

Kirchhoff-Consigli Constr. Mgt., LLC v Dharmakaya, Inc.
2015 NY Slip Op 32953(U)
October 15, 2015
Supreme Court, Dutchess County
Docket Number: 51167/15
Judge: Maria G. Rosa
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SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

KIRCHHOFF-CONSIGLI CONSTRUCTION
MANAGEMENT, LLC,

Plaintiff,

DECISION AND ORDER

-against-

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DHARMAKAYA, INC. and SBBC ASSOCIATES,
INC. d/b/a STONEMARK CONSTRUCTION
MANAGEMENT,

Defendants
_____x

The following papers were read and considered on defendants' motion to dismiss.

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A-E
MEMORANDUM OF LAW IN SUPPORT

AFFIRMATION IN OPPOSITION
EXHIBITS A-C
AFFIDAVIT IN OPPOSITION
EXHIBITS A-H
MEMORANDUM OF LAW IN OPPOSITION

REPLY AFFIRMATION
EXHIBIT A

Plaintiff commenced this action alleging that defendant Dharmakaya, Inc. ("Dharmakaya") breached a contract under which plaintiff agreed to provide construction management services for a construction project in Cragmoore, New York. Plaintiff raised various causes of action seeking damages based on Dharmakaya's alleged improper termination and breach of the contract. Plaintiff also raised a cause of action for tortious interference with contract against defendant SBBC Associates, Inc. ("Stonemark Construction"), and named both defendants in its cause of action to foreclose on a mechanic's lien on the property. Defendants now move to dismiss pursuant to CPLR §3211 alleging that plaintiff failed to satisfy a contractual condition precedent to commencing the

action and that the complaint fails to state a cause of action against defendant Stonemark Construction.

Defendants' motion to dismiss pursuant to CPLR §3211(a)(2) is based on allegations that the contract required mediation of any disputes arising thereunder prior to the commencement of an action. Defendants allege that plaintiff failed to satisfy this condition precedent and thus the action must be dismissed as premature. This assertion is incorrect. Section 15.3.1 of the AIA General Conditions of the Contract for Construction incorporated in the parties' contract provides, in relevant part, that "[c]laims, disputes, or other matters in controversy arising out of or related to the contract except those waived . . . shall be subject to mediation as a condition precedent to binding dispute resolution." However, Section 15.3.2 that follows states that "[t]he request [for mediation] may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of sixty days from the date of filing, unless stayed for longer period by agreement of the parties or court order." The parties' contract defines binding dispute resolution as litigation in a court of competent jurisdiction. The foregoing contractual provisions dictate that plaintiff acted within its rights in filing a request for mediation on June 26, 2015 and commencing this action on July 8, 2015.

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss pursuant to CPLR §3211(a)(2) based on plaintiff's alleged failure to satisfy a condition precedent is denied. It is further

ORDERED that to the extent that plaintiff moves for a stay of this action pending mediation the application is denied. A determination to stay a pending action lies within the discretion of this court. See CPLR§2201. It is not for the parties to an action to make a determination as to a stay. This is a judicial function. Thus, even if the parties' contract stated their agreed upon consent to stay a legal action after it was filed, it would not be binding on this court. Moreover, the contractual provision providing for a sixty day stay of litigation in the parties' contract is no longer controlling as in excess of sixty days has elapsed since the filing of this action.

In considering a motion to dismiss pursuant to CPLR §3211(a)(7), the court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 NY2d 83, 87-88 (1994). In a contract interference case, the plaintiff must show the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach and damages. White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 NY3d 422 (2007). An agent cannot be held liable for inducing his or her principal to breach a contract with a third person when that agent is acting on behalf of the principal and within the scope of the agent's authority. Lutz v. Caracappa, 35 AD3d 673 (2nd Dept. 2006). An exception to this rule exists, however, when an agent does not act in good faith and

commits independent torts or predatory acts directed at another for personal pecuniary gain. BIB Constr. Co. v. City of Poughkeepsie, 204 AD2d 947 (3rd Dept. 1994).

Plaintiff's complaint alleges that the contract designated Stonemark Construction as Dharmakaya's representative for the project. It is alleged that on March 23, 2015 Stonemark Construction issued a letter to plaintiff seeking to terminate the contract and demanding immediate cessation of all construction activities at the project site. Stonemark then issued subsequent letters stating the basis for termination. Plaintiff's tortious interference with contract claim against Stonemark Construction alleges that Stonemark made recommendations to Dharmakaya about terminating the contract and withholding payments to plaintiff that lacked factual support and were in violation of the contractual terms. It is alleged that "Stonemark's recommendations and participation in a meritless scheme to fabricate justification for the termination of the Contract for cause adversely effected [plaintiff's] rights under the contract." Plaintiff further alleges that such conduct was done knowingly, intentionally and maliciously, and that Stonemark falsely slandered and disparaged plaintiff.

The foregoing allegations are insufficient to state a tortious interference with contract claim against Stonemark in its capacity as Dharmakaya's agent. Initially, it is not alleged that Stonemark was acting without Dharmakaya's authority in terminating the contract. Although an agent can be held liable for inducing its principal to breach a contract, such a theory requires allegations not only that the agent did not act in good faith, but that it committed independent torts or predatory acts directed at another for personal pecuniary gain. See BIB Constr. Co. v. City of Poughkeepsie, *supra*. While plaintiff makes a conclusory allegation that Stonemark "falsely slandered and disparaged" plaintiff, the complaint fails to make any allegation that such conduct was done for its pecuniary gain. Thus, even if the allegation of slander and disparagement met the pleading requirements for asserting an independent tort or predatory act, plaintiff fails to allege that any actions Stonemark took in its capacity as Dharmakaya's agent was for its own pecuniary gain or self interest. Accordingly, it fails to allege an essential element of a claim against an agent for tortious interference with a contract. Therefore , it is further

ORDERED that plaintiff's cause of action against Stonemark for tortious interference with a contract is dismissed. It is further

ORDERED that Stonemark's Construction's motion to dismiss plaintiff's fifth cause of action against it to enforce a mechanic's lien is granted. Section 24 of the Lien Law provides that a mechanic's lien "may be enforced against a property specified in the notice of lien. . . and against any person liable for the debt upon which the lien is founded." Necessary parties to an action to enforce a lien against real property are "all persons appearing by the records in the office of the county clerk or register to be owners of such real property or any part thereof." Lien Law §44(3). Plaintiff's complaint fails to allege that Stonemark has an ownership interest in the real property at issue. Nor has it filed a lien against the property. See Lien Law §44. Accordingly, plaintiff has failed to state a cause of action against Stonemark to enforce a mechanic's lien as it fails to allege that Stonemark has any interest in the subject property or owes it any debt.

[* 4]
Counsel are directed to appear before this court for a preliminary conference on October 28, 2015 at 9:45 a.m.

This constitutes the decision and order of this court.

Dated: October 15, 2015
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Rosa's Chambers, please do not submit any copies. Submit only the original papers.