

| |
|--|
| D & A Sand & Gravel, Inc. v Dynamic Constr. Corp. |
| 2008 NY Slip Op 32320(U) |
| August 12, 2008 |
| Supreme Court, Suffolk County |
| Docket Number: 0014095/2006 |
| Judge: Emily Pines |
| Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case. |
| This opinion is uncorrected and not selected for official publication. |

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 06-09-2008
Motion Submit Date: 06-25-2008
Motion Sequence No.: 003 MOTD

_____ X
D & A SAND AND GRAVEL, INC.,

Plaintiff,

-against-

DYNAMIC CONSTRUCTION CORP, SJS
CONSTRUCTION COMPANY, INC.,
HARBORFIELDS CENTRAL SCHOOL
DISTRICT AND "JOHN DOE ONE" THROUGH
"JOHN DOE TEN",

Defendants.

_____ X

Attorney for Plaintiff
Marshall M. Stern, Esq.
17 Cardiff Court
Huntington, New York 11746

Attorney for Defendant Dynamic Const.
Agovino & Asselta, LLPC
170 Old Country Road, Suite 608
Mineola, New York 11501

Attorney for Defendant SJS
Westermann Hamil Sheehy Aydelott &
Keenan, LLP
By: Michael F. Kuzow, Esq.
100 Quintin Roosevelt Blvd., Suite 502
Garden City, New York 11530

Harborfields Central School District
2 Old Field Road
Greenlawn, New York 11740

ORDERED, that the motion (motion sequence number 003) by plaintiff pursuant to CPLR §602(b) seeking to consolidate the within action with an action captioned SJS Construction Company, Inc., v. Dynamic Construction Corporation, Peter Evangelista and Nelson Bernardes a/k/a Nelson Bernardes Ferreira, index no. 17774-2004 is granted to the extent that the actions are joined for discovery purposes only; and it is further

ORDERED, that the application by plaintiff pursuant to CPLR §2101(f) to amend the caption to reflect the addition of the proper name of "JOHN DOE ONE" defendant to FIDELITY AND DEPOSIT COMPANY OF MARYLAND and to amend the complaint to add Fidelity and Deposit Company of Maryland as the surety issuing a lien discharge bond, and to discontinue the action against Harborfields Central School District is granted; and it is further

ORDERED, that a compliance conference is scheduled for

September 19, 2008 at 9:30 a.m. before the undersigned.

This is an action by plaintiff against defendants seeking to foreclose a mechanic's lien, and damages for breach of contract and recovery in quantum meruit arising out of a construction project at the Harborfields Central School District ("Harborfields"). The submissions reflect that on or about June 3, 2003, defendant Harborfields entered into a contract with defendant SJS Construction Company, Inc. ("SJS"), wherein SJS agreed to perform certain labor and furnish certain materials for improvements to Harborfields High School. Thereafter, SJS, the general contractor of the project, entered into a contract with defendant Dynamic Construction Corp. ("Dynamic"), wherein Dynamic agreed to perform labor and provide materials on behalf of SJS. Subsequently, on or about July 9, 2003, plaintiff entered into a contract with Dynamic, wherein plaintiff agreed to provide ready mix concrete to Dynamic, as a subcontractor to SJS. Dynamic agreed to pay plaintiff for said ready mix concrete in the purported amount of \$41,659.50. Plaintiff alleges that the entire amount remains due and owing under its agreement with Dynamic.

According to the Complaint, on or about June 15, 2004, plaintiff filed with the Superintendent and Chief Fiscal Officer of Harborfields a Notice of Mechanic's Lien pursuant to the Lien Law, in the amount of \$41,659.50, with interest, against Dynamic and SJS. Thereafter, on or about June 13, 2005, plaintiff filed with the Superintendent and Chief Fiscal Officer of Harborfields and Extension of Notice of Public Improvement Lien.

Based on the foregoing, plaintiff seeks to foreclose on the Mechanic's Lien and also seeks recovery for damages for breach of contract and in quantum meruit in the amount of \$41,659.50.

By prior Order (SGROI, J.) dated September 16, 2005, the Court joined for discovery purposes only several related actions, including the action captioned SJS Construction Company, Inc., v. Dynamic Construction Corporation, Peter Evangelista and Nelson Bernardes a/k/a Nelson Bernardes Ferreira, index no. 17774-2004, sought to be consolidated with the action herein. The Court noted in its decision that the fifth cause of action in that matter

involved a written contract entered into between SJS and Dynamic for the performance of concrete work at Harborfields High School. The remaining causes of action concern separate contracts for construction work at other school districts and fire districts. The Court found that there were some common issues of fact and law that overlap in the various construction projects, but that any attempt to try all of the cases together would be unwieldy. However, the Court did find that it was proper to join all of the actions for the purpose of discovery.

Subsequent to this Order, plaintiff commenced the within action as set forth herein above and plaintiff now moves to consolidate this action with the action captioned SJS Construction Company, Inc., v. Dynamic Construction Corporation, Peter Evangelista and Nelson Bernardes a/k/a Nelson Bernardes Ferreira, index no. 17774-2004. Plaintiff's counsel states that at the time it commenced the instant action, he was unaware that an action existed between SJS and Dynamic for nonpayment arising out of the Harborfields High School project. Plaintiff argues that the actions contain common claims of proof, to wit, the work performed by Dynamic on the Harborfields High School project. Moreover, plaintiff asserts that pursuant to Lien Law §44, in an action to enforce a lien, every defendant who is a lienor is a necessary party. Thus, plaintiff seeks consolidation of the with action with the action by SJS against Dynamic.

Plaintiff also seeks to amend the Complaint to substitute Fidelity and Deposit Company of Maryland ("Fidelity") as a party defendant in the place of "JOHN DOE ONE". Specifically, plaintiff states that SJS bonded the Mechanic's Lien with Fidelity, and therefore, pursuant to Lien Law §44-b, that Harborfields is no longer a necessary party in this action.

Defendant SJS opposes the motion to consolidate and amend the Complaint. Regarding the proposed amendment, SJS argues that the proposed amendment is palpably without merit and states that Fidelity has never been served with the Summons in this case and thus is not a "party defendant" as alleged by plaintiff's counsel. SJS also argues that Fidelity is not a proper "John Doe" pursuant to CPLR §1024 in that plaintiff could have referred to Fidelity in

the caption of the complaint as "unknown Surety Company". Additionally, SJS asserts that plaintiff's lien has lapsed by operation of law in that it was filed on or about May 28, 2004, extended on or about June 10, 2005, which may have extended it until June 10, 2006, but the commencement of this action on June 6, 2006, without the filing of a notice of pendency, did not extend the lien.¹ Based on the foregoing, SJS argues that the motion to amend should be denied because the lien expired and the amendment is thus wholly without merit.

SJS also argues that consolidation should be denied. SJS argues that plaintiff has failed to articulate the common questions of law or fact that exist between the actions and thus has failed to satisfy the requirements of CPLR §602. Additionally, SJS argues that its claims in the 17774-2004 action do not seek to enforce a lien in relation to the Harborfields' project and although the other actions were joined for discovery, those actions do not include an action to enforce a lien. Additionally, SJS notes that Dynamic has commenced two additional actions against SJS, including an action to enforce a Mechanic's Lien on the Harborfields project. That action (index no. 15351-2007) was joined for discovery and trial with the 17774-2004 action. SJS asserts that this action, at most, should only be consolidated with the actions involving the Harborfields project (index nos. 15351-2007 and 09102-2005) and the action to enforce a lien (index no. 14095-2006).

In Reply, plaintiff's attorney states that at the time he commenced the within action he did not know that D & A's lien had been discharged by Fidelity until he received correspondence from counsel for SJS suggesting that the parties "stipulate to the discontinuance of this action against the Harborfields Central School District and substitute F & D as a party defendant." Counsel states that he thereafter responded and requested that SJS's counsel prepare the stipulation, but that he never received same. Further, plaintiff argues there would be no prejudice to substitute Fidelity as a defendant for Harborfields and that it is not seeking such substitution pursuant to CPLR §1024 but rather

¹Counsel for SJS notes discrepancies between the Complaint and the Affirmation of plaintiff's counsel regarding the dates of the filing of the Mechanic's Lien. Regardless, SJS asserts that the lien expired by operation of law.

pursuant to Lien Law §44-b(a), which permits the discontinuation of a lien foreclosure action against a public corporation when a contractor executes a bond, as in the instant case.

With regard to the validity of the lien, plaintiff states that the lien was actually filed on June 15, 2004 and extended on or about June 13, 2005. Thereafter, the instant lien foreclosure action was commenced on June 6, 2006, before the lien expired, and on June 9, 2006, a Notice of Pendency was filed. Thus, plaintiff argues that the lien did not expire and the amendment is proper. Finally, plaintiff argues that this action should be consolidated with the other pending actions based on the same Harborfields project.

Lien Law §44-b(a) provides in relevant part:

Notwithstanding any inconsistent provision of section forty-four of this article, any private owner or the state or a public corporation with which a notice of lien is filed shall not be a necessary party defendant in an action to enforce the lien if, either before or after the commencement of the action, a contractor or subcontractor, (a) in the case of a public improvement, executes a bond or undertaking, in accordance with subdivision five of section twenty-one of this chapter, to the state or the public corporation with which the notice of lien is filed conditioned for the payment of any judgment that may be recovered in an action to enforce the lien....

In the case at bar, it is undisputed that SJS bonded the Mechanic's Lien that is the subject of this action. Thus, pursuant to Lien Law §44-b(a), Harborfields is no longer a necessary party to this action and the action is dismissed as against Harborfields Central School District. As reflected in the correspondence between counsel for plaintiff and SJS, the parties contemplated substitution of Fidelity as a party defendant. Specifically, by letter dated July 5, 2006, counsel for SJS stated that in light of the bond, he suggested that "we stipulate to the discontinuance of this action against the Harborfields Central School District and substitute F & D as a party defendant." The Court is thus unclear why SJS now objects to the substitution of Fidelity as a party defendant. In light of the foregoing, the request to substitute Fidelity & Deposit Company of Maryland as a party defendant is granted. Plaintiff shall serve a Supplemental Summons and Amended

Complaint on all parties within twenty (20) days from the date herein.

Turning to the request for consolidation, it is clear that the issues in the instant case are related to the fifth cause of action in the 17774-2004 action regarding the Harborfields project. However, since that action also involves a myriad of other issues and municipal projects, a true consolidation of the actions for trial is not appropriate. Rather, as done by Justice Sgroi in the prior Order, joining the actions for discovery only is warranted. Thus, plaintiff's application to consolidate the within action with the action captioned SJS Construction Company, Inc., v. Dynamic Construction Corporation, Peter Evangelista and Nelson Bernardes a/k/a Nelson Bernardes Ferreira, index no. 17774-2004 is granted to the extent of discovery only. In light of the So-Ordered Stipulation between the parties, this action is also joined for discovery with the action commenced under index no. 15351-2007.

Counsel are reminded that a compliance conference is scheduled for September 19, 2008 at 9:30 a.m. before the undersigned.

This constitutes the DECISION and ORDER of the Court.

Dated: August 12, 2008
Riverhead, New York



EMILY PINES
J. S. C.