

Singh v Geiger Constr. Co.

2012 NY Slip Op 33131(U)

November 13, 2012

Sup Ct, Queens County

Docket Number: 234/11

Judge: Augustus C. Agate

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

-----x
KAMRAJ SINGH AND NARAINEE SINGH,

Plaintiffs,

-against-

GEIGER CONSTRUCTION CO., INC. AND
JOSE A. VELASQUEZ, P.E.,

Defendants.

-----x

Index No.: 234/11

Motion Dated:
February 27, 2012

Motion Cal.
No.: 119

M#1

The following papers numbered 1 to 18 read on this motion by plaintiffs for summary judgment over and against the defendants and dismissing the affirmative defenses, for an order discharging the mechanic's lien held by defendant Geiger Construction Co. and an award of legal fees.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion - Affidavits - Exhibits.....	1 - 4
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Upon the foregoing papers, it is ordered that this motion by plaintiffs for summary judgment over and against the defendants and other relief, referred to the undersigned by the Honorable Martin E. Ritholtz, is decided as follows:

At the outset the court notes that this action was marked stayed by the Honorable Martin E. Ritholtz on July 16, 2012. However, the parties have entered into a stipulation agreeing to lift the stay solely for purposes of rendering a decision on plaintiffs' motion for summary judgment.

The court further notes that pursuant to a short form order dated October 6, 2011, this court, by the Honorable Martin E. Ritholtz, consolidated the actions pending under Index Numbers 19754/09 and 19549/11 with the action pending under Index Number 234/11 for all purposes under Index Number 234/11.

This action arises out of the construction of a two-family home in Queens County. The plaintiffs own property located at 25-10 94th Street in Jackson Heights, Queens. On January 31,

2003, plaintiff Kamraj Singh and defendant Jose A. Velasquez, P.E. ("Velasquez") entered into a Professional Engineering Services Agreement whereby defendant Velasquez agreed to provide professional architectural and engineering services to the plaintiffs in connection with the subject premises. Thereafter, on June 2, 2004, plaintiff Kamraj Singh entered into an American Institute of Architects Agreement ("AIA") with defendant Geiger Construction Co., Inc. ("Geiger") whereby defendant Geiger agreed to construct the two-family dwelling at the subject premises. Plaintiffs planned on selling the new construction upon its completion. In April 2009, the New York City Department of Buildings issued an Outstanding Objections Query with respect to the subject premises, listing nine (9) objections with the work performed. The objections included, inter alia, height elevation discrepancies not as per code, the height of the door not as per code and a bathroom in the cellar. As a result of the objections, the New York City Department of Buildings denied a Certificate of Occupancy to the subject premises. In May 2009, defendant Velasquez filed an additional set of plans for the subject premises. On August 10, 2009, the New York City Department of Buildings issued a stop work order pursuant to Section 28-207.2 of the Administrative Code of the City of New York.

Plaintiffs commenced an action against the defendants to recover damages for negligence and breach of contract. On November 2, 2009, defendant Geiger filed a Notice of Mechanic's Lien against the subject premises, seeking payment from the plaintiffs for the work it performed at the site. In August 2011, Geiger commenced an action to foreclose the Mechanic's Lien.

In their cause of action against defendant Velasquez, plaintiffs allege that inasmuch as the subject premises were constructed improperly, said defendant failed to supervise the work at the premises in accordance with the prior plans and specifications. Plaintiffs also allege that defendant Velasquez was negligent in his preparation of the plans and specifications inasmuch as he failed to design plans that conformed to the New York City Department of Buildings Code. Plaintiffs assert that as a result of the negligent conduct and breaches by defendant Velasquez, the New York City Department of Buildings denied a Certificate of Occupancy to the subject premises.

With respect to defendant Geiger, plaintiffs allege that defendant Geiger breached its obligations under the AIA Agreement by failing to construct the subject premises in conformance with the codes, regulations and laws of the City of New York. The

complaint also asserts that defendant Geiger failed to construct the premises in conformance with the approved Drawings and Specifications of the Architect. The complaint alleges that as a result of the breaches by defendant Geiger, the New York City Department of Buildings denied a Certificate of Occupancy to the subject premises.

Plaintiffs now move for, inter alia, summary judgment in their favor against both defendants. In support of the branch of the motion against defendant Velasquez, plaintiffs assert that defendant's Professional Certification and Directive 14 privileges were revoked and, thus, any and all designs, including the designs of the subject premises, are highly suspect and must be found to be defective. Plaintiffs also submit the expert report of Leonard Gallo, a Registered Architect, who performed an inspection of the subject premises on June 5, 2011 and found numerous discrepancies between the approved plans and actual "as-built" conditions. The court notes that although Mr. Gallo's report is unsworn, in their reply papers plaintiffs submit an affidavit from Mr. Gallo in which he states and attests that he prepared the prior report on July 6, 2011 with respect to the subject premises.

In support of the branch of the motion against defendant Geiger, plaintiffs note that the expert, Mr. Gallo, detailed egregious defects in the "as-built" conditions of the construction of the premises. Plaintiffs argue that defendant Geiger failed to meet its obligations under the AIA Agreement and constructed a defective building.

In opposition to the motion, defendant Velasquez asserts that the Professional Engineering Services Agreement limits plaintiffs' damages to a full refund of the funds paid up to date. Further, defendant Velasquez argues that he never agreed to supervise the means and methods of the work performed by the contractors at the subject premises.

In opposition to the branch of the motion as against it, defendant Geiger contends that it never guaranteed the work performed by the Architect and, thus, cannot be held liable for such work. Defendant Geiger states that it performed the work as specified in the plans that it received. Defendant Geiger also asserts that it has not received all discovery from the plaintiffs necessary to properly respond to the plaintiffs' motion.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law,

tendering sufficient evidence to demonstrate the absence of any material issues of fact. (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993].) Once a prima facie 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 material issues of fact which require a trial of the action. (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (Peerless Ins. Co. v Allied Bldg. Prods. Corp., 15 AD3d 373, 374 [2005].)

When a summary judgment motion involves an allegation of malpractice against a licensed professional such as an engineer, a plaintiff must establish that there was a departure from accepted standards of practice and that the departure was a proximate cause of the plaintiff's injury. (Wing Wong Realty Corp. v Flintlock Constr. Servs., LLC, 95 AD3d 709, 711 [2012]; Bruno v Trus Joist a Weyerhaeuser Bus., 87 AD3d 670, 672 [2011]; Kung v Zheng, 73 AD3d 862, 863 [2010]; Travelers Indem. Co. v Zeff Design, 60 AD3d 453, 455 [2009].) In addition, architects assume certain legal duties independent of their contractual obligations and may be held liable for failure to exercise reasonable care irrespective of their contractual duties. (17 Vista Fee Assocs. v Teachers' Ins. and Annuity Assn. of America, 259 AD2d 75, 83 [1999].)

With respect to the branch of the motion by the plaintiffs for summary judgment against defendant Velasquez, the court finds that there are triable issues of fact which preclude the granting of this branch of the motion. As noted above, the expert report of Mr. Gallo details numerous discrepancies between the approved plans and actual "as-built" conditions. In his affidavit in opposition, defendant Velasquez avers that he never supervised the contractors at the subject premises nor was he required to supervise them. However, although paragraph 10.1 of the AIA Agreement provides that "[t]he Contractor shall supervise and direct the work ... and be solely responsible for all construction means...", paragraph 8.3 states that the Architect shall "determine in general if the work is proceeding in accordance with the Contract Documents." Thus, there are issues of fact as to whether the Architect fulfilled his obligations under the Agreements herein.

In addition, contrary to plaintiffs' assertions, the court cannot conclude that the revocation of Professional Certification

and Directive 14 Privileges establishes, as a matter of law, that any plans prepared by defendant Velasquez were defective. Plaintiffs submit a one-page finding regarding the revocation without any specific details of the reasons for the revocation. Indeed, plaintiffs' contention is based entirely upon speculation unsupported by any evidence.

Turning to the branch of the motion as against defendant Geiger, the moving papers make a prima facie showing of entitlement to summary judgment through Mr. Gallo's expert report. In opposition, the project manager for defendant Geiger, Gordon Puran, avers in his affidavit that the work on the subject project was delayed until issues concerning a failed audit could be resolved. He also avers that defendant Velasquez did not timely respond to requests to appear at the site to inspect the premises, and this led to delays with the sub-contractors. Mr. Gordon explains that issues regarding the height of the door on the second floor of the premises could not be resolved because defendant Velasquez ignored Geiger's concerns and, thus, Geiger built the premises pursuant to the plans. Mr. Gordon further avers that defendant Velasquez filed a new set of plans on May 22, 2009, which were not received by Geiger until June 10, 2009. However, by that time, the New York City Department of Buildings had already inspected the worksite to see if the work was being conducted in accordance with the 2009 plans. In view of these averments, the court finds that there are triable issues of fact as to whether defendant Geiger breached its obligations under the agreement herein.

The branch of the motion by plaintiffs to discharge defendant Geiger's Mechanic's Lien is denied. A court has no power to discharge or vacate a notice of lien except as provided in Lien Law § 19[6]. (Retek v City of New York, 14 AD3d 708, 708 [2005].) Inasmuch as the mechanic's lien herein is not invalid on its face, it is not subject to summary discharge pursuant to Lien Law § 19[6], and "any dispute regarding the validity of the lien must await trial thereof by foreclosure." (Gold Dev. & Mgt., LLC v P.J. Contr. Corp., 74 AD3d 1340, 1341 [2010][quoting Matter of Northside Tower Realty, LLC v Klin Constr. Group, Inc., 73 AD3d 1072, 1072 [2010].])

The branch of the motion to dismiss the affirmative defenses is denied without prejudice to renewal. Plaintiffs have failed to annex a copy of the Answer with the affirmative defenses to their moving papers.

The branch of the motion by plaintiffs for legal fees is denied.

To the extent that defendant Geiger seeks affirmative relief in its affirmation in opposition, such requests are denied inasmuch as defendant Geiger has not made a cross motion for any relief. (CPLR 2215.)

Accordingly, this motion by plaintiffs is denied in its entirety.

Dated: November 13, 2012

AUGUSTUS C. AGATE, J.S.C.