

Long Indus., Inc. v Aetna Cas. & Sur. Co.

2009 NY Slip Op 31662(U)

July 9, 2009

Supreme Court, New York County

Docket Number: 112015/03

Judge: Marcy S. Friedman

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

PRESENT: **Hon. Marcy S. Friedman**
Justice

PART 57

Index Number : 112015/2003

INDEX NO. 112015/03

LONG INDUSTRIES, INC.

MOTION DATE _____

vs

AETNA CASUALTY & SURETY

MOTION SEQ. NO. 003

Sequence Number : 003

MOTION CAL. NO. _____

SUMMARY JUDGMENT

_____ this motion to/for _____

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

Replying Affidavits _____

3

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

15

JUL 27 2009

COUNTY CLERK'S OFFICE
NEW YORK

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

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

Dated: 7-9-09



MARCY S. FRIEDMAN, J.S.C. J.S.C.

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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
LONG INDUSTRIES, INC.,

Plaintiff,

Index No.: 112015/03

- against -

DECISION/ORDER

THE AETNA CASUALTY & SURETY
COMPANY, PEREZ INTERBORO ASPHALT
CO., INC., and THE CITY OF NEW YORK

Defendants.

_____ x

In this action, plaintiff Long Industries, Inc. (“Long”) seeks to foreclose on a mechanic’s lien for excavation equipment rented to defendant Perez Interboro Asphalt Co. (“Perez”). Defendants Perez and Aetna Casualty & Surety Company (“Aetna”) each move for summary judgment dismissing the complaint on the grounds that plaintiff filed the lien against the wrong public improvement project, failed to timely extend the lien pursuant to Lien Law § 18, lacked legal capacity to sue or extend the filing of the lien from the date plaintiff ceased to exist as a corporation, failed to timely serve the complaint, and failed to bring its breach of contract claim within the statute of limitations. Perez also seeks a set-off against any potential judgment in plaintiff’s favor of a judgment obtained by Perez against plaintiff in a prior action. Defendant The City of New York (“City”) cross-moves for summary judgment largely on the same grounds as Perez. Plaintiff cross-moves to consolidate this action with an action under Index No. 602986/97.

It is undisputed that plaintiff rented excavation equipment to Perez to be used on a public works project sponsored by the City. Plaintiff argues, and Perez disputes, that pursuant to a

letter, dated August 15, 1990 from Perez to plaintiff, Perez agreed to rent the equipment beginning August 16, 1990 for a period of 10 months at \$6,000 per month. (See P.s' Cross-Motion, Ex. 1.)¹ Perez contends, rather, that the terms of the rental were governed by a letter agreement, sent by plaintiff to Perez and dated August 24, 1990, in which plaintiff stated that the rental was for a 10 month period from July 10, 1990 to April 10, 1991. (Perez's Motion, Ex. P.)² The parties do not dispute that Perez tendered a check to plaintiff for \$30,000 at the beginning of the rental period and ceased to make any additional payments. (See Aff. of Mitchell Studley in Support of Perez's Motion, ¶¶ 44, 47.) On or about April 3, 1992, plaintiff filed a Notice Under Mechanic's Lien Law for Account of Public Improvement ("first lien") with the New York City Department of Finance in the amount of \$30,000. (Id., Ex. M.) The first lien described the public improvement project subject to the lien as "Contract No. HWM446AW, Comptrollers No. 9015619 Construction of 14th Street from Avenue 'C' to FDR Drive." (Id.) On or about September 29, 1992, plaintiff filed a second notice of lien ("second lien") on the same project.³ Instead of seeking another continuation of the second lien, plaintiff filed a third notice of lien ("third lien") on the same project on February 20, 1998.⁴

On July 1, 2003, plaintiff commenced this action by filing a summons with notice against

¹Thus, plaintiff contends that pursuant to this letter, the rental period ended on June 16, 1991.

²The end date is a miscalculation as ten months from July 10, 1990 is May 10, 1991.

³Plaintiff filed an extension on the second lien on March 25, 1993 and the second lien was subsequently continued by court order dated March 22, 1994 for a period of one year, continued again by court order dated March 16, 1995 for a period of one year, continued again by court order dated March 5, 1996 for a period of one year, continued again by court order dated February 24, 1997 for a period of one year, and continued again by court order dated February 4, 1998 for a period of one year.

⁴Plaintiff filed an extension on the third lien on July 23, 1998 and the third lien was subsequently continued by court order dated July 16, 1999 for a period of one year, continued again by court order dated July 12, 2000 for a period of one year, continued again by court order dated July 9, 2001 for a period of one year, continued again by court order dated July 2, 2002 for a period of one year.

Perez and Aetna after filing a notice of pendency, and later amended its complaint to add the City as a defendant.⁵

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

It is well settled that pursuant to Lien Law § 9(7), a notice of lien must “properly describe the specific” property which the lienholder seeks to encumber. (Northeast Restoration Corp. v K & J Constr. Co., L.P., 304 AD2d 306, 307 [1st Dept 2003]. See also Hudson Demolition Co., Inc. v Ismor Realty Corp., 62 AD2d 980 [2nd Dept 1978] [holding lien invalid where the property “description placed within the notice of lien described an adjacent property”].) Accordingly, “[s]uch a description must be sufficiently specific to allow an identification of the premises with reasonable certainty to the exclusion of all other premises.” (Contelmo’s Sand & Gravel, Inc. v J & J Milano, Inc., 96 AD2d 1090 [2nd Dept 1983] [holding lien invalid where notice of lien

⁵Plaintiff commenced an action against Perez and Aetna in 1997 for payment of the balance due on the rental agreement. (Sup Ct, New York County, Index No. 602986/97.) Perez contends, and plaintiff does not dispute, that this action remained dormant until Perez moved, on August 30, 2007, for leave to amend its answer in the instant action to include the affirmative defenses and counterclaim it pleaded in the 1997 action. Aetna cross-moved to amend its answer to add affirmative defenses. Plaintiff cross-moved to consolidate both actions. By stipulation dated December 20, 2007, the parties agreed to let Perez and Aetna amend their answers accordingly and plaintiff to incorporate its causes of action from the 1997 action into the instant action. Plaintiff also agreed to withdraw its cross-motion. Plaintiff further agreed to discontinue the 1997 action upon executing and serving a stipulation of discontinuance on all parties. Although both plaintiff and Perez executed a stipulation of discontinuance dated December 27, 2007, the parties dispute whether it is enforceable because Aetna did not sign it.

[* 5]

described subject property as situated on west side of road when property was in fact located on the north side of road].)

Perez argues that plaintiff's notice of lien is facially defective because it describes the wrong public improvement project. In support of its motion, Perez submits the affidavit of its comptroller Joshua Sokolow who was responsible for Perez's accounting at the time the rental agreement was effective. Sokolow attests that Perez actually worked on two separate projects for the City on 14th street and that the particular project for which Perez rented the excavation equipment was Contract No. HWM446W from Avenue C to Hudson Street ("Hudson Street project") which is not the project described in the notice of lien. (Aff. of Joshua Sokolow, ¶¶ 4-7.) As previously stated, the project description in plaintiff's notice of lien is for Contract No. HWM556AW (emphasis added) for 14th Street from Avenue C to FDR drive ("FDR Drive project"). Perez and the City also submit a letter from the Department of Transportation dated August 13, 1991, which ordered Perez to commence work on the FDR Drive project on September 23, 1991, a date after the rental period had expired. (Perez's Motion, Ex. L.) On this record, defendants make a prima facie showing that the lien on which plaintiff seeks to foreclose is facially defective.

In opposition, plaintiff fails to raise a triable issue of fact. Plaintiff does not submit the affidavit of anyone with personal knowledge of the parties' contract nor any other evidence that plaintiff rented the excavation equipment to Perez for the FDR Drive project. Contrary to plaintiff's assertion, there is no inconsistency between Mr. Sokolow's affidavit and his testimony. Therefore, plaintiff's cause of action to foreclose on the mechanic's lien as against defendants Perez and Aetna must be dismissed.

In light of the above holding, the court need not address defendants' additional arguments in support of dismissal of plaintiff's claim on the mechanic's lien.

Perez also seeks dismissal of plaintiff's breach of contract claim as untimely. CPLR § 213(2) imposes a six year statute of limitations for "an action upon a contractual obligation or liability, express or implied, except as provided in . . . article 2 of the uniform commercial code." Further, "article 2-A of the Uniform Commercial Code (Leases) . . . requires that an action for default under a lease be commenced within four years of its accrual." (ESP Fin. Servs., LLP v Vielot, 18 AD3d 208, 209 [1st Dept 2005]. See also Cadlerock Joint Venture, L.P. v Remillard, 56 AD3d 1095 [3rd Dept 2008].) UCC § 2-A-103(1)(j) defines "lease" as "a transfer of the right to possession and use of goods for a term in return for consideration." Moreover, a cause of action for breach of a lease "accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later." (See UCC § 2-A-506[2].)

Perez argues that the rental agreement is governed by UCC Article 2-A because it is a lease and plaintiff did not commence its breach of contract claim within the four year limitations period. In support of its motion, Perez submits the testimony of plaintiff's principal, Steven Long, stating that the agreement was "structured to be a lease," that the total cost was "\$60,000 whether [Long] used it a month or ten months" and acknowledging that it was a "ten-month deal." (Steven Long Dep. at 42.) While the letters memorializing the parties' agreement were not signed, plaintiff does not dispute that the agreement was a lease or that the final payment was due more than four years before this action was commenced. The action is accordingly barred by the UCC § 2-A-506(1) four year statute of limitations. (See e.g. Cadlerock Joint Venture, L.P., 56 AD3d 1095, supra [60-month lease of ATM machine subject to UCC four year statute of limitations].)

In light of the above holding, the court need not address Perez's other arguments in

support of its motion seeking dismissal of plaintiff's breach of contract claim.

To the extent that plaintiff pleads a cause of action for quantum meruit against Perez, this claim must be dismissed as the parties do not dispute the existence of a valid agreement. (See Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 NY2d 382, 388 [1987]; Skillgames, LLC v Brody, 1 AD3d 247, 251 [1st Dept 2003].) Similarly, plaintiff's cause of action for account stated against Perez should be dismissed as it is "premised on the same allegation, namely, nonpayment for goods, thus invoking the four-year statute." (Wuhu Import & Export Corp. v Capstone Capital, LLC, 39 AD3d 314, 315 [1st Dept 2007]. See also Herba v Chichester, 301 AD2d 822 [3rd Dept 2003].)

Aetna makes a prima facie showing that plaintiff's cause of action on the bond should be dismissed. Contrary to plaintiff's contention, Aetna timely moved for summary judgment to dismiss the complaint in its entirety, which included a cause of action by plaintiff against Aetna for payment on a performance bond and payment bond. As all of plaintiff's causes of action are dismissed against Perez, plaintiff's claims on the bond against Aetna, as Perez's surety, should be dismissed as a matter of law. (See American Bldg. Supply Corp. v Avalon Props., Inc., 8 AD3d 515 [2nd Dept 2004].)

While Perez does not move for judgment on its counterclaim for breach of implied warranties and plaintiff likewise does not move to dismiss it, plaintiff nevertheless argues that the court may search the record and deny Perez's counterclaim sua sponte pursuant to CPLR 3212(b). Contrary to plaintiff's contention however, "a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court." (Dunham v Hilco Constr. Co., Inc., 89 NY2d 425, 429-430 [1996].) As Perez's counterclaim is not the subject of any of the motions before

the court it should not be dismissed sua sponte.

As all of plaintiff's claims in the instant action have been dismissed, plaintiff's cross-motion to consolidate the two actions is denied as moot.

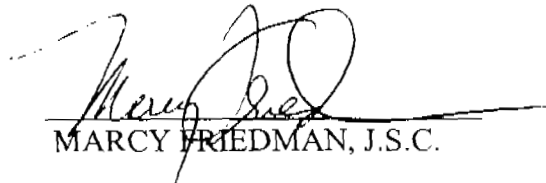
Accordingly, it is hereby ORDERED that the motions of defendants Perez Interboro Asphalt Co. and Aetna Casualty & Surety Company and the cross-motion of defendant The City of New York are granted to the extent that the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the counterclaim of defendant Perez Interboro Asphalt Co. is severed and shall continue; and it is further

ORDERED that the remaining parties shall appear in Part 57 of this Court on August 6, 2009 at 2:30 p.m. for a status conference.

This constitutes the decision and order of the court.

Dated: New York, New York
July 9, 2009


MARCY FRIEDMAN, J.S.C.

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