

**Midland Elec. Contr. Corp. v Manhattana Bus.
Interiors, Inc.**

2015 NY Slip Op 30127(U)

January 20, 2015

Supreme Court, New York County

Docket Number: 451085/14

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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MIDLAND ELECTRICAL CONTRACTING CORP.,
on behalf of itself and all other persons
similarly situated as trust fund
beneficiaries of Lien Law Trusts of
which Manhattan Business Interiors, Inc.
d/b/a MBI Group, is Trustee,

Plaintiff,

-against-

MANHATTAN BUSINESS INTERIORS, INC.
D/B/A MBI GROUP, DORMITORY AUTHORITY
OF THE STATE OF NEW YORK, THE STATE
OF NEW YORK, FIDELITY & DEPOSIT
COMPANY OF MARYLAND and JOHN DOE
NO. 1 THROUGH JOHN DOE NO. 10,

Defendants.

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Mtn Seq. Nos. 002 and 003

DECISION AND ORDER

JEFFREY K. OING, J.:

Background

This action arises out of a construction project known as the Medgar Evers College Library Expansion (the "project"). Medgar Evers College is located in Brooklyn at 1650 Bedford Avenue and is owned by defendant Dormitory Authority of the State of New York ("DASNY"). Defendant Manhattan Business Interiors, Inc. d/b/a MBI Group ("MBI") entered into a contract with DASNY in February 2013 as the project's general contractor. In April 2013, plaintiff Midland Electrical Contracting Corp. ("Midland") and MBI entered into a subcontract agreement (the "subcontract") wherein Midland was to perform certain electrical work for the

project and MBI would pay Midland the agreed-upon subcontract price of \$1,969,000.

Midland alleges that prior to entering into the subcontract there was a bidding process pursuant to which it submitted a proposal to MBI for certain electrical work containing a specific scope of work provision ("scope of work"). On or about April 12, 2013, Bayardo Joseph Peralta ("Peralta"), an MBI employee, sent a proposed subcontract to Michael McGinley, Midland's employee, via electronic mail (Amended Compl., ¶ 10). Midland contends that the scope of work contained in MBI's proposed subcontract contained items or work that were not included in the scope of work agreed to between Midland and MBI during the bidding process (Id., ¶ 11). As a result, Midland claims that it inserted a copy of the previously agreed-upon scope of work from its original proposal into the proposed subcontract at page 10, and Kevin McGinley, Midland's president, signed the new version of the subcontract (Id., ¶ 12). On that same date, April 12, 2013, Yevgeniy Medovoy ("Medovoy"), Midland's employee, replied to Peralta's email message indicating that Midland was inserting the scope of work into the proposed subcontract because the proposed subcontract contained work items which were not part of the previously agreed-upon scope of work (Id., ¶ 13).

Plaintiff Midland goes on to claim that on April 15, 2013 Medovoy sent via electronic mail the subcontract, which contained the scope of work inserted at page 10 and signed by Kevin McGinley, to Yuriy Davidoff ("Davidoff"), MBI's employee (Id., ¶ 14). Medovoy's message again pointed out that Midland's proposal was inserted into the subcontract to clarify the scope of work (id.). By electronic mail and telephone on that same date, Davidoff instructed Medovoy that Midland should proceed to work on the project as soon as possible (Id., ¶ 15).

Midland contends that during the course of the project MBI began insisting that certain items of work be performed that were outside the scope of work agreed upon. By way of example, Midland claims that MBI insisted on certain video wall work that was not included in the scope of work for the agreed upon subcontract price (Id., ¶ 19). At that point, MBI sent Midland a fully-signed copy of the subcontract between Midland and MBI. Midland claims, in fact, that it did not receive a counter-signed copy of the subcontract from MBI until November 2013 (Id., ¶ 18). Midland alleges that MBI had physically removed the scope of work that Midland had inserted at page 10 of the subcontract and signed the document (Id., ¶ 20). As a result, Midland's scope of work increased without its approval and without additional

compensation (Id.). MBI terminated the subcontract in February 2014.

In March 2014, Midland filed a public improvement lien with DASNY against the proceeds due on the contract in the amount of \$1,017,610.25. In April 2014, Midland filed a partial satisfaction of lien in the amount of \$83,177.74. Thus, the remaining balance on the lien is \$934,432.51. Midland commenced this action to foreclose on its public improvement lien, and for breach of contract against MBI, unjust enrichment against MBI and DASNY, diversion of lien law trust funds against MBI, fraudulent inducement against MBI, and a claim for payment from MBI's surety, defendant Fidelity & Deposit Company of Maryland.

Procedural History

Midland originally commenced this action against defendants in Kings County. On April 14, 2014, MBI filed a motion to dismiss Midland's fourth, fifth, and seventh causes of action. On the same date, defendant The State of New York ("NYS") also filed a motion to dismiss the complaint against it. On April 24, 2014, Midland filed an amended complaint revising Midland's fourth and fifth causes of action. Thereafter, the parties entered into a stipulation transferring venue of this action from Kings County to New York County. On May 27, 2014, defendant NYS re-filed its motion to dismiss the complaint in New York County,

making the motion returnable on July 29, 2014. MBI also re-filed its motion to dismiss, but limiting it to the seventh cause of action for fraudulent inducement. Its motion was returnable on July 10, 2014 (the "MBI motion"). On July 14, 2014, this Court issued an order granting the MBI motion and dismissing Midland's fraudulent inducement claim due to Midland's default in opposing the motion (Steinvurzel Affirm., Ex. 1).

Relief Sought

In mtn seq. no. 002, defendant NYS moves, pursuant to CPLR 3211(a)[2], to dismiss the complaint against it for lack of subject matter jurisdiction.

In mtn seq. no. 003, Midland moves, pursuant to CPLR 5015(a)[1], for an order vacating this Court's July 14, 2014 order dismissing the seventh cause of action for fraudulent inducement, and, upon vacatur of the order, which this Court entered on default, restoring MBI's dismissal motion, upon restoration denying that motion, and reinstating the seventh cause of action.

Discussion

Mot. Seq. No. 002

Defendant NYS argues that because Midland is seeking money damages from the State of New York jurisdiction lies exclusively

with the Court of Claims (Court of Claims Act § 9[4]; Bertoldi v State of New York, 275 AD2d 227 [1st Dept 2000]).

Section 42 of the Lien Law, however, provides:

A lien for labor done or materials furnished for a public improvement may be enforced against the funds of the state or the public corporation for which such public improvement is constructed or demolished ... and against the contractor or subcontractor liable for the debt, by a civil action, in the same court and in the same manner as a mechanic's lien on real property.

Thus, contrary to the defendant NYS's argument, Supreme Court has jurisdiction over matters involving a lien upon "funds of the state". In addition, Midland asserts that it had to add defendant NYS as a necessary party in the amended complaint pursuant to Lien Law § 44(6), which provides, in relevant part:

In an action in a court of record to enforce a lien against real property or a public improvement, the following are necessary parties defendant:

* * *

(6) The state, when the lien is one filed against funds of the state for which the public improvement is constructed or demolished.

Defendant NYS, however, points out that the contract for the project was between DASNY and MBI, and argues that DASNY is a separate and distinct entity from the State of New York. What defendant NYS fails to make clear, however, is whether or not the lien was "filed against funds of the state for which the public improvement is constructed" (Lien Law § 44[6]). As such,

defendant NYS fails to demonstrate that this Court lacks subject matter jurisdiction or that it is not a necessary party in this action.

Accordingly, defendant NYS's motion, pursuant to CPLR 3211(a)[2], to dismiss the complaint against it is denied.

Mot. Seq. No. 003

In order to vacate its default, Midland must proffer a reasonable excuse for the default and demonstrate a meritorious claim for fraudulent inducement (see Bobet v Rockefeller Center, North, Inc., 78 AD3d 475 [1st Dept 2010]). As for a reasonable excuse, plaintiff proffers the affirmation of Jennifer Church, Esq., an attorney associated on a per diem basis with plaintiff's counsel Steinvurzel & Levy Law Group. In her affirmation, Church describes a miscommunication between Ronald Steinvurzel, Esq., the attorney who assigned her the task of opposing the MBI motion, and herself. Apparently, Steinvurzel mistakenly believed that Church had filed Midland's opposition to the MBI motion on June 10, 2014, when, in fact, she had not filed such opposition but instead filed papers in response to defendant NYS's dismissal motion. These facts support a finding of law office failure, which constitutes a reasonable excuse for the default. There is no evidence, as MBI alludes to, of a pattern by Midland of

dilatory behavior (Bobet v Rockefeller Center, North, Inc., 78 AD3d 475, supra).

As for a meritorious claim for fraudulent inducement, Kevin McGinley, Midland's president, proffers an affidavit reiterating the allegations contained in the amended verified complaint. A review of that affidavit demonstrates that Midland has a meritorious claim for fraudulent inducement.

Accordingly, that branch of plaintiff Midland's motion to vacate its default is granted. MBI's motion to dismiss the seventh cause of action for fraudulent inducement asserted against it is hereby restored for reconsideration.

MBI moves, pursuant to CPLR 3211(a)[7], to dismiss Midland's fraud inducement claim by arguing that Midland has not pleaded the existence of a legal duty that is extraneous to the breach of contract claim, and, further, that the claim is premised upon the same allegations as the breach of contract claim. In the alternative, MBI moves to dismiss the fraudulent inducement claim on the ground that Midland failed to plead it with the requisite specificity as required by CPLR 3016(b).

MBI's motion to dismiss the seventh cause of action for fraudulently inducement is denied. Here, Midland contends that it is pleading the fraudulent inducement claim as an alternative to the breach of contract claim. It asserts that either MBI

breached the subcontract by attempting to force Midland to perform work outside the scope of work without additional compensation, or MBI fraudulently induced Midland into the subcontract by misrepresenting that MBI had accepted Midland's scope of work, which Midland had incorporated into the subcontract.

In addition, Midland alleges that Medovoy, its employee, pointed out Midland's changes to the scope of work to Davidoff, yet Davidoff allegedly instructed Medovoy that Midland should proceed with work on the project as soon as possible, without informing Midland that MBI was not accepting Midland's changes to the scope of work. This fact sufficiently alleges a misrepresentation of present fact that is collateral to the contract (GoSmile, Inc. v Levine, 81 AD3d 77 [1st Dept 2010]).

Contrary to MBI's argument, the amended verified complaint also contains the requisite specificity under CPLR 3016(b) in that Midland alleges the time, place, and manner in which MBI made the alleged misrepresentation.

Accordingly, it is hereby

ORDERED that defendant NYS's motion to dismiss the complaint (mtn seq. no. 002) is denied; and it is further

ORDERED that plaintiff Midland's motion to vacate its default (mtn seq. no. 003) is granted; and it is further

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ORDERED that upon vacatur of plaintiff's default, defendant MBI's motion, pursuant to CPLR 3211(a)[7] and CPLR 3016(b), to dismiss the seventh cause of action of the amended verified complaint (mtn seq. no. 001), is restored to the Part 48 calendar, and it is further

ORDERED that upon restoration of MBI's motion to dismiss (mtn seq. no. 001) it is denied; and it is further

ORDERED that MBI is directed to serve and file an answer to the amended verified complaint within twenty (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 48, Room 242, on February 25, 2015, at 10:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/20/15


HON. JEFFREY K. OING, J.S.C.