

Exedus Contr. Corp. v P.C. Consulting Mgt. Corp.

2015 NY Slip Op 30966(U)

June 2, 2015

Supreme Court, New York County

Docket Number: 652798/2014

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 45

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EXEDUS CONTRACTING CORP.,

Plaintiff,

-against-

Index No. 652798/2014

P.C. CONSULTING MANAGEMENT CORP.,
HUDSON INSURANCE COMPANY and
PAUL GAMBINO,

Defendants.

-----X
SINGH, J.

Defendants P.C. Consulting Management Corp. (PC Consulting), Hudson Insurance Company (Hudson Insurance), and Paul Gambino (Gambino) move, pursuant to CPLR 3211 (a) (3), for an order dismissing this action on the ground that plaintiff Exedus Contracting Corp. (Exedus) lacks legal capacity to sue on a construction subcontract.

This action arises out of a construction subcontract executed on December 11, 2012 by PC Consulting and Exedus (Exedus subcontract). The Exedus subcontract provided for Exedus to be paid the fixed amount of \$2.2 million, and to provide other work for a unit price allowance of \$577,000. Gambino executed the Exedus subcontract in his corporate capacity as president of PC Consulting.

Pursuant to the Exedus subcontract, PC Consulting subcontracted to Exedus a portion of the renovation and construction work that it had been hired to perform by nonparty McGowan Builders, Inc. (McGowan Builders). McGowan Builders had hired PC Consulting, pursuant to a subcontract dated November 8, 2012 (PC Consulting subcontract), to perform certain work,

including roofing work, masonry work, interior refurbishment, and wood work, at a construction project located at several buildings on Colonels Row and Nolan Park on Governors Island (the Project).

McGowan Builders had procured a labor and materials payment bond from Hudson Insurance that guaranteed payment of McGowan Builders' employees, subcontractors, and suppliers on the Project.

On January 11, 2013, McGowan Builders terminated the PC Consulting subcontract.

By letter dated January 17, 2013, PC Consulting terminated the Exedus subcontract, citing Exedus's failure to procure the proper insurance, and failure to provide the necessary labor and materials.

In the complaint, Exedus alleges that, prior to termination of the Exedus subcontract, Exedus had incurred costs for labor, materials, and specific and general overhead totaling \$91,370.65, and, as a result of the termination, incurred lost profits of \$670,000.

Exedus alleges that it demanded payment equal to its costs and lost profits from PC Consulting and Hudson Insurance, and that they refused to pay any portion of the sums sought.

Exedus also alleges that PC Consulting received payment from McGowan Builders, that those funds are trust funds, pursuant to Lien Law Article 3-A, and that PC Consulting and Gambino knowingly diverted those trust funds.

Exedus commenced this action against PC Consulting and Gambino to recover its costs and lost profits, an award of punitive damages, and attorneys' fees on theories of breach of the Exedus subcontract by nonpayment and improper termination; unjust enrichment by retaining the benefit of Exedus's labor and materials without compensating Exedus; and violation of Lien Law

Article 3-A by improper retention of the trust funds. Exedus asserts a claim against Hudson Insurance to recover its costs, pursuant to the terms of the labor and materials payment bond and Finance Law § 137.

Defendants now seek to dismiss this action on the ground that, when Exedus executed the Exedus subcontract, it was listed as an inactive corporation with the New York State Department of State, Division of Corporations, and, therefore, lacked legal capacity to enter into that subcontract and to commence this action.

In opposition, Exedus contends that it cured its tax payment delinquency, and was reinstated as an active corporation, and, therefore, enjoys all the rights it would have had, had the delinquency never occurred.

The motion to dismiss is denied.

On July 27, 2011, prior to the execution of the PC Consulting subcontract, Exedus was dissolved by proclamation of the New York Department of State, pursuant to Tax Law § 203-a, for failure to pay corporate franchise taxes. "The Secretary of State may dissolve a corporation by proclamation for nonpayment of the franchise taxes. Upon dissolution, the corporation's legal existence terminates" (*80-02 Leasehold, LLC v CM Realty Holdings Corp.*, 123 AD3d 872, 873 [2d Dept 2014]; Tax Law § 203-a) and the corporation has no standing to maintain a legal action or proceeding (*Vantrel Enters., Inc. v Vantage Petroleum Corp.*, 270 AD3d 412, 412 [2d Dept 2000]; *see* CPLR 3211 [a] [3]).

Significantly, however, the record conclusively demonstrates that Exedus cured the delinquency, and regained its active corporate standing with the Department of State (*see* http://appext20.dos.ny.gov/corp_public for Exedus Contr. Corp.).

Therefore, Exedus has legal capacity to commence, and maintain, this action. There is no dispute that the corporate reinstatement occurred prior to Exedus's commencement of this action on September 13, 2014.

Exedus has legal capacity to sue to enforce the Exedus subcontract. Exedus's reinstatement as an active corporation resulted in the retroactive validation of that subcontract. Sections 203-a (7) and (8) of the Tax Law permit retroactive nullification of a corporate dissolution, upon payment of accrued tax arrears.

"[O]nce back taxes are paid, the corporation is 'reinstated to de jure status nunc pro tunc [and] its contracts entered into during the period of delinquency would be retroactively validated. By statute, the corporate powers, rights, duties and obligations are reinstated nunc pro tunc, as if such proclamation [of dissolution] had not been made or published"

(*Flushing Plaza Assoc. # 2 v Albert*, 31 AD3d 494, 495 [2d Dept 2006], quoting *Lorisa Capital Corp. v Gallo*, 119 AD2d 99, 113 [2d Dept 1986] [internal quotation marks omitted], quoting Tax Law §§ 203-a [7], [8]; *Propp v Chaya Amusement Corp.*, 155 AD2d 251, 251 [1st Dept 1989]).

Accordingly, it is

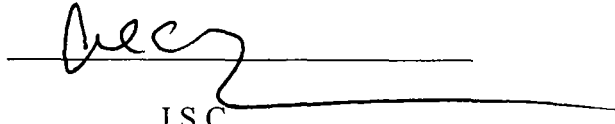
ORDERED that the motion is denied in its entirety; and it is further

ORDERED that defendants P.C. Consulting Management Corp., Hudson Insurance Company, and Paul Gambino shall serve and file an answer to the complaint within 20 days from 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 Room 218,
60 Centre Street, New York, New York 10007, on June 9, 2015, at 10:00 a.m.

Date: June 2, 2015

ENTER:

A handwritten signature in black ink, appearing to read 'Anil C. Singh', is written over a horizontal line. The signature is cursive and extends to the right of the line.

J.S.C.

ANIL C. SINGH