

Metro Found. Contrs., Inc. v M.A. Angeliades, Inc.

2016 NY Slip Op 32616(U)

December 22, 2016

Supreme Court, Queens County

Docket Number: 27786/2010

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

METRO FOUNDATION CONTRACTORS, INC.,

Plaintiff,

-against-

M.A. ANGELIADES, INC., et al.,

Defendants.

Index No. 27786/10

Motion
Date February 8, 2016

Motion
Cal. No. 105

Motion
Seq. No. 6

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Upon the foregoing papers it is ordered that this motion by defendants, M.A. Angeliades, Inc. ("MAA"), Federal Insurance Company and Chubb Group of Insurance Companies pursuant to CPLR 3211(a)(1), (3), and (7) for an order: dismissing the Second Amended Complaint of plaintiff, Metro Foundation Contractors, Inc. ("Metro") is hereby decided as follows:

This commercial action arises out of an alleged contract entered into between defendant MAA and defendant, New York City School Construction Authority, and a subcontract entered into between MAA and defendant, Integrated Construction Management, Inc. ("ICM"). Moving defendants now move to dismiss the plaintiff's Second Amended Complaint against them.

A. CPLR 3211 (a) (1)

That branch of moving defendants' motion to dismiss plaintiff's action pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v. Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006][internal citations omitted]).

"To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v. John Doe 1*, 73 AD3d 78 [2d Dept 2010]). However, it is well-established law that affidavits and deposition testimony are not documentary evidence, and deeds and contracts are documentary evidence (*Id.*) "[T]o be considered 'documentary', evidence must be unambiguous and of undisputed authenticity" (*Id.*)(*internal citations omitted*).

The documentary evidence submitted in the instant matter consists mainly of Contracts, Subcontract, and Subcontractor Approval Forms. This documentary evidence is insufficient to dispose of the plaintiff's Second Amended Complaint. While moving defendants also submit affidavits and various correspondence in support of this branch of the motion, such documentation is not considered "documentary evidence" within the intended scope of CPLR 3211(a) (*Suchmacher v. Manana Grocery*, 73 AD3d 1017 [2d Dept 2010][internal citations omitted]; see, *Fontanetta, supra*).

The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman* 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the Contracts, Subcontract, and Subcontractor Approval Forms are insufficient to dispose of the plaintiff's Second Amended Complaint, as factual issues remain. Accordingly, this branch of the motion is denied.

B. CPLR 3211(a)(3)

The branch of the motion which is to dismiss the Second Amended complaint pursuant to CPLR 3211(a)(3), on the ground

that plaintiff has no legal capacity to sue, is denied.

According to CPLR 3211(a)(3), a party may move to dismiss a cause of action on the ground that the party asserting the cause of action does not have the legal capacity to sue.

Moving defendants have failed to establish a prima facie case in support of this branch of the motion.

C. CPLR 3211(a)(7)

That branch of moving defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the Second Amended Complaint against moving defendants for failure to state a cause of action is denied.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, *Rovello v. Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159).

"The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages." (*Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd.*, 801 NYS2d 243 [Sup Ct, NY County 2004][internal citations omitted]).

That branch of the motion for an order pursuant to CPLR

3211(a)(7) dismissing the plaintiff's first cause of action for breach of contract in the Second Amended Complaint is denied as the Second Amended Complaint adequately states a cause of action for breach of contract via, inter alia, Paragraphs 8-12 of the Second Amended Complaint.

That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff's cause of action for fraudulent inducement of contract in the Second Amended Complaint is denied as moving defendants have failed to present any allegations in the Second Amended Complaint which relate to fraudulent inducement of contract.

That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing plaintiff's second cause of action for quantum meruit/unjust enrichment is denied as the Second Amended Complaint adequately states a cause of action for quantum meruit/unjust enrichment via, inter alia, Paragraphs 13-18 of the Second Amended Complaint.

It is well-established law that: "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (internal quotation marks and citations omitted) (*Blue Wolf Group, LLC v. Gaiam, Inc.*, 847 NYS2d 895 [Civ Ct, New York County 2007]).

Furthermore, it is permissible to sue for services under a contract, and if that is not proved, to recover upon quantum meruit. It has been held, even where the complaint contains two counts for the same services, one under contract and one on quantum meruit, that the plaintiff should not be compelled on motion in advance of the trial to elect upon which count he will proceed (*Rubin v. Cohen*, 129 AD395 [1908]). In short, since plaintiff is entitled to plead inconsistent causes of action in the alternative, the quasi-contractual claims are not precluded by the pleading of a cause of action for breach of a written agreement (see, *Winick Realty Group LLC v. Austin & Associates*, 51 AD3d 408 [2008]). Inasmuch as there is a bona fide dispute as to the existence of a contract, the plaintiff may proceed on theories of breach of contract and quantum meruit (see, *Breslin Realty Development Corp. v. 112 Leaseholds, LLC*, 270 AD2d 299 [2000]).

Moving defendants have improperly sought to reach the merits of the complaint on this mere CPLR 3211(a) motion (see *Stukuls v State of New York*, *supra*; *Jacobs v Macy's East Inc.*, *supra*).

Moving defendants may serve an Answer within twenty (20) days of service of a copy of this Order with Notice of Entry.

That branch of plaintiff's cross motion for an order granting summary judgment as to liability under plaintiff's second and third causes of action is denied as premature as issue has yet to be joined in this case (see, *J. Castronovo, Inc. v. Hillside Development Corp.*, 160 AD2d 763 [2d Dept 1990]).

That branch of plaintiff's cross-motion for an order directing defendant M.A. Angeliades, Inc. to respond to Metro's demands for a Verified Statement pursuant to New York Lien Law § 76 is denied as it is premature as issue has not been joined yet and additionally, there has been no prima facie case in support of said relief as there is no cause of action in the Complaint relating to this.

That branch of plaintiff's cross motion for an order disqualifying M.A. Angeliades' counsel is hereby set down for a conference to be held on Monday, January 30, 2017, 10:00 a.m., IAS Part 6, courtroom 24, 88-11 Sutphin Blvd., Jamaica, New York.

This constitutes the decision and order of the court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: December 22, 2016

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Howard G. Lane, J.S.C.