

367 Waverly Ave. Realty LLC v Camman Constr. Group Corp.
2016 NY Slip Op 31244(U)
June 29, 2016
Supreme Court, Kings County
Docket Number: 508628/15
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of June, 2016.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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367 WAVERLY AVENUE REALTY LLC, on behalf of
itself and others similarly situated,

Plaintiff,

- against -

CAMMAN CONSTRUCTION GROUP CORP.,
CAMELIA D. POPA, EMMANUEL PAPADOPOULOS,
NORTHEASTERN BUILDERS OF NY INC.,
AMERICAN STANDARD PLUMBING & HEATING CORP.,
APOLLO TECH IRON WORK CORP., and
DELTA PHASE ELECTRICAL WORK.

Defendants,

AMERICAN STANDARD PLUMBING & HEATING CORP.,
TRISTATE LUMBER INC., TRISTATE LUMBER LTD., and
PARK CONSTRUCTION CORP.,

Counterclaim Defendants.

-----X¹
The following e-filed papers read herein:

DECISION AND ORDER

Index No. 508628/15

Mot. Seq. No. 1

Notice of Motion, Affirmation, Affidavit, Memorandum of Law
and Exhibits Annexed _____
Memorandum of Law in Opposition Annexed _____
Memorandum of Law in Reply _____
Plaintiff's Supplemental Memorandum of Law in Opposition _____

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16-17, 24, 26
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¹ The caption is amended to reflect the interposition of counterclaims by defendant Delta Phase Electrical Work by way of a supplemental summons.

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In this action, inter alia, for breach of contract, negligence, and violation of Lien Law, defendant Emmanuel Papadopoulos (hereafter, defendant) moves, pre-answer, for an order, pursuant to CPLR 3211 (a) (1), (3), and (7), dismissing the complaint insofar as asserted against him (Seq. No. 1).

Background

Defendant is an officer and a 49% shareholder in the defendant Camman Construction Group Corp. (hereafter, Camman). Acting on Camman's behalf, he entered into a contract with plaintiff for certain construction work to be performed at plaintiff's premises located at 367 Waverly Avenue in the Greenpoint section of Brooklyn (hereafter, the premises). At the time, the premises consisted of a supermarket on the ground floor and the basement. The contract, which was on forms AIA A101-1997 and AIA A201-1997, provided that Camman would furnish all of the work, labor, services, equipment, and materials for (1) the construction of ten apartments in the three floors to be located above the supermarket, (2) the installation of a new facade on the ground floor, and (3) the installation of a staircase in the basement as well as some repairs and upgrades to the basement. According to plaintiff's complaint, Camman breached the contract in that, among other things, (1) the roof of the premises leaks when it rains; and (2) there is damage to the exterior and interior walls, as well as to the floors, exterior railings, ceilings, windows, bathroom fixtures, wood trim, and doors (Complaint ¶ 17).

Plaintiff's Claims Against Defendant

Plaintiff's claims against defendant sound in negligent performance and supervision (the sixth and eighth causes of action, respectively), fraud (the seventh cause of action), and violation of the trust-fund provisions of Lien Law article 3-A (the ninth cause of action).

The Sixth and Eighth Causes of Action (Negligent Performance and Supervision, Respectively)

The sixth cause of action asserts that defendant, among others, was negligent in performing the work called for under the contract, thereby causing "defects and damage to existing portions of the Premises, including . . . exterior and interior walls, floors, exterior railings, ceilings, windows, bathroom fixtures, wood trim and doors" (Complaint, ¶42). The eighth cause of action asserts that defendant "personally supervised and/or participated in the work performed at the Project," that defendant "owed a duty to Plaintiff to properly and adequately supervise the work at the Project," and that defendant breached that duty (Complaint, ¶¶ 54-56).

Although the parties have not called the Court's attention to section 3.18.1 of the contract on Form AIA A201-1997, the Court notes that this section imposes liability on Camman for, among other things, damage to the existing structure. Section 3.18.1 provides, in relevant part, that:

"To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability. . . , the Contractor [*i.e.*, Camman] shall indemnify and hold harmless the Owner [*i.e.*, plaintiff] . . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that

such claim, damage, loss or expense is attributable . . . to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable. . .” (emphasis added).

Assuming for pleading purposes that the preexisting structure on the premises (*i.e.*, the ground-floor supermarket and/or the basement) was damaged as a result of the work performed under the contract, Camman would be responsible for such damage, subject to a showing of negligence either on its part or on the part of its subcontractors. Aside from making Camman liable in certain circumstances, however, the contract does not make defendant, who is an officer and co-owner of Camman, personally liable for its acts or omissions. Equally important, the complaint advances no allegations that Camman’s corporate veil should be pierced to hold defendant personally liable. Thus, the branch of defendant’s motion for dismissal of the sixth and eighth causes of action against him for failure to state a claim under CPLR 3211 (a) (7) is granted (*see East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 129 [2d Dept 2009], *aff’d* 16 NY3d 775 [2011]; *Westminster Const. Co., Inc. v Sherman*, 160 AD2d 867, 868 [2d Dept 1990]).

The Seventh Cause of Action (Fraud)

The seventh cause of action asserts a two-pronged fraud claim. Its first prong is that of fraud in the inducement, in that before entering into the contract, defendant, among others, fraudulently represented to plaintiff his qualification and ability to perform work under the contract (Complaint ¶ 45). The second prong of the fraud claim is that during the course of

work, the "Camman defendants" (collectively defined in the complaint as Camman, the defendant, and the co-defendant Camelia D. Popa who is Camman's 51% owner) fraudulently represented to plaintiff that they were properly performing work under the contract and that they had fully paid Camman's subcontractors and suppliers all sums owed to these subcontractors and suppliers (Complaint, ¶ 46).

"A cause of action for fraud in inducing a contract cannot be based solely upon a failure to perform contractual promises of future acts. An alleged failure to perform such acts is a breach of contract which must be enforced by an action on the contract" (*Westminster Const. Co., Inc.*, 160 AD2d at 868 [internal quotation marks omitted]). Further, a claim that defendant fraudulently represented that he and Camman had the requisite expertise to perform the subject contract is based solely on a failure to perform contractual promises of future acts. Accordingly, the branch of defendant's motion for dismissal of the seventh cause of action for failure to state a claim under CPLR 3211 (a) (7) is granted (*see Westminster Const. Co., Inc.*, 160 AD2d at 868-869).

The Ninth Cause of Action (Lien Law Article 3-A)

The ninth and final cause of action as against defendant is for his alleged violation of the trust-fund provision of Lien Law article 3-A, in that (1) plaintiff paid Camman under the contract, (2) Camman failed to pay one or more of the subcontractors and/or suppliers at the project, and (3) plaintiff was required to pay them directly (Complaint, ¶¶ 60-61). Although the Complaint alleges (in ¶ 62) that plaintiff is a "beneficiary" of the trust-fund monies received by Camman from plaintiff, that assertion is incorrect. Rather, as plaintiff corrects

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itself in its opposition papers, it is a subrogee of those subcontractors and suppliers whom it paid on Camman's behalf. As a subrogee, plaintiff may maintain this cause of action against defendant individually (*see Holt Const. Corp. v Grand Palais, LLC*, 108 AD3d 593, 597 [2d Dept 2013], *lv denied* 22 NY3d 853 [2013]; *Ippolito v TJC Dev., LLC*, 83 AD3d 57, 71 [2d Dept 2011]; *J. Petrocelli Const., Inc. v Realm Elec. Contrs., Inc.*, 15 AD3d 444, 447 [2d Dept 2005]). Accordingly, the branch of defendant's motion for dismissal of the ninth cause of action against him for lack of standing under CPLR 3211 (a) (3) and for failure to state a claim under CPLR 3211 (a) (7) is denied.

Conclusion

Defendant's motion is granted to the extent that plaintiff's sixth, seventh, and eighth causes of action against him are dismissed for failure to state a claim under CPLR 3211 (a) (7), and the motion is otherwise denied.

Defendant's remaining contentions are either moot in light of the Court's determination, or they are without merit.

Defendant is directed to answer the ninth cause of action of the complaint within twenty days of service of this decision and order with notice of entry on his counsel.

The parties are reminded of their next scheduled appearance in Commercial Part Trial Term 4 on July 8, 2016 for a preliminary conference.

This constitutes the Decision and Order of the Court.

ENTER FORTHWITH,

J. S. C.

HON. LAWRENCE KNIPEL