

**Dormitory Auth. of the State of N.Y. v A. Williams
Trucking & Backhoe Trenching, Inc.**

2016 NY Slip Op 31294(U)

July 8, 2016

Supreme Court, New York County

Docket Number: 450133/2011

Judge: Kelly A. O'Neill Levy

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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 19

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 DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Plaintiff,

Index No.: 450133/2011

- against -

A. WILLIAMS TRUCKING & BACKHOE TRENCHING, INC.,
 CNA SURETY CORPORATION d/b/a AMERICAN CASUALTY
 COMPANY OF READING, PA., DIERKS HEATING
 COMPANY, INC., FUTURE TECH CONSULTANTS OF
 NEW YORK, INC., PYRAMID FIRE PROTECTION, INC.,
 SMI-OWEN STEEL COMPANY, INC., STONEWALL
 CONTRACTING CORPORATION, ADF SOUTH
 CAROLINA, INC.,

DECISION/ORDER
Mot. Seq. 011

Defendants.

-----X
 A. WILLIAMS TRUCKING & BACKHOE TRENCHING, INC.,

Third-Party Plaintiff,

- against -

FRED TODINO & SONS, INC.,
 CONSTRUCTION WATERPROOFERS, INC.,
 FALCO CONSTRUCTION CORP.,

Third-Party Defendants.

-----X
KELLY O'NEILL LEVY, J.:

Defendant/Third-Party Plaintiff A. Williams Trucking & Backhoe Trenching, Inc.

(Williams) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and cross-claims asserted against it. Plaintiff Dormitory Authority of New York (DASNY) opposes the motion. Defendant Dierks opposes the portion of Williams's motion that seeks to dismiss Dierks's cross-claim against Williams.

DASNY argues, among other things, that Williams's motion should be denied as untimely as the court set a deadline of September 30, 2015 by which to move for summary judgment. While that is true, in light of outstanding discovery, the deadline to file was further extended to December 4, 2015 by Decision/Order dated October 16, 2015. Accordingly, the court makes its determination on the motion on the merits.

As set forth below, the motion is granted only to the extent that DASNY's claim for liquidated damages from A. Williams is dismissed as withdrawn. The motion is otherwise denied in its entirety.

Discussion

DASNY states in its opposition to the motion, as it did in its interrogatory responses to Williams dated May 31, 2013, that it does not seek liquidated damages from A. Williams for loss of use in connection with the completion of the project at issue. Therefore, the motion is granted only to the extent that the portion of DASNY's second cause of action against Williams seeking liquidated damages is dismissed as withdrawn.

"[T]he 'proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 A.D.3d 508, 510 (1st Dep't 2010), quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the movant meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial."

Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep't 2012), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). If there is any doubt as to the existence of a trial issue of fact, summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978); *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 (1st Dep't 2002).

DASNY brought claims against Williams for breach of contract arising out of the construction of the Bronx County Criminal Court complex. Williams argues that DASNY failed to fully perform its own obligations under the contract and therefore cannot recover the damages sought; that DASNY cannot seek damages from Williams under the contract; that DASNY "admitted it would not assert liquidated damages" in its interrogatory responses; that DASNY has already acknowledged and admitted that the delays were not Williams's fault; that Williams was not responsible for performing the work alleged to have been defective; and also that the action is barred by applicable statute of limitations. Williams further makes a spoliation argument, arguing that DASNY made corrections to conditions without giving Williams the opportunity to inspect the alleged conditions at issue.

In support of its motion, Williams submits an affidavit of Keith Williams, who served as Executive Vice President of A. Williams Trucking & Backhoe Trenching Inc., appending various exhibits in support. The submissions do not establish, prima facie, that the breach of contract claim must fail. As Williams failed to set forth its entitlement to judgment as a matter of law, the burden did not shift to plaintiff to produce evidence sufficient to raise an issue of fact. See *Tower Ins. Co. of N.Y. v. BCS Const. Servs. Corp.*, 118 A.D.3d 527, 530 (1st Dep't 2014), citing *Winegrad, supra*; *Kebbeh v. City of N.Y.*, 113 A.D.3d 512, 512 (1st Dep't 2014). Even

assuming that Williams had met its prima facie burden, factual issues warrant denial of the motion.

For example, Williams contends that Williams and DASNY dispute what amount, if any, remains to be paid to the other pursuant to the contract. Williams argues that it is due further payments in the amount of \$594,815.94 based on its contract with DASNY while DASNY contends that it has actually overpaid Williams in the amount of \$461,440.55 for its work, a dispute which cannot be resolved based on the current record. Among the numerous additional contested issues that remain involve the defective work claims, including what responsibility Williams had with regard to the plumbing work at the site and the later significant problems that arose with the sanitary lines.

As Williams has failed to address the cross-claims asserted against it, the portion of the motion seeking dismissal of any cross-claims asserted against it is also denied. Moreover, issues of fact preclude the grant of summary judgment on the cross-claims asserted against Williams.

The court rejects Williams's statute of limitations defense. After having reviewed the so-ordered Stipulation and Order Concerning Discovery Materials and Tolling of Limitations in the predecessor federal action, *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Company* (S.D.N.Y. 07-CV-10639), dated March 30, 2011, the court finds that the instant action was filed well within the applicable statute of limitations.

As the Note of Issue has been filed and the deadline by which to file summary judgment motions has passed, there shall be no further conference dates scheduled in Part 19 at this time.

Order

Accordingly, it is


ORDERED that the motion is granted only to the extent that DASNY's claim for liquidated damages from A. Williams is dismissed as withdrawn; and it is further

ORDERED that the remainder of the motion is denied.

This constitutes the decision and order of the court.

Dated: July 8, 2016

ENTER:



KELLY O'NEILL LEVY, A.J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.