Nagan Constr., Inc. v Monsignor McClancy Mem. High Sch.
2014 NY Slip Op 32049(U)
April 1, 2014
Sup Ct, Queens County
Docket Number: 9543 2011
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY ORIGINAL

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

x

NAGAN CONSTRUCTION, INC., and CONAIR CORPORATION,

Plaintiff(s)

-against-

MONSIGNOR McCLANCY MEMORIAL HIGH SCHOOL, JOHN CIARDULLO ASSOCIATES P.C., LIZARDOS ENGINEERING ASSOCIATES, P.C., KENSTAR CONSTRUCTION CORP., LOVETT, SILVERMAN CONSTRUCTION CONSULTANTS, INC., and THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY.

Defendant(s)

x

Index Number 9543 2011

Motion Dates: October 22, 2013
February 13, 2014
(two motions)
March 3, 2014

Motion Cal No.: 102, 172, 173 & 138

Motion Seq. No.: 10, 11, 12, & 13

FILED
APR 11 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 60 read on this motion by defendant The Port Authority of New York and New Jersey (Port Authority) pursuant to CPLR 3212, for summary judgment dismissing the complaint; on the motion by defendant John Ciardullo Associates, P.C. (Ciardullo): (1) pursuant to CPLR 3212, for summary judgment dismissing the complaint; (2) pursuant to CPLR 3025(b), granting leave to amend its answer to assert additional affirmative defenses; or (3) pursuant to CPLR 3025(c), deeming Ciardullo's answer to include the additional affirmative defenses; on the motion by defendant Kenstar Construction Corp. (Kenstar) pursuant to CPLR 3212, for summary judgment dismissing the complaint; and on the motion by defendant Monsignor McClancy Memorial High School (MMHS): (1) pursuant to CPLR 3212(b), for summary judgment dismissing the complaint; (2) pursuant to CPLR 3025(b), granting leave to amend its answer to assert additional affirmative defenses; or (3) pursuant to CPLR 3025(c), deeming it's answer to include additional affirmative defenses.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-23
Answering Affidavits - Exhibits.....	24-48
Reply Affidavits.....	49-60

Upon the foregoing papers it is ordered that these motions are determined as follows:

Plaintiffs Nagan Construction, Inc. (Nagan) and Conair Corporation (Conair) formed a joint venture (Joint Venture) and entered into a construction contract, dated June 30, 2005 with MMHS to perform noise abatement work at the school. The contract price was $7.2 million dollars. Travelers Casualty and Surety Company of America (Travelers) issued a performance and payment bond in connection with said construction project on June 16, 2005. The Joint Venture, and others, each executed an indemnity agreement in favor of Travelers dated June 16, 2005 and Conair and others also executed an indemnity agreement in favor of Travelers dated March 14, 2006.

MMHS, in a letter dated October 29, 2007, terminated the Joint Venture's right to proceed due to its default under the contract, and made a demand on the surety Travelers to complete the contract pursuant to its performance bonds. Travelers, with the consent of MMHS, initially attempted to use the Joint Venture to complete the project, but these efforts were not successful. MMHS then retained a company to conduct an evaluation of the quality of the work performed by the Joint Venture.

In December 2007, Travelers retained Lovett-Silverman Construction Consultants Inc. (Lovett-Silverman), a surety and construction claim consultant, to assist it in obtaining bids to complete the remaining work on the project. In June 2009, MMHS and Kenstar entered into a tender agreement whereby Travelers tendered Kenstar as the completion contractor. Kenstar furnished its own surety bonds, and Travelers funded the $1,954,544.72 shortfall between the remaining contract balance and Kenstar's completion price.

On March 21, 2008, Travelers commenced an action in Queens County Supreme Court entitled *Travelers Casualty and Surety Company of America v Stransky*, Index No. 7359/08 (Travelers Case), for reimbursement pursuant to the two indemnity agreements. Nagan and Conair were named defendants in that action. The court, in an order dated October 1, 2010, and a judgment entered December 28, 2010, granted Travelers' motion for summary judgment against the defendants in its favor in the sum of $2,536,775.70. A stipulation of settlement was entered into by the parties on January 24, 2011, which expressly reserved the defendants' right to appeal the court's order and judgment, and a satisfaction of

judgment was filed with the court. The court thereafter, in an order dated January 19, 2012, denied the defendants' motion to renew Travelers' motion for summary judgment. The defendants appealed and the Appellate Division, Second Department, affirmed the Supreme Court's order and judgment (*Travelers Cas. & Sur. Co. of Am. v Stransky*, 93 AD3d 781 [2d Dept 2012]).

Nagan and Conair commenced this action on April 18, 2011, alleging breach of contract, tortious interference with a contract, fraud and unjust enrichment. The defendants Ciardullo and Kenstar have sought to amend their complaint, and the defendants Port Authority, MMHS, Ciardullo, and Kenstar have moved for summary judgment dismissing the complaint.

Leave to amend a pleading should be freely given absent prejudice to the other party, provided the amendment is not palpably insufficient (CPLR 3025[b]; *Ruddock v Boland Rentals*, 5 AD3d 368 [2d Dept 2004]; *Holchendler v We Transport*, 292 AD2d 568 [2d Dept 2002]). A defendant waives the defense of lack of standing by failing to timely interpose an answer or move by pre-answer motion asserting the defense of lack of standing (CPLR 3211[e]; *see Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989 [2d Dept 2010]; *HSBC Bank, USA v Dammond*, 59 AD3d 679 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]). However, the defense of standing waived under CPLR 3211(e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay *(HSBC Bank v Picarelli*, 110 AD3d 1031 [2d Dept 2013]; *U.S. Bank, N.A.*, 89 AD3d at 724; *Aurora Loan Servs. LLC v Thomas*, 70 AD3d 986 [2d Dept 2010]). Mere lateness is not a barrier to the amendment, unless the lateness is coupled with significant prejudice to the other side, the very elements of the laches doctrine (see *U.S. Bank, N.A. v Sharif*, 89 AD3d 723 [2d Dept 2011]; *Public Adm'r of Kings County v Hossain Constr. Corp.*, 27 AD3d 714 [2d Dept 2006]). Here, there is no prejudice to the plaintiffs to allow the defendants to amend their answer. Additionally, at the time that the defendants' answered the complaint they did not know about the indemnity agreements as they only learned about them during discovery. The defendants' answers are deemed to contain the defense of lack of standing (CPLR 3205[c]). 3025(c)

On a motion for summary judgment, the party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The defendants MMHS, Ciardullo, and Kenstar allege that pursuant to the indemnity agreements, upon the default of the Joint Venture, that all rights that the plaintiffs had were transferred to the

surety, Travelers. The Nagan indemnity agreement contained a remedies provision as follows:

> "6. Remedies: In the event of a Default, Indemnitor assigns, conveys, and transfers to the Company all of the right and interests growing in any manner out of the Contracts and assigns all right, title, and interest of all of Indemnitor's plant, tools, vehicles, machinery, equipment and materials to be effective as of the date of such Contracts. In addition, in the event of a Default, the Company shall have a right at its sole discretion to:
>
> (A) Take Possession of the work under any Contract and to complete said Contract, or cause, or consent, to the completion of thereof;...
>
> (C) Assert or prosecute any right or claim in the name of the Indemnitor and to settle any such right or claim as the Company sees fit;...
>
> (E) Take possession of the Indemnitor's rights, title and interest in and to all Contracts, subcontracts let and insurance policies in connection therewith."

The Conair indemnity agreement contained a remedies provision as follows:

> "6. Remedies In the event of a Default, Indemnitors assign, convey and transfer to Company all of their rights, and title and interests in Property and Company shall have a right in its sole discretion to: (a) take possession of the work under any Contract and to complete said Contract, or cause, or consent to, the completion, thereof;... (c) assert or prosecute any right or claim in the name of any Indemnitor and to settle any such right or claim as Company sees fit."

It is undisputed that a default occurred when MMHS terminated the contract. By the terms of these provisions, all rights that the plaintiffs had in or growing out of the contract were assigned under the remedies provision to Travelers at the time MMHS declared Nagan in default. Here, all claims that are asserted by the plaintiffs grow in some manner out of the contract and have been assigned to Travelers. Therefore, by virtue of this assignment the plaintiff is no longer the party of interest with respect to any of their claims (*James McKinney & Sons, Inc. v Lake Placid*, 61 NY2d 836 [1984]). The plaintiffs' attempts to distinguish *James McKinney* are unavailing. Here, while Travelers did not bring a suit against MMHS, this decision was in its sole discretion. The fact that no suit was brought does not mean the right to such a suit was not assigned to Travelers. There was no need for Travelers to take possession of this right or of any claim, or to bring suit. The fact that Travelers chose not to bring suit and did not exercise these rights does not make the right to bring a suit revert back to the plaintiffs. Upon default these rights were assigned away and no other conditions were necessary for them to remain with Travelers. Similarly, the fact that Travelers did not issue a release is not relevant to whether the rights were assigned. The

issue of release would only effect Travelers and not the plaintiffs, as plaintiffs no longer had any rights to any claim. Additionally, any attempt to rely on Justice Kitzes' October 1, 2010 decision in the *Travelers* case is misplaced as Justice Kitzes did not address the assignment provision at issue and whether Nagan has rights to maintain this action. Therefore, the motions for summary judgment should be granted and the complaint dismissed.

The Port Authority has also moved for summary judgment dismissing the complaint. The Port Authority is entitled to summary judgment as this action was not commenced within one year after the accrual of all the causes of action (McKinney's Unconsolidated Laws of NY § 7107; *DaCruz v Towmasters of New Jersey, Inc.*, 22 AD3d 629 [2005]). The plaintiffs' argument that damages were not incurred until the damages were paid to the surety is without merit. The plaintiffs admit that they were owed money at the time of termination and thus, the injury occurred at the time of the termination of the contract.

Notwithstanding, the above, The Court notes that although the Port Authority references a memorandum of law, no such memorandum of law was included in the papers that the Court received from the Centralized Motion Part.

Accordingly, the motions by Ciardullo and MMHS to amend its answer are granted. The motions by Ciardullo, Kenstar, MMHS and the Port Authority for summary judgment are granted and the complaint is dismissed against those defendants.

Dated: APR 11 2014

J.S.C.

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APR 11 2014
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