

Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.
2014 NY Slip Op 32204(U)
June 30, 2014
Sup Ct, Queens County
Docket Number: 702547/2012
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES
Justice

IA Part 17

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Gym Door Repairs, INC., for itself and
on behalf of all other trust
beneficiaries similarly situated,

Plaintiff,

-against-

ASTORIA GENERAL CONTRACTING CORP.,
DIMITRIOS KOUTSOUKOS, JOHN DOES 1-25
being and intended to be those persons
or entities with an interest against the
public improvements and subject funds,
JOHN DOES 26-40 being fictitious names
of parties liable for the diversion of
trust funds pursuant to Article 3-A of
the Lien Law and JOHN DOES 41-50 being
sureties that provided payment bonds for
the work performed at the project,

Defendant(s).

-----x
ASTORIA GENERAL CONTRACTING CORP. and
DIMITRIOS KOUTSOUKOS,

Third-Party Plaintiff,

-against-

THE NEW YORK CITY DEPARTMENT OF
EDUCATION and DAVID N. ROSS, as
Executive Director of the New York City
Department of Education,

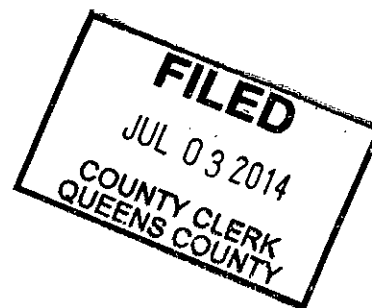
Third-Party Defendant.
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Index
Number 702547/ 2012

Motion
Date February 20,
2014

Motion Seq. No. 3

Handwritten signature or initials



The following papers numbered E33 to E110 read on this motion by
third party defendant New York City Department of Education and

third party defendant David N. Ross for, *inter alia*, an order dismissing the third party complaint against them pursuant to CPLR 3012(b) and 3211.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	E33-E49
Memorandum of Law.....	E51
Answering Affidavits - Exhibits.....	E100-E101
Reply Affidavits.....	E111-E112
Memoranda of Law.....	E110

Upon the foregoing papers it is ordered that the branch of the motion to dismiss this action pursuant to CPLR 3012(b) is denied, and the branch of the motion to dismiss the causes of action for violation of due process, breach of contract, conversion and unjust enrichment pursuant to CPLR 3211(a)(1) and (7) is granted.

The Allegations of the Third Party Complaint

Third party plaintiff Dimitrios Koutsoukos owns and operates third party plaintiff Astoria General Contracting Corp. (AGC) which does work for the New York City Department of Education (DOE). By letter dated October 2, 2012, DOE alleged that investigators had determined that AGC had underpaid some of its employees by compensating them at less than the prevailing wage rate and that the underpayments exceeded \$500,000. However, AGC does not pay less than the prevailing wage rate to its two on-site employees (Dimitrios Kousoukos and John Sanango), and AGC does not control the employees of its subcontractors.

By letter dated January 4, 2013, DOE notified AGC that it had terminated contracts numbered 9871153, 9871160 and 9871161 for cause on December 10, 2012. By letter dated April 4, 2013, AGC confirmed that it was protesting DOE's finding that AGC was in default. DOE did not reply to AGC's protest, has not produced evidence showing that AGC is in default, and has not afforded AGC a hearing. DOE has violated AGC's right to due process of law by confiscating funds amounting to \$480,000 owed to AGC for performed work, labor, and services. Although AGC has requested a meeting or a hearing concerning DOE's charges against it, it has not been given one.

Pleadings and Procedural History

Plaintiff Gym Door Repairs, Inc. (GDR) began the instant action against AGC by the filing of a summons and complaint, dated October 18, 2012, alleging that AGC, a general contractor, had subcontracted work to it on public improvement projects undertaken by DOE. On or about April 8, 2013, AGC began the instant third party action against DOE by the filing of a summons with notice which was served on DOE on April 23, 2013. On April 29, 2013, DOE served a notice of appearance and a demand for a complaint.

On September 4, 2013, DOE's attorney consented to the late service of the third party complaint. The preliminary conference order states in relevant part: "Defendants shall file third party complaint by September 6, 2013." By e-mail, dated September 4, 2013, AGC served a copy of the third party complaint upon the attorney for DOE. (The defendants' argument that the third party complaint was served late has no merit, and this third party action need not be dismissed pursuant to CPLR 3012[b].)

The third party complaint, which seeks to recover \$480,000 for work performed under the contracts, asserts four causes of action: (1) violation of due process, (2) conversion, (3) unjust enrichment, and (4) breach of contract.

Violation of Due Process Rights

AGC alleges that DOE has violated its state and federal due process rights by failing to respond to a notice of protest, failing to afford AGC a hearing, and failing to produce evidence of wrongful conduct.

The funds allegedly owed to AGC have been withheld by the Comptroller pursuant to Labor Law § 220-b(2)(a)(1) and (2)(b) until the conclusion of its investigation into the charges that the contractor violated its duty to pay prevailing wages as required by Labor Law §§ 220(3) and 220(7). "Labor Law § 220-b is part of a statutory framework, grounded in N.Y. Constitution, article I, § 17, long recognized as 'intended to protect the interests of laborers engaged upon public work of the State and its subdivisions' ***. The officer or person charged with the disbursement of state or municipal corporation funds applicable to a public improvement contract is statutorily authorized to withhold moneys due to a contractor pending an investigation regarding insufficient wages." (*Glenman Indus. & Commercial Contracting Corp. v New York State Office of State Comptroller*, 75 AD3d 986,

987-988 [3d Dept 2010], quoting *Devitt v Schottin*, 248 AD 298, 301, aff'd 274 NY 188 [1937].)

In the case at bar, the Comptroller began a prevailing wage investigation because of complaints filed by AGC's employees, and as a result of that investigation the Comptroller has determined that AGC did underpay its employees in the amount of \$735,185.21. On or about April 26, 2013, the Comptroller sent AGC a letter informing the contractor of its findings and suggesting the possibility of a settlement or a referral to the New York City Office of Administrative Trials and Hearings.

Although a hearing has not been conducted as of the present time, the documentary evidence in this case establishes that there has been no violation of AGC's due process rights, and the defendant is entitled to the dismissal of this cause of action pursuant to CPLR 3211(a)(1) and (7). (See *Vanderminden v Vanderminden*, 226 AD2d 1037 [3d Dept 1996]; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248 [1st Dept 1995]; *Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700 [3d Dept 1992].)

The court notes that when funds are withheld pursuant to the prevailing wage law, Labor Law § 220-b(2)(c) directs that the "investigation and hearing shall be expeditiously conducted." (See *Glenman Indus. & Commercial Contracting Corp. v New York State Office of State Comptroller*, *supra*.) "This is an administrative proceeding where quick resolution is statutorily directed and the failure to act promptly can result in a court directing an expeditious hearing ***." (*Glenman Indus. & Commercial Contracting Corp. v New York State Office of State Comptroller*, *supra* at 988.)

Breach of Contract

The breach of contract cause of action is dismissable pursuant to CPLR 3211(a)(1) and (7). It is alleged that AGC performed all of its contractual obligations, but that DOE has failed to pay more than \$480,000 due to the contractor. 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. (*McCormick v Favreau*, 82 AD3d 1537 [3d Dept 2011]; *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009].) Although DOE has not paid AGC the \$480,000 earned by the contractor, DOE has not breached its contractual obligations because Labor Law § 220-b(2)(a) provides that when a complaint alleging prevailing wage and supplement violations with respect to labor performed on a public improvement has been filed, the City is

required to withhold sufficient monies to satisfy the underpayment pending a final determination. DOE has shown that it has a legal right and duty to withhold the payments claimed by AGC.

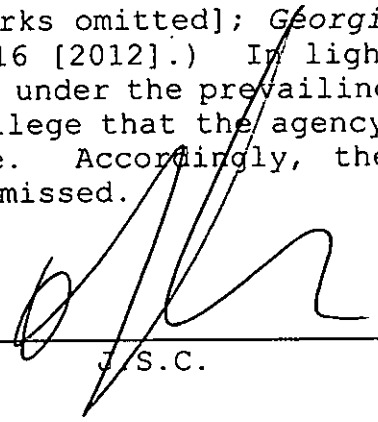
Conversion

The plaintiff has failed to state a claim for conversion. An action for conversion will lie where a plaintiff has a superior right to possession of funds and a defendant has exercised unauthorized dominion over the funds to the exclusion of the plaintiff's rights. (*Lucker v Bayside Cemetery*, 114 AD3d 162 [1st Dept 2013].) Here, DOE has a statutory right to withhold funds due a contractor where a complaint alleging a violation of the prevailing wage law has been filed. (See Labor Law § 220-b[2][a].)

Unjust Enrichment

To state a claim for unjust enrichment, the plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [brackets and internal quotation marks omitted]; *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012].) In light of DOE's statutory right to withhold payments under the prevailing wage law, the complaint does not adequately allege that the agency's actions violate equity and good conscience. Accordingly, the cause of action for unjust enrichment is dismissed.

Dated: June 30, 2014



J.S.C.