

Monmouth Dev., LLC v Maleh
2013 NY Slip Op 33042(U)
November 25, 2013
Supreme Court, Kings County
Docket Number: 500701/13
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of November, 2013.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

-----X
MONMOUTH DEVELOPMENT, LLC,

Plaintiff,

- against -

VICTOR MALEH,

Defendant.

-----X

DECISION AND ORDER

Index No. 500701/13

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Other Papers _____

1-2 _____
3-4 _____

Upon the foregoing papers, plaintiff Monmouth Realty Development, LLC (Monmouth) moves for summary judgment on its breach of contract claim against defendant Victor Maleh (Maleh), pursuant to CPLR 3212, for the “sum certain” of \$697,000.00, plus interest from November 1, 2012.

Monmouth commenced this breach of contract action on or about February 12, 2013, alleging that Maleh breached the parties’ contract under which Monmouth agreed to perform construction work at Maleh’s residential real property at 7 Harry Lane in Elberon, New Jersey (New Jersey Property) in exchange for \$1,710,000.00 (Construction Contract). Monmouth alleges that Maleh improperly cancelled the Construction Contract after certain

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work had already commenced and was completed at the New Jersey Property. Specifically, Maleh allegedly refused to pay Monmouth \$36,000.00 due under the Construction Contract for Monmouth's work on the "rough plumbing" at the New Jersey Property. Monmouth's complaint seeks damages of at least \$586,000.00, Monmouth's alleged lost profits for work under the Construction Contract, plus interest, attorneys' fees, costs and disbursements.¹

Monmouth contends that it commenced construction work at the New Jersey Property in October 2012 following Maleh's payment of a non-refundable deposit of \$260,000.00. The Construction Contract provides that "the balance of the contract amount, \$1,450,000.00 . . . shall be paid upon completion by [Monmouth] of the various stages of work in accordance with the schedule annexed . . . Maleh shall pay to [Monmouth] the amounts listed for each completed line item" and that "[Monmouth's] obligation to perform under this Agreement is contingent upon the timely payments of the amounts due . . ." The Construction Contract further states that "[a]ny disputes under this Agreement . . . shall be settled by binding arbitration . . ." The Construction Contract also contains a choice of law provision that unambiguously provides that "[t]his Agreement shall be governed by the law of the State of New Jersey."

In accordance with the Construction Contract, the parties' dispute was submitted to binding arbitration before the American Arbitration Association (AAA) in January 2013. Correspondence from the AAA in the record reflects that the arbitration matter was "closed" because Maleh inexplicably refused to proceed with arbitration proceedings before the AAA. Monmouth commenced this action shortly thereafter.

¹ Monmouth calculated its alleged lost profits of \$586,000.00 under the Construction Agreement by deducting Maleh's \$260,000.00 deposit from its projected profits of \$846,000.00.

Maleh answered the complaint on or about May 1, 2013, denying the material allegations therein and asserting ten affirmative defenses for: (1) failure to state a claim; (2) estoppel; (3) unclean hands; (4) failure to join a necessary party; (5) failure to plead corporate capacity; (6) lack of subject matter jurisdiction; (7) res judicata; (8) laches; (9) “[p]laintiff is not a party to any alleged contract”; and (10) forum non-conveniens.

Monmouth now moves for summary judgment, pursuant to New York law, seeking a “sum certain” of \$697,000.00, which is allegedly comprised of: (1) Monmouth’s lost profits of \$586,000.00; (2) Monmouth’s out-of-pocket cost of \$17,000.00 for the “rough plumbing” work; (3) Monmouth’s out-of-pocket costs of \$4,000.00 for other line items under the Construction Contract’s punch list; and (4) \$90,000.00 that is due and owing to Meyer Real Estate Agency LLC for “consulting services in the design specification and sequence of construction at the site.” Maleh opposed Monmouth’s summary judgment motion on the grounds that issues of fact preclude summary judgment under New York law.

The Construction Contract plainly and unambiguously provides that it is governed by New Jersey law, yet the parties’ motion papers recite and rely exclusively on New York law. “Generally, courts will enforce a choice of law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction” (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006] [upholding parties’ choice of Florida law in construction contract]). Furthermore, the Court of Appeals has specifically instructed that “[w]here an agreement is clear and unambiguous, a court is not free to alter it and impose its personal notions of fairness” (*id.*).

Here, the choice of law clause in the Construction Contract unambiguously states that it “shall be governed by the law of the State of New Jersey”, the place of performance. Plaintiff is not entitled to summary judgment, having failed to satisfy its burden of

demonstrating legal entitlement to the relief it seeks under the governing law of New Jersey (see e.g. *Citibank [S. D.], N.A. v Martin*, 11 Misc 3d 219, 222 [NY City Civ Ct 2005] [denying credit card issuer's summary judgment motion because it did not provide a statement of state law that governs interest rate and directing parties to remedy omissions in motion papers]). Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied without prejudice to renewal based on proper motion papers that are based on applicable New Jersey law.

This constitutes the decision and order of the court.

ENTER,

J. S. C


Karen B. Rothenberg
Justice, Supreme Court

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