Engineering Control Corp. v MRC II Contr., Inc.
2014 NY Slip Op 31548(U)
June 17, 2014
Sup Ct, NY County
Docket Number: 650076/2011
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ENGINEERING CONTROL CORP.,

Plaintiff,

- against -

MRC II CONTRACTING, INC., MANHATTAN COMMUNITY ACCESS CORP. d/b/a MANHATTAN NEIGHBORHOOD NETWORK, STRUCTURAL PRESERVATION SYSTEMS, LLC, "JOHN DOE NO. 1" THROUGH "JOHN DOE NO. 5", MC GOWAN BUILDERS, INC., RONALD D'AGOSTINO and PETER D'AGOSTINO,

Defendants.

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Index No. 650076/2011

Mot. seq. no. 003

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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Nelson Levine *et al.*
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For defendants:
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Plaintiff and counterclaim-defendant Engineering Control Corp. moves pursuant to CPLR 3212 for an order granting it summary dismissal of all counterclaims asserted against it. Defendant and counterclaim-plaintiff MRC II Contracting Inc. opposes.

I. BACKGROUND

In or about September 2009, defendant, hired to conduct excavations at a building located at 175 East 104th Street in Manhattan, entered into a contract with plaintiff whereby plaintiff agreed to provide dewatering services at the site. Included in the services to be rendered were the design and installation into the ground of pumps, or well points. (NYSCEF 72). The well points

connect to a vacuum which drains groundwater from the soil. (*Id.*, NYSCEF 71).

Heavy rainfall the weekend of March 13, 2010 caused an adjacent sewer system to back up into the site's sewer discharge pipe, flooding the building's basement, and damaging plaintiff's equipment, necessitating plaintiff's rental of replacement pumps to complete the project. (NYSCEF 71).

A dispute about payment thereafter arose between the parties. Plaintiff filed a mechanic's lien and commenced this action. (NYSCEF 76). Defendant asserts counterclaims for breach of contract and negligence. (NYSCEF 85).

II. CONTENTIONS

Plaintiff contends that defendant's counterclaim for negligence arises from the alleged breach of the dewatering contract and thus, is duplicative of the contract claim and must be dismissed. It also denies having breached the contract (NYSCEF 89), and submits the affidavit dated January 27, 2014, of Joel Rogers, its vice-president, who maintains that the dewatering system, which was installed to remove groundwater, functioned properly. The system, he claims, cannot remove surface rainwater or storm sewer backups, as the pumps are below the surface. Rather, he claims, to remove surface water, a sump pit or surface water pump is required. (NYSCEF 71).

In opposition, by affidavit dated February 10, 2014, defendant's president and codefendant Ronald D'Agostino claims that when a dewatering system is used, sump pumps are not necessary. However, as the water entering the site resulted from a back up of a storm sewer, D'Agostino argues that plaintiff should have installed a back flow flap "as part of the dewatering package," which would have prevented it. (NYSCEF 90). By affidavit of the same date, Peter

D'Agostino states that in his professional experience, well point dewatering systems "are capable of removing surface water under certain conditions," and that a back flow preventer should have been included with the discharge out flow pipe to prevent the back flow from the sewer, which plaintiff failed to recommend. (*Id.*). Defendant thus alleges that there exist triable issues of fact as to plaintiff's liability.

In reply, plaintiff claims that defendant's allegation that it should have provided back flow protection had never before been pleaded or mentioned in defendant's bills of particular, and that, in any event, it was not contractually obligated to provide it. (NYSCEF 91).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, however "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

It is not disputed that plaintiff provided defendant with a dewatering system. The sole issue is whether plaintiff provided the system pursuant to the contract. Absent any indication in the parties' contract requiring plaintiff to provide back flow or surface water protection at the site, there was no such duty. Plaintiff has thus sustained its *prima facie* burden to establish its

entitlement to a summary dismissal of defendant's counterclaim for breach of contact. The burden of proof on the motion then shifts to defendant to demonstrate the existence of a triable issue of fact.

Defendant's conclusory assertion that plaintiff should have installed back flow protection, absent any contractual requirement to do so, raises no triable issue. Defendant could have but did not include such a requirement, and to the extent it argues that in entering into the contract, plaintiff undertook an implied duty to provide back flow or surface water protection, it offers no evidence in support thereof. (*See Spancrete Northeast v Elite Assoc.* 184 AD2d 562, 563-64 [2d Dept 1992] [in light of *prima facie* showing, conclusory allegation that party failed to perform subcontract in professional manner failed to raise triable issue]). Plaintiff has thus established that it did not breach the dewatering contract. (*See Collins v Yodle, Inc.*, 105 AD3d 1178, 1179 [3d Dept 2013], *lv denied* 21 NY3d 860 [defendants entitled to summary dismissal of contract claim with evidence that they acted in accordance with agreement's terms and conditions]; *Fudenberg v State of New York*, 35 AD3d 281, 282 [1st Dept 2006], *lv denied* 9 NY3d 801 [2007] [defendant established entitlement to summary dismissal of contract claim upon demonstrating that defendant fully performed its obligations]).

Defendant provides no opposition to plaintiff's argument that its claims for breach of contract and negligence are duplicative.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, plaintiff/counterclaim-defendant Engineering Control Corp.'s motion for summary judgment dismissing defendant/counterclaim plaintiff MRC II Contracting Inc.'s

counterclaims is granted.

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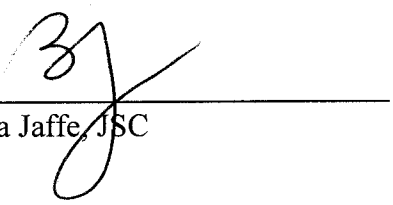

Barbara Jaffe, JSC

DATED: June 17, 2014
New York, New York