Mandeville Manor Health Sys. Inc. v Brook Val. Kydaha Inc.
2014 NY Slip Op 32468(U)
September 16, 2014
Supreme Court, New York County
Docket Number: 6510731/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11
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MANDEVILLE MANOR HEALTH SYSTEMS INC.,
d/b/a SYNERGY CLEANING SERVICE, INDEX NO. 651073/13

Plaintiff,

-against-

BROOK VALLEY KYDAHA INC., and NEW YORK
CITY HOUSING AUTHORITY,

Defendants.

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JOAN A. MADDEN, J.:

In this action, plaintiff Mandeville Manor Health Systems, Inc., d/b/a Synergy Cleaning Service (Synergy or Mandeville) seeks to recover the sum of $87,059.91 as due and owing for work it performed as a subcontractor at five properties owed by defendant New York City Housing Authority (NYCHA) in the aftermath of Hurricane Sandy. Defendant NYCHA moves pursuant to CPLR 3211 (a) (1) and (7) for an order dismissing the complaint, and an order vacating and discharging plaintiff's public improvement lien. Plaintiff opposes the motion.

The verified amended complaint alleges that on or about November 7, 2012, NYCHA entered into a contract with co-defendant Brook Valley Kydaha Inc. (Brook Valley), for Brook Valley to perform "Emergency Janitorial, Remediation & Restoration Services Related to the Response and Recovery from Hurricane Sandy." The complaint also alleges that on or about November 9, 2012, Synergy entered into an agreement with Brook Valley to perform "janitorial,

remediation & restoration labor and services related the response and recovery from Hurricane Sandy at the subject premises set forth above," and that Synergy "also had various subsequent oral agreements with Brook Valley." The complaint further alleges that Synergy "duly performed all of the conditions of said contract(s) and any change orders," and that on or about January 31, 2013, "Synergy became entitled to receive from Brook Valley the sum of not less than $87,059.9, which sum or any part thereof has not been paid."

The complaint additionally alleges that "on or about March 28, 2013, all of which was eight (8) months of the last dated Synergy supplied and/or furnished services, labor and/or materials for said improvement, Synergy duly filed a Notice Under Mechanic's Lien in writing in the office of the Clerk of the County of New York and Queens in which Counties the properties against which the liens are asserted and are situated." The complaint annexes and incorporates by reference a copy of the "Notice of Lien." The document annexed to the complaint is entitled "Notice under Mechanic's Lien Law for Account of Public Improvements" (Notice of Lien). The Notice of Lien lists the contractor for which Synergy performed work as Brook Valley and the public improvement for which Synergy performed the work as NYCHA, and states that the work performed for the "above described public improvement [was] mold inspection and removal." The "wherefore clause" of the Notice of Lien states that Synergy "claims a lien in the sum of $87,059.91, the agreed price of the work performed and/or materials furnished by lienor [Synergy] for the above described public improvement, on the moneys of the New York City Housing Authority applicable to the construction of said public improvement, to the extent of the amount is due or to become due to the above named general contractor [Brook Valley], as

provided by Section 5 of the Lien Law of the State of New York." Attached to the Notice of Lien is an "Affidavit of Service of Notice of Lien on Account of Public Improvements on Owner, Contractor and NYCHA," which states that on March 14, 2013, the "Notice of Mechanic's Lien on a Public Improvement" was served by certified mail on NYCHA's Legal Department at 250 Broadway, NY, NY and Brook Valley at two separate addresses.

The complaint asserts seven causes of action against both Brook Valley and NYCHA, and requests damages in the amount of $87,059.91. The first cause of action seeks foreclosure of Synergy's lien. The second cause of action is for breach of contract. The third cause of action is for unjust enrichment and quantum meruit. The fourth cause of action is for an account stated. The fifth cause of action asserts that Brook Valley and NYCHA are "in possession of" and are "trustees" of "funds as defined in Article 3-A of the Lien Law," and such funds "should be applied to the payment of Synergy's claim of $87,059.91." The sixth cause of action asserts that Synergy is "entitled to a just and full verified account of the monies received by NYCHA and disbursed by Brook Valley" pursuant to Lien Law §§75 and 76. The seventh cause of action alleges "breach of trust obligation by Brook Valley and NYCHA in taking monies from the said trust for themselves and making and consenting to diversions of said trust funds to persons, firm or corporations not authorized to receive said trust funds."

Defendant Brook Valley answered the complaint asserting six affirmative defenses and three counterclaims, including unclean hands, estoppel, failure to pay prevailing wages, breach of contract, defective and untimely mechanic's lien, and willful exaggeration of its mechanic's lien.

In lieu of answering the complaint, NYCHA is now moving pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, arguing that documentary evidence bars Synergy's claims

against NYCHA, and that the complaint fails to state any cause of action against NYCHA. Specifically, NYCHA contends it has no privity of contract with Synergy; Synergy's agreement with Brook Valley governs its work and precludes quasi-contractual claims such as quantum meruit and unjust enrichment; no right exists to assert a mechanic's lien against real property owned by a public entity such as NYCHA; Synergy cannot have lien on NYCHA's funds, as "janitorial services" are not a "permanent improvement" within the meaning of Lien Law §§2 and 5, and even if they are, Synergy's lien is invalid for not complying with the Lien Law's dual filing requirement, and at the time the lien was filed "money was no longer due or to become due" from NYCHA to Brook Valley; Lien Law Article 3-A does not impose a trust upon the "funds of a public owner appropriated for public improvement"; Synergy's cause of action to compel NYCHA "to produce records and make an accounting regarding a non-existence 'trust' is inherently without merit"; and Synergy fails to allege facts evidencing an account stated.[1] In support of the motion, NYCHA submits an affidavit of Sabrina Stevenson, Chief of its Supply Management Procurement Department, and documents including NYCHA's specifications as to the scope work, a Notice to Proceed from NYCHA addressed to Brook Valley, NYCHA's purchase orders for the work to be performed by Brook Valley, and an email dated April 9, 2013, from Stevenson to Brook Valley advising that NYCHA had paid Brook Valley a total of $676,139.51, and the "balance due" was "$00.00."

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[1]By letter dated February 14, 2014, NYCHA advised the court that it was withdrawing its additional argument that Synergy had failed to comply with the notice and pleading requirements of Public Housing Law §157, but "reserves the right the assert the same argument as an affirmative defense in its answer if the motion is denied."

On a CPLR 3211 motion to dismiss addressed to the sufficiency of the pleadings, the complaint must be liberally construed, and the Court must accept all allegations as true and accord them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory. See Nonnon v. City of New York, 9 NY3d 825, 827 (2007) (quoting Leon v. Martinez, 84 NY2d 83, 87-88 [1994]); Cron v. Hargro Fabrics, Inc, 91 NY2d 362, 366 (1998); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC, 19 AD3d 273 (1st Dept 2005); DeMicco Bros, Inc. v. Consolidated Edison Co, 8 AD3d 99 (1st Dept 2004). In assessing a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), "a court may freely consider affidavits submitted by plaintiff to remedy any defects in the complaint," and the "criterion is whether the proponent of the pleading has a cause of action, not whether [it] has stated one." Leon v. Martinez, supra at 88 (quoting Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]); accord Dollard v. WB/Stellar IP Owner, LLC, 96 AD3d 533 (1st Dept 2012); Amaro v. Gani Realty Corp, 60 AD3d 491, 492 (1st Dept 2009). Dismissal under CPLR 3211(a)(1) based on a defense founded on documentary evidence is warranted only if defendant submits documentary evidence conclusively refuting plaintiff's claims or conclusively establishing a defense to the claims as a matter of law. See A.G. Capital Funding Partners, L.P. v. State Street Bank & Trust Co., 5 NY3d 582 (2005); 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144 (2002); Gorelik v. Mount Sinai Hospital Center, 19 AD3d 319 (1st Dept 2005), lv app den 6 NY3d 707 (2006).

Construing the complaint and Synergy's supplemental submissions liberally, and accepting all the allegations as true and according them the benefit of every favorable inference,

the Court concludes that NYCHA's motion must be granted, and the complaint is dismissed in its entirety as against NYCHA.

The second cause of action for breach of contract claim is without merit as a matter of law, since Synergy does not allege that it was a party to any contract with NYCHA, nor that it was a third-party beneficiary of NYCHA's contract with Brook Valley. See Perfetto v. CEA Engineers, P.C., 114 AD3d 835 (2nd Dept 2014); Bulbonia Holding Corp v. Jeckel, 189 AD2d 957 (3rd Dept 1993); Perma Pave Contracting Corp v. Paerdegat Boat & Raquet Club, Inc, 156 AD2d 550 (2nd Dept 1989). Plaintiff's reliance on Hill v St. Clare's Hospital, 67 NY2d 72 (1986) and Kleeman v Rheingold, 81 NY2d 270 (1993), is misplaced as those cases involve underlying claims sounding in tort, and not as here, breach of contract. Moreover, while Synergy submits and affidavit of its chief operating officer, Leslie Lewis, that Brook Valley's "officers" told him that "payment of our bills was directly guaranteed by the New York City Housing Authority," plaintiff does not allege that NYCHA executed a written guaranty of payment which is necessary to satisfy the statute of frauds. A promise to be responsible for the debt of another must be in writing in order to be enforceable. GOL § 5-701 (a) (2); Bronx Store Equipment Co, Inc v. Westbury Brooklyn Assocs, LP, 16 AD3d 119 (1st Dept 2005). Thus, since plaintiff was not in privity with NYCHA, the breach of contract claim is dismissed as against NYCHA. See Perfetto v. CEA Engineers, PC, supra.

The third cause of action for unjust enrichment and quantum meruit is likewise dismissed as against NYCHA. The existence of a valid and enforceable contract governing a particular subject matter precludes recovery in quasi contract for events arising out that same subject matter. See Clark-Fitzpatrick, Inc v. Long Island Railroad Co, 70 NY2d 382 (1987); Melcher v.

Apollo Medical Fund Management LLC, 105 AD3d 15 (1st Dept 2013). Thus, in view of the contract between Synergy and Brook Valley governing Synergy's work, Synergy cannot assert claims for unjust enrichment and quantum meruit arising out of the identical subject matter.

As to the fourth cause of action for an account stated, the complaint does not plead the requisite elements against NYCHA. An account stated exists when a party to a contract receives invoices or bills and does not object within a reasonable time. Russo v Heller, 80 AD3d 531, 532 (1st Dept 2011). Synergy does not allege that it submitted any bills directly to NYCHA. Plaintiff's Chief Operating Officer, Leslie Lewis simply states that "my company presented our just bills for payment to Brook, and through Brook to the Authority," which is insufficient to support a claim for account stated. Id.

The balance of Synergy's claims, consisting of the first, fifth, sixth and seventh causes of action, are based on plaintiff's lien. Where as here, the real property is owned by a public entity, i.e. NYCHA, the lien attaches solely to funds due under the contract, and not to the property. See EMC Iron Works v. City of New York, 294 AD2d 173 (1st Dept 2002). Contrary to NYCHA's assertion, it is clear from Synergy's Notice of Lien that the lien involves a "public improvement" pursuant to Section 5 of the Lien Law. However, the court agrees that the lien is invalid based on Synergy's failure to comply with the statutory filing requirements for public improvement liens as set forth in Lien Law §12. See EMC Iron Works v. City of New York, supra; Intercounty Supply, Inc v. TAP Plumbing & Heating, Inc, 2007 WL 7560625 (Sup Ct, Westchester Co, 2007) (n.o.r.), aff'd as modified 60 AD3d 907 (2nd Dept 2009); Attica Construction Corp v. Tycoon Construction Corp, 32 Misc3d 1234(A) (Sup Ct, Queens Co 2011).

Under Lien Law §12, a subcontractor such as Synergy, which alleges it furnished labor or materials in improving real property owned by a public entity, such as the NYCHA,

> may file a notice of lien with the head of the department or bureau having charge of such construction or demolition *and* with the comptroller of the state or with the financial officers of the public corporation, or other officer or person charged with the custody and disbursements of the state or corporate funds applicable to the contract under which the claim is made.

Section 12 imposes a "dual" filing requirement for a public improvement lien: the lien must be filed with the head of the department responsible for the work, and also with the financial officer of the public entity, or the custodian of the funds. See EMC Iron Works v. City of New York, supra; Attica Construction Corp v. Tycoon Construction Corp, supra; Matter of Callanan Industries, Inc, 88 Misc2d 802 (Sup Ct, Albany Co, 1975). Failure to serve the correct parties as set forth in Lien Law §12 is a "fatal defect." Intercounty Supply, Inc v. TAP Plumbing & Heating, Inc, supra (citing EMC Iron Works v. City of New York, supra).

Here, the allegations in the complaint show that plaintiff did not comply with the filing requirements of Lien Law §12. The complaint merely alleges that Synergy "duly filed a Notice Under Mechanic's Lien in writing in the office of the Clerk of the County of New York and Queens in which Counties the properties against which the liens are asserted and are situated." While Lien Law §10 requires that a notice of *mechanic's lien* be filed "in the clerk's office of the county where the property is situated," the Lien Law provides for "two distinct sets of filing requirements, one for public improvement liens and one for mechanic's liens." EMC Iron Works v. City of New York, supra at 174. As the First Department explains, "[a]lthough the Lien Law is to be liberally construed and 'substantial compliance with its several provisions shall be sufficient for the validity of a lien' (Lien Law §23), the Legislature explicitly created two

separate types of liens, with two separate notice requirements, to restrict the rights of creditors of City-owned properties, consistent with the unique circumstance that City-owned property is inalienable." Id.

Since the case at bar involves a public improvement lien, the notice of lien must be filed in accordance with Lien Law §12, as quoted above. Even if the court considers the affidavit of service as to the Notice of Lien which is annexed to the complaint, the affidavit shows that the Notice of Lien was merely served on NYCHA's legal department, which does not even satisfy one prong of the dual filing requirement of Lien Law §12. Thus, since plaintiff did not comply with statutory filing requirements for a public improvement lien, the lien is invalid as a matter of law, and the first, fifth, sixth and seventh causes of action based on the lien are dismissed for failure to state a cause of action, and plaintiff's lien is discharged of record pursuant to Lien Law §21(7). See EMC Iron Works v. City of New York, supra at 174.

In view of the foregoing conclusion, the court need not address the additional grounds raised by NYCHA for dismissing the first, fifth, sixth and seventh causes of action.

ORDERED that the motion to dismiss by defendant New York City Housing Authority is granted, and the complaint is severed and dismissed in its entirety as against defendant New York City Housing Authority, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the Notice under Mechanic's Lien Law for Account of Public Improvements dated February 14, 201, filed by plaintiff Mandeville Manor Health Systems, d/b/a Synergy Cleaning Service with the New York City Housing Authority in the sum of $87,059.91, pursuant to a contract between the New York City Housing Authority and Brook Valley Kydaha

Inc., is canceled and discharged of record, and the New York City Housing Authority shall enter the discharge in its lien records; and it is further

ORDERED that the balance of the action as against defendant Brook Valley Kyadha Inc. shall continue and the remaining parties shall appear for a preliminary conference on October 23, 2014 at 11:00 am, in Part 11, Room 351, 60 Centre Street.

Dated: September 16, 2014

ENTER:

J.S.C. HON. JOAN A. MADDEN
J.S.C.