

Suffolk Paving Corp. v Commercial Contr. Co., Inc.

2010 NY Slip Op 33007(U)

October 14, 2010

Sup Ct, Suffolk County

Docket Number: 25200/2007

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 SUFFOLK PAVING CORP.,

Plaintiff,

-against-

COMMERCIAL CONTRACTING COMPANY,
 INC. and ANTHONY CASTELLO,

Defendants.

ORIG. RETURN DATE: MARCH 25, 2010
 FINAL SUBMISSION DATE: APRIL 1, 2010
 MTN. SEQ. #: 003
 MOTION: MG

ORIG. RETURN DATE: MARCH 25, 2010
 FINAL SUBMISSION DATE: APRIL 1, 2010
 MTN. SEQ. #: 004
 CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 7 read on this motion _____
FOR SUMMARY JUDGMENT AND CROSS-MOTION TO STRIKE ANSWER
 Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers
4-6; Replying Affirmation 7; it is,

ORDERED that this motion by defendant ANTHONY CASTELLO ("defendant") for an Order, pursuant to CPLR 3212, granting summary judgment to defendant dismissing plaintiff's complaint as asserted against him, is hereby **GRANTED** for the reasons stated hereinafter; and it is further

ORDERED that this cross-motion by plaintiff for an Order: (1) pursuant to CPLR 3126, striking the answer of defendants upon the grounds that defendants willfully failed to comply with plaintiff's notice for discovery and inspection, demand for interrogatories, and notice to take deposition, in violation

of Orders of the Court; and in the event the motion is denied, (2) pursuant to Lien Law § 76 (5), directing defendants to serve upon plaintiff a verified statement setting forth the entries with respect to the books and records maintained for the Lien Law trusts established by law for the improvements of the property described herein, is hereby **DENIED** in its entirety for the reasons set forth hereinafter.

This action, commenced on August 16, 2007, is for breach of an oral contract between defendant COMMERCIAL CONTRACTING COMPANY, INC. ("corporate defendant"), a general contractor, and plaintiff SUFFOLK PAVING CORP. ("plaintiff"), a sub-contractor, with respect to certain improvements to a parking lot located at Mavis Tires, in Patchogue, New York. The individual defendant is the president of the corporate defendant. Issue was joined on or about September 27, 2007, and plaintiff served a reply to defendants' counterclaim on or about February 4, 2008. Plaintiff alleges that it performed asphalt paving and related work as agreed to by the parties on or about June 26, 2006. After a credit and partial payment made by the corporate defendant, plaintiff contends that the balance currently due and owing plaintiff is in the amount of \$28,360. The gravamen of this dispute concerns the cost and quality of the work performed by plaintiff. Although plaintiff initially provided the corporate defendant with a written estimate of the cost of the work, plaintiff later billed the corporate defendant for additional sums it allegedly never agreed to pay.

By Order dated March 31, 2009, this Court denied a motion by plaintiff for summary judgment, finding triable issues of fact relative to the specific work performed and the invoices issued by plaintiff in connection therewith. Defendants had indicated that complaints were made to plaintiff regarding incorrect charges and deficient work performed. Moreover, the Court found that the precise terms and obligations of the parties' agreement were unclear. Defendants relied on an estimate dated May 18, 2006, while plaintiff claimed that additional work was agreed to by the parties subsequent to the estimate. In addition, an issue of fact remained as to which party was responsible for obtaining municipal approval for the paving. Thus, questions of fact existed as to the reasonable value and agreed-upon price of the materials and services provided by plaintiff, as well as the terms of the parties' agreement.

Defendant has now filed the instant motion for summary judgment dismissing plaintiff's complaint as asserted against him. Defendant argues that at

all times relevant, he acted on behalf of the corporate defendant and at no time did he ever act or conduct business in an individual capacity. As such, defendant seeks a dismissal of the action as asserted against him based upon lack of privity of contract. In support thereof, defendant has submitted, among other things, the pleadings, his own affidavit, and an estimate and invoices addressed to the corporate defendant.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Comms. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that defendant has made an initial *prima facie* showing of entitlement to judgment as a matter of law (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). The burden then shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action with respect to this defendant (*Alvarez v Prospect Hosp.*, 68 NY2d 320, *supra*). In opposition, plaintiff concedes that defendant was improperly named herein, as there is no privity of contract between defendant and plaintiff.

In view of the foregoing, this motion by defendant for summary judgment dismissing plaintiff's complaint as asserted against him, is **GRANTED**.

Next, plaintiff has filed the instant cross-motion for an Order striking the answer of defendants upon the grounds that defendants willfully failed to

comply with plaintiff's notice for discovery and inspection, demand for interrogatories, and notice to take deposition, in violation of Orders of the Court. In the event that relief is denied, plaintiff seeks a direction from the Court that defendants serve upon plaintiff a verified statement, pursuant to Lien Law § 76 (5), setting forth the entries with respect to the books and records maintained for the Lien Law trusts established by law for the improvements of the subject property. Plaintiff indicates that defendants have wholly failed to respond to any of the aforementioned discovery demands.

In opposition, defendants allege that they have not willfully failed to comply with discovery, but rather that the delays in completing discovery have been caused by many factors, including plaintiff's prior motion for summary judgment which stayed discovery; a change of defendants' counsel and a delay in transferring the file; and plaintiff's alleged refusal to discontinue this action against the individual defendant which necessitated the instant motion for summary judgment. Moreover, defendants argue that plaintiff's Lien Law demand is untimely and inappropriate, as this is a simple breach of contract action not one pursuant to the Lien Law, which action need to be commenced within one year after completion of the work or the date the last payment was due, whichever is later (see Lien Law § 77).

CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either: (a) refuses to obey an order for disclosure; or (b) willfully fails to disclose information which the court finds ought to have been disclosed (CPLR 3126). The penalties proposed by the statute include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed issue; or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a party's pleading where there is a clear showing that its failure to comply with discovery demands is wilful, contumacious, or in bad faith (see *Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (see *Siegman v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

On this record, the Court finds that defendants' failure to respond to plaintiff's discovery demands was not wilful or contumacious. As such, striking defendants' answer is not warranted at this juncture. In addition, the Court finds plaintiff's request that the Court direct defendants to serve upon plaintiff a verified statement pursuant to Lien Law § 76 (5) is misplaced, as this action was not commenced pursuant to article 3-A of the Lien Law, i.e., to enforce a trust or for unjust enrichment (see Lien Law §§ 76, 77; see e.g. *Negvesky v United Interior Resources, Inc.*, 32 AD3d 530 [2006]), but instead was pleaded as a breach of contract action.

Accordingly, this cross-motion by plaintiff is **DENIED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: October 14, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION