East Port Excavation & Util. Contr., Inc. v Stoneridge Homes, Inc.

2009 NY Slip Op 31898(U)

August 13, 2009

Supreme Court, Nassau County

Docket Number: 000182-08

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	**TRIAL/IAS PART: 25**
EAST PORT EXCAVATION & UTILITIES CONTRACTORS, INC.	**NASSAU COUNTY**
Plaintiff,	
-against-	**Index No: 000182-08**
	Motion Seq. No: 4
STONERIDGE HOMES, INC., NASSAU COUNTY INDUSTRIAL DEVELOPMENT AGENCY, 839 PROSPECT AVENUE, LLC, NEW YORK CONTRACTING & CONSTRUCTION MANAGEMENT CORP., SALVATORE SANGEORGE AND "JOHN DOE ONE" THROUGH "JOHN DOE TEN,"	**Submission Date: 6/15/09**
Defendants.	
----------x	

Papers Read on this Motion:

Amended Notice of Motion for Summary Judgment and Affirmation in Support.....x
Affidavit in Opposition (J. Gioino) and Exhibit.....x
NCIDA Memorandum of Law.....x
Reply Affirmation and Exhibits.....x
Affirmation in Opposition and Affidavit in Opposition (R. Batheja)..x
Affidavit in Further Support and Exhibits.....x

This matter is before the court on the motion for summary judgment filed by Defendant All Systems Precast, Inc. (designated "John Doe One" in the caption) [1] on its three cross-claims against Defendants Stoneridge Homes, Inc. and the Nassau County Industrial Development

[1] Pursuant to a stipulation dated August 21, 2008, All Systems Precast, Inc. became a party in the action in place of "John Doe One."

Agency, filed on February 18, 2009 and submitted on June 15, 2009. For the reasons set forth below, the Court denies All Systems' motion in its entirety.

BACKGROUND

A. Relief Sought

Defendant All Systems Precast, Inc. ("All Systems"), sued herein as "John Doe," moves for an Order, pursuant to CPLR § 3212, awarding it summary judgment on its first, second and third cross claims against Defendants Stoneridge Homes, Inc. ("Stoneridge") and Nassau County Industrial Development Agency ("NCIDA") in the sum of $43,457.11, plus interest and costs. [2]

Defendants Stoneridge and NCIDA oppose All Systems' motion.

B. The Parties' History

NCIDA is a public benefit corporation empowered to acquire property to assist with financing projects that promote the economic welfare and prosperity of the county. NCIDA owns the premises located at 816-822 Prospect Avenue, Westbury, New York ("Premises") that are the subject of this construction dispute.

On July 1, 2006, NCIDA, as lessor, leased the Premises to Prospect Avenue Apartments Limited Partnership ("Prospect Partnership"), as lessee. [3] This lease was part of the industrial development agency's "straight lease" transaction pursuant to which NCIDA provided financial assistance in the form of tax benefits to the lessee in connection with the construction of various improvements on the Premises.

Prospect Partnership retained Stoneridge as the general contractor for the Project. Stoneridge, in turn, hired various subcontractors including the Plaintiff East Port Excavation & Utilities Contractors, Inc. ("East Port") and All Systems to complete certain parts of the Project.

In its verified complaint ("Complaint"), East Port, alleges, *inter alia*, that on or about and between June 28, 2006 and December 2, 2006, at the request of Stoneridge, as contractor, and with the consent of NCIDA, as owner, East Port agreed to provide "all labor and material

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[2] By letter dated February 3, 2009, counsel for All Systems confirms that, although it named the Plaintiff in both the Notice of Motion for Summary Judgment and the "Wherefore" clause of the Affirmation in Support, All Systems does not seek any relief against the Plaintiff in this motion. Thus, its motion for summary judgment, on its third cross claim, is made only as against Defendants Stoneridge and the NCIDA, and not against Plaintiff on the counterclaim.

[3] It is unclear what the precise relationship is between Defendant, 839 Prospect Avenue LLC, and Prospect Partnership.

necessary to perform excavation, drive steel retaining wall, remove excess materials from [the] job site and lagging at the Premises" for the sum of $91,660.00. Complaint ¶ 19. East Port also agreed to provide all labor and material necessary to "obtain permits, fill dumpsters, lagging, clean up and placement of recycled concrete aggregate" at the subject premises, for an additional sum of $78,121.02. Complaint ¶ 26. East Port alleges that, despite its demands for payments, Defendants have failed to pay any of the $91,660.00 owed, and have only made payments of $32,000.00 towards the $78,121.02 owed.

On January 23, 2007, within eight months after providing the last item of labor and material, East Port filed with the Clerk of the County of Nassau, *inter alia*, two separate Notices of Mechanic's Lien in the amounts of $91,660.00 and $46,121.02. Both Mechanic's Liens were served upon Defendants Stoneridge and NCIDA, pursuant to Section 11 of the Lien Law, and proof of service was filed with the Clerk of Nassau County.

On November 15, 2006, All Systems entered into an agreement with Stoneridge to supply and install a precast plank on the subject premises, but there is a dispute whether this agreement was written or oral. David Koehler ("Koehler"), Vice President of All Systems, affirms that, on or about November 15, 2006, All Systems contracted with Stonebridge to furnish precast planks for the sum of $826,000. Koehler does not mention a written contract, and does not provide a copy of any writing evidencing the contract. Koehler affirms, further, that the parties subsequently agreed to increase the price by $43,142.06, raising the total contract price to $869,142.06. Koehler affirms that Stoneridge has paid All Systems the sum of $825,684.95, but still owes $43,457.11 towards the alleged $869,142.06 total.

All Systems has asserted three cross claims, on which it now moves for summary judgment: 1) a breach of contract action against Stonebridge seeking $43,457.11, 2) an action against NCIDA, based on *quantum meruit*, seeking $43,457.11, and 3) a lien foreclosure action against Stoneridge, NCIDA and NY Management seeking $43,457.11. [4] The cross claims are based on All Systems' assertion that, in connection with changes that Stoneridge requested, the parties agreed that the contract would be revised and Stoneridge would pay All Systems an

[4] The Court notes that, although All Systems also asserted the third cross claim against New York Contracting & Constructing Management Corp., counsel's February 3rd letter explicitly states that All Systems' motion is for summary judgment against Stoneridge and NCIDA. Accordingly, the Court's decision will be limited to the cross claims against those Defendants.

additional $43,142.06, increasing the total contract price from $826,000 to $869,142.06. All Systems alleges that it is still owed $43,457.11.

Ranjan Batheja ("Batheja"), a principal officer of Stoneridge, disputes All Systems' claim that the parties agreed to an upward modification of the contract. Batheja affirms that Stoneridge and All Systems executed a written contract, which Batheja signed on behalf of Stoneridge. Batheja avers that, despite his extensive efforts, which included searching for documents placed in storage, he has been unable to locate that contract. Batheja affirms, further, that it is not his business practice to enter into a contract of this magnitude without a writing evidencing the agreement and, further, that his work order contracts always provide that any changes or amendments must be written, rather than oral. Batheja also affirms that neither he, nor anyone on behalf of Stoneridge, ever agreed to an increase in the contract price, and that Stoneridge has paid All Systems all the money it is owed.

In a responsive affidavit, Koehler submits that Batheja agreed, in writing, to the amendment of the contract. In support thereof, Koehler provides documentation including 1) Application and Certification for Payment forms, 2) checks and 3) correspondence signed or otherwise approved by Batheja that, Koehler submits, demonstrate Koehler's assent to the upward modification.

C. The Parties' Positions

All Systems submits that it is entitled to summary judgment on its counterclaims because it has demonstrated 1) the existence of the contract, 2) the upward modification of that contract, 3) All Systems' performance pursuant to that Contract, 4) the proper filing and service of the Notices of Lien and 5) Stonebridge and NCIDA's failure to make its required payments.

NCIDA opposes All Systems' motion on the grounds that 1) NCIDA was not a party to the agreement with Stoneridge, and never expressly or implicitly agreed to pay the obligations of Stonebridge to third parties; 2) NCIDA is not liable to All Systems, a subcontractor, under a *quantum meruit* theory because NCIDA never expressly agreed to pay the obligations of the contractor; and 3) All Systems, a subcontractor, is not entitled to summary judgment on its mechanic's lien claim because it has not established that the contractor, Stoneridge, was not paid in full.

Stoneridge opposes All Systems' motion on the ground, *inter alia*, that there are triable issues of fact regarding the alleged modification of the contract.

RULING OF THE COURT

A. Standard for Summary Judgment

The party seeking summary judgment must establish an entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). If the party moving for summary judgment fails to establish a *prima facie* entitlement to judgment as a matter of law, the motion must be denied. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Widmaier v. Master Products, Mfg.*, 9 A.D.3d 362 (2d Dept. 2004); *Ron v. New York City Housing Auth.*, 262 A.D.2d 76 (1st Dept.1999). CPLR § 3212(b) further requires that, in ruling on a motion for summary judgment, the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action or defense has no merit." In making this determination, the Court must view the evidence submitted by the moving party in a light most favorable to the non-movant. *Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept. 1990). The Court may only grant summary judgment when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979).

B. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, (2) consideration, 3) performance by the plaintiff, (4) breach by the defendant, and (5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986)

The modification of a contract results in the establishment of a new agreement between the parties which supplants the affected provisions of the original agreement while leaving the balance of it intact. *Becker v. Faber*, 280 N.Y. 146 (1939); *Radist v. Zidel*, 12 A.D.2d 648 (2d Dept. 1960). Fundamental to the establishment of a contract modification is proof of each element requisite to the formulation of a contract, including mutual assent to its terms. *See, e.g., Becker*; *Ballard v. Friedeberg*, 177 A.D. 715 (1st Dept. 1917). Under New York law, oral

directions to perform extra work may modify contract provisions requiring written authorization. *Barsotti's v. Consolidated Edison*, 254 A.D.2d 211, 212 (1st Dept. 1998).

While it is true that modification may be proved circumstantially by the conduct of the parties, *see, e.g., Martin v. Peyton*, 246 N.Y. 213 (1927), the record here does not demonstrate, as a matter of law, the required mutual assent to a change in terms. All Systems' breach of contract claim is based on an alleged modification to the contract that required Stoneridge to pay All Systems additional money beyond the $826,000 agreed to in their initial contract. Neither party has produced a writing indisputably evidencing the modification, and the parties dispute that they orally agreed to the modification. Stoneridge denies that the parties agreed to any such modification, submitting that it would have required such an amendment to be in writing. In light of the factual dispute whether there was a mutual agreement to increase the price, All Systems has not met its *prima facie* burden herein and the Court must deny its motion for summary judgment on its first cross claim.

C. Quantum Meruit

To state a claim in *quantum meruit*, a claimant must establish 1) the performance of the services in good faith, 2) the acceptance of the services by the person to whom they are rendered, 3) an expectation of compensation therefor, and 4) the reasonable value of the services. *Geraldi v. Melamid*, 212 A.D.2d 575, 576 (2d Dept. 1995). Where an express agreement exists between the parties, the rights and liabilities, as between them, should be determined based on a breach of contract theory. *Apfel v. Prudential-Bache Sec., Inc.*, 81 N.Y.2d 470, 479 (1993). Therefore, if a service is required by the terms of an express contract, there can be no recovery in *quantum meruit*. *Mary Matthews Interiors, Inc. v. Levis*, 208 A.D.2d 504, 506 (2nd Dept. 1994).

The plaintiff must establish that the services were performed at the request or behest of the defendant. *Clark v. Daby*, 300 A.D.2d 732 (3d Dept. 2002); *Prestige Caterers v. Kaufman*, 290 A.D.2d 295 (1st Dept. 2002); *Lakeville Pace Mechanical, Inc. v. Elmar Realty Corp.*, 276 A.D.2d 673 (2d Dept. 2000). However, where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which covers the dispute between the parties, a cause of action for recovery in *quantum meruit* must be dismissed. *Clark-Fitzpatrick v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 389 (1987); *Battery Park*

Realty, Inc. v. RKO Delaware, Inc., 18 A.D.3d 690 (2d Dept. 2005); *Cooper, Bamundo, Hecht, & Longworth, LLP v. Kuczinski*, 14 A.D.3d 644 (2d Dept. 2005),.

In this case, NCIDA and All Systems did not enter into any written agreement. Moreover, All Systems not demonstrated that NCIDA played any role in the subcontract between Stoneridge and All Systems. Specifically, All Systems has failed to prove that NCIDA 1) agreed to be responsible for Stoneridge's obligations to its subcontractors; 2) as an industrial development agency, did more than provide financial assistance in the form of tax benefits to the Lessee in connection with the Project; or 3) expressly or implicitly agreed to any particular work to be performed by any of Stoneridge's subcontractors, or any material to be supplied by any of Stoneridge's material suppliers. The record suggests, in fact, that the lessee had sole responsibility for constructing the improvements.

Morever, although NCIDA holds record title to the Premises, under the terms of the Lease, the NCIDA is not entitled to possess, use or enjoy the Premises or the improvements prior to an event of default. Rather, it may take possession of the Premises in the event of a default, but only to recapture the value of any tax benefits enjoyed by the Lessee as a result of the NCIDA's record ownership. The Premises and the improvements constitute the security for repayment of a "Recapture of Benefits" pursuant to the Lease. Thus, the structure of the industrial development agency and its financing of the Project actually preclude NCIDA from enjoying the benefits of the work allegedly performed by All Systems. In fact, NCIDA maintains that the value of those benefits is below that of the Premises even without the improvements. Therefore, it does not appear that NCIDA will benefit from any value that may have inured to the Premises as a result of All Systems' work.

In light of the foregoing, the Court concludes that All Systems has not met its *prima facie* burden of proof to recover against NCIDA as a matter of law on its *quantum meruit* claim. The Court thus denies All Systems' motion for summary judgment on its second cross claim against NCIDA.

D. Lien Foreclosure Claim

All Systems also moves for summary judgment on its third cross claim based on foreclosure of its mechanic's lien. To establish the right to enforce a mechanic's lien, the contractor or subcontractor must make a prima facie case that the lien is valid, and that it is entitled to the amount asserted in the lien. *Ruckle and Guarino, Inc. v. Hangan*, 49 A.D.3d 267 (1st Dept. 2008). To maintain and enforce a mechanic's lien, a plaintiff is required to demonstrate that the defendant consented to the work performed on its property. *Modern Era Construction v. Shore Plaza*, 51 A.D.3d 990, 991 (2d Dept. 2008) (trial court properly denied summary judgment in action to foreclose mechanic's lien where factual issue existed regarding defendant's consent to improvements). Moreover, as a subcontractor, All Systems is not entitled to a mechanic's lien on the property if the owner has paid the contractor in full. Lien Law §341(1); *Bunce v. Fahey*, 73 A.D.2d 632 (2d Dept. 1979). In light of the factual disputes noted above, including the issue of whether Stoneridge has been paid in full for its performance pursuant to the contract, the Court denies All System's motion for summary judgment on its third cross claim.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a Preliminary Conference before the Court on September 16, 2009 at 9:30 a.m.

ENTER

DATED: Mineola, NY
August 13 , 2009

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
AUG 19 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE