

Montana Datacom, Inc. v Applied Projects Co., Inc.

2014 NY Slip Op 34036(U)

September 30, 2014

Supreme Court, Queens County

Docket Number: 700673/2014

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

FILED
OCT 10 2014
COUNTY CLERK
QUEENS COUNTY

P R E S E N T : HON. ROBERT J. MCDONALD IAS PART 34
Justice

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MONTANA DATACOM, INC.,

Index No.: 700673/2014

Petitioner

Motion Date: 04/24/14

- against -

Motion No.: 143

APPLIED PROJECTS COMPANY, INC., SCOTT
ELECTRICAL SERVICE, LLC, RODNEY SCOTT,
and JOHN DOES 1 - 25,

Motion Seq.: 1

Respondents.

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The following papers numbered 1 to 24 were read on this motion by petitioner, Montana Datacom, Inc., for an order punishing defendants, Applied Projects Company, Inc., Scott Electrical Service, LLC and Rodney Scott for contempt pursuant to CPLR §§ 5210 and 5251 and Judiciary Law § 753 for failure to comply with certain subpoenas duces tecum, and for an order directing respondents to turn over certain sums to petitioner to satisfy its judgment against Scott Electrical Service, LLC; and the cross-motion of respondent, Applied Projects Company, Inc., for an order dismissing the petition pursuant to CPLR 3211(a)(3) and 3211(a)(7) for lack of standing and failure to state a cause of action:

Papers
Numbered

Montana Datacom's Order to Show Cause-Affidavits-Exhibits..	1 - 6
APC's Cross-Motion-Affidavits-Exhibits-Memo of Law.....	7 - 12
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This is a special proceeding commenced by the petitioner, Montana Datacom, Inc. (Montana), for an order pursuant to CPLR §§ 5225 and 5227, directing the defendant, Applied Projects Company, Inc. (APC), to pay to Montana the sum of \$107,739.80 received

from the New York City Transit Authority (NYCTA) or to be received from NYCTA in the future to satisfy a money judgment in favor of the petitioner, a judgment creditor against respondent, Scott Electrical Service, LLC (SES), a judgment debtor; directing SES to pay to Montana any and all monies in its possession sufficient to satisfy the judgment in favor of the petitioner; and for an order pursuant to CPLR §§ 5210 and 5251 and Judiciary Law § 753 holding APC, SES and Rodney Scott in contempt for their failure to comply with the subpoena duces tecum served by Montana on APC and SES and punishing them by fine or imprisonment or both.

In its verified petition, Montana states that between August 2012 and March 2013, SES an electrical contractor, ordered certain cable and wire products from Montana which Montana delivered to SES and rendered certain invoices. The products purchased from Montana were used by SES in certain projects in which SES was the electrical subcontractor to APC, the general contractor. When SES failed to make payment to Montana for the products it purchased, Montana commenced an action in Queens County Supreme Court against SES for payment of the amount due which totaled \$180,281.95. When SES failed to answer the complaint, a money judgment in the amount of \$107,739.80 was entered on September 5, 2013 in favor of Montana.

Based on information provided to Montana that APC had received monies which were to be disbursed to SES, Montana served a Subpoena Duces Tecum with Restraining Notice on APC on September 25, 2013, directing the production of documents, restraining APC from transferring any monies in which SES had an interest, and directing APC appear at petitioner's counsel's office for a deposition.

Petitioner also served SES with a similar subpoena duces tecum with a restraining notice, directing the production of documents and directing their appearance for a deposition. SES failed to produce any documents or to appear for a deposition as directed by the Montana subpoena.

Petitioner asserts that both SES and APC have failed to comply with the subpoenas, failed to produce documents and failed to appear for depositions.

On December 7, 2013, Montana was advised that APC received a remittance from the New York City Transit Authority for a project on which SES was a subcontractor of APC. Montana was also advised that APC was in possession of surplus monies belonging to SES but intended to distribute the proceeds to the vendors and

subcontractors that had not been paid by SES. Montana was also informed that APC was not going to disburse any of the surplus money to Montana.

By order to show cause dated January 31, 2014, this court ordered that APC be stayed from transferring monies received from the NYCTA and that said funds be deposited into APC's attorney's escrow account.

Montana asserts that pursuant to CPLR §§ 5225 and 5227, as a judgment creditor, it is entitled to recover monies in the possession of the judgment debtor, SES, or monies in the possession of third-party APC who owes money to a judgment debtor. Therefore, petitioner seeks an order directing APC to turn over money in their possession which is owed to SES and which may be used to satisfy Montana's judgment. In addition, Montana asserts that it is entitled to an order holding APC, SES and Scott in contempt for failing to comply with the subpoena duces tecum, failing to supply documents and failing to appear for a deposition.

SES has not served an answer to the petition.

APC has filed a pre-answer cross-motion to the order to show cause and objections in point of law to the petition seeking an order dismissing Montana's petition pursuant to CPLR 3211(a)(3) and 3211(a)(7) for lack of standing and failure to state a cause of action and seeking financial sanctions for frivolous conduct.

In support of the cross-motion, Joseph Gibson, President of APC, submits an affidavit stating that APC is a general contractor engaged in construction projects for Municipal, State and Federal entities. With respect to projects for the NYCTA, APC is the general contractor on two projects, one for the renovation of the 45th Road-Court House Square Subway Station in Long Island City and the other is a renovation project of the Mott Avenue Subway Station in Far Rockaway. Mr. Gibson states that SES was a subcontractor to APC on both projects. Mr. Gibson also states that Montana supplied electrical materials to SES on the Court House Square project but not on the Mott Avenue project. Mr. Gibson states that in December 2013 it received two payments from the NYCTA on the Mott Avenue Project. Gibson intended to use the surplus funds to pay the vendors of SES who had provided materials to the Mott Avenue project. Gibson states that no payments have been received on the Court House Square project for which Montana supplied materials. Mr. Gibson contends that before paying Montana, as a judgment creditor of SES he is required to first use the surplus monies to pay the vendors who supplied

materials to the Mott Avenue Project as they are trust fund beneficiaries with regard to the Mott Avenue payments. Mr. Gibson contends that the trust fund beneficiaries are entitled to receive the monies from those payments prior to a judgment creditor such as Montana who is not a trust fund beneficiary of the Mott Avenue project. Gibson states that pursuant to this Courts restraining order the sum of \$31,493.60 has been deposited into APC's attorney's escrow account. Gibson contends that none of said sum is due to SES and therefore Montana is not entitled to a turnover of said funds.

Counsel for APC, Joyce Sun, Esq. asserts that because APC is not holding any money which is due to SES, Montana's petition to require APC to turn over monies to it must be dismissed pursuant to CPLR 3211 (a)(3) and (a)(7) based upon lack of standing. Counsel asserts that as the payment received by APC from NYCTA was for the Mott Avenue Project and as all the trust fund beneficiaries of the Mott Avenue Project have not been paid, that there is no money due to SES from the Mott Avenue Project and therefore SES, the judgment debtor to Montana, is not entitled to any of those monies and the turnover petition must be dismissed. APC also seeks sanctions against Montana for filing a frivolous motion.

In its memorandum, respondent states that at the time APC received the Mott Avenue payment from the NYCTA in December 2013, the amount owed to SES was \$22,982.20. Counsel contends that the Mott Avenue payment constitutes trust funds for payments to contractors, vendors, and laborers pursuant to Lien Law Article 3-A and as such the asset must be used to pay out the claims of the trust fund beneficiaries. Therefore, counsel asserts that SES has no interest in the corpus of the trust until the trust funds are first paid out to its suppliers, vendors and laborers (trust fund beneficiaries). Further counsel indicates that one trust fund beneficiary, Red Hawk Fire and Security, has claims that may exceed the amount of SES's trust fund. Accordingly, it is contended by APC that Montana does not have a cause of action against it for turnover of surplus funds.

With respect to the petitioner's motion for contempt, APC contends that the respondent cannot be punished for contempt because the subpoena is a non-judicial subpoena made returnable at counsel's office rather than at the court house.

Upon review and consideration of the petitioner's motion, respondent's cross-motion to dismiss the petition and petitioner's reply thereto, this court finds as follows:

CPLR § 5224(a)(3)(iv) provides in pertinent part as follows:

(iv) failure to comply with an information subpoena shall be governed by subdivision (b) of section twenty-three hundred eight of this chapter...

CPLR § 2308(b)(1) provides as follows:

b) Non-judicial. (1) Unless otherwise provided, if a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If that court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars.

"[A] person who is served with a non-judicial subpoena cannot be held in contempt for failure to comply unless and until a court has issued an order compelling compliance, which order has been disobeyed" (Dias v. Consolidated Edison Co, 116 AD2d 453, 454[1st Dept. 1986; also see Reuters, Ltd. v. Dow Jones Telerate, 231 AD2d 337 [1st Dept. 1997]]).

Here the petitioner's non judicial subpoena was not made returnable in court. Accordingly, plaintiff's motion to punish defendant for contempt and for counsel fees is denied without prejudice.

However, the respondents SES and APC are hereby directed to comply with plaintiff's information subpoena, to supply documents as requested within twenty (20) days of service of a copy of this order with notice of entry, and to appear for a deposition within thirty (30) days of service of a copy of this order with notice of entry thereof.

Pursuant to CPLR § 5225, SES is directed to turnover to Montana forthwith the amount necessary to satisfy its judgment against SES entered on September 5, 2013.

That branch of petitioner's motion for an order pursuant to CPLR 5227 directing APC to turnover any amounts it is holding for the benefit of SES is denied without prejudice as there is a question of fact as to whether APC will have any funds in its possession owed to SES after payment of its trust beneficiaries. APC has failed to provide sufficient admissible evidence to show exactly how much is owed to trust beneficiaries and whether there will not be any surplus money left to pay SES now or in the future after such payment is made.

APC's cross-motion to dismiss the petition on the ground that Montana does not have standing to commence the action and for failure to state a cause of action is denied. As stated above, although APC claims that after paying the trust beneficiaries with the surplus money it has on hand there will be no money left that is due to SES, there is a question of fact as to how much money is owed to trust beneficiaries and the amount of money that will be left over, if any, after payment to the trust beneficiaries. Thus, as Montana was not a trust fund beneficiary of the Mott Avenue Project, there is a question of fact as to whether APC, after payment to its trust fund beneficiaries on the Mott Avenue project, will have remainder monies which are subject to execution and are required to be turned over to Montana in partial payment of its judgment against SES.

In addition, that branch of the respondent's cross-motion seeking sanctions against the petitioner is denied.

The stay contained in the order to show cause dated January 31, 2014, requiring APC to deposit surplus funds in its attorney's escrow account shall be continued pending the final determination of the petition.

The time for the respondents to serve and file an answer to the petition is extended until 20 days after service upon them of a copy of this decision and order with notice of entry (see CPLR 7804 [f]).

Dated: September 30, 2014
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.