International Asbesto Removal, Inc. v Beys Specialty Inc.

2013 NY Slip Op 31884(U)

August 8, 2013

Sup Ct, New York County

Docket Number: 652494/2012

Judge: Marcy S. Friedman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN
Justice

PART 60

INTERNATIONAL ASBESTOS REMOVAL, INC.,

Plaintiff,

-against-

BEYS SPECIALTY INC. and FEDERAL INSURANCE COMPANY,

Defendants.

INDEX NO. 652494/2012

MOTION DATE ______

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____ were read on this motion to dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s). ______

Answering Affidavits — Exhibits ______ No (s). ______

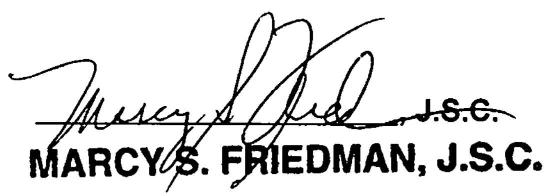
Replying Affidavits ______ No (s). ______

Cross-Motion: ☐ Yes ☒ No

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

Defendants' motion to dismiss is decided in accordance with the attached decision/order, dated August 8, 2013.

Dated: 8-8-13



J.S.C.

MARCY S. FRIEDMAN, J.S.C.

1. Check one: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:.................... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

-- x

INTERNATIONAL ASBESTOS REMOVAL, INC.,

Plaintiff,

- against -

BEYS SPECIALTY INC. and FEDERAL INSURANCE COMPANY,

Defendants.

-- x

Index No.: 652494/2012

Motion Seq. 001

DECISION/ORDER

In this breach of contract action, plaintiff subcontractor, International Asbestos Removal, Inc. (IAR), alleges that defendant contractor, Beys Speciality Inc. (Beys), failed to pay it for asbestos removal work performed on public housing buildings in New York City. Beys contends that it paid IAR and that, in exchange, IAR signed releases of any outstanding claims, including those asserted in the complaint, through March 2012. Defendants Beys and Federal Insurance Company, a surety (collectively Beys), now move to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211(7). In the alternative, defendants seek leave to convert their motion to one for summary judgment, pursuant to CPLR 3212.

The parties do not dispute that they entered into a written contract, dated May 12, 2010, which governs the performance of and the payment for the asbestos removal. (Aff. of Karen Grando [IAR's President] In Support [Aff. In Support], Ex. A.) The contract required IAR to submit "requisitions" for partial payments during the project and, ultimately, for a final payment. With each requisition, IAR was required to "furnish a certified affidavit of payment and waiver

of lien for the Work performed and materials furnished through the date covered by the last preceding partial payment." (Id., § 5.6.) In addition, Beys could require IAR to execute a waiver of lien at the time the requisition was submitted for all work performed through the date of the requisition. (Id.) Each requisition was to be supported by "such data substantiating [IAR's] right to payment as [Beys], Construction Manager or Owner may require or as may be required under the Contract Documents." (Id., § 5.3.) The contract also provided a corrective mechanism. After a requisition and the accompanying release were proffered, IAR could submit "corrections" of "data elements" previously submitted "for consideration of reimbursement." (Id.)

It is undisputed that IAR executed a series of partial releases beginning in or about January 2011, variously titled "Receipt and Waiver of Mechanics' Lien Rights - Partial Release" and "Partial Waiver and Release of Lien" (collectively the Releases). (Aff. In Support, Ex. B.) Although titled "partial" releases, each Release contained a broad provision purporting to release and discharge "all actions, suits, debts, . . . claims and demands whatsoever" incurred through the date of the release or, for some of the Releases, an earlier date specified in the individual release. (Id.) Each Release also acknowledged the total amount of money IAR had received "to date for the . . . project." (Id.) All of the Releases are denominated partial, and neither party has alleged the existence of a final release.

According to IAR, a dispute arose in July or August 2011 as to the number of asbestos decontamination units required to complete performance. (Aff. In Opp., ¶ 16.) IAR alleges that its requisitions for November 2010 through October 2011 included requests for payment for two decontamination units per apartment and that Beys paid those requisitions, at least in part. (Compl., ¶ 21.) IAR also alleges that Beys did not object to the number of decontamination units

[* 4]

prior to May 2011. (Aff. In Opp., ¶¶ 9-10.) In addition, IAR claims that Beys "separately approved and acknowledged" the construction of 32 decontamination units, but failed to pay for them. (Id., ¶ 24.) Some of the Releases, including the last release from April 2012, contained handwritten notations specifically excluding payment for the decontamination units from the released claims. (Aff. In Support, Ex. B [Releases dated August 11, 2011, September 27, 2011, November 22, 2011, and April 17, 2012].) The others did not. (Id. [Releases dated January 27, 2011, February 1, 2011, March 18, 2011, April 7, 2011, May 12, 2011, June 15, 2011, July 13, 2011, October 24, 2011, February 15, 2012, and March 15, 2012].) IAR claims that Beys itself prepared an April 2012 release which exempted decontamination units. (See Aff. In Opp., ¶ 17, Ex. 9.)

Based on Beys' alleged failure to pay, IAR filed a Notice of Claim under the payment bond issued by defendant Federal Insurance Company, and a Notice of Mechanic's Lien. (Id., ¶¶ 32-33.) IAR pleads that Beys paid it $758,943 and continues to owe it $875,844. (Id., ¶¶ 28, 53.)

Although Beys brings this motion to dismiss for failure to state a cause of action, Beys bases the motion exclusively on the Releases. The motion is therefore more properly considered a motion to dismiss based on documentary evidence, pursuant to CPLR 3211(a)(1). It is well settled that on a motion to dismiss addressed to the face of the pleading, "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See also 511 W. 232nd Owners Corp. v Jennifer Realty

Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon, 84 NY2d at 88; see also Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

Beys contends that, whatever claims IAR may have had, it released them in a series of valid and binding releases culminating in the March 15, 2012 release (the March Release). In support of this proposition, Beys relies on general contract law that an unambiguous general release bars a subsequent action on the released claims. (Memo. Of Law in Support at 4.) As a general rule, "absent fraudulent inducement or concealment, misrepresentation, mutual mistake or duress, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim that is the subject of the release." (Diontech Consulting, Inc. v New York City Hous. Auth., 78 AD3d 527, 528 [1st Dept 2010].) However, under settled case law that has arisen in the construction context, where "the terms of the waiver and the contract between the parties expressly provide for partial payments upon execution of the waiver, 'the waiver form is construed as merely a receipt for the monies referenced in the waiver. . . . Where a waiver form purports to acknowledge that no further payments are owed, but the parties' conduct indicates otherwise, the instrument will not be construed as a release.'" (E-J Elec. Installation Co. v

Brooklyn Historical Socy., 43 AD3d 642, 643-644 [1st Dept 2007] [internal citation omitted].) Put another way, under such circumstances, the parties' course of conduct is relevant to determine whether the document is a receipt rather than a release. (Id.; see also Diontech Consulting, 78 AD3d at 528.)

Here, as noted above, the parties' contract expressly provided for partial payments to be made on a rolling basis, subject to the execution of intermediate releases. Each Release was labeled "partial," and it is undisputed that Beys made payments after IAR signed Releases in 2011 that on their face purported to preserve claims for decontamination units. It is further undisputed that Beys made at least one additional payment to IAR after the March Release. The terms of the March Release recognize the interim nature of the payment to IAR, stating that IAR has "received the total amount of $723,943.72 (including the above amount) to date for the above project." (Aff. In Support, Ex. B.) IAR also signed at least one subsequent release, in April 2012, in which it expressly excluded payment for the decontamination units from the claims being released. Further, the parties' contract contemplated that IAR could revise a requisition to seek additional payment after it was submitted and after the corresponding waiver of claims had been signed. These circumstances raise a triable issue of fact as to whether the Releases were waivers or receipts. (See West End Interiors v Aim Constr. & Contr. Corp., 286 AD2d 250, 252 [1st Dept 2001] [contractors "conduct in subsequently paying [subcontractor] for work theoretically released by prior payments is completely inconsistent with its theory of general release"]; see also Penava Mech. Corp. v Afgo Mech. Servs., Inc., 71 AD3d 493, 495 [1st Dept. 2010] [holding that, where payments were made after waivers were given, "the parties treated the waivers as mere receipts of the amounts stated in the waivers, not as complete waivers of all

[* 7]

claims to that point"].)

The authorities relied on by Beys are not to the contrary. For example, in MAFCO Electrical Contractors, Inc. v Turner Construction Company (357 Fed Appx 395 [2d Cir 2009]), the federal Court, applying Connecticut law, held that a general contractor was not liable for delay damages, where the subcontractor had agreed to a change order which waived such claims and included compensation for all prior claims. (Accord Zimmcor v Permasteelisa North Am. Corp., 2012 WL 1085776 [ND NY, March 30, 2012, No. 1:10-CV-1160 (MAD/DRH)].) In E.M. Substructures v City of New York (73 AD2d 608 [2d Dept 1979], appeal dismissed 49 NY2d 878 [1980]), the Appellate Division upheld a waiver which a subcontractor had given in exchange for an extension of time to complete performance. Moreover, the court expressly noted that there was "no evidence of the kind of conduct which has been held to preclude the city from asserting a waiver." (Id.) These cases thus involved individually negotiated releases in exchange for a benefit beyond the original contract term, not partial releases executed to secure interim payments on an ongoing basis.

The court accordingly holds that on this motion to dismiss, Beys does not demonstrate as a matter of law, based on the face of the March Release, that it effected a general release of all claims. (See Diontech Consulting, 78 AD3d at 528.)

The court declines to convert Beys' motion to dismiss into one for summary judgment as, for the reasons stated above, Beys has not made a prima facie showing that it is entitled to judgment as a matter of law on the undisputed facts.

Finally, Beys moves to dismiss IAR's sixth cause of action "sounding in quantum meruit or unjust enrichment" as precluded by the express contract between the parties. (Memo. Of Law

[* 8]

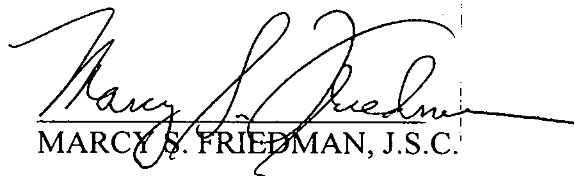
in Support at 9-10.) IAR does not respond to this argument. Moreover, it is well settled that the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery for events arising out of the same subject matter. (Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 NY2d 382, 388 [1987].)

It is accordingly hereby ORDERED that Beys' motion is granted to the extent of dismissing IAR's sixth cause of action and is otherwise denied; and it is further

ORDERED that the parties shall appear for a compliance conference on September 12, 2013 at 2:30 p.m. as set forth in the preliminary conference order, dated April 30, 2013.

This constitutes the decision and order of the court.

Dated: New York, New York
August 8, 2013



MARCY S. FRIEDMAN, J.S.C.