SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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PATRICK TOMLINSON, individually and on behalf of all other persons similarly situated who were employed by Danco Electrical Contractor Inc. and/or any other entities affiliated with or controlled by Danco Electrical Contractor Inc.,

Plaintiff,

Index No.: 155082/2013

Decision and Order

- against -

Mot. Seq.: 01

WASHINGTON INTERNATIONAL INSURANCE COMPANY and DANCO ELECTRICAL CONTRACTOR INC. and any all related corporate entites,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Patrick Tomlinson ("Plaintiff" or "Tomlinson"), brings this action on behalf of himself and a putative class of individuals who furnished labor to defendant, Danco Electrical Contractor Inc. ("Danco Electrical"), on a construction project located at Grand Central Terminal (the "Public Works Project" or "Project"), to recover wages and benefits that Plaintiff and the members of the putative class allegedly were statutorily and contractually entitled to receive, based on the prevailing wages provisions of the New York State Labor Law governing public works contracts in New York. Plaintiff claims that Danco Electrical, as principal, and defendant, Washington International Insurance ("Washington International") (and together with Danco Electric, "Defendants") as surety, entered into a public works

contract with the Metropolitan Transportation Authority ("MTA") to perform "PLM & Standby Generation Upgrade" at Grand Central Terminal (the "Public Works Contract"), that the prevailing wages provisions of New York's Labor Law were annexed thereto and incorporated therein, and that Defendants failed to pay or to ensure payment of, prevailing rates of wages, supplements, and overtime to which Plaintiff was entitled. Plaintiff asserts one cause of action against Defendants for failure to pay wages and supplements, and one cause of action for *quantum meruit* against Danco Electrical.

Defendants now move for an Order, pursuant to CPLR §§ 3211(a)(1), (a)(3), and (a)(7), dismissing Plaintiff's complaint based on documentary evidence, for lack of capacity to sue, and failure to state a cause of action. Defendants submit the affidavit of Danny Ramanrain, Danco Electrical's President. Annexed to Ramanrain's affidavit is a copy of Purchase Order entered into with the New York State Power Authority ("NYSPA") for the Installation of NYPA provided generators, PLC/SCADA and Switchgears for the Project, which incorporates the applicable New York State prevailing Wages for the building trades, a copy of the agreement between Quality Control and Danco, and a copy of a letter prepared by Tomlinson's attorney to Quality Control, requesting Tomlinson's W-2's..

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (1) a defense is founded upon documentary evidence;
>
> (3) the party asserting the cause of action has not legal capacity to sue;
>
> (7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under

CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

Section 220(3)(a) of the New York Labor Law provides that, in connection with all public works, "The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined . . . Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be paid the wages herein provided." For purposes of this provision, "Eight hours shall constitute a legal day's work." (Labor Law § 220[2]).

"In situations where the Labor Law requires the inclusion of a provision for payment of the prevailing wage in a labor contract between a public agency and a contractor, a contractual obligation is created in favor of the contractor's employees, and an employee covered by or subject to the contract, in his or her status as third-party beneficiary to the contract, possesses a common-law cause of action against the contractor to recover damages for breach of such a contractual obligation." (*Stennett v Moveway Transfer & Stor., Inc.*, 97 A.D.3d 655, 656-657 [2d Dep't 2012]); (*Wright v. Herb Wright Stucco, Inc.*, 50 N.Y.2d 837 [1980]).

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]).

Defendants submit documentary evidence establishing Danco Electrical entered into a subcontract with Quality Control LLC ("Quality Control"), to provide a project

manager to monitor specification compliance and coordinate third party inspections in connection with the Project. The agreement between Quality Control and Danco Electrical provides that the "Project manager's primary responsibility in this project is as a consultant and project coordinator regarding specification, technical issues and witnessing that the actual inspections and testing are being carried out in accordance with the contractual documents and specifications . . . the scope of work *does not include* the actual performance of testing and inspection." (sic).

Defendants argue that Plaintiff was a project manager for Quality Control, and that as such, Plaintiff solely provided supervision and oversight services for the Project. Defendants argue that Plaintiff's services fall outside the categories of trade classifications covered under the New York State Department of Labor prevailing wage requirements, and that, as a result, Plaintiff lacks standing to maintain an action pursuant to Labor Law § 220.

Plaintiff's complaint alleges, "beginning in or about 2010 Danco Electrical entered into a Public Works Contract in the form of subcontracts or prime contracts with the MTA" for the Project, and that "the schedule of prevailing rates of wages and supplements to be paid to all workers furnishing labor on the site of the Public Works Project was annexed to and formed a part of the Public Works Contract." Plaintiff's complaint further alleges:

> Danco Electrical, as principal, and Washington International, as surety, firmly bounded themselves to the Metropolitan Transportation Authority, under Payment Bond No. 2134064, to ensure the prompt payment to any and all laborers, such as the plaintiff and the other members of the putative class, who perform labor and construction services at the aforementioned Public Works Project, by furnishing labor or materials, or both, in connection with the aforementioned Public Works Project.

Plaintiff's complaint further asserts, "Plaintiff and other members of the putative class performed labor at the Public Works Project for the benefit of and at the direction of Danco Electrical" and alleges, "Plaintiff performed various types of construction-related improvement work, and all work incidental thereto, including but not limited to engineering and related construction work at the Public Works Project." Plaintiff's complaint further asserts, "Danco Electrical failed to pay, or failed to

ensure payment of, prevailing rates of wages, supplements and overtime to which the plaintiff was entitled." Additionally, Plaintiff's complaint alleges that "Washington International furnished Labor and Material Payment Bonds, the terms of each bond insured that Washington International would pay unpaid prevailing wages and supplemental benefits to the plaintiff and the putative class members in the event Danco Electrical failed to pay these wages" and that "pursuant to the terms of Washington International's labor and material payment bond, Washington International is required to make payment to the plaintiff and the other members of the putative class."

Initially, "[a] contractor subject to the provisions of Labor Law § 220 cannot avoid or circumvent the protection afforded to those workers covered by the law by bestowing job titles instead of adequate pay. Rather, '[the] pivotal question is the nature of the work actually performed.'" (*Tenalp Constr. Corp. v. Roberts*, 141 A.D.2d 81, 85 [2d Dep't 1988]). Thus, Defendants' documentary submissions regarding the scope of the project manager's duties fail to flatly contradict the factual allegations in Plaintiff's complaint, and Defendants' documentary evidence does not conclusively establish a defense to Plaintiff's claim.

However, "a private right of action for underpayment of wages does not exist under Labor Law § 220 until there has been an administrative determination pursuant to subdivision (8) that either has gone unreviewed or been affirmed in the claimants-employees' favor." (*Pesantez v. Boyle Envtl. Servs., Inc.*, 251 A.D.2d 11, 12 [1st Dep't 1998]). Here, Plaintiff's complaint contains no allegation that such an administrative determination was sought or made. Accordingly, to the extent that Plaintiff's first cause of action purports to assert a cause of action for unpaid wages under Labor Law § 220, Plaintiff's complaint fails to adequately plead a statutory cause of action for unpaid wages.

Here, it is undisputed that the Project is a New York State Public Project. Plaintiff's complaint adequately pleads the formation of a public works contract which incorporated the prevailing wage provisions of New York's Labor Law between the MTA and Danco Electrical, as principal, and Washington International, as surety for Danco Electrical's obligation for prevailing wages, supplements, and overtime. Plaintiff's complaint also adequately pleads Defendants' respective breaches of this contract, in that Defendants failed to pay or to ensure payment of wages, supplements, and overtime to which Plaintiff was entitled, and asserts that Plaintiff suffered damages as a result. Plaintiff's complaint adequately pleads

Plaintiff's status as a third party beneficiary to the prevailing wages provisions of the purported Public Works Contract, in that Plaintiff's complaint pleads that Plaintiff performed certain construction-related services under the contract.

As for Plaintiff's second cause of action for work, labor, and services rendered, "To state such a cause of action, plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services. (*Soumayah v. Minnelli*, 41 A.D.3d 390, 391 [1st Dep't 2007]).

"[T]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (*Clark- Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]). However, "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." *Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434, 438-439 (1st Dep't 2012); *Loheac v. Children's Corner Learning Ctr.*, 51 A.D. 3d 476, 476 [1st Dep't 2008]).

Plaintiff's complaint alleges, "Plaintiff and the other members of the putative class have performed numerous and valuable services at the request for and on behalf of defendant Danco Electrical. The reasonable value of those services for which the plaintiff and the other members of the putative class have not been paid is believed to be in excess of $250,000.00." Accepting these allegations as true and drawing all favorable inferences in favor of the non-moving party, Plaintiff's allegations are sufficient to state a claim for *quantum meruit*, at this early stage of litigation. Accordingly, insofar as there appears to be a dispute as to whether Plaintiff's services fall within the prevailing wage provisions incorporated into the Public Works Contract, the four corners of Plaintiff's complaint adequately plead a cause of action for *quantum meruit*, for purposes of surviving a motion to dismiss at this early stage of litigation.

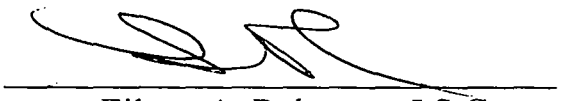
Wherefore it is hereby,

ORDERED that the motion to dismiss is granted only to the extent that the plaintiff's complaint asserts a statutory cause of action pursuant to Labor Law Section

220. The motion to dismiss is otherwise denied.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: April 28, 2014



Eileen A. Rakower, J.S.C.