

Talbot v JNJ Constr., Inc.

2009 NY Slip Op 31654(U)

July 16, 2009

Supreme Court, Nassau County

Docket Number: 006199-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
BRIAN TALBOT,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

Index No: 006199-08

Motion Seq. No: 2

-against-

Submission Date: 6/04/09

**JNJ CONSTRUCTION, INC., KASSON
CONSTRUCTION INC.,**

Defendants.

-----x

Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition.....x**
- Reply Affirmation and Exhibit.....x**

This matter is before the court on the motion by Defendants JNJ Construction Inc. (“JNJ”) and Kasson Construction Inc. (“Kasson”) (collectively “Defendants”), filed on February 6, 2009 and submitted June 4, 2009.¹ Defendants request an Order dismissing the verified complaint (“Complaint”) for failure to join a necessary party. Alternatively, Defendants asks the Court to name Linda Talbot as a party in this action. For the reasons set forth below, the Court denies Defendants’ motion in its entirety.

BACKGROUND

A. Relief Sought

Defendants move for an Order 1) dismissing the Complaint, pursuant to CPLR § 3211(a)(10), due to the absence of a necessary party, Linda Talbot; and/or 2) naming Linda

¹ This Court assumed responsibility for this case on May 8, 2009.

Talbot as a defendant, pursuant to CPLR § 1001(a), because she is a necessary party who refuses to join this action as a plaintiff; or 3) naming Linda Talbot as a plaintiff in this action, pursuant to CPLR § 1001(a). Plaintiff opposes Defendants' motion.

B. The Parties' History

Brian Talbot ("B. Talbot"), a homeowner, has sued JNJ and Kasson, general contractors, for their alleged breach of a contract for work that Defendants agreed to perform at B. Talbot's home located at 15 Second Street, Garden City, New York ("Premises"). In the Complaint, B. Talbot alleges that, on or about January 4, 2005, he entered into a contract with JNJ and Kasson for the performance of work, labor and services at the Premises. The Complaint includes a copy of the agreement, which is in the form of a letter on JNJ letterhead, dated January 4, 2009. The letter is from Joseph Kasson, to "Brian and Linda Talbot" at 15 Cathedral Avenue, Garden City, New York 11530.² The letter outlines the work to be performed on seven bathrooms at the Premises and states that the cost of that work will be \$143,400. Neither Brian Talbot nor his wife Linda Talbot ("L. Talbot") signed that letter.

The Complaint alleges, further, that Plaintiff and Defendants entered into supplemental contracts dated May 15, June 23, July 29 and December 19, 2005, and April 29, 2006. The Complaint includes copies of those supplemental contracts, which are also in the form of letters on JNJ letterhead, from Joseph Kasson to Brian and Linda Talbot at 15 Cathedral Avenue, Garden City, New York. Those letters outline the work to be performed and the cost of that work. Neither of the Talbots signed any of those letters. (The letters will collectively be referred to as the "Agreements.")

Plaintiff alleges that JNJ breached the Agreements by failing to complete the work as agreed and failing to cure defects in its workmanship and materials. Plaintiff alleges that Kason breached the Agreements by failing to provide the required equipment and materials and failing to perform the required labor. Plaintiff seeks damages from the Defendants. Defendants have filed a counterclaim alleging that Plaintiff has failed to pay Defendants for their services and seeking damages from Plaintiff.

² The letter was originally addressed to Brian and Linda Talbot at 15 Second Street, but the words "Second Street" are crossed out and the words "Cathedral Avenue" are handwritten in their place.

Defendants affirm, and Plaintiff does not dispute, that at a conference before the Court (Austin, J.), counsel discussed the addition of L. Talbot as a party. Plaintiff advised the Court that he would not consent to add L. Talbot as a party and the Court, at that conference, permitted Defendants to file the instant motion.

C. The Parties' Positions

Plaintiff submits that L. Talbot is a necessary party to this action, in light of the facts that she is a) a party to the Agreements, b) a co-resident of the Premises, and c) Plaintiff's spouse. Plaintiff argues that the rights and/or liabilities of the parties cannot be properly adjudicated without adjudication of the rights and/or liabilities of L. Talbot because, *inter alia*, 1) she is responsible for the payment for work performed pursuant to the Agreements; 2) she is a potential beneficiary of the sixth cause of action of the Complaint, in which Plaintiff alleges a substantial deprivation of the use of a portion of the Premises; 3) she is one of the people who allegedly denied Defendants access to the Premises, which Defendants have set forth as an affirmative defense; and 4) if she is not named as a party, Defendants will be forced to initiate a separate action against for her alleged non-payment of monies due. In light of the foregoing, Plaintiff argues that the Court should dismiss the action, or alternatively direct that L. Talbot be joined either as a plaintiff or a defendant in this action.

Plaintiff opposes Defendants' motion, submitting that 1) Defendants have filed this motion to harass Plaintiff and L. Talbot, as demonstrated by the fact that Defendants could have joined L. Talbot as a third-party defendant in the year since the Complaint was filed but did not do so; 2) Defendants can obtain relevant information from L. Talbot by deposing her; 3) by waiting for almost a year to raise this issue, Defendants have waived their right to name L. Talbot as a plaintiff and should be limited to the remedy of joining her as a third-party defendant; 4) L. Talbot is not a necessary party because a) the Agreements were prepared by Defendants; b) the Agreements do not contain the signature or other acknowledgment of Plaintiff or L. Talbot; and c) the mere presence of L. Talbot's name on the Agreements does not render her a necessary party; and 4) Plaintiff has offered only conclusory assertions in support of their claim that L. Talbot denied them access to the Premises.

In their Reply Affirmation, Defendants take particular issue with Plaintiff's argument that

there is a lack of proof that L. Talbot is a party to the Agreements, or is bound by them. Defendants submit that Plaintiff, by filing the Complaint and identifying the Agreements as contracts, has made a judicial admission that contracts existed among the parties. Thus, Defendants submit that Plaintiff should not now be permitted to question the validity of the Agreements, or dispute that L. Talbot was a party to those Agreements.

RULING OF THE COURT

CPLR § 3211(a)(10) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the court should not proceed in the absence of a person who should be a party. In turn, CPLR § 1001(a) defines parties who should be joined as follows:

Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

Finally, CPLR § 1003 provides as follows:

Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section. Misjoinder of parties is not a ground for dismissal of an action. Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it. Parties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just. The court may order any claim against a party severed and proceeded with separately.

Joinder is mandatory under CPLR § 1001(a) where (1) the party to be included is necessary if complete relief is to be accorded between the persons who are then parties to the action; or (2) the unnamed party might be inequitably affected by a judgment in the action. *Castaways Motel v. Schuyler*, 24 N.Y.2d 120, 125 (1969). Compulsory or mandatory joinder should be enforced so that there is not a multiplicity of litigations and non-parties can be protected if they have a material interest in the subject matter. *27th Street Block Assoc. v. Dormitory Auth. of the State of New York*, 302 A.D.2d 155, 160 (1st Dept. 2002). Ultimately, the

determination of whether a party is necessary for joinder is left to the sound discretion of the court. *Miller v. Keefe*, 164 A.D.2d 933 (2d Dept. 1990). Thus, CPLR §§ 1001 and 1003 give a court wide latitude and are to be liberally construed. *Gross v. BFH Co.*, 151 A.D.2d 452 (2d Dept. 1989).

In the matter *sub judice*, Defendants have failed to sustain their burden of proving that the addition of L. Talbot to this action is necessary. Defendants contend that L. Talbot is a necessary party, based on her connection to the Agreements that are the subject of the Complaint. These Agreements, however, were prepared by the Defendants and do not contain L. Talbot's signature. Nor do these Agreements contain any acknowledgment of L. Talbot stating that she is a party to the Agreements, much less any suggestion that she would be required, by basic contract principles, to be bound by their terms. Defendants have also failed to demonstrate that, in order to adjudicate and afford complete relief to the Plaintiff's breach of contract action and Defendants' counterclaims, L. Talbot must be joined herein. In addition, Defendants have failed to show that Linda Talbot might be inequitably affected by a judgment in this action. Moreover, the Defendants had the opportunity to add Linda Talbot as a third-party defendant for over a year and did not do so. Finally, Defendants can obtain relevant information from L. Talbot by serving her with a non-party witness deposition subpoena.

In light of the foregoing, the Court denies Defendants' motion in its entirety.

All matters not decided herein are hereby denied.

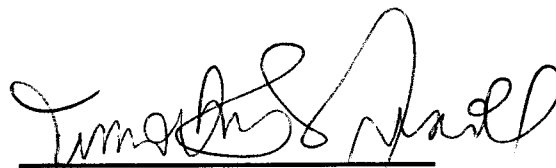
This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a certification conference on August 14, 2009 at 9:30 a.m.

ENTER

DATED: Mineola, NY

July 16, 2009



HON. TIMOTHY S. DRISCOLL

J.S.C. **ENTERED**

JUL 21 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**