slip Op 31914(U)
June 26, 2008
Supreme Court, Kings County
Docket Number: 0033224/2006
Judge: Karen B. Rothenberg
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At an IAS Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of June, 2008.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

----- X,
NELSON AIR DEVICE CORP.,

Index No. 33224/06

Plaintiff,

- against -

NOVA CASUALTY COMPANY, AWL INDUSTRIES, INC.,
DORMITORY AUTHORITY FOR THE STATE OF NEW YORK,
LIBERTY MUTUAL INSURANCE COMPANY AND BRADSHAW
MECHANICAL COMPANY, INC.,

Defendants.¹

----- X
The following papers numbered 1 to 11 read on these motions:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-3 9</u>
Opposing Affidavits (Affirmations)_____	<u>4 10</u>
Reply Affidavits (Affirmations)_____	<u>5-6</u>
Other Papers <u>Defendant's Memorandum of Law in Support</u>	<u>7</u>
<u>Defendant's Reply Memorandum of Law</u>	<u>8</u>
<u>Plaintiff's Reply Memorandum of Law</u>	<u>11</u>

Upon the foregoing papers, defendant Dormitory Authority for the State of New York (DASNY) moves for an order dismissing plaintiff's complaint against it pursuant to

¹ By order dated April 30, 2008, the court granted defendant State of New York's cross motion for summary judgment dismissing the complaint as against it.

CPLR 3211 (a) (7) and granting it summary judgment pursuant to CPLR 3212. Plaintiff Nelson Air Device Corp. (plaintiff) cross-moves for leave to serve an amended complaint, pursuant to CPLR 3025 (b), as against DASNY.

Facts and Procedural Background

According to plaintiff's original complaint, on or about December 11, 2003, DASNY entered into a contract with defendant AWL Industries, Inc. (AWL) for the latter to serve as the general contractor on a public improvement project for the renovation of Kings County Hospital Center Building E located at 451 Clarkson Avenue in Brooklyn (the "project").² AWL, in turn, engaged non-party Cole Mechanical Corp. (Cole) as a subcontractor to furnish and install all mechanical and HVAC piping work on the project. In accordance with the subcontract, Cole arranged for defendant Nova Casualty Company (Nova) to execute and deliver to AWL a Subcontractor Performance Bond and a Subcontractor Labor and Material Payment Bond. On or about August 19, 2004, AWL declared Cole to be in default under the subcontract. Thereafter, AWL made a demand upon Nova for the completion of the Cole subcontract under the terms of the Subcontractor Performance Bond.

On or about December 2, 2004, plaintiff and Nova entered into a contract for the completion of the work outstanding under the Cole subcontract (the completion contract). Plaintiff alleges that it fully performed its obligations under the completion contract by providing all of the required materials and labor. Plaintiff was paid a total of approximately \$2.2 million and has an outstanding balance of approximately \$300,000, plus interest (the outstanding balance), since the completion date of June 14, 2006. On or about August 29, 2006, plaintiff filed with DASNY, and served on Nova and AWL, a written notice of its mechanic's lien for the outstanding balance. On or about October

² The general contract is designated by DASNY as Contract No. 99873/2479609999/3.

27, 2006, plaintiff commenced the instant action against DASNY, Nova and AWL, among others, for recovery of the outstanding balance. In its original cause of action against DASNY, plaintiff alleges that DASNY is “in possession of funds due and owing to Defendant AWL under a public improvement contract” (¶ 4). In its proposed amended complaint, plaintiff seeks to add a quantum meruit/unjust enrichment claim against DASNY, alleging that DASNY, among other defendants, accepted plaintiff’s work, labor and services and that DASNY’s failure to pay therefor unjustly enriched DASNY (¶¶ 17-20).

Additional facts, which plaintiff does not dispute, are taken from the affidavits of Frances P. Lewis and J. Matthew Moore, associate counsel for DASNY, whose duties include reviewing and approving instruments for filing on the lien docket for DASNY contracts. On October 16, 2006, Nova executed Bond Number 76046 in the face amount of 110% of the outstanding balance owed to plaintiff (the Discharge of Lien Bond). On October 20, 2006, the Discharge of Lien Bond, together with a certificate of Nova’s solvency, was served on plaintiff, among others, by mail. On October 26, 2006, DASNY docketed the Discharge of Lien Bond in its register of subcontractor claims with respect to the project.

Arguments

DASNY contends that, by virtue of the Discharge of Lien Bond, Nova has secured the payment of plaintiff’s lien and, therefore, DASNY is no longer a necessary party to this action. Plaintiff counters that DASNY’s motion to dismiss must be denied because DASNY’s moving papers omit any documentation establishing that the Discharge of Lien Bond was properly served and that plaintiff’s lien was properly discharged. By way of cross motion, plaintiff seeks leave to amend its complaint to add a quantum meruit cause of action against DASNY because discovery has

revealed that DASNY may have willfully exaggerated charge-backs against plaintiff and AWL, which resulted in the underpayment to plaintiff.

Analysis

I. DASNY's for Summary Judgment Dismissing the Complaint

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, however, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 493 [1989]).

“Generally in a public improvement contract, the contractor is required to secure the performance of his contract, and also to secure performance payments of the claims of subcontractors, materialmen and laborers. Upon default by a contractor, the surety, pursuant to a performance bond, completes the contract, at its own cost and expense, and becomes equitably subrogated to the same rights as the contractor has in and to the unpaid balance of the contract price.

“Under a performance bond, a completing surety will be paid the money owed by the owner to the defaulting contractor, but the money owed is first subject to the claims of all trust beneficiaries [, such as subcontractors].”

(*Titan Indemnity Co. v Triborough Bridge & Tunnel Auth., Inc.*, 1996 WL 556988, *4 [SD NY 1996], *affd* 135 F3d 831 [1998] [citing *Tri-City Electric Co., Inc. v New York*, 96 AD2d 146, 149 [1983], *affd* 63 NY2d 969 [1984]).

Thus, upon filing timely notice, a subcontractor who has provided labor or material on a public improvement project has a mechanic's lien for the value of its work, including interest, against the public funds set aside to finance the project (*see* Lien Law § 5). Nevertheless, a

mechanic's lien for public improvement may be discharged by the issuance of a replacement bond (*see* Lien Law § 21 [5] [a]).³ The filing of a bond does not extinguish the mechanic's lien, but shifts it from the public funds to the bond (*see Tri-City Elec. Co. v People*, 63 NY2d 969, 971 [1984] ["Upon the filing of such a discharge bond the public improvement lien attaches to the bond, which is substituted for the lien property."]).

In this case, admissible evidence reflects that Nova executed the Discharge of Lien Bond to secure plaintiff's mechanic's lien and that such bond was served on plaintiff, among others. By operation of law, plaintiff's claim to the funds purportedly held by DASNY for the benefit of plaintiff has been transferred to, and secured by, the Discharge of Lien Bond. Accordingly, plaintiff has no valid claim against DASNY under the original complaint. In view of the foregoing, DASNY has made a prima facie showing of its entitlement to summary judgment as a matter of law and plaintiff has failed to rebut DASNY's claims. Therefore, DASNY's motion is granted.

³ Lien Law § 21 (5) (a) provides, in relevant part:

"A lien against the amount due or to become due a contractor from the state or a public corporation for the construction or demolition of a public improvement may be discharged as follows:

* * *

"(5) Either before or after the beginning of an action by a contractor or subcontractor executing a bond or undertaking in an amount equal to one hundred ten percent of such lien conditioned for the payment of any judgement which may be recovered in an action to enforce the lien:

"(a) The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be sufficient Any such bond or undertaking shall be filed with the state or the public corporation with which the notice of lien is filed and a copy shall be served upon the adverse party. The undertaking is effective when so served and filed. . . ."

II. *Plaintiff's Cross Motion for Leave to Amend Complaint*

Plaintiff seeks to amend its complaint to assert a new cause of action for quantum meruit against DASNY, alleging that DASNY, among others, was unjustly enriched by the performance of plaintiff's work, labor and services on the project. Through an affirmation of its counsel, plaintiff elaborates that "DASNY was in possession of the funds that were due to [plaintiff], DASNY made the decisions to accept and reject [plaintiff's] work, DASNY made decisions as to the percentage of work [plaintiff] had completed, and DASNY made decisions that certain work performed by [plaintiff] was unsatisfactory" (§ 6). Since these statements are not made by a person with personal knowledge and, moreover, are not alleged in the proposed amended complaint, the court disregards these statements and confines itself to the general allegation in the proposed amended complaint that DASNY was unjustly enriched (*see Gair Co., Inc. v Cambridge Carpet, Ltd.*, 160 AD2d 371, 372 [1990]).

Pursuant to CPLR 3025 (b),⁴ leave to amend a pleading should be liberally granted in the absence of surprise or prejudice resulting from the delay and where the amendment is not plainly lacking in merit or palpably insufficient as a matter of law (*see Lucido v Mancuso*, 49 AD3d 220, 222 [2008]; *Spano v Northwood Tree Care, Inc.*, 48 AD3d 667, 668 [2008]). DASNY does not claim any surprise or prejudice resulting from the delay, but argues that the proposed cause of action is without merit and legally insufficient.

⁴ CPLR 3025 ("Amended and supplemental pleadings") states, in applicable part:

"(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

In *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.* (70 NY2d 382 [1987]), the Court of Appeals held, as follows:

“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. A ‘quasi contract’ only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party’s unjust enrichment. . . .

“ . . . It is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties.”

(*Id.* at 388-389 [internal citations omitted]).

Although the parties have not provided the court with a copy of plaintiff’s completion contract with Nova, it is fair to assume that the subject matter of that contract involves the services and materials for which plaintiff is now seeking recovery. If that were the case, plaintiff would have no claim for quantum meruit or unjust enrichment against DASNY (*see Clark-Fitzpatrick*, 70 NY2d at 389; *Gibraltar Mgt. Co., Inc. v Grand Entrance Gates, Ltd.*, 46 AD3d 747, 748 [2007]).

Even if the subject matter of the completion contract related to something other than plaintiff’s services and materials, plaintiff still would not have a claim for quantum meruit or unjust enrichment. In a recent decision, Justice Mark I. Partnow of this court denied a proposed amendment to a complaint to add a cause of action for quantum meruit where the party seeking recovery was not in privity of contract (*see Danica Plumbing & Heating LLC v Amoco Const. Corp.*, 18 Misc 3d 1137 [A] [2008], 2008 NY Slip Op 50338 [U] [2008]). Justice Partnow held that the “prohibition against quasi-contractual claims where a written contract exists applies not only to the parties that are in privity of contract, but also to noncontracting parties as well” (*id.* at *4-5). In this case, the subject matter of the contract – the performance of HVAC and related services – was

indisputably part of the general contract between DASNY and AWL. The fact that plaintiff was not a party to that contract does not permit plaintiff to assert a quantum meruit claim (*id.* at *4). Similarly, DASNY’s consent to the work performed by plaintiff on the project does not allow plaintiff to assert such a claim (*id.* at *5). As stated above, the proposed amended complaint merely alleges that DASNY, along with certain co-defendants, benefitted from plaintiff’s work, but fails to allege the grounds for departing from the general rule that the existence of a contract precludes recovery on quasi-contractual claims related to that contract. Thus, plaintiff’s cross motion for leave to serve an amended complaint is denied.

Conclusion

Accordingly, it is

ORDERED that defendant Dormitory Authority for the State of New York’s motion for summary judgment and dismissal of the complaint as against it is granted; and it is further

ORDERED that plaintiff Nelson Air Device Corp.’s motion for leave to serve an amended complaint, pursuant to CPLR 3025 (b), is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

This constitutes the decision and order of the court.

ENTER,

J.S.C.