

AMEC Constr. Mgt., Inc. v City of New York
2012 NY Slip Op 30072(U)
January 10, 2012
Supreme Court, New York County
Docket Number: 604391/2004
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECEMENT. JAFFE BARBARA JAFFE
J.S.C.

PART 5

Index Number : 604391/2004

AMEC CONSTRUCTION MANAGEMENT

vs
CITY OF NEW YORK

Sequence Number : 003

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

CAL # 7

The following papers, numbered 1 to 5 were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	2
3	4
5	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JAN 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/10/12
JAN 10 2012

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
AMEC CONSTRUCTION MANAGEMENT, INC.,

Index No. 604391/04

Plaintiff,

Motion Date: 10/25/11

Motion Seq. No.: 003

-against-

DECISION AND ORDER

CITY OF NEW YORK, and MAZZOCCHI
WRECKING, INC.,

Defendants.

FILED

JAN 13 2012

-----X
BARBARA JAFFE, JSC:

For Mazzocchi:
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Sullivan Gardner P.C.
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For City:
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Michael A. Cardozo
Corporation Counsel
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NEW YORK
COUNTY CLERK'S OFFICE

By amended notice of motion dated May 17, 2011, defendant Mazzocchi Wrecking, Inc. (Mazzocchi) moves pursuant to CPLR 3126(3) for an order striking defendant City's answer for its failure to provide discovery, and granting it a default judgment against City on its cross claims. Defendant City opposes and, by amended notice of cross motion dated June 17, 2011, moves pursuant to CPLR 3211(a)(3) and (7) for an order summarily dismissing the cross claim against it. Mazzocchi opposes the cross motion.

I. PERTINENT BACKGROUND

In this action (first action), plaintiff, a general contractor, sues defendants for services rendered in removing debris from the cleaning of the World Trade Center site after September 11, 2001, alleging that City hired it to provide construction management services at the site, that City obtained federal and state funds to pay for the clean-up and reviewed and approved any

payments to be made to contractors, and that it incurred obligations to contractors which were not paid by City. As to Mazzocchi, plaintiff alleges that it contracted with City to remove debris at the site, that it was paid \$13 million for its work as approved by City, and that a post-performance audit revealed that it was overpaid by \$3 million. (Affirmation of Edwin M. Levy, ACC, dated June 17, 2011 [Levy Aff.], Exh. A).

In the first action and in a related action, *Mazzocchi Wrecking, Inc. v Evergreen Recycling of Corona and City of New York*, pending in this court under Index No. 111906/05, and joined for trial, Mazzocchi asserts claims and cross claims against City for:

- (1) breach of contract based on its assertion that City initially enlisted it to perform services and received funds to pay for Mazzocchi's services yet failed to pay;
- (2) unjust enrichment based on allegations that Mazzocchi rendered services with the express understanding that it would be paid by City, and that City has been unjustly enriched by its failure to pay Mazzocchi; and
- (3) common law indemnification against plaintiff's claims based on City's approval of payment to Mazzocchi for services rendered.

(Levy Aff., Exhs. C, E).

II. MOTION TO DISMISS

A. Contentions

City argues that Mazzocchi's breach of contract claims must be dismissed for failing to plead privity of contract with City, and on the ground that a subcontractor may not assert a direct claim against an owner. City also contends that as Mazzocchi no longer exists and the litigation is controlled by Grace Mazzocchi, a former owner and president of Mazzocchi, Mazzocchi cannot be a party. (Levy Aff.).

Mazzocchi denies that it insufficiently pleaded its breach of contract claim against City, and asserts that quasi-contractual claims lie against City even if its contract was solely with

plaintiff, and that a subcontractor may directly sue an owner if the owner has had contact with or agreed to pay the subcontractor. Mazzocchi denies City's assertion that it no longer exists, submitting a printout from the New Jersey Department of State reflecting that it is a registered active corporation, and argues that, in any event, City waived the defense of lack of capacity by failing to allege it in its answer. If the pleadings are deemed insufficient, Mazzocchi seeks an order granting leave to replead. (Affirmation of Brian Gardner, Esq., dated Sept. 15, 2011, Exh. C).

B. Analysis

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Thomas v Thomas*, 70 AD3d 588 [1st Dept 2010]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*).

To state a claim for breach of contract, a party must allege that: (1) the existence of a contract or agreement; (2) the party's performance of the contract; (3) the other party's breach; and (4) resulting damages. (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425 [1st Dept 2010]; *JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802 [2d Dept 2010]).

Here, having alleged that City hired it to perform services, that it performed, that City failed to pay for its services, and that it has been damaged, Mazzocchi has sufficiently stated a breach of contract claim. To the extent that the existence of a contract is disputed, a party is entitled to plead claims sounding in quasi-contract as alternative theories of liability, and does

not thereby concede the absence of a contract. (*See Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208 [2d Dept 2008] [“where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies”]).

And, while it is well-settled that a subcontractor may not recover for breach of contract from an owner, rather than a general contractor, absent a contract or privity between it and the owner (*CDJ Bldrs. Corp. v Hudson Group Constr. Corp.*, 67 AD3d 720 [2d Dept 2009]; *IMS Engrs.-Architects, P.C. v State of New York*, 51 AD3d 1355 [3d Dept 2008], *lv denied* 11 NY3d 706; *Kelly Masonry Corp. v Presbyt. Hosp. in City of New York*, 160 AD2d 192 [1st Dept 1990]; *Perma Pave Contr. Corp. v Paerdegat Boat and Racquet Club, Inc.*, 156 AD2d 550 [2d Dept 1989]), it may recover if there existed the functional equivalent of privity between them (*Bri-Den Constr. Co., Inc. v Kapell & Kostow Architects, P.C.*, 56 AD3d 355 [1st Dept 2008], *lv denied* 12 NY3d 703 [2009]).

Here, Mazzocchi alleges that it was contacted or hired by City to provide services and that City promised to pay for its services, thereby asserting the functional equivalent of privity between them. (*See Robert H. Finke & Sons, Inc. v Sears Oil Co. Inc.*, 256 AD2d 868 [3d Dept 1998] [owner may be held liable to subcontractor if it agrees to be bound or there exist circumstances giving rise to such obligation]; *Perma Pave Contr. Corp.*, 156 AD2d at 551 [owner may be liable to subcontractor in quasi-contract if it expressly agrees to pay for subcontractor’s performance]).

And, as Mazzocchi has shown that it is an active corporation, City has not established that it lacks the capacity to sue here.

III. MOTION TO STRIKE

Mazzocchi's motion to strike is granted unless City, within 60 days of service on it of a copy of this order, provides the following:

- (1) responses to Mazzocchi's two sets of Interrogatories, dated May 2006 and March 2011; and
- (2) responses to Mazzocchi's document requests by corresponding the produced documents with each request.

If, upon review of the responses, Mazzocchi determines that additional depositions are necessary, it is granted leave to take the depositions, but only on the condition that it serves its deposition notices within 30 days of its receipt of City's responses.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Mazzocchi Wrecking, Inc.'s motion to strike defendant City of New York's answers is granted to the extent indicated above; and it is further

ORDERED, that defendant City of New York's motion to dismiss defendant Mazzocchi Wrecking, Inc.'s claims and cross claims against it is denied.

ENTER:



 Barbara Jaffe, JSC
BARBARA JAFFE
 J.S.C.

DATED: January 10, 2012
 New York, New York
JAN 10 2012

FILED

JAN 13 2012

NEW YORK
COUNTY CLERK'S OFFICE