Mahopac Improvements, LLC v Double Tee-Kay Diner Corp.
2015 NY Slip Op 30247(U)
February 23, 2015
Supreme Court, Putnam County
Docket Number: 3030/10
Judge: Lewis J. Lubell

Conference 4/6/15 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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MAHOPAC IMPROVEMENTS, LLC, successor-in interest to MAHOPAC CENTER ASSOCIATES, L.P.,

Plaintiff,

-against -

DOUBLE TEE-KAY DINER CORP. and ZORBA DINER, INC., trading as OLYMPIC DINER,

Defendants.

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DECISION & ORDER

Index No. 3030/10

Sequence No. 3
Motion Date 12/01/14

LUBELL, J.

The following papers were considered in connection with this motion by plaintiff for an Order (a) pursuant to CPLR 3212(a), granting plaintiff summary judgment on liability against defendants due to defendants' failure to pay to plaintiff their proportionate share of the cost of maintenance, operation and repair of plaintiff's sewage treatment plant ("STP") from October 1, 2004 and thereafter; and (b) pursuant to CPLR 3212(c) and 4317(b), appointing a referee to determine the amount owing from defendants to plaintiff, which requires the examination of a "long accounting" running from October 1, 2004 to the date of the determination by the referee; and (c) pursuant to CPLR 5001, granting to plaintiff prejudgment interest on the unpaid sums, commencing with the amount due on October 1, 2004; and (d) awarding to plaintiff costs and such further relief as the Court may deem proper:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIDAVITS	1
MEMORANDUM OF LAW IN SUPPORT	2
EXHIBITS TO MOTION 1-14	3
AFFIDAVIT IN OPPOSITION	4
REPLY AFFIDAVIT IN SUPPORT/EXHIBIT 15	5
REPLY MEMORANDUM OF LAW	6

As currently constituted, plaintiff Mahopac Improvements, LLC., successor-in-interest to Mahopac Center Associates, L.P., brings this breach of contract action to recovery from defendants, Double Tee-Kay Diner Corp. and Zorba Diner, Inc, trading as Olympic Diner, ("Olympic") alleged amounts due and owing for the maintenance, operation and repair of plaintiff's sewerage treatment plant referred to in certain 1983 and 1992 agreements.

This motion follows the Court's Decision & Order of March 19, 2014, wherein the Court ruled on the discovery aspects of the motion then before it and denied plaintiff's motion for summary judgment without prejudice, however, for either party to move for summary judgment as to any extant questions of law and/or for referral of this matter to a referee pursuant to CPLR §4317, if the parties cannot agree upon same.

SUMMARY JUDGMENT

Plaintiff, as the party seeking summary judgment, must demonstrate the absence of genuine issues of material fact as to the causes of action contained in the complaint and any affirmative defenses (Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 AD2d 64, 70 [1st Dept 2002]; Mendel Group, Inc. v. Prince, 114 AD3d 732 [2d Dept 2014] citing Deutsche Bank Natl. Trust Co. v. Whalen, 107 A.D.3d 931, 932-933 [2d Dept 2013]). Only then does the burden shift to the defendants' to lay bare their proof in opposition to movant's prima facie showing (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Upon review and consideration of the moving papers, the Court finds that plaintiff has established entitlement to judgment in its favor as a matter of law to the extent that summary judgment is sought as to liability stemming from defendants' failure to pay the balance of their proportionate share of the cost of maintenance, operation and repair of plaintiff's Sewage Treatment Plant ("STP") from October 1, 2004, after accounting for the $1,300 per month of partial payments properly attributed to the account. A fair reading of the documentary evidence, including the 1983 agreement between plaintiff's predecessor in interest, J&M Realty Corp., and defendants and the November 25, 1992 modification of same by Mahopac Center Associates, L.P., another of plaintiff's predecessors, establishes defendants' obligation to pay its ". . . proportionate share of the cost of maintenance, operation [and] repair . . . of the septic-sewage disposal system . . . "

The Court finds merit to and plaintiff concedes that the affirmative defense of statute of limitation precludes recovery for any period prior to October 1, 2004.

However, contrary to defendants' position, the Court finds that plaintiff has come forward in the first instance with a sufficient showing in admissible form that there is no merit to any of the other affirmative defenses such that summary judgment in favor of plaintiff should be denied.

Among other things, plaintiff concedes and has or will properly account for any monthly payments made by defendants to plaintiff on this account. A question of fact has not been properly raised as to whether the $1,300 paid per month by defendants to plaintiff was intended by the parties to constitute the discharge of defendants' obligation to pay their proportionate share of the operation, maintenance and repair of the STP as calculated by the 1983 formula, and the Court rejects any such assertion as a matter of law. Plaintiff has established that such payments were paid on account, not in full payment of the underlying STP obligations and no material questions of fact have been properly raised regarding same.

Laches is inapplicable.

> The doctrine of laches, "which bars recovery where a plaintiff's inaction has prejudiced the defendant and rendered recovery inequitable, has no application in actions at law" (Hilgendorff v. Hilgendorff, 241 AD2d 481 [1997]; see Roth v. Black Star Publ. Co., 302 AD2d 442 [2003]; Matter of County of Rockland v. Homicki, 227 AD2d 477 [1996]).

(Blinds To Go (U.S.), Inc. v. Times Plaza Dev., L.P., 45 AD3d 714, 715 [2d Dept 2007][improper for supreme court to have dismissed amended complaint for laches in action to recover damages for breach of a commercial lease, an action at law]).

Estoppel also fails as a matter of law.

> [E]stoppel is an equitable doctrine wherein a party is induced to act in reliance of the conduct of the other party, to his detriment. Not only must the party claiming an estoppel have relied upon the words or conduct of the other party, but he must have been induced to change his position or suffer injury or prejudice therefrom (see, Central N.Y. Realty Corp. v. Abel, 28 AD2d 50, affd 22 NY2d 963; Five Platters v. Williams, 81 AD2d 534; Diamond v. Wasserman, 8 AD2d 623; Friedman v.

Libin, 4 Misc 2d 248, affd 3 AD2d 827).

(Waldman v. Cohen, 125 AD2d 116, 122 [2d Dept 1987]).

Here, in response to plaintiff's showing of entitlement to judgment in its favor on this issue, defendants have not come forward with sufficient proof in admissible form as to its "reliance or change of position or prejudice of any kind . . . " resulting from any action of plaintiff (Waldman v. Cohen, 125 AD2d 116, 122 [2d Dept 1987] citing Glenesk v. Guidance Realty Corp., 36 AD2d 852). "Not only must the party claiming an estoppel have relied upon the words or conduct of the other party, but he must have been induced to change his position or suffer injury or prejudice therefrom" (Waldman v. Cohen, 125 AD2d 116, 122 [2d Dept 1987] citing Central N.Y. Realty Corp. v. Abel, 28 AD2d 50, affd 22 NY2d 963; Five Platters v. Williams, 81 AD2d 534; Diamond v. Wasserman, 8 AD2d 623; Friedman v. Libin, 4 Misc 2d 248, affd 3 AD2d 827). In any event, the Court finds that plaintiff has properly established that the doctrine of equitable estoppel is inapplicable to the facts of this case and defendants have not sufficiently refuted same as a matter of law nor have they otherwise properly raised questions of fact regarding same.

Finally, plaintiff has properly refuted and defendants have not, in response, come forward with sufficient proof in admissible form such as would raise a triable issue of fact as to whether plaintiff "voluntar[ily] and intentional[ly] abandon[ed] . . . a known right which may not be inferred from mere silence or inaction" (Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC, 78 AD3d 746, 750 [2d Dept 2010 citing Golfo v. Kycia Assoc., Inc., 45 AD3d 531, 532-533 [2007]).

Referee:

Plaintiff's motion to have the damages issue referred to a referee to compute is granted.

This is a breach of contract action entailing the "examination of a long account" (CPLR 4317[b]). As such, by statute if not in all other respects, it should properly be referred to a referee (see CPLR 4317[b]). To be clear, this is a reference to hear and determine (CPLR §4301) all issues dealing with damages (CPLR §4311), i.e., all amounts owed to plaintiff by defendant for STP charges from October 1, 2004 forward. As such, the

> . . . referee . . . shall have all the powers of a court in performing a like function; but he [or she] shall have no power to relieve

> himself [or herself] of his [or her] duties, to appoint a successor or to adjudge any person except a witness before him [or her] guilty of contempt. For the purposes of this article, the term referee shall be deemed to include judicial hearing officer.

(CPLR §4301, supra).

The Court notes that, notwithstanding the Court's determination granting plaintiff's motion for the appointment of a referee, the parties may, upon stipulation, chart their own course as to the identity and payment of a referee (see CPLR §4317[a]) or, absent such consent and based upon the Court's determination granting plaintiff's motion regarding same, the Court will

> . . . designate either one or three referees; provided, however, a judicial hearing officer may be designated a referee, in which case there shall be only one referee.

(CPLR §4312). The parties should take further note that,

> [e]xcept by consent of the parties, no person shall be designated a referee unless he is an attorney admitted to practice in the state and in good standing. Where a referee may be designated by the parties, they may designate any number of referees.

(CPLR §4312, supra).

Finally, and except upon the appointment of a Judicial Hearing Officer (CPLR §4321[b]), the availability of which is questionable, section 4321(a) of the CPLR provides:

> [Any] order or a stipulation for a reference shall determine the basis and method of computing the referee's fees and provide for their payment. The court may make an appropriate order for the payment of the reasonable expenses of the referee. Unless the court otherwise orders or the stipulation otherwise provides, such fees and expenses of the referee shall be taxed as costs.

With those options and statutory framework in mind, the Court directs a conference on the referee issue.

CPLR §5001

That aspect of plaintiff's motion pursuant to CPLR §5001 seeking prejudgment interest on unpaid sums, commencing with the amount due on October 1, 2004, is granted.

Section 5001 provides, in pertinent part:

> (a) . . . Interest shall be recovered upon a sum awarded because of a breach of performance of a contract . . .
>
> (b) . . . Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. *Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.*
>
> (c) . . . The date from which interest is to be computed shall be specified in the verdict, report or decision . . . The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

Based upon the foregoing, it is hereby

ORDERED, that, plaintiff's motion for summary judgment as to liability is hereby granted on its first cause of action for breach of contract; and, it is further

ORDERED, that, the issue as to damages is hereby referred to a referee to hear and determine as will more fully be set forth in an order that will issue following a conference to be held at 9:30 A.M. on April 6, 2015, if the parties have not already agreed upon, among other things, the identity of and terms of payment for said referee; and, it is further

ORDERED, that, any judgment rendered in favor of plaintiff and against defendants shall include pre-judgment interest, as provided by statute (CPLR §5001).

The foregoing constitutes the Opinion, Decision, and Order of

the Court.

Dated: Carmel, New York
February 23, 2015

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

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