Top Shelf Elec. Corp. v Legacy Bldrs./Devs. Corp.
2016 NY Slip Op 30789(U)
April 26, 2016
Supreme Court, New York County
Docket Number: 652192/14
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

TOP SHELF ELECTRIC CORPORATION,

Plaintiff,

Index No. 652192/14

-against-

DECISION/ORDER

LEGACY BUILDERS/DEVELOPERS CORP., BLDG LIC 39th STREET, LLC, BLDG OCEANSIDE 39th STREET, LLC, BLDG CLARK 39th STREET, LLC,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Top Shelf Electric Corporation ("Top Shelf") commenced the instant action seeking to foreclose on a mechanic's lien it filed on a construction project. Plaintiff now moves for an Order pursuant to CPLR § 3025(b) granting it leave to amend its complaint. For the reasons set forth below, plaintiff's motion is granted in part and denied in part.

The relevant facts are as follows. In or around October 2013, plaintiff, an electrical contractor, entered into a subcontract with defendant Legacy Builders/Developers Corp. ("Legacy") to provide electrical contracting services on a project (the "Subcontract") at the premises owned by defendants Bldg LIC 39th Street, Bldg Oceanside 39th Street, LLC and Bldg

Clark 39th Street, LLC located at 222 East 39th Street, New York, New York (the "subject premises") (hereinafter referred to as the "Project"). Plaintiff alleges that it completed all work under the Subcontract and all change orders, all of which was fully accepted and approved by Legacy, but that it has not been paid any of the funds it is owed, totaling $120,968.00.

Thereafter, in or around May 2014, plaintiff filed a mechanic's lien on the Project (the "Lien"). In or around June 2014, Legacy filed an undertaking to discharge the Lien. Legacy and Washington International Insurance Company ("Washington") are sureties on the undertaking. In or around July 2014, plaintiff filed its complaint (the "Original Complaint") in which plaintiff alleged that it performed work on the Project pursuant to the Subcontract and the change orders and asserted one cause of action to foreclose on the mechanic's lien it filed on the Project (the "Lien"). As plaintiff's prior counsel was allegedly unaware of the undertaking when it filed the Original Complaint, the Original Complaint did not allege the existence of, or request judgment on, the undertaking.

Plaintiff now moves for an Order granting it leave to amend its complaint to add causes of action for breach of contract, quantum meruit, unjust enrichment, account stated and diversion of trust funds and to add Washington, Harry Zapiti ("Zapiti"), Legacy's Chief Financial Officer, and John Bernardo ("Bernardo"), Legacy's Chief Executive Officer, as defendants.

Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of

merit." *Id.*

As an initial matter, plaintiff's motion for an Order granting it leave to amend the complaint to add causes of action against Legacy for breach of contract and account stated and to add Washington as a defendant for the purposes of asserting a claim against it for judgment on the undertaking or any other bond posted is granted without opposition as this court finds that the proposed amendments are not palpably insufficient or patently devoid of merit.

Additionally, plaintiff's motion for an Order granting it leave to amend the complaint to add causes of action against Legacy for quantum meruit and unjust enrichment is granted as this court finds that the proposed amendments are not palpably insufficient or patently devoid of merit. To the extent defendant Legacy asserts that plaintiff may not amend the complaint to add such causes of action because they would be duplicative of plaintiff's breach of contract claim, such assertion is without merit. It is well settled that "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 23 (2005); *see also Clerk-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382 (1987). However, here, although the parties do not dispute the existence of the Subcontract between Legacy and plaintiff, there is a dispute as to whether all of the work performed by plaintiff arose out of the Subcontract, namely the work performed pursuant to the change orders, which plaintiff alleges did not arise out of the Subcontract. Thus, as the existence of the Subcontract does not, as a matter of law, govern the entire subject matter of the instant action, plaintiff may not be precluded from recovering in quasi contract at this stage of the litigation.

Plaintiff's motion for an Order granting it leave to amend the complaint to add a cause of action against Legacy for diversion of trust funds in violation of Article 3-A of the Lien Law is

also granted as this court finds that such proposed amendment is not palpably insufficient or patently devoid of merit. Although it is undisputed that a claim for diversion of trust funds pursuant to Article 3-A of the Lien Law is untimely pursuant to Lien Law § 77(2), which provides for a one-year statute of limitations for such claims, the court finds that plaintiff may amend its complaint to add such a claim based on the relation-back doctrine. Pursuant to CPLR § 203(f), "a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." Indeed, "[t]he relation-back doctrine permits a plaintiff to interpose a claim or cause of action which would otherwise be time-barred, where the allegations of the original complaint gave notice of the transactions or occurrences to be proven and the cause of action would have been timely interposed if asserted in the original complaint." *Moezinia v. Ashkenazi*, 136 A.D.3d 990, 992 (2d Dept 2016). *See also Boxhorn v. Alliance Imaging, Inc.*, 74 A.D.3d 1735, 1736 (4th Dept 2010)(allowing plaintiff to amend complaint to add cause of action against existing defendants because the new theory of recovery "arose out of the same transaction set forth in the original complaint" and because the defendants "failed to establish that they would be prejudiced by the delay in amending the complaint.")

Here, the court finds that plaintiff may amend its complaint to add a cause of action against Legacy for diversion of trust funds pursuant to Article 3-A of the Lien Law as such claim relates back to plaintiff's claim for foreclosure of the Lien asserted in the Original Complaint. Indeed, the foreclosure of the Lien cause of action and the allegations in the Original Complaint gave notice to Legacy of the transactions and occurrences to be proven; a claim for diversion of trust funds would have been timely interposed if it was asserted in the Original Complaint; the

diversion of trust funds cause of action arises out of the same transaction set forth in the Original Complaint; and Legacy has failed to establish that it would be prejudiced by any delay in amending the complaint.

However, plaintiff's motion for an Order granting it leave to amend the complaint to add Zapiti and Bernardo as defendants for the purposes of asserting a claim against them for diversion of trust funds pursuant to Article 3-A of the Lien Law is denied as this court finds that the proposed amendment is palpably insufficient and patently devoid of merit because such claim is untimely pursuant to Lien Law § 77(2). To the extent plaintiff asserts that such claim is timely based on the relation-back doctrine, such assertion is without merit. Pursuant to CPLR § 203(c), "a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced." The "relation back doctrine" "allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are united in interest." *Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995)(internal citations omitted). Parties will be found to be united in interest when a "judgment against one will similarly affect the other." *27th Street Block Ass'n. v. Dormitory Authority of the State of New York*, 302 A.D.2d 155, 164 (1st Dept 2002). Indeed, unity of interest "will be found where there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other." *Vanderburg v. Brodman*, 231 A.D.2d 146, 147-48 (1st Dept 1997). "The classic test is that '[i]f the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other.'" *Id.*, citing *Connell v. Hayden*, 83 A.D.2d 30, 40 (2d Dept 1981).

Here, the court finds that plaintiff may not amend its complaint to add Zapiti and

Bernardo as defendants for the purposes of asserting a claim against them for diversion of trust funds pursuant to Article 3-A of the Lien Law on the ground that such claim does not relate back to the identical claim asserted against Legacy. Plaintiff has failed to establish that the proposed defendants Zapiti and Bernardo are united in interest with Legacy as there is no evidence that a judgment against Legacy will similarly affect Zapiti and Bernardo. Zapiti and Bernardo cannot be held vicariously liable for Legacy's alleged diversion of trust funds as they can only be held liable under such a claim if they themselves diverted the trust funds.

Accordingly, plaintiff's motion to amend its complaint is resolved as set forth herein. This constitutes the decision and order of the court.

Dated: 4/26/16

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C