Commissioners of the State Ins. Fund v Mario Lopez Constr. Corp.

2016 NY Slip Op 31582(U)

August 17, 2016

Supreme Court, New York County

Docket Number: 450459/2014

Judge: Cynthia S. Kern

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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 : PART 55

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COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

-against-

MARIO LOPEZ CONSTRUCTION CORP. and MARIO LOPEZ,

Defendants.
---X

DECISION/ORDER
Index No. 450459/2014

HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action against defendants Mario Lopez Construction Corp. ("Construction") and Mario Lopez ("Lopez") seeking recovery of outstanding premiums on a workers' compensation insurance policy provided by plaintiff. Plaintiff now moves pursuant to CPLR § 3212 for summary judgment against defendants. Defendants cross-move pursuant to CPLR § 3211(a)(7) to dismiss plaintiff's complaint as against Lopez and pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's cause of action for unjust enrichment. Plaintiff's motion and defendants' cross-motion are resolved as set forth below.

The relevant facts are as follows. From July 13, 2010 to March 19, 2013, plaintiff provided Construction with workers' compensation insurance pursuant to a contract with an automatic renewal provision (the "insurance policy"). Under the insurance policy, unless Construction gave plaintiff notice of its intention to discontinue the insurance coverage, the insurance policy was automatically renewed for a one-year period on the anniversary of the policy's effective date. On or about January 25, 2012, Construction was dissolved by proclamation, although plaintiff contends that it continued to do business. The insurance policy was automatically renewed on July 13, 2012 and Construction made several premium payments, including a renewal deposit, after that date. Lopez was the sole owner and officer of Construction at all relevant times. Plaintiff cancelled the insurance policy on March 19, 2013 due to Construction's nonpayment of premiums.

As an initial matter, defendants' contention that plaintiff's motion for summary judgment must be denied in its entirety because plaintiff failed to attach defendants' answer to its motion papers is without merit. Pursuant to CPLR § 3212(b), "[a] motion for summary judgment shall be supported by affidavit, *by a copy of the pleadings* and by other available proof, such as depositions and written admissions" (emphasis added). However, "[a]lthough CPLR 3212(b) requires that a motion for summary judgment be supported by copies of the pleadings, the court has discretion to overlook the procedural defect of missing pleadings when the record is 'sufficiently complete.'" *Washington Realty Owners, LLC v. 260 Washington Street, LLC*, 105 A.D.3d 675, 675 (1st Dept 2013). "The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted." *Id.* The pleadings will be considered available for the court's consideration if they are filed electronically, *see Studio A Showroom, LLC v. Yoon*, 99 A.D.3d 632, 632 (1st Dept 2012), if they are attached to the reply papers, *see Pandian v. New York Health and Hospitals Corp.*, 54 A.D.3d 590, 591 (1st Dept 2008), or if they are attached to a summary judgment motion made by one of the other parties, *see Welch v. Hauck*, 18 A.D.3d 1096, 1098 (3rd Dept 2005). Here, the court finds that plaintiff's error in failing to attach defendants' answer to its motion for summary judgment may be overlooked as the record is sufficiently complete. Indeed, it is undisputed that defendants' answer was filed electronically and the answer was attached to defendants' opposition papers and plaintiff's reply papers. Thus, defendants' answer is available for the court's consideration.

The court next considers the portion of plaintiff's motion for summary judgment on its cause of action for breach of contract as against Construction. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The First Department has held that an insurer may make a *prima facie* showing of entitlement to unpaid workers' compensation premiums by submitting the insurance application, audit worksheets and resulting invoices. *Commissioners of State Ins. Fund v. Allou Distribs.*, 220 A.D.2d 217, 217 (1st Dept 1995). In the present case, plaintiff has established its *prima facie* entitlement to summary judgment against Construction for the outstanding premiums from the July 13, 2010 to July 13, 2011 and the July 13, 2011 to July 13, 2012 policy periods by submitting the insurance policy, Construction's application for workers' compensation insurance, a statement of account showing premium bills and payments, an audit estimate for the 2012-2013 policy period, completed audits for the 2010-2011 and 2011-2012 policy periods, the cancellation notice dated April 5, 2013 and the final premium invoice.

However, plaintiff has failed to establish its *prima facie* entitlement to summary judgment against Construction for the outstanding premium from the July 13, 2012 to March 19, 2013 policy period as it is undisputed that Construction was dissolved before the insurance policy was automatically renewed on July 13, 2012. "Upon dissolution, the corporation's legal existence terminates and it is prohibited from carrying on new business." *80-02 Leasehold, LLC v. CM Realty Holdings Corp.*, 123 A.D.3d 872, 873-74 (2nd Dept 2014) (internal citations omitted). Pursuant to Business Corporation Law ("BCL") § 1006(a), a dissolved corporation may continue to function only for the purpose of winding up its affairs. A dissolved corporation remains liable for "any right or claim existing or any liability incurred before such dissolution." BCL § 1006(b). Here, Construction is not liable for the alleged breach of the insurance policy automatically renewed on July 13, 2012 as this obligation was not incurred before Construction's dissolution on January 25, 2012. The mere fact that Construction made several premium payments on the premium from the July 13, 2012 to March 19, 2013 policy period after its dissolution does not render Construction liable for the alleged breach of the renewed insurance policy, an obligation incurred after its dissolution.

The court next considers the portion of plaintiff's motion for summary judgment on its cause of action for breach of contract as against Lopez. Where a corporation purports to carry on new business after it is dissolved and obligations are thereby incurred, all officers of the dissolved corporation are personally liable for these obligations. *80-02 Leasehold, LLC*, 123 A.D.3d at 874, citing *Keystone Mech. Corp. v.*

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Conde, 309 A.D.2d 627 (1st Dept 2003). *See also Pennsylvania Bldg. Co. v. Schaub*, 14 A.D.3d 365, 366 (1st Dept 2005) (holding an officer personally liable for a lease he signed after the corporate defendant was dissolved where he failed to show that he signed the lease to wind up the corporation's affairs).

In the present case, plaintiff has established that Lopez is personally liable for the outstanding premium from the July 13, 2012 to March 19, 2013 policy period as the insurance policy was automatically renewed on July 13, 2012 and Construction made premium payments after that date, after it was dissolved, and it is undisputed that Lopez was the sole owner and officer of Construction.

In opposition, defendants have failed to raise a triable issue of fact. Defendants' argument that plaintiff has failed to establish its entitlement to summary judgment against Lopez as plaintiff has not established, or even alleged, that Lopez had actual knowledge of Construction's dissolution when the insurance policy was automatically renewed on July 13, 2012 is without merit. In cases wherein the First Department has found corporate officers personally liable for obligations incurred after dissolution, the First Department has not required any showing that the officers actually knew of the corporation's dissolution. *See Pennsylvania Bldg. Co.*, 14 A.D.3d at 366; *Keystone Mech. Corp.*, 309 A.D.2d at 627. Although the Second Department in *Lodato v. Greyhawk North America, LLC*, 39 A.D.3d 496, 497 (2nd Dept 2007), required a plaintiff to establish the officer's actual knowledge of the corporation's dissolution to hold the officer personally liable for obligations incurred after dissolution, the court declines to follow the holding in *Lodato* as it contradicts established First Department precedent.

Defendants' argument that Lopez is not personally liable for the outstanding premium from the July 13, 2012 to March 19, 2013 policy period because the insurance policy was automatically renewed, rather than affirmatively signed by Lopez, is also without merit. Although the insurance policy was automatically renewed on July 13, 2012, which did not require any affirmative action, plaintiff has submitted evidence that Construction made premium payments, including a renewal deposit, after that date. Viewing the transaction as a whole, Construction intentionally, not merely passively, renewed the insurance policy, thereby entering into an obligation, after it was dissolved. Lopez was the sole owner and officer of Construction when the insurance policy was automatically renewed and when Construction made premium

payments after it was dissolved, and is thus personally liable for the obligation Construction incurred after its dissolution. Based on the foregoing, the portion of defendants' cross-motion to dismiss plaintiff's complaint as against Lopez is denied.

The portion of defendants' cross-motion for summary judgment dismissing plaintiff's cause of action for unjust enrichment is granted on the ground that a valid and enforceable written contract, the insurance policy, governs the outstanding premiums. *See Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987) ("The 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").

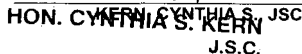
Accordingly, the portion of plaintiff's motion for summary judgment on its cause of action for breach of contract is granted as against Construction for the outstanding premiums from the July 13, 2010 to July 13, 2011 and the July 13, 2011 to July 13, 2012 policy periods and as against Lopez for the outstanding premium from the July 13, 2012 to March 19, 2013 policy period, but plaintiff's motion is otherwise denied. The portion of defendants' cross-motion to dismiss plaintiff's cause of action for unjust enrichment is granted, but the cross-motion is otherwise denied. It is hereby

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant Mario Lopez Construction Corp. in the amount of $26,699.55, with interest thereon at the statutory rate from March 19, 2013, and it is further;

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant Mario Lopez in the amount of $43,820.22, with interest thereon at the statutory rate from March 19, 2013, together with costs and disbursements.

This constitutes the decision and order of the court.

DATE : 8/17/16



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