

MDB Dev. Corp. v Shirin Constr., Inc.

2015 NY Slip Op 32013(U)

October 22, 2015

Supreme Court, New York County

Docket Number: 650064/2014

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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MDB DEVELOPMENT CORP., on behalf of itself and on behalf of all other persons entitled to share in the trust funds received by SHIRIN CONSTRUCTION INC., contractor, from Consolidated Edison of New York, as owner, pursuant to Lien Law Article 3-A, in connection with the improvements of real property known as (a) Local Law 11 work to the building situated at 4 Irving Place, in the City, County State of New York, and (b) Local Law 11 work to the building situated at the 74th Station in the City, County and State of New York,

Plaintiff,

-against-

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SHIRIN CONSTRUCTION, INC. and FARROKH MAZDEYASNA and JANE DOE NOS. 1 TO 10, fictitious names, true names being unknown, who are or were officers, directors, shareholders, or agents of trustee, SHIRIN CONSTRUCTION, INC., claimed to apply or consented to the application of trust funds for purposes other than those of the Trusts, who are or were recipients of funds diverted from the Trusts described in the Complaint,

Defendants.

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MILLS, J.

Plaintiff MDB Development Corp. (MDB) brings this action to recover certain amounts that defendant Shirin Construction, Inc. (Shirin) allegedly owes MDB for construction work that it performed, as Shirin's subcontractor, on two separate construction/Local Law 11 projects: (1) at a Consolidated Edison (Con Ed) office building located at 4 Irving Place in Manhattan (the Irving Place project); and (2) at a Con Ed property located

at 503 East 74th Street in Manhattan (the 74th Street project). MDB also asserts causes of action against Shirin and its principals pursuant to Article 3-A of New York's Lien Law (Lien Law), seeking, inter alia, damages resulting from defendants' alleged diversion and conversion of the trust funds created under this statute.

Defendants now move to dismiss plaintiff's sixth, ninth, tenth, eleventh, and twelfth causes of action.¹

BACKGROUND

According to its complaint, on October 20, 2009, MDB entered into a subcontract with Shirin to perform certain construction work on the Irving Place project (the Irving Place subcontract). The complaint alleges that Shirin previously had contracted with Con Ed to perform all Local Law 11 work at the site.

The complaint alleges that several months earlier, on June 9, 2009, MDB had entered into a separate subcontract with Shirin to perform certain construction work on the 74th Street project (the 74th Street subcontract). The complaint alleges that Shirin also had contracted with Con Ed to perform all Local Law 11 work at this site.

MDB alleges that Shirin improperly terminated the Irving Place subcontract on October 18, 2010. MDB alleges that, until

¹Although defendants originally moved to dismiss the complaint's fourth and fifth causes of action, as well, defendants since have withdrawn those portions of their motion.

the date of that termination, MDB had performed all of the work required of it under this subcontract. MDB further alleges that, as of the date of termination, the adjusted price of this subcontract, including change orders, was \$2,124,922.99. Of that amount, MDB alleges that it already had earned \$1,702,794.44, of which \$1,192,637.18 remains due and owing from Shirin. MDB alleges that no part of this amount has been paid, despite MBD's due demand for payment.

MDB alleges that the total contract price of the 74th Street subcontract was \$1,204,836. MDB alleges that it performed all of the work required of it under the 74th Street subcontract, and that upon completion of its work, the adjusted price of this subcontract, including change orders, was \$1,259,175.13. Of that amount, MDB alleges that \$352,498.65 remains due and owing from Shirin and that no part of this amount has been paid, despite MBD's due demand for payment.

The complaint alleges, on information and belief, that Con Ed has paid Shirin in excess of \$1,192,637,18 for the work that was to be completed on the Irving Place project, and in excess of \$352,498.65 for the work that was to be completed in connection with the 74th Street project. MDB alleges that, under Article 3-A of the Lien Law, the sums that Con Ed paid to Shirin on each of these two projects constitute trust funds that were to be applied to the payment of claims of the various subcontractors, laborers

and materialmen, such as MDB, who worked on these projects. MDB alleges, on information and belief, that in violation of this statute, Shirin has used these trust funds for purposes other than the payment of such claims. The complaint alleges that MDB, along with other of the Lien Law trust fund beneficiaries that supplied labor and/or materials on these projects, has been injured by this unlawful diversion.

Finally, the complaint alleges that, because of Shirin's failure to pay MDB the amounts due and owing to it under the Irving Place and 74th Street subcontracts, MDB has been unable to pay, and has been sued by, a number of MDB's own subcontractors, suppliers, and vendors. As a result, MDB alleges that it owes, or has been forced to pay from its own funds, a number of these subcontractors and suppliers for services that they performed for MDB on one or both of these projects.

MDB commenced the instant action on January 9, 2014.

With respect to the Irving Place project, the complaint asserts causes of action against defendant Shirin for breach of contract (first), account stated (second), quantum meruit (third), diversion of Lien Law trust funds (fourth), and common-law indemnification (sixth). The complaint additionally asserts a cause of action against defendant Farrokh Mazdeyasna, alleged to have been a manager, member, officer, director and/or shareholder of Shirin, based on his alleged involvement in the diversion of

the Lien Law trust funds on the Irving Place project (fifth).

With respect to the 74th Street project, the complaint asserts causes of action against Shirin for breach of contract (seventh), account stated (eighth), quantum meruit (ninth), diversion of the Lien Law trust funds (tenth), and common-law indemnification (twelfth); and against Mazdeyasna, for his alleged involvement in the diversion of the Lien Law trust funds on the 74th Street project (eleventh).

In the instant motion, defendants argue that this court should dismiss MDB's tenth and eleventh causes of action, for diversion of the Lien Law trust funds with respect to the 74th Street project, as time-barred under the applicable one-year statute of limitations contained in Lien Law § 77(2). Defendants argue that this court should dismiss MDB's ninth cause of action, for quantum meruit, as precluded by the express written agreement between the parties. Lastly, defendants argue that this court should dismiss MDB's sixth and twelfth causes of action, for common-law indemnification, as duplicative of MDB's breach of contract and quantum meruit claims and for failure to allege a viable cause of action.

DISCUSSION

MDB's Tenth and Eleventh Causes of Action

MDB asserts its tenth and eleventh causes of action, for diversion of the Lien Law trust funds with respect to the 74th

Street project, on behalf of both itself and other trust fund beneficiaries. MDB seeks, inter alia, to recover such trust fund amounts as will satisfy MDB's claims against defendants.

Defendants move to dismiss both of these causes of action, as time-barred, pursuant to Lien Law § 77 (2).

"Article 3-A of the Lien Law creates 'trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction'" (*Aspro Mech. Contr. v Fleet Bank*, 1 NY3d 324, 328 [2004], quoting *Caristo Constr. Corp. v Diners Fin. Corp.*, 21 NY2d 507, 512 [1968]). Section 77 (1) of the Lien Law provides that "[a] trust arising under this article may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding a trust claim, in a representative action brought for the benefit of all beneficiaries of the trust." Lien Law § 77 (2) provides that no action to enforce a trust arising under Article 3-A

"shall be maintainable if commenced more than one year after the completion of such improvement or, in the case of subcontractors or materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later."

Defendants argue that dismissal of MDB's tenth and eleventh causes of action is warranted, as there is evidence that MDB had completed all of its work on the project and that final payment

under the 74th Street subcontract had become due no later than October, 18, 2010, more than three years prior to the January 9, 2014 commencement of this action. In support of their contentions, defendants note that, in the complaint, MDB itself alleges that it completed all of its work under the 74th Street subcontract by no later than October 18, 2010 (see complaint, ¶¶ 54, 62). Defendants also submit a copy of a notice of mechanic's lien that MDB had filed with respect to the 74th Street project on July 22, 2010, in which MDB stated that "[t]he time when the last item of work was performed and material furnished was July 21, 2010" (see Heller aff, exhibit D). As evidence of the date when final payment under the 74th Street subcontract became due, defendants submit a copy of a "Statement" that MDB allegedly had prepared and submitted to Shirin on January 4, 2011 (see Mahan aff, exhibit H). This "Statement," which consists entirely of a list of the invoices then due and owing on both the Irving Place and 74th Street projects, including the amounts and date each invoice was declared due, indicates that the last invoice for the 74th Street project was dated and declared due on October 1, 2010 (*id.*).

MDB argues that defendants' motion to dismiss these two causes of action must be denied because our courts have held that the one-year statute of limitations provided by Lien Law § 77 (2) only begins to run "'from the date of completion of all work'" on

the subject project, and not from the date of partial or substantial completion of the work (citing *Holt Constr. Corp. v Grand Palais, LLC*, 108 AD3d 593, 596 [2^d Dept 2013], quoting *Northern Structures v Union Bank*, 57 AD2d 360, 368 [4th Dept 1977]). MDB notes that defendants, in their moving papers, have failed to submit any evidence to establish when work on the entire 74th Street project actually was completed, as opposed to when MDB may have completed its portion of the work under the 74th Street subcontract.

“On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired” (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011], quoting *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2^d Dept 2008]). To make the requisite prima facie showing, the movant must establish, inter alia, when the cause of action accrued (see *Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2^d Dept 2006]).

Where “the date of accrual of the cause of action cannot be discerned from the face of the complaint, . . . the movant is required to support the motion with an affidavit or other competent proof sufficient, if uncontroverted, to establish the defense as a matter of law” (*Matter of Dean v Bradford*, 158 AD2d

771, 771 [3rd Dept 1990]; see also *Wint v Fields*, 177 AD2d 425 [1st Dept 1991] [motion to dismiss based upon statute of limitations properly denied for lack of proof as to when cause of action accrued]). Only when a movant has met its initial burden "does the burden shift to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period" (*J.A. Lee Elec., Inc. v City of New York*, 119 AD3d 652, 653 [2^d Dept 2014]).

"In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. Further, plaintiff's submissions in response to the motion must be given their most favorable intendment" (*Benn*, 82 AD3d at 548 [internal citations and quotation marks omitted]).

Defendants' motion to dismiss MDB's tenth and eleventh causes of action, as time-barred, is denied. The one-year statute of limitations on an action to enforce a trust under Article 3-A of the Lien Law only begins to run from the date that the work on the subject project is fully completed, and not from the date on which any portion of the work on the project has been completed (see *Holt Constr. Corp.*, 108 AD3d at 596). Here, defendants failed to present, within their initial moving papers, evidence from which to establish the date when all of the

improvements encompassed by the 74th Street project were fully complete.

Nevertheless, in reply papers, defendants argue that dismissal of these two causes of action is warranted, as there exists evidence that Shirin had, in fact, actually subcontracted the entirety of the 74th Street project to MDB. In support of this contention, defendants submit a detailed reply affidavit from Hosain Ali Mahan, a former manager of Shirin, who avers that there were no other facets of the 74th Street project other than the work subcontracted to MDB, and thus, that the entire project encompassed the work that MDB was to perform (Mahan reply aff, ¶¶ 21, 23-24). In addition to the Mahan reply affidavit, defendants also submit, inter alia, copies of Shirin's contract with Con Ed and copies of Con Ed's contract specifications, as further evidence that MDB's subcontract encompassed the entire scope of the 74th Street project (*id.*).

Defendants argue that, as all of the improvements contemplated under Shirin's contract with Con Ed were fully encompassed within MDB's subcontract with Shirin, the date on which MDB completed its work under that subcontract was, in effect, the date on which the entire improvement was completed. Defendants further argue that because the additional evidence submitted with their reply affidavit, in combination with the evidence originally submitted with their motion, establishes that

the entire 74th Street project was completed and approved by Con Ed no later than October 13, 2010, dismissal of plaintiff's causes of action, as time-barred, is warranted.

However, while Mahan's detailed reply affidavit, along with the additional evidence submitted in conjunction therewith, might well have been sufficient to meet defendants' initial burden of establishing when MDB's causes of action accrued, a reply affidavit may not be considered to remedy basic deficiencies in a party's moving papers (see *Batista v Santiago*, 25 AD3d 326 [1st Dept 2006]; see also *Malanga v Chamberlain*, 71 AD3d 644, 646 [2^d Dept 2010]; *Rengifo v City of New York*, 7 AD3d 773 [2^d Dept 2004]). Having failed to make this requisite prima facie showing in their initial moving papers, the burden never shifted to the plaintiff to raise a question of fact as to whether the action was timely commenced within the applicable limitations period. Moreover, given that plaintiff has, as yet, had no opportunity to respond to the additional materials submitted by movants in their reply papers, consideration of defendants' additional evidence, regarding the scope and completion of the project, would not be appropriate in deciding the motion now before this court.

MDB's Ninth Cause of Action

In the complaint's ninth cause of action, MDB seeks to recover, in quantum meruit, the \$352,498.65 that it claims still is due and owing from Shirin for the labor and/or materials that

it supplied with respect to the 74th Street project.

Defendants argue that MDB's ninth cause of action should be dismissed because, as a matter of law, it is impermissible to seek damages under a quantum meruit theory where, as here, there exists an express written agreement between the parties governing the same subject matter. Defendants further argue that, insofar as this cause of action is premised on the same subject matter and seeks the identical relief as MDB's seventh cause of action for breach of contract, it merely is duplicative of that cause of action.

MDB argues that defendants' motion to dismiss its quantum meruit claim should be denied, as premature, because it is not yet clear whether defendants intend to attack the validity of the 74th Street subcontract. MDB notes that defendants previously have claimed that MDB materially breached the Irving Place and 74th Street subcontracts by, inter alia, utilizing improper union labor.

On a motion to dismiss pursuant to CPLR § 3211 (a) (7), this court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; see also *Leon v Martinez*, 84 NY2d 83 [1994]). On a

motion to dismiss pursuant to CPLR 3211 (a) (1), dismissal "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Defendants' motion to dismiss MDB's ninth cause of action is granted. It is well settled that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Thus, a cause of action to recover in quantum meruit will be dismissed "where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties" (*id.* at 389).

Here, MDB has alleged the existence of a valid written subcontract between MDB and Shirin, pursuant to which MDB allegedly performed and completed all of the work required of it on the 74th Street project (see complaint ¶¶ 52-53). Defendants also expressly have acknowledged the existence of this written subcontract with MDB in their moving papers (see Heller aff, ¶ 3 and exhibit B), as well as MDB's performance of all of the work required of it under that subcontract (see Mahan reply aff, ¶¶ 15 and 23).

While a plaintiff may proceed upon a theory of quasi contract as well as contract where there is a bona fide dispute as to the existence of such a contract (see *Zuccarini v Ziff-Davis Media*, 306 AD2d 404 [2^d Dept 2003]), no such dispute has been alleged or shown here. Thus, as MDB is seeking to recover in quantum meruit the same \$352,498.65 that it claims remains due and owing from Shirin for completion of its work under the 74th Street subcontract, dismissal of this cause of action, as duplicative of MDB's breach of contract claim, is appropriate.

MDB's Sixth and Twelfth Causes of Action

In the complaint's sixth and twelfth causes of action, MDB alleges that it is entitled to indemnification for the amounts that it has been forced to pay to its own subcontractors and suppliers for the services and materials that they supplied to MDB in connection with the Irving Place and 74th Street projects. Specifically, the complaint alleges that Shirin, by failing to pay MDB in full for its work, thereby deprived MDB of the money that it needed to pay its own subcontractors and suppliers. MDB alleges that, as a result, it has been forced to pay these subcontractors and suppliers from its own funds. MDB contends that since Con Ed has paid Shirin in full for MDB's work, and since MDB has been cast in damages solely by Shirin's failure to then pay MDB, MDB is entitled to be indemnified by Shirin as a

matter of common law.

Defendants argue that MDB's sixth and twelfth causes of action should be dismissed because, insofar as MDB is seeking to recover for the damages that it incurred as a result of Shirin's failure to pay MDB all of the money due under its subcontract, these claims are duplicative of MDB's breach of contract and quantum meruit claims.

MDB opposes defendants' motion to dismiss its indemnification claims; however, in so doing, MDB now asserts a different basis for, and different allegations in support of, these two claims. Thus, while MDB originally asserted that it was entitled to indemnification to recover damages incurred as a result of defendants' failure to pay it the full amounts due under its subcontracts, MDB now asserts that it is entitled to indemnification to recover losses it incurred as a result of defendants' wrongful diversion of the Lien Law trust funds.

Specifically, MDB argues that defendants' motion to dismiss its claims for indemnification should be denied because, as set forth in the affidavit of Michael DeBellas, MDB's president, defendants, as trustees, had wrongfully diverted and/or misused the Lien Law trust funds relating to the Irving Place and 74th Street projects. MDB contends that, as a direct result of defendants' wrongful diversion, MDB has been sued by numerous other beneficiaries of these trust funds. MDB argues that

because it was defendants' sole wrongdoing that led to these suits, and caused MDB to suffer "great losses and damages," MDB is entitled to indemnification from defendants for any losses relating to those trust fund beneficiary claims.

Defendants' motion to dismiss plaintiff's sixth and twelfth causes of action is granted. It is clear that MDB intends to recast these indemnification claims to recover losses resulting from defendants' alleged wrongful diversion of the Lien Law Trust funds, rather than damages from defendants' failure to pay the amounts due under the parties' agreements. Thus, having now essentially abandoned the basis and allegations for these two claims, as currently pled, there is no point in requiring defendants to serve an answer to these causes of action in their current form.

However, defendants' motion to dismiss these claims will be granted without prejudice, and with leave to replead, to allow MDB to reassert these two causes of action on the basis, and upon the allegations, that it now has asserts in its opposition papers. Although it not entirely clear, based on the facts alleged in the complaint and since supplemented by the DeBellas affidavit, whether MDB can state a cognizable claim for indemnification that would not otherwise be duplicative of the Lien Law trust fund claims already asserted against defendants in the complaint's fourth, fifth, tenth, and eleventh causes of

action, leave to replead these claims is appropriate at this early stage of the litigation.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted to the extent of dismissing the complaint's sixth, ninth, and twelfth causes of action, and the motion is otherwise denied; and it is further

ORDERED that plaintiff is granted leave to serve an amended complaint so as to replead the sixth and twelfth causes of action within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall thereafter be deemed denied; and it is further

ORDERED that counsel are directed to appear for a [preliminary] [status] conference in Room 574, III CENTRE Street, on JAN. 8th, 2016, at 10:00 (AM) PM.

DATED: 10/22/15

ENTER:



 J.S.C.
DONNA M. MILLS, J.S.C.