

<b>Tag Mech. Sys., Inc. v Dworkin Constr. Corp. (USA)</b>
2014 NY Slip Op 33973(U)
May 7, 2014
Supreme Court, Onondaga County
Docket Number: 2014EF244
Judge: Donald A. Greenwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**At a Motion Term of the Supreme  
Court of the State of New York,  
held in and for the County of  
Onondaga on April 15, 2014.**

**PRESENT: HON. DONALD A. GREENWOOD  
Supreme Court Justice**

**STATE OF NEW YORK  
SUPREME COURT COUNTY OF ONONDAGA**

---

**TAG MECHANICAL SYSTEMS, INC.,**

**Plaintiff,**

**v.**

**DWORKIN CONSTRUCTION CORP. (USA),**

**Defendant.**

---

**DECISION AND ORDER  
ON MOTION**

**Index No.: 2014EF244  
RJI No.: 33-14-0897**

**APPEARANCES: ROBERT M. COTE, ESQ., OF D'ARRIGO & COTE  
For Plaintiff**

**DAVID O. WRIGHT, ESQ.  
For Defendant**

The defendant has made a pre-answer motion to dismiss, seeking dismissal of the complaint on the grounds that its defense is founded upon documentary evidence and that the causes of action may not be maintained because of the statute of limitations. *See, CPLR §3211(a)(1) and (a)(5)*. The complaint alleges that the defendant was the subcontractor on a construction project at Destiny USA for a Freshly Squeezed retail food chain franchise and that plaintiff entered into a subcontract with the defendant on October 1, 2012 to perform the HVAC work. Plaintiff alleges that it performed the work and has not been paid. The complaint contains causes of action for breach of contract, quantum meruit, unjust enrichment and account stated. The complaint seeks \$29,500.00.

In making the pre-answer motion to dismiss, the defendant points to the language in the subcontract which provides that “no action arising out of this agreement for any cause whatsoever shall be maintained against the contractor (the defendant) by a subcontractor or anyone claiming under the subcontractor unless such action shall be commenced no later than the earlier of: six months after the completion of the subcontractor’s activity on the job site or one year and one day after substantial completion of the job.” Defendant argues that the action was commenced on February 4, 2014, more than six months after plaintiff’s last activity on the job site and more than one year after substantial completion. Defendant claims that plaintiff’s claim accrued on December 28, 2012 and that the action is barred by both documentary evidence and the statute of limitations, with the action having become time barred as of June 2013. Defendant further argues that even adopting the longer limitations period of one year and a day from substantial completion, the limitation would have run out in December of 2013 since the complaint alleges that work was completed prior to December 20, 2012.

The complaint in this matter may only be dismissed upon documentary evidence if the factual allegations contained therein are definitively contradicted by the evidence submitted or defense conclusively established thereby. *See, Yew Prospect, LLC v. Szulman*, 305 AD2d 588 (2d Dept. 2003). In addition, to dismiss a complaint as time barred pursuant to CPLR §3211(a)(5), the defendant bears the initial burden of establishing *prima facie* that the time in which to sue has expired. In deciding the motion the court must take the allegations in plaintiff’s complaint as true and resolve all inferences in favor of the plaintiff. *See, Sabadie v. Burke*, 47 AD3d 913 (2d Dept. 2008).

The plaintiff opposes the motion to dismiss and contends that its claims cannot accrue under the express terms of the subcontract until the defendant first receives payment from the owner and the defendant fails to conclusively establish or even allege receipt of payment from the owner from which plaintiff's claims accrued. *See, Swift v. New York Medical College*, 25 AD3d 686 (2d Dept. 2006). Plaintiff provides affidavits from Ellis Guiles, Jr., plaintiff's Vice President, Darren Streeter, a field foreman employed by plaintiff, and Cassandra Sharpe, plaintiff's payroll clerk. The plaintiff has established that the defendant did not provide the plaintiff with a certificate of occupancy or any other documentation evidencing that the project was substantially complete in December in 2012 as alleged. Plaintiff argues that the project could not have been substantially complete in December of 2012 as the defendant alleges because plaintiff continued its work under the subcontract until April of 2013 when the project field foreman last visited the job site and completed the final punch list items under the subcontract.

In addition, the affidavit of plaintiff's payroll clerk establishes that her notes indicate that she was advised that the defendant made repeated representations to her that plaintiff would be paid in full between May of 2013 and July of 2013, when she again spoke with a representative of the defendant and advised that the plaintiff was going to have to pursue their claims in court.

The subcontract provides that payment is only due to plaintiff within seven days of receipt by defendant from the owner and in viewing the facts as alleged in the compliant in the light most favorable to the plaintiff both the contractual limitations and the "pay when paid" provision of the subcontract upon which defendant attempts to bar plaintiff's claims are void as against public policy and wholly enforceable against the plaintiff. *See, Lien Law §34; see also,*

*Clifton Steel Corp. v. General Electric*, 80 AD2d 714 (3<sup>rd</sup> Dept. 1981). Therefore, the defendant cannot establish *prima facie* entitlement to dismissal on a statute of limitations ground under CPLR §3211(a)(5) based upon the void provisions of the subcontract, which are unenforceable against the plaintiff.

In addition, the documentary evidence before the Court fails to establish that plaintiff's claims are time barred under the subcontract in light of the clear issues of fact with respect to defendant's receipt of payment from the owner, the completion of plaintiff's work under the subcontract, the date of substantial completion, and defendant's repeated representations of payment to the plaintiff.

The Lien Law provides that a subcontractor which performs work or provides materials for the improvement of real property on a commercial project has the absolute right to file or enforce a mechanic's lien for monies due and unpaid within 8 months after the completion of its work under the contract. *See, Lien Law §10(1)*. Lien Law §34 provides that "notwithstanding the provision of any other law, any contract, agreement or understanding whereby the right to file or enforce any lien created by [the statute] is waived shall be void as against public policy and wholly unenforceable." *See, Lien Law §34*. The statute was adopted to protect subcontractors and material men who are not economically strong enough to resist demands that they may waive a valuable statutory right created especially for their protection. *See, Rotodyne, Inc. v. Con Ed. Co. of NY, Inc.*, 85 Misc.2d 347 (1975) (rev'd on other grounds, 55 AD2d 600 [2d Dept. 1976]).

In this matter the subcontract's shortened six month statute of limitations measured from the date of plaintiff's last activity at the job site, waives plaintiff's absolute right to file and enforce a mechanic's lien for monies due and unpaid under the subcontract within eight months

after completion of its work under the subcontract. *See, Lien Law §10.* As a result the limitation is void on its face as against public policy and wholly unenforceable against plaintiff. *See, Lien Law §34; see also, Clifton Steel Corp. v. General Electric Co., 80 AD2d 714 (3<sup>rd</sup> Dept. 1981).*

The plaintiff has established that the last work on the subcontract was finished on April 13, 2013 and plaintiff therefore had the absolute statutory right to file or enforce its mechanic's lien within eight months thereof until December 13, 2013 under Lien Law §10. However, if measured from the date of substantial completion of the project, as the subcontract provides, plaintiff's statutory right is automatically waived if the one year limitation shortens plaintiff's right to assert its lien any time prior to December 13, 2013, and thus is in clear violation of Lien Law §34. Plaintiff argues that if substantial completion of the project actually occurred on December 12, 2012 as defendant claims, then plaintiff's statutory right to file or enforce its mechanic's lien until December 13, 2013 was waived by the subcontract's one year limitation in violation of Lien Law §34 and thus is unenforceable.

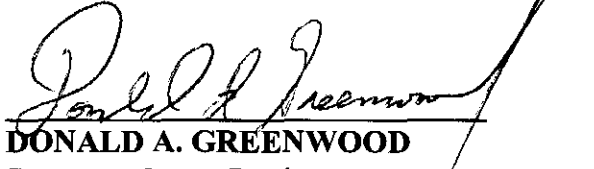
The payment term of the subcontract is a "pay when paid" provision which improperly transfers the risk of the owner's default from the defendant to the Plaintiff and is void as against public policy. *See, Westfair Electric Contractors v. Aetna Casualty and Surety Co., 872 FSupp 1212 (SDNY 1994).* "Permitting a contractor to avoid its obligation to pay a building subcontractor by means of an exculpatory provision limiting liability to payments as to the prime contractor by a project owner would be tantamount to defeating the objectives of §34 and is an indirect way to create and enforce what is in effect a forbidden waiver." *Id.* As such, the defendant's pre-answer motion to dismiss is denied.

NOW, therefore, for the foregoing reasons, it is

**ORDERED**, that the defendant's motion to dismiss the complaint pursuant to CPLR §3211(a)(1) and (a)(5) is denied.

**ENTER**

**Dated: May 7, 2014**  
Syracuse, New York

  
**DONALD A. GREENWOOD**  
Supreme Court Justice

Papers Considered:

1. Defendant's Notice of Motion to Dismiss, dated March 10, 2014;
2. Affidavit of Lawrence Dworkin in support of defendant's motion to dismiss, dated March 10, 2014;
3. Defendant's Memorandum of Law in support of motion to dismiss, dated March 10, 2004;
4. Affidavit of Darren Streeter in opposition to defendant's motion, dated April 3, 2014;
5. Affidavit of Cassandra Sharp, dated April 3, 2014, and attached exhibits;
6. Affidavit of Ellis G. Guiles, Jr. in opposition to defendant's motion, dated April 3, 2014;
7. Plaintiff's Memorandum of Law in opposition to defendant's motion to dismiss, dated April 4, 2014; and
8. Defendant's Reply Memorandum, dated April 14, 2014.