

Ostberg v Litric

2010 NY Slip Op 31307(U)

May 21, 2010

Supreme Court, New York County

Docket Number: 111647/09

Judge: Paul Wooten

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5-26-10

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

PRESENT: _____

PART _____

Index Number : 111647/2009

OSTBERG, NEAL

INDEX NO. _____

vs

DRAGAN LITRIC

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

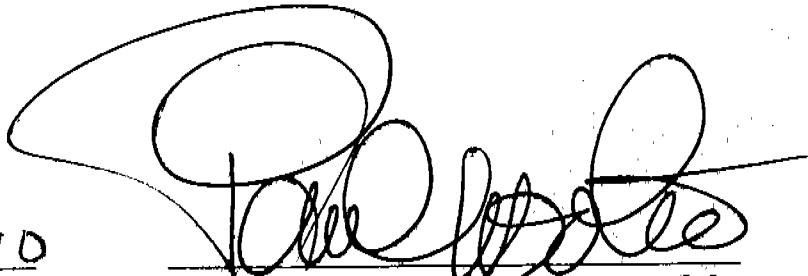
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

see attached decision

FILED
MAY 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/21/2010



J.S.C.
Paul Wooten

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

NEAL OSTBERG,

Plaintiff,

- v -

DRAGAN LITRIC, a/k/a DANNY LITRIC
d/b/a LITRIC CONTRACTING,

Defendants.

INDEX NO. 111647/09

MOTION DATE _____

MOTION SEQ. NO. 00

MOTION CAL. NO. _____

FILED
MAY 27 2010
NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 1 were read on this motion by defendant Trocom Construction Corp., for summary judgment dismissing the complaint, pursuant to CPLR 3212 (b). No opposition papers were submitted.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____

PAPERS NUMBERED
| 1
| None

Cross-Motion: Yes No

On or about November 4, 2005, plaintiff Neal Ostberg and defendant Dragan Litric, a contractor, entered into a written agreement ("the contract"), for the renovation of plaintiff Ostberg's Residence located at 333 East 66th Street, New York, New York. In his complaint, plaintiff Ostberg alleged *inter alia*, that defendant Dragan abandoned working on the construction project and refused to return to the site to correct "substantially defective and deficient work" (plaintiff's complaint page 5, paragraph 16). Subsequently, plaintiff submitted a request for an Architect's Decision, pursuant to the contract. Plaintiff commenced this action seeking a declaration by this Court that the Architects's Decision, dated December 12, 2008, is conclusive, final and binding.

Defendant Dragan Litric now moves for an order, [1] pursuant to CPLR 3211

(a)(1), CPLR 3211(a)(7), dismissing the complaint against him and declaring that he is not prohibited from maintaining an action or an arbitration proceeding against plaintiff Ostberg.

CPLR 3211 [a][1]

CPLR 3211 [a][1] provides:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

[1]. a defense is founded upon documentary evidence;

Pursuant to CPLR 3211 (a) (1) in order to “prevail on a motion to dismiss based on documentary evidence, the documents relied upon must definitively dispose of plaintiff’s claim” (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 221 AD2d 248 (1 Dept 1995); *Juliano v McEntee*, 150 AD2d 524 [2d Dept 1989]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476, [1Dept 1986]). A CPLR 3211 (a)(1) a “motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v. Mut. Life Ins. Co.*, 98 NY2d 314, 326-327 [2002]).

“The motion must be denied if from the pleadings’ four corners ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law’ (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, [1977]). “In furtherance of this task, we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion” (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, supra; *Leon v Martinez*, 84 NY2d 83, 87, [1994]; *Sokoloff v Harriman Estates Dev.*

Corp., 96 NY2d 409, [2001]; *Wieder v Skala*, 80 NY2d 628,[1992]). “We also accord plaintiffs the benefit of every possible favorable inference” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, *supra*; *Sokoloff v Harriman Estates Dev. Corp.*, *supra*).

CPLR 3211 (a)(7)

CPLR 3211 [a][7] provides:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

7. the pleading fails to state a cause of action; . . .

Upon a 3211 [a][7] motion to dismiss for failure to state a cause of action, the “question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts ‘can be fairly gathered from all the averments” (*Foley v D’Agostino*, *supra*; *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). “However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege ‘whatever can be implied from its statements by fair and reasonable intendment” (*Foley v D’Agostino*, *supra*). “[W]e look to the substance [of the pleading] rather than to the form (*Foley v D’Agostino*, 21 AD2d 60, 65 [1 Dept 1964]). “Such a motion is solely directed to the inquiry of whether or not the pleading, considered as a whole, ‘fails to state a cause of action’ [l]ooseness, verbosity and excursiveness, must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading” (*Foley v D’Agostino*, *supra*; See Siegel, 38 St. John’s L. Rev.).

DISCUSSION

Provisions of the General Contract for Construction

Article 4.4.1 of the contract provides:

Decision of Architect. Claims, including those alleging an error or omission by the Architect . . . shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect.

Article 4.3.2 of the contract provides:

Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

Article 4.4.2 provides:

The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or are sponse with supporting data from the other party, (2) reject the Claim in whole or in part, (3)approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.

Article 4.4.4 provides:

If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part.

Article 4.4.6 provides:

When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a

demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision maybe entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

Article 4.5.1 provides:

Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

Article 4.6.1 provides:

Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

Defendant Litric claims that construction on plaintiff Ostberg's residence ceased in early March 2007. Defendant Litric claims that plaintiff made requests for an Architects Decision concerning defendant Litric's performance under the contract, on December 18, 2007 and on October 31, 2008. Both requests were made after the termination of the construction activity and after the 21-day period provided by Article 4.3.2 of the contract.

In addition, defendant Litric claims that plaintiff failed to supply the architect with supporting data within ten days, pursuant to Article 4.4.4 of the contract. Defendant

Litric also claims that the architect was required to render his decision within 30 days of the plaintiff's request and he failed to do so.

Defendant Litric argues that plaintiff's failure to request an Architects decision during the period when construction was in progress, or within 21 days after the occurrence of the events and the Architect's failure to render a decision within a 30 day time period after plaintiff's request, rendered the Architect's decision invalid. Thus, the plaintiff's complaint should be dismissed.

In opposition plaintiff argues that the contract calls for a final and binding determination of disputes by the Architect, subject to arbitration. Plaintiff argues that, if defendant Litric had objections as to the timeliness of plaintiff's request for an Architect's Decision and the decision rendered by the Architect, he was required to demand arbitration within 30 days after the receipt of the Architect's Decision, pursuant to Article 4.4.6 of the contract . Plaintiff argues that defendant Litric's failure to demand arbitration, within the time period called for in the contract, deemed his objections as waived.

"It is for the courts to determine whether the parties agreed to submit their disputes to arbitration, if so, whether the particular dispute comes within the scope of their agreement, and finally whether there has been compliance with any condition precedent to access to the arbitration forum" (*County of Rockland v. Primiano Constr. Co.*, 51 NY2d 1 [1980]; *Matter of United Nations Dev. Corp. v Norkin Plumbing Co.*, 45 NY2d 358, [1978]).

"Sharply to be distinguished from conditions precedent to arbitration are procedural stipulations that the parties may have laid down to be observed in the conduct of the arbitration proceeding itself -- conditions in arbitration, e.g., limitations of time within which the demand for arbitration must be made, or requirements as to parties on whom or as to the manner in which service of the demand for arbitration shall be made (*County of Rockland v. Primiano Constr. Co.*, 51 NY2d 1, [1980]). "[Q]uestions as to whether there has been compliance with such procedural regulations and, if not, what the consequences shall be, are for resolution by the arbitrator as incidental to the conduct of the arbitration proceeding (*County of Rockland v. Primiano Constr. Co.*, supra).

Defendant Litric produced the contract that he entered into with plaintiff. The contract provided the terms and conditions of their agreement, including the 21-day time period by which claims are to be initiated, the options to submit claims to an architect for an Architect's Decision and the ten day time period to furnish the architect with supporting data. The contract provided that an "initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims . . . , unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect (Article 4.4.1). The contract also provided that the failure to demand arbitration within 30 days after the Architect's Decision, renders[†] the Architect's decision as "final and binding upon the Owner and Contractor"(Article 4.4.6).

However, the contract did not provide that the plaintiff is barred from commencing an action, to confirm the Architect's Decision, based upon plaintiff's filing of the request for an Architect's Decision after the 21 day period or plaintiff's failure to

provide supporting data within ten days after the request or the Architect's failure to render an Architects decision within 30 days. "While compliance with periods of limitation imposed by statutes is generally for the courts, compliance with contractual periods of limitation is for the arbitrator" (*County of Rockland v. Primiano Constr. Co.*, 51 NY2d 1, [1980]). "The failure to file a formal notice within 21 days, and the reason for such alleged lapse, were failures of conditions inextricably bound up with questions of contract performance, and thus were issues for arbitration" (*Calvin Klein, Inc. v G.P. Winter Assocs.*, 204 A.D.2d 149, 150 [1 Dept 1994]; see *County of Rockland v. Primiano Constr. Co.*, supra; see *Matter of Spencer-Van Etten Cent. School Dist. [Auchinachie & Sons]*, 179 AD2d 855, lv denied 79 NY2d 759 [3 Dept 1992]).

Defendant Litric has not established that plaintiff's complaint fails to state a cause of action. Additionally, the documentary evidence submitted by defendant Litric does not "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law"(*Goshen v. Mut. Life Ins. Co.*, supra).

Accordingly, it is,

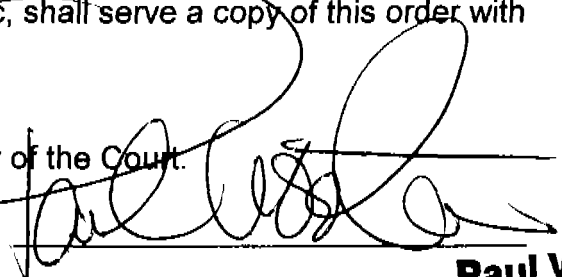
ORDERED that defendant Dragan Litric's motion to dismiss is hereby denied;

and it is further,

ORDERED that defendant Dragan Litric, shall serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 5/21/2010

FILED

 Paul Wooten
 J.S.C.

Paul Wooten
Paul Wooten

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 MAY 27 2010