Island Intl. Indus., Inc. v Artisan Lofts Dev. Owner LLC
2011 NY Slip Op 34341(U)
July 18, 2011
Supreme Court, New York County
Docket Number: 115844/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ISLAND INTERNATIONAL INDUSTRIES, INC.,

Plaintiff,

INDEX NO. 115844/09

-against-

ARTISAN LOFTS DEVELOPMENT OWNER LLC, PAVARINI MCGOVERN, LLC, COMPONENT ASSEMBLY SYSTEMS, INC. and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendants.

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JOAN A. MADDEN, J.:

This is an action to recover damages for spray-on fireproofing work performed in connection with the conversion of an existing office building into a residential condominium located at 157 Chambers Street in Manhattan. Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment in the sum of $95,956.00 on its first, second and third causes of action against defendant Pavarini McGovern, LLC ("Pavarini"), and summary judgment against Pavarini, as principal, and Travelers Casualty and Surety Company of America ("Travelers"), as surety, on its fourth cause of action to foreclose its mechanic's lien. Plaintiff also moves for an order pursuant to CPLR 3211(b) dismissing the affirmative defenses of defendants Pavarini and Travelers. Defendants Artisan Lofts Development Owner, LLC, Pavarini McGovern, LLC, and Travelers Casualty and Surety Company of America (collectively

"defendants") oppose the motion and cross-move for an order pursuant to CPLR 3124 directing plaintiff to respond to their discovery demands, or in the alternative, an order pursuant to CPLR 3126 striking plaintiff's pleadings for failure to comply with discovery.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 852 (1985). Once the proponent satisfies this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986). Both parties are required to lay bare their proof, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

In support of its motion for summary judgment, plaintiff submits an affidavit from its vice president, Henry F. Elsesser, an attorney's affirmation, the pleadings and various documents, including the parties' contract, correspondence between plaintiff and defendant Pavarini, correspondence between Pavarini and the owner of the building, numerous "Daily Extra Work Order" vouchers, and a November 2008 Financial Summary prepared by Pavarini. In opposition to the motion, defendants submit an affidavit from Michael Romano, an "employee" of Pavarini, who states that he was "the Project Manager at 157 Chambers Street, New York for a period of time." Defendants also submit an attorney's affirmation, Pavarini's Financial Summary for February 2010, defendants' discovery demands, and a chart prepared by Romano which purportedly analyzes information from Pavarini's Daily Superintendent Reports. In reply,

plaintiff submits another affidavit from Elsesser, an attorney's affirmation in reply, some previously submitted documents, and the transcript of the deposition of a witness on behalf of Pavarini, Frances Tufaro-Graham, in an action entitled Paul Barton v. 157 Chambers Development Owner, LLC, Artisan Lofts Development Onwers, LLC, Tribeca Associates, LLC, Pavarini McGovern LLC and 137 Reade Street Condominium, Index No. 114150/07, Supreme Court, New York County.[1]

Based on the affidavits and documents, specifically plaintiff's Daily Extra Work Order Vouchers which are all signed as authorized by one of Pavarini's employees, and Pavarini's November 2008 and February 2010 Trade Contractor Closeout Financial Summaries for plaintiff's work at the project which indicate the "total amount due," plaintiff has made a prima facie showing of entitlement to judgment as a matter of law. Defendant, on the other hand, has failed to make a sufficient showing to establish a genuine of material fact requiring a trial.

Pavarini's February 2010 Trade Contractor Closeout Financial Summary for plaintiff – Island International Industries, lists the "total approved" as $172,241.00, the "total paid to date" as $136,757.00, and the "total due" as $35,484.00. Defendant Pavarini is bound by the

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[1]In its reply papers, plaintiff objects to Romano's affidavit, arguing that he does not indicate the dates when he was involved with the project, and does not state that he has personal knowledge of the facts. Plaintiff submits the deposition testimony of Frances Tufaro-Graham to show that she is the individual with personal knowledge of the project, the contract, change orders and proposed change orders. She appeared as a witness for Pavarini in a personal injury action involving an alleged accident at the project. She testified that she is a licensed architect and was the Project Manager at the project from May 2007 through July 2009, with overall responsibility for costs, and contact with trade contractors and the owner. She testified that she was at the project site daily, had an office at the premises, and had several people working for her on-site, including Maura Taylor, who according to plaintiff, signed some of plaintiff's Daily Extra Work Order Vouchers.

admission in this document that a total of $172.241.00 is approved as payment to plaintiff, and a balance of $34,484 is due to plaintiff. As to the remainder of the amount sought by plaintiff, defendants do not dispute that plaintiff provided the labor and material. Pavarini's employee, Michael Romano, submits an affidavit merely asserting that the work for which plaintiff is seeking payment was included in the parties' original contract, so it could not be "extra work" for which plaintiff is entitled to additional compensation. Romano's assertion is contrary to the clear and plain language printed on each of plaintiff's Daily Extra Work Order Vouchers, that were all signed as authorized on behalf of Pavarini, under the following statement: "THE UNDERSIGNED AGREES THIS WORK IS NOT PART OF THE CONTRACT AND IS UNQUESTIONABLY EXTRA." Romano's assertion is also belied by the record, including Pavarini's February 2010 Financial Summary as noted above, which shows that plaintiff is entitled to be paid, at a minimum, an additional $34,484 for "extra work" as detailed in certain Daily Extra Work Order Vouchers which were presumably approved by Pavarini and the owner as change orders.

While Romano alleges that Pavarini has "Daily Superintendent Reports" for the project which show that plaintiff's Daily Extra Work Order Vouchers are inaccurate, defendants have not produced copies of any of Pavarini's records. Defendants submit only an "analysis" prepared by Romano after "examining all pertinent documents," which does not constitute competent proof, since it was prepared specifically for the purposes of opposing the instant motion. Absent the actual documents from which the information was compiled, Romano's bare and conclusory allegations are insufficient to raise an issue of fact as to the number of

plaintiff's employees at the job site. Romano's further vague and conclusory statement that "it is my understanding that certain tickets submitted by Island alleging extra, unpaid work have actually been paid," is likewise insufficient to raise an issue of fact as to the amount to which plaintiff is entitled. As noted above, defendants are required to lay bare their proof, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment. See Zuckerman v City of New York, supra at 562.

The one meritorious objection by defendants is their argument that some of the Daily Extra Work Order Vouchers include a notation as to "verification of time." Only two vouchers contain such notation, and those date from the latest period of the work, February 6 and 9, 2009, and account for a total of $3,536.00 (February 6, 2009, $1797.00; February 9, 2009, $1739.00). In light of that notation questioning plaintiff's time, plaintiff has not made a prima facie showing as to the amounts listed on those vouchers. However, with respect to the balance of the amount sought, defendants have failed to establish the existence of genuine issue of material fact, and plaintiff is entitled to judgment as a matter of law in the amount of $92,420.00 ($95,956.00 - $3,536.00 = $92,420.00). Pursuant to General Business Law § 756-b (1)(b), plaintiff is entitled to interest at the rate of 1% per month, or 12% per annum.

The portion of plaintiff's motion for an order dismissing defendants' affirmative defenses is granted.

The portion of plaintiff's motion to foreclose on its mechanics lien is granted in the absence of opposition

In view of the foregoing conclusions, defendants' cross-motion for discovery is denied as moot. To the extent defendants argue that summary judgment is premature based on the

outstanding discovery, that argument is without merit, as defendants have failed to show that facts essential to oppose the motion are in plaintiff's exclusive knowledge, or that discovery might lead to facts relevant to the issues. See Silverstein v. Westminster House Owners, Inc., 50 AD3d 257 (1st Dept 2008); Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009).

Settle order on notice in accordance with the foregoing, including a copy of this decision.

DATED: July 18, 2011

ENTER:

J.S.C.