

A. Russo Wrecking, Inc. v Bullard Purch. & Sales, Inc.

2014 NY Slip Op 31666(U)

June 24, 2014

Sup Ct, New York County

Docket Number: 106225/11

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 106225/2011
A. RUSSO WRECKING, INC.
vs.
BULLARD PURCHASING & SALES
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is


**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUN 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/24/14
JUN 24 2014


_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
A. RUSSO WRECKING, INC.,

Plaintiff,

-against-

BULLARD PURCHASING & SALES, INC,
KANSAS FRIED CHICKEN, INC., HORACE
BULLARD as an Individual, THE CITY OF NEW
YORK, et al.,

Defendants.

-----X
HON. KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED.....	1-2(Exs. A-E)
ANSWERING AFFIDAVITS.....	3(Exs.1-10),4
REPLYING AFFIDAVITS.....5.....

FILED

JUN 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This action was brought by plaintiff A. Russo Wrecking, Inc. (Russo) for monetary relief, and to foreclose on a mechanic's lien filed against defendants Bullard Purchasing and Sales, Inc. and Horace Bullard (collectively "Bullard") by Russo, dated September 23, 2010, and for damages. Russo claims that it was hired the New York City Department of Housing Preservation and Development, Greenwich Insurance Co. ("Greenwich"), and Public Insurance Adjusters of N.Y., Ltd. (Public), as contract vendee of Bullard to perform work from February 28, 2010 through March 1, 2010. The total amount of the lien is \$63,945.28.

Public and its employee, defendant Craig Spiegel, now move to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7), as well as for summary judgment pursuant to CPLR 3212. Russo opposes the motion and Bullard partially opposes the motion. For the reasons set forth below, the motion is **denied**.

Factual and Procedural Background:

The complaint and the contentions therein arise from the performance of demolition work performed by Russo in connection with the collapse of the second floor of a two-story structure at the premises known as both as 685-689 Lenox Ave, and as 107 West 144th Street, New York, New York (collectively “the premises”). The demolition work was allegedly performed between February 28 and March 1, 2010 pursuant to an immediate declaration of emergency by the New York City Department of Buildings, following an inspection on February 26, 2010 which revealed a dangerous condition.

On February 26, 2010, after it was determined that demolition work needed to be performed at the premises, Russo provided Public with an estimate stating that “our price to demolish and remove the collapsed area of the second floor of [the premises] including the supplying of equipment, labor, and insurance is for the lump sum of [\$135,000.] Price excludes asbestos testing/removal if any . . .” The same day, Russo allegedly provided an initial proposal to Bullard via defendants Public and its employee, Craig Spiegel, who Russo claims, were Bullard’s duly authorized representatives, for partial demolition at the premises. Reportedly, on February 27, 2010, Bullard’s carrier, Greenwich, was provided with a contract for partial demolition and removal of the second floor of Premises (“the contract”). Despite presentation on February 27, 2010, and a request

for signature, the contract was never signed, but, according to Russo, it was approved orally by Public, Spiegel, and Greenwich, and Russo commenced work on the Premises.

Russo maintains that, as of March 1, 2010, while working at the premises, it learned that Greenwich was refusing to make payment on account of the asbestos monitoring work required to complete the demolition work because asbestos abatement work was excluded under the terms of the insurance policy for the premises, and, thus, payment for this aspect of the work would have to be covered by Bullard. Bullard has thus far refused to pay for this work, the value of which Russo claims is \$63,945.28, the amount of the lien.

Russo then commenced this action seeking the foreclosure of the Lien. Ex. B.¹ Russo also asserted causes of action sounding, inter alia, in fraud, breach of contract, unjust enrichment, quantum meruit, account stated, negligence, and tortious interference with a contract. Ex. B.

Russo subsequently moved to dismiss certain of Bullard’s counterclaims and affirmative defenses and Bullard cross-moved for summary judgment on its counterclaims. These motions were denied by this Court by order entered October 24, 2013. Ex. A.

Public and Spiegel now move, pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint. In the alternative, they move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them.² In support of the motion, Public and Spiegel submit, inter alia, the pleadings and a Public Adjuster Compensation Agreement, dated February 26,

¹Unless otherwise noted, references are to the exhibits annexed to the notice of motion.

²Public and Spiegel assert that they previously brought a cross-motion seeking the identical relief but that, after its papers were “seemingly misplaced when this case was reassigned from Judge Jaffe to Judge Freed”, Justice Freed granted them leave to bring the instant application.

2010, between defendant Kansas Fried Chicken Inc. and Public. They further submit affidavits written by Spiegel, as well as John Carino, Public's president, representing, among other things, that neither of them acted as an agent of Bullard for the purpose of retaining Russo. Exs. C, D.

The Parties' Contentions:

Public and Spiegel argue that the complaint should be dismissed against them because they had no involvement in hiring Russo. They further assert that, to the extent that they had any involvement in hiring Russo, they cannot be held liable herein since they are not responsible for Bullard's refusal to pay for Russo's services. In support of this argument, they assert that an agent who executes an agreement on behalf of a known disclosed principal will not be held liable for its performance unless the agent clearly and explicitly intended to substitute its personal liability for that of his principal.

In opposition to the motion, Russo asserts that, since a prior motion by Public and Spiegel was denied by this court, their motion is one for reargument, and since they failed to annex all prior moving papers to their motion, their application must be denied. Russo further asserts that Public and Spiegel's motion must be denied since the affidavit of Carino does not bear a certificate of conformity.³ Further, Russo asserts that the motion is premature because discovery, including depositions, remains outstanding.

In an affirmation in partial opposition to the motion, counsel for Kansas Fried Chicken, Inc., into which defendant Bullard Purchasing and Sales has merged, asserts that Public and Spiegel did

³This court notes that this infirmity was cured in the reply papers served by Public and Spiegel.

not have Kansas' authority to hire Russo.

In a reply affirmation in further support of their motion, Public and Spiegel assert that Russo has failed to raise an issue of fact sufficient to warrant the denial of their motion.

Conclusions of Law:

It is well settled that “[o]n a motion to dismiss the complaint pursuant to CPLR§ 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept the facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994); *see also Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Here, despite the fact that plaintiff has asserted thirteen causes of action, all but two of which are asserted against Public and Spiegel, counsel for Public and Spiegel fails to explain why the allegations of any of the eleven claims against his clients fail to set forth any of the causes of action alleged against them. Rather, Public and Spiegel simply state that plaintiff “cannot support a cause of action” against them. Public and Spiegel’s Aff. In Support, at par. 4. Therefore, Public and Spiegel have failed to establish that the eleven claims against them fail to fit within any cognizable theory.

Nor are Public and Spiegel entitled to the dismissal of the complaint against them pursuant to CPLR 3211(a)(1). The Court of Appeals has consistently stated that evidence used by a defendant to attack the sufficiency of a pleading “will seldom if ever warrant the relief [that a plaintiff] seeks unless [such evidence] conclusively establishes that plaintiff has no cause of action.” *Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976); *Guggenheim v Ginzburg*, *supra*. Here, the affidavits

submitted by Spiegel and Carino state, in sheer conclusory fashion, that neither Public nor Spiegel acted as “authorized agents” of Bullard for the purpose of retaining Russo to work at the premises. Exs. C, at par. 7; Ex. D, at par. 6. Such conclusory statements in an affidavit do not entitle Public and Spiegel to the dismissal of the claims against them.

Similarly, the conclusory affidavits submitted by Carino and Spiegel do not satisfy their burden of establishing their prima facie entitlement to summary judgment dismissing the complaint against them. *See Mattes v C.R. Bard, Inc.*, 295 AD2d 324 (2d Dept 2002). In any event, since depositions have not yet been held in this matter, the motions by Public and Spiegel are premature. *See Ali v Effron*, 106 AD3d 560 (1st Dept 2013). Even assuming, arguendo, that Public and Spiegel established their prima facie entitlement to summary judgment by showing, through the affidavits of Carino and Spiegel, that they did not hire Russo to perform services for Bullard, Salvatore Russo, Russo’s project manager, would have raised an issue of fact by submitting an affirmation in which he represents that “[t]here was a verbal agreement made between Russo and [Spiegel] on February 27, 2010 to commence work immediately given the emergency nature of the situation.” Russo’s Aff. In Opp., at Ex. 7.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants Public Insurance Adjusters of N.Y., Ltd. and Craig Spiegel is denied in all respects; and it is further,

ORDERED that the parties are to appear for a compliance conference on August 12, 2014

at 80 Centre Street, Room 103, at 2:00 p.m.; and it is further,

ORDERED that this constitutes the decision and order of the court.

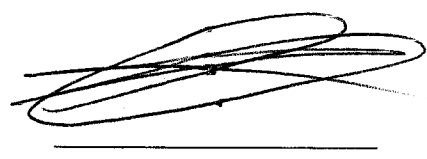
FILED

JUN 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 24, 2014

ENTER:



Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**