

Martack Corp. v 20/22 Mercer St. LLC

2009 NY Slip Op 30953(U)

April 20, 2009

Supreme Court, New York County

Docket Number: 106581/08

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 106581/2007
MARTACK
vs
20/22 MERCER STREET LLC
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *be denied*
and costs awarded
as decided per
attached

FILED
APR 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/20/09

[Signature]
EMILY JANE GOODMAN
KSG

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

MARTACK CORP.,

Plaintiff,

Index No. 106581/08

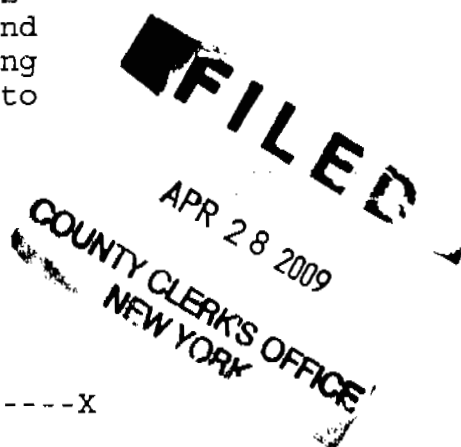
-against-

20/22 MERCER STREET LLC, GOING AWAY,
LLC, COMMONWEALTH LAND TITLE INSURANCE
COMPANY, RICHARD LAM, KEVIN MALONEY and
"JOHN DOES" 1 thru 10, said names being
fictitious, true names being unknown to
plaintiff, corporate entity(s) or
person(s) intended being a member,
officer, or director of 20/22 MERCER
STREET LLC,

Defendants.

-----X

Emily Jane Goodman, J.S.C.:



In this action to foreclose on a mechanic's lien, defendants Richard Lam (Lam) and Kevin Maloney (Maloney) (together, movants) move for partial summary judgment dismissing the amended complaint's fourth cause of action, in which plaintiff Martack Corp. seeks from these two defendants return of monies allegedly part of a trust allegedly created on plaintiff's behalf under Article 3-A and Section 13 of the Lien Law (LL). Plaintiff cross-moves for summary judgment on the issue of liability.

I. Disposition of Cross Motion

As an initial matter, plaintiff's cross motion is denied, as it was made in violation of this court's Rule No. 11, which

states that "[a]bsent leave of the court on good cause shown, dispositive motions must be made within 45 days after the filing of the Note of Issue." This court granted the parties until November 30, 2008 to make dispositive motions. While movants brought their motion within that period, plaintiff did not cross-move until December 19, 2008. No one denies that the cross motion was not made within the court's proscribed period.

CPLR 3212 (a) provides that a court may set a date for dispositive motions "such date being no earlier than thirty days after the filing of the note of issue." This time limitation may only be extended upon a showing of "good cause." *Brill v City of New York*, 2 NY3d 648, 651 (2004). No such good cause has been shown herein.

A cross motion may be brought after the court's appointed date, even without a showing of good cause, if it seeks relief "nearly identical" to that sought in the timely main motion (see *Filannino v Triborough Bridge and Tunnel Authority* (34 AD3d 280, 281 [1st Dept 2006]), such as would be the case if the two motions were "based on the same arguments raised in [movant's] timely motion and the same findings that mandated judgment for [movant] also require judgment for [cross-movant]." *Altschuler v Gramatan Management, Inc.*, 27 AD3d 304, 304 (1st Dept 2006).

In the present case, plaintiff's dispositive motion discussing the merits of its causes of action based on the

alleged trust are not "nearly identical" to movants' narrow motion for partial summary judgment on a single cause of action, based on the application of the statute of limitations. Therefore, the cross motion will not be addressed.

II. Background

This action was brought against the corporate defendants, and Commonwealth Insurance Company, for foreclosure of a mechanic's lien. The complaint was later amended to add the movants, and the John Doe defendants, based on the theory that movants received monies that should have been applied to the claim against defendant 20/22 Mercer Street LLC (Mercer), as trust funds under LL Article 3A and Section 13.¹

Plaintiff's lien is directed towards the \$18 million that Mercer is said to have received as financing for the renovation and development of a building located at 20/22 Mercer Street, Manhattan (project). Plaintiff performed work and provided materials for the project, for a contract sum of \$998,000. Plaintiff also claims change orders and additional work orders, bringing the total sum of over \$1.1 million.

The building was divided into two condominiums, one commercial, one residential. The renovations were for the purpose of remaking the residential unit into 16 residential

¹The action has been dismissed as to defendants Going Away, LLC and Commonwealth Insurance Company.

condominium units. Mercer owned the residential condominium.

Movants claim that the work on the building was completed on December 22, 2006, when the final certificate of occupancy was issued by the City of New York Department of Buildings. Aff. of Franklin R. Kaiman, Ex. H. Plaintiff filed its mechanic's lien on August 26, 2006.

At this time, enough of the balance due under the contract has been paid, both before and after the mechanic's lien was filed, to reduce the sum plaintiff claims is owing to . . . \$129,160.30. Defendants dispute this sum, and Mercer claims to have set aside, in escrow, the sum of \$40,443.76, the amount it claims is owed to plaintiff.

Plaintiff's complaint against movants arises from the sale of units to various parties, including Lam.² Plaintiff claims that the monies received from certain units, each in excess of \$1 million, was used either to repay Mercer's lender, or was pocketed by Maloney, and another partner, non-party Ziel Feldman. Allegedly, none of the proceeds was paid to plaintiff, or put aside in trust for satisfaction of plaintiff's lien.

Plaintiff commenced this action against movants on or about May 28, 2008. In consequence, movants claim that it is untimely,

²Lam did not pay monies for this transfer, but rather, effected an oral demand note for the transfer in excess of \$1.2 million, which was later reduced to writing, and made payable in December 2010. *Id.*, Ex. K.

having been brought more than one year after the completion of the project in December 2006, pursuant to the statute of limitations contained in the LL.

III. Discussion

Section 13 of the LL pertains to the priority of mechanic's liens with regard to other creditors of an owner or general contractor. Article 3-A deals with the creation of a trust for the benefit of the lienor. Section 77 (2) of Article 3-A provides that no action based on a LL trust "shall be maintainable if commenced more than one year after the completion of such improvement or, in the case of subcontractors or materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later" See *Northern Structures, Inc. v Union Bank*, 57 AD2d 360 (4th Dept 1977) (statute of limitations under LL § 77 [2] begins to run from date of completion of work).

Under this section, plaintiff's action would be untimely as to Lam and Maloney, unless plaintiff's claims against these two parties can be said to "relate back" to the original, timely, action against Martack.

It is well settled that even in instances where the Statute of Limitations has run with respect to unnamed parties, process may still issue, and the unnamed parties joined if they are determined to be "united in interest" with the party against whom process was actually served.

Cruz v Vinicio, 259 AD2d 294, 295 (1st Dept 1999), citing to

Mondello v New York Blood Center-Greater N.Y. Blood Program, 80 NY2d 219, 226 (1992), adapting the test in *Brock v Bua*, 83 AD2d 61, 69 (2d Dept 1981).

The doctrine applies as follows:

[o]nce a defendant has shown that the statute of limitations has run, the plaintiff bears the burden of demonstrating the applicability of relation-back doctrine. There are three conditions that must be satisfied for a claim asserted against a defendant subsequently sought to be joined to relate back to claims asserted against another defendant: (1) both claims must arise out of the same conduct, occurrence or transaction; (2) the new party must be "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the lawsuit that he will not be prejudiced in maintaining his defense on the merits[;] and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well [internal citations omitted].

Anderson v Montefiore Medical Center, 41 AD3d 105, 107 (1st Dept 2007); see also *Brock v Bua*, 83 AD2d 61, *supra*. The plaintiff bears the burden to establish the applicability of this doctrine. *Nani v Gould*, 39 AD3d 508 (2d Dept 2007). What is more, "[p]laintiff must satisfy all three prongs of the test to toll the statute of limitations." *Anderson v Montefiore Medical Center*, 41 AD3d at 107.

Plaintiff's claim that the new fourth cause of action against Lam and Maloney relates back to the claims against Mercer rests solely on the second prong of the *Brock* test: that the individual defendants, as members of Mercer, were united in

interest; "knew of this action and were fully familiar with the proceedings" as members of Mercer; "had at all times during the course of the litigation an interest in the development"; and that Mercer could be found to be vicariously liable for Lam and Maloney's actions. Aff. of Gregory Singer, at 2.

Plaintiff fatally fails to address the other two prongs of the *Brock* test. The original action against Mercer sought foreclosure of a mechanic's lien; an action for account stated; and a cause of action for breach of contract. In short, the original action sought recovery of amounts due plaintiff from Mercer. None of these claims relates to an action to recover monies allegedly misappropriated from the trust created by the mechanic's lien by the individual defendants, and nothing in the original action would have alerted Lam and Maloney to the fact that an action of this nature would ever be brought against them at the time that the main action was brought against Mercer. The allegations against these parties are discrete and different from those alleged against Mercer. Thus, plaintiff has failed to show that the claim against Lam and Maloney of misdirecting trust funds, which has been asserted against them in their individual capacities, "arises out of" Mercer's failure to pay plaintiff under the mechanic's lien. Nor does plaintiff show that Lam and Mercer should have known that plaintiff was mistaken in failing to name them in the main action in relation to Mercer's failure

to pay amounts due plaintiff under the mechanic's lien.

As a result, plaintiff cannot show that Lam and Maloney were so "united in interest" with Mercer, with regard to the timely claims brought against Mercer, so as to permit plaintiff to bring an action against these individuals after the passing of the statute of limitations.

Lastly, plaintiff maintains that there is no statute of limitations under Section 13 of the LL. However, plaintiff's action is one for creation of a trust under Article 3-A, and so the limitations period in Article 3-A is applicable to invalidate the present action.

Accordingly, it is

ORDERED that the motion brought by Richard Lam and Kevin Maloney for dismissal of the fourth cause of action in the amended complaint is granted, and the fourth cause of action is dismissed; and it is further

ORDERED that the cross motion is denied.

Dated: April 20, 2009

FILED
APR 28 2009
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NEW YORK

ENTER:



J.S.C.
EMILY JANE GOODMAN