Towers Food Serv., Inc. v New York City Health & Hosps. Corp.
2016 NY Slip Op 31787(U)
September 27, 2016
Supreme Court, New York County
Docket Number: 652174/2014
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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TOWERS FOOD SERVICE, INC.,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, acting on behalf of BELLEVUE HOSPITAL CENTER,

Defendant.

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Index No. 652174/2014
Subm. Date: March 16, 2016
Mot. Seq. No.: 002

DECISION AND ORDER

Appearances:

For Plaintiff:
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Submissions on this motion to reargue and renew:

Notice of Motion with Supporting Exhibits.....1
Memorandum of Law in Support.....2
Affirmation in Opposition.....3
Reply Affirmation.....4

Ellen M. Coin, J.

Plaintiff Towers Food Service, Inc. ("Towers") moves pursuant to CPLR 2221(d) and (e) for leave to renew and reargue the Court's decision and order dated November 30, 2015, dismissing the complaint upon defendant's motion pursuant to CPLR 3211. The Court refers to the prior ruling for the factual and procedural background. In essence, Towers sued defendant New York City Health and Hospitals Corporation ("HHC") on a breach of contract claim. HHC terminated the contract effective May 17, 2013. The contract provided for a six-month period of limitations on all claims arising therefrom. As Towers commenced this action on July 16, 2014,

more than a year after its claim accrued, the complaint was time-barred. Towers argued in opposition that certain correspondence between the parties after the expiration of the period of limitations on November 17, 2013 essentially restarted the limitations clock.

In support of the reargument branch of the motion, Towers contends that the Court misconstrued the ruling in the case of *Arnell Constr. Corp. v Village of N. Tarrytown* (100 AD2d 562, 564 [2d Dept 1984]) by concluding that (1) the running of the statute of limitations cannot be revived under General Obligations Law §17-101 and that (2) as a public corporation, HHC may not waive its statute of limitations defense. Towers relies on the Court of Appeals decision in *Planet Constr. Corp. v Bd. of Educ. of City of New York* (7 NY2d 381 [1960]) for the proposition that this prohibition only applies to a statutory limitations period, and not, as here, to a contractual limitations period.

The portion of the motion seeking renewal is based on documents Towers received from HHC in response to a FOIL request after oral argument on the underlying motion. Towers now offers HHC's Request for Proposals (RFP) and the contract with the vendor that replaced Towers. Towers points to language in the RFP stating that the restaurant had been recently renovated and that a vendor could take over with "minimal renovation." Towers also underscores the fact that the contract does not require the new vendor to make any capital improvement. Towers argues that both documents amount to a written acknowledgement that HHC owes payment to Towers for the equipment it left behind and for its capital improvement costs.

Analysis

The Court grants the motion to reargue to clarify that Towers is not barred from invoking GOL §17-101 despite the prohibition of waiver of the statute of limitations by a municipality,

government agency or public corporation. The Court also grants the motion to renew in order to consider Towers' additional submissions. This, however, does not change the outcome: no writing from HCC constitutes an acknowledgment of a debt.

General Obligations Law §17-101 Acknowledgment is Not Waiver

A municipality is precluded from waiving a statute of limitations defense by operation of General City Law § 20(5) . However, by its very terms this statute is limited to the principle of waiver, and only with regard to the statutory period of limitations, not one imposed by contract (*Planet Constr. Corp.*, 7 NY2d at 385; *Baltimore & Ohio R.R. Co. v County of Genesee*, 112 AD2d 725, 725 [4th Dept 1985] [applying estoppel]; *Arc Elec. Constr. Co., Inc. v City of New York*, 44 AD2d 783, 783 [1st Dept 1974] [applying estoppel]).

Acknowledgment of a debt is not a waiver of the statute of limitations. The two have different legal underpinnings. Waiver is the intentional relinquishment of a known right (*see generally Hadden v Consol. Ed. Co. of New York, Inc.*, 45 NY2d 466, 469 [1978]). Once waived, the statute of limitations is no longer in issue. An acknowledgment, on the other hand, takes the form of an independent contract. GOL §17-101 provides:

> An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest.

An acknowledgment does not constitute a contract in a classical sense: there is no requirement of consideration and meeting of the minds. Nonetheless it is enforceable, separate and apart from the underlying obligation (*cf Faulkner v Arista Records LLC*, 797 F Supp 2d 299, 316 [SDNY

2011]). A period of limitations still applies, but runs from the date of a new contract, i.e., the written acknowledgment (*see Hon Fui Hui v E. Broadway Mall, Inc.*, 4 NY3d 790, 791 [2005]).

Therefore, the General City Law's prohibition against a public entity's waiver of the statute of limitations does not preclude application of GOL §17-101. As the Court of Appeals ruled in *Lew Morris Demolition*, Section 17-101 of the General Obligations Law determines the timeliness of lawsuits filed against public entities and affects both contractual and statutory periods of limitations (*Lew Morris Demolition Co., Inc. v Bd. of Educ. of the City of New York*, 40 NY2d 516, 521 n [1976] [citations omitted]). [1]

Absence of Valid Written Acknowledgment or Promise To Pay

"The writing, in order to constitute an acknowledgment of a debt, must recognize an existing debt and contain nothing inconsistent with an intention on the part of the debtor to pay it" (*Lew Morris Demolition Co., Inc.*, 40 NY2d at 521 [citations omitted][writing memorializing partial payment did not evince sufficient intent on debtor's part, as it contained disclaimer that payment made as "'partial settlement without prejudice to the rights of either party with respect to the balance"']). Whether a writing constitutes written acknowledgment may either be plainly clear or depend on a fact-intensive inquiry, warranting a trial (*Petito v Piffath*, 85 NY2d 1, 8

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[1] *Arnell Constr.* does not hold otherwise. In *Arnell Constr.* the Appellate Division ruled that a letter invitation from a village attorney to a contractor to submit a payment request did not constitute an acknowledgement under Section 17-101. The court also rejected an estoppel argument, as the contractor did not delay filing suit in reliance on the letter. Finally, the court opined that the letter could not be deemed a waiver of the limitations defense. To the extent that the last sentence in *Arnell Constr.* decision may be misinterpreted to suggest that Section 17-101 is inapplicable to public entities, this sentence relied for its authority on *George C. Diehl, C.E., Inc. v City of Lackawanna* (233 AD 348 [4th Dept 1931], affd 258 NY 529 [1932]) and *35 Park Ave. v City of New York* (64 Misc 2d 418, 418 [App Term, 1st Dept 1969]). *George C. Diehl, C.E.* is a 1931 Fourth Department decision that dealt only with the issue of a waiver of a statutory limitations period and, in any regard, predated the subsequent Court of Appeals rulings in *Planet Constr.* by 29 years and in *Lew Morris Demolition* by 43 years. *35 Park Ave.* is an appellate term decision that expressly asserts that Section 17-101 does not apply to a public defendant. For this assertion, it also relies on *George C. Diehl, C.E.* As *35 Park Ave.* directly conflicts with binding precedent, it is not good authority.

[1994] [stipulation settling lawsuit insufficient as acknowledgment of underlying debt]; *Lynford v Williams*, 34 AD3d 761, 762-63 [2d Dept 2006] [statements made on school financial aid application and hearsay evidence of statement of net worth in matrimonial matter not communicated to plaintiff]; *Knoll v Datek Secs. Corp.*, 2 AD3d 594, 595 [2d Dept 2003] [intent behind listing balance on commission analysis statement crucial to determining effectiveness of acknowledgment]; *see also Estate of Vengroski v Garden Inn*, 114 AD2d 927, 928-29 [2d Dept 1985] [debt carried on partnership's books and tax returns not, without more, acknowledgment; inquiry necessary on partnership's underlying intent in carrying and reporting debt]). Furthermore, implicit in the phrase "acknowledgment or promise" is that it be communicated to the person to whom the debt is owed and who relies on it (*Lynford*, 34 AD3d at 763; *Vengroski*, 114 AD2d at 929). Otherwise, there is no promise to pay.

Here, apart from the fact that Towers has not shown sufficient grounds for renewal,[2] its newly submitted documents at most suggest that plaintiff made and left behind certain capital improvements. That does not amount to an acknowledgment of a breach of contract and a concurrent promise to pay for it. It is merely some evidence of the substance of Towers' untimely claim.

Furthermore, Towers does not show that it, or someone on its behalf, received the RFP and the contract with the new vendor before commencement of this action, causing it to delay filing suit until after the limitations period (*Lynford*, 34 AD3d at 763). Towers received these documents only after oral argument on the summary judgment motion (*id.*).

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[2] Towers fails to offer reasonable justification for its failure to obtain and present the newly offered documents on the original motion (CPLR 2221[e][3]; *Nassau County v Metro. Transp. Auth.*, 99 AD3d 617, 618-19 [1st Dept 2012]).

Accordingly, it is hereby

ORDERED that plaintiff's motion to renew and reargue pursuant to CPLR 2221(d) and (e) is granted, and upon reargument and renewal, the Court adheres to its prior determination.

This constitutes the Decision and Order of the Court.

Date: September 27, 2016

ENTER:

ELLEN M. COIN, A.J.S.C