

Alpha Interiors Inc. v NCI Constr., Inc.

2011 NY Slip Op 32483(U)

August 10, 2011

Supreme Court, Suffolk County

Docket Number: 42110/2008

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 42110-2008

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 01-28-2011
Motion Submit Date: 05-17-2011
Motion Sequence No.: 001 MOTD

FINAL
 NON FINAL

_____X

ALPHA INTERIORS INC.,

Plaintiff,

-against-

**NCI CONSTRUCTION, INC., CSC HOLDINGS, INC., a/k/a
CABLEVISION CSC HOLDINGS INC., WE'RE
DEVELOPING , LLC., TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA, AND MARJAM
SUPPLY CO., INC., together with John Doe number 1
through John Doe number 10, inclusive, the last names
being fictitious and unknown to plaintiff, such entities
being intended to be those entities with an interest in
the real property located at 6 Corporate Drive, Melville,
New York, Suffolk County District No. 0400, Section No.
268.00, Block No. 02.00, Lot No. 017.018,**

Defendant.

_____X

BACKGROUND

Plaintiff Alpha Interiors, Inc. ("Alpha") commenced this action by filing a Summons and Verified Complaint on or about November 21, 2008, asserting breach of contract and account stated against NCI Construction, Inc. ("NCI") and a lien

foreclosure against the real property owned by We're Developing, LLC ("We're Developing") and the Cablevision/Travelers-Alpha Bond, issued by Cablevision CSC Holdings, Inc. ("CSC") and Travelers Casualty and Surety Company of America ("Travelers") (Travelers and CSC sometimes referred to collectively as "CSC").¹ Upon receipt of the Verified Complaint, Alpha, We're Developing, CSC and Travelers agreed that Alpha would pursue its claims against the bond, which Travelers issued to CSC, discontinuing its action against the real property and We're Developing.

On December 23, 2009, NCI filed for bankruptcy. On July 22, 2009, this Court issued a stay of this action pending NCI's bankruptcy, precluding Alpha or any other litigant from taking further action in this proceeding, including joining any other party. Defendants CSC and Travelers now move to continue the stay of the instant action. Plaintiff lienholders Alpha, BKM Enterprises Inc. ("BKM"), CMT Lighting Company, Inc. ("CMT") and CPI Industries, Inc. ("CPI") oppose the defendants' motion to continue the stay of the instant action.

Defendant CSC is the tenant at the premises and entered into a contract with NCI, as general contractor, to perform work at the premises. Alpha, BKM, CMT, and CPI are four of several subcontractors which contracted with NCI to perform work at the premises. Defendant We're Developing is the landlord and fee owner of the premises and was not party to the CSC-NCI general contract.

CSC entered into a general contract with NCI to construct certain alterations and improvements on CSC's call center. The contract price under the CSC-NCI contract was \$836,407, which later increased as a result of approved change orders. The CSC-NCI contract required NCI to discharge and expunge any and all mechanics' liens and claims to payment thereunder and to indemnify, hold harmless and pay CSC for any costs and expenses CSC incurred in doing so. The general contract also required NCI to pay CSC for any costs and expenses incurred by CSC in defending any mechanic's lien foreclosure action or other action wherein a subcontract of NCI asserted claims against CSC or the premises.

Subsequent to the CSC-NCI general contract, NCI entered into a number of subcontracts to perform the alterations and improvement to the CSC call center. In September of 2008, 11 subcontractors which alleged they had performed their obligations pursuant to their subcontract with NCI without being fully paid for said performance, filed mechanics' liens against the premises totaling \$532,375.62. Pursuant to CSC's lease agreement with We're Developing, CSC bonded the 11

¹ The Court would like to acknowledge the valuable aid of Raymond Castronovo, legal intern.

mechanics' liens. Travelers issued a bond for \$585,612.12, which was filed with the Suffolk County Clerk's Office.

Defendant CSC now moves (i) to stay prosecution of the within action by any party, on the grounds that prosecution of the instant action is barred by the automatic stay provision of 11 U.S.C. § 362 and that Lien Law § 44 requires all subcontractors' claims be handled together; (ii) to consolidate a certain action pending in the Supreme Court, Suffolk County under Index No. 5104/09, commenced by C.M. Richey Electrical Contractors, Inc., with the instant action and, (iii) for any other relief the court deems just, proper and equitable. No party opposes the consolidation application and it is granted to the extent that the lien foreclosure action by C.M. Richey Electrical Contractors, Inc., under index no. 5104-09 shall be tried jointly with the claims of the other named subcontractor/lienors.

DISCUSSION

CSC and Travelers move for a stay of prosecution of the instant action on the ground that the automatic stay provision in 11 U.S.C. § 362 (a), which automatically stays prosecutions of any claims against NCI or involving NCI and its property, also stays prosecution of any claims against CSC and Travelers and its property. CSC and Travelers allege that NCI is a necessary party to the foreclosure actions. CSC and Travelers further argue that there is an inextricable link between NCI and CSC and NCI's possible defenses to the foreclosure action would not be heard if the stay was lifted. CSC and Travelers also contend that the instant action cannot proceed against CSC and/or Travelers so long as the prosecution of the instant action is stayed against NCI.

In opposition, plaintiff Alpha and cross-claimants BKM, CMT and CPI allege that the automatic stay in the prosecution of NCI does not automatically stay the prosecution of codefendants CSC and Travelers. These subcontractors argue that the language of 11 U.S.C § 362 does not expressly include non-bankrupt codefendants within the automatic stay provision. Plaintiffs further assert that NCI does not have any claims against the Traveler's bond and are not required parties in the prosecution against said bond. They state that in the lawsuit against CSC and Travelers on the bond, NCI is capable of testifying as a witness to contest any of the plaintiffs' claims.

11 U.S.C. § 362 (a) is intended to prevent dismemberment of the estate and to enable an orderly distribution of the debtor's assets. **Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n**, 997 F.2d 581 (9th Cir. 1993). "The clear language of 11

U.S.C. § 362 indicates that the provisions of the statute will only serve to stay proceedings against the debtor.” **State v. Defranco Ford, Inc.**, 202 A.D.2d 593, 609 N.Y.S.2d 266 (2d Dept. 1994), citing **Carley Capital Group v. Firemans Fund Ins. Co.**, 889 F.2d 1126 (D.C. Cir. 1989). Thus, the automatic stay provision of the Federal Bankruptcy Law does not extend to non-bankrupt codefendants.

Rosenbaum v. Dane Murphy, Inc., 189 A.D.2d 760, 592 N.Y.S.2d 391 (2d Dept. 1993). “An automatic stay of proceedings accorded by 11 U.S.C. § 362 may not be invoked by entities such as sureties, guarantors, co-obligators or others with similar legal or factual nexus to the debtor.” **Defranco**, 202 A.D. at 594. It has been held that, “the balance of the equities lies with the plaintiffs when one defendant has received an automatic stay pursuant to 11 U.S.C. § 362 (a) and codefendants request a stay of the entire action.” **Rosenbaum**, 189 A.D.2d at 761, quoting **Lottes v. Slater**, 114 A.D.2d 580, 494 N.Y.S.2d 438 (3d Dept. 1985).

The automatic stay provision of 11 U.S.C. § 362 does not expressly extend to non-bankrupt codefendants. The Second Department has clearly refused to extend the automatic stay provision to non-bankrupt codefendants, **see Defranco Ford, Inc.**, 202 A.D.2d 593; **Rosenbaum**, 189 A.D.2d 760, and the movants do not offer New York case law to the contrary. It is important to note that Lien Law § 44 does not list general contractors as required parties in a lien foreclosure action. The burden of proving the existence of entitlement to recovery of a lien lies with the lienholder. **See Brainard v. County of Kings**, 155 N.Y. 538 (1898). Thus, CSC and Travelers will have the full opportunity to utilize NCI’s testimony regarding payments and performance of the subcontractors under their respective contracts to challenge the accuracy and sufficiency of the proof proffered by the lienholders. Under these circumstances, the automatic stay provision of 11 U.S.C § 362 does not extend to CSC and Travelers. Accordingly, CSC’s motion for a stay of the prosecution of the instant action against CSC and Travelers based on 11 U.S.C. § 362, is denied.

It is CSC’s further position that unless and until all of the eleven (11) mechanics’ lienors which have filed liens against the property that are the subject of the construction giving rise to such liens are joined in the action, it is inappropriate for the Court to proceed. CSC has bonded the mechanics’ liens of all those subcontractors which have filed liens on the subject premises pursuant to Lien Law § 19(4) by the issuance of bonds in the amount of 110 % of the face amount of the mechanic’s lien bonded. According to CSC, under the provisions of Lien Law § 44 “(a)ll lienors having liens notices of which have been filed against the same real property . . . or any part thereof . . .” are necessary parties defendant in any action to enforce a lien against real property. The basic reason for this, according to CSC, is that the Court will not be in a position to determine what, in fact, each lienor is owed unless it is determined what is owed to all of the lienors. By making all such

lienors necessary parties under Lien Law § 44, the statute avoids potentially inconsistent results that could occur otherwise. As only four of such lienors have appeared in this action (and another has appeared in a separate action, which CSC also moves to consolidate), CSC argues that the action must be stayed at this point in time. As set forth by CSC, citing the Second Department in **Martirano Construction Corp v Briar Construction Corp**, 104 A.D.2d 1028, 481 N.Y.S.2d 105 (2d Dept. 1984), although property may be released from a lien by the posting of a bond, in order for the plaintiff to recover, it must commence a formal action for the enforcement of its mechanic's lien and obtain judgment as if the lien still existed, thus limiting the judgment to that found due upon the lien.

Citing Lien Law § 44, CSC alleges that nothing in that section indicates that its provisions become inapplicable simply because a bond is filed to discharge one or more of the mechanics' liens. According to CSC, this has clearly been the law since the Court of Appeals, in the 1895 decision of **Morton v Tucker**, 145 N.Y. 244 (1895), discussed the subject in reference to the predecessor statute to current Lien Law § 19, permitting the posting of a bond to discharge a mechanic's lien. The Court in **Morton** stated the following:

“(a) claimant who has filed a notice of lien may enforce his claim against the property by a civil action in the same manner and form of instituting and prosecuting an action for foreclosing on a mortgage upon real property. That plaintiff must make persons who have filed notices of liens against the property, as well as those who have subsequent liens and claims by judgment, mortgage or conveyance, parties defendants; and the court in which the action is brought is required to determine the equities of all the parties to the action, the counterclaims or set offs, and the priority and amount of each lien chargeable against the land. The action is in equity, in which the rights and equities of all the parties interested must be determined. The action is in equity brought under the statute in which all of the persons interested including the sureties on the bond are made parties. The complaint is in the usual form, with the exception that it should allege the giving of the bond and the discharging of the lien, so far as the real estate is concerned, and instead of asking for judgment for a sale of the premises it should demand relief against the persons executing the bond for the amount that should be determined to be payable upon the lien. The court then upon the trial can determine the rights and equities of all the parties and award final judgment contemplated by the statute. 145 NY at 247-249.

Thus, as set forth by CSC, in order to fulfill the requirements of determining the equities of all parties involved in the construction project with regard to counterclaims, set offs and priorities among lienors, this Court cannot proceed without the joinder of the remaining lienors, at least five of which have not filed lawsuits.

Three of these lienors have opposed this ground for CSC's motion to stay this action. These parties set forth that it has long been the law of the Second

Department that once a bond has been filed, the rules of Lien Law § 37(7) (and not Lien Law § 44) apply. Thus, in ***Bryant Equipment Corp v A-1 Moore Contracting Corp***, 51 A.D.2d 792, 380 N.Y.S.2d 705 (2d Dept. 1976) the Court found that once a bond is filed, § 44 and its joinder requirements are no longer applicable. In ***Bryant, supra*** where the fee owner of property had filed a bond to discharge a mechanic's lien, a subsequent mortgagee on the property was not required to be included among the class of parties required to be served in a foreclosure action. Since a bond had been filed pursuant to Lien Law § 19 (4), the Second Department thereafter found that the bond had, in effect, replaced the real property as security to be attached, and that Lien Law § 44, along with its joinder requirements, was no longer applicable.

Bryant's holding was recently followed in ***Danica Group LLC v Atlantic Court LLC***, 23 Misc.3d 1111 (A) (Sup. Ct. Kings Co. 2009). In ***Danica, supra***, the Court found that although Lien Law § 44 required joinder of numerous parties in any action to foreclose a mechanic's lien on real property, once the lien is discharged the only necessary parties to an action to enforce the lien are those identified in Lien Law § 37 (7), to wit, the principal and surety on the bond, the contractor suing to foreclose and all claimants who have filed notices of claim prior to the date of the filing of the particular contractor's summons and complaint. Thus, according to the subcontractor lienors which have filed actions before this Court, the doctrine set forth in ***Morton***, to the extent that it is not followed by ***Bryant***, is not the law in the Second Department.

This is not a simple issue. While the Court, in ***Bryant, supra***, distinguishes ***Morton***, as ***Morton*** only dealt factually with the issue of joining two sureties rather than other lienors, ***Morton's*** dicta goes far further in its reasoning. While ***Morton*** seems to require that all lienors be joined and their claims be litigated together even after the filing of a bond discharging the liens, ***Bryant*** finds that § 37, which has no similarly broad joinder requirements, applies once a bond has been filed, even a §19 bond, such as the one issued in this case. Interestingly, CSC argues that the Court in ***Bryant*** confused the § 19 and the § 37 bonds, as the § 37 bond requires court approval. The Court does not find this argument specious; however, this Court believes it is bound by the clear language of ***Bryant, supra***, and holds therefore, that the necessity to join the remaining five lienors, which have not joined the action, does not act to stay the current lien foreclosure pending before the Court. The Court also recognizes that this may not be the rule in the First Department (***see In re Rockefeller, Inc***, 238 A.D.2d 736, 265 N.Y.S.2d 546 [1st Dept. 1933]) or indeed what the Court of Appeals found in dicta in 1895.


However, based on what it considers controlling authority, the Court finds the

joinder requirements of § 44 do not apply, the bonds discharging the lines having been filed and, therefore, finds that Lien Law § 44 requirements are inapplicable to this case and do not give the surety the basis to further stay this action.

For all of the above reasons, CSC's motion to stay this action is denied.

This constitutes the **Decision** and **Order** of the Court.

Dated: August 10, 2011
Riverhead, New York



EMILY PINES
 J. S. C.

FINAL
 NON FINAL

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