

Tag Mech. Sys., Inc. v Dworkin Constr. Corp. (USA)
2016 NY Slip Op 32906(U)
June 23, 2016
Supreme Court, Onondaga County
Docket Number: 2014EF244
Judge: Donald A. Greenwood
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**At a Motion Term of the Supreme
Court of the State of New York,
held in and for the County of
Onondaga on June 21, 2016.**

**PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice**

**STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA**

TAG MECHANICAL SYSTEMS, INC.,

Plaintiff,

v.

DWORKIN CONSTRUCTION CORP. (USA),

Defendant.

**DECISION AND ORDER
ON MOTION**

**Index No.: 2014EF244
RJI No.: 33-14-0897**

**APPEARANCES: ROBERT M. COTE, ESQ., OF D'ARRIGO & COTE
For Plaintiff**

**DAVID O. WRIGHT, ESQ.
For Defendant**

The defendant moves for dismissal of the amended complaint in this matter, which contains the same ten causes of action as originally alleged and adds an eleventh cause of action alleging a diversion of trust fund assets pursuant to Lien Law Article 3-A. This Court previously denied defendant's pre-answer motion to dismiss the original complaint on the grounds, rejecting defendant's argument that the claims were untimely under the contractual limitations of the subcontract between the parties. *See, Decision and Order, dated May 7, 2014.* This Court also held that both the contractual limitations and the "pay when paid" provisions of the subcontract under which defendant attempted to bar plaintiff's claims were void as against public policy and wholly unenforceable against plaintiff. *See, id.* In addition, the Decision and Order found that

the documentary evidence failed to establish that plaintiff's claims were time barred under the subcontract in light of the clear issues of fact with respect to defendant's receipt of payment from the owner, the completion of plaintiff's work under the subcontract, the date of substantial completion and defendant's repeated representations of payment to the plaintiff. *See, id.* The complaint alleged that plaintiff was owed \$29,500 for work performed as a subcontractor to defendant under an HVAC subcontract and a plumbing contract in connection with the construction of a Fleshly Squeezed retail food franchise at the Destiny Mall. The original ten causes of action included, *inter alia*, breach of contract, quantum meruit, unjust enrichment and account stated. Defendant appealed this Court's order and the Appellate Division, Fourth Department unanimously affirmed this Court's holdings. *See, TAG Mechanical Systems, Inc. v. Dworkin Construction Corp.*, 125 AD3d 1335 (4th Dept. 2015).

Defendant subsequently served its answer and counterclaims and the parties continued with discovery. Plaintiff proposed the amendment of the complaint by stipulation as permitted under CPLR §3025(b) and defendant refused to consent. Plaintiff then moved to serve and file an amended verified complaint pursuant to CPLR §3025(b) to assert the new cause of action and that motion was granted by order dated February 25, 2016.

Defendant now moves for dismissal with respect to the entire amended complaint. It argues that the new cause of action as well as the original ten causes of action are time barred by both the Lien Law statute of limitations and the contractual limitations period and do not relate back. Defendant concedes that this Court previously rejected the statute of limitations defense but that the Court should now reconsider since there is a "fuller record" and in the interest of judicial economy. However, defendant presents no new evidence and it appears that there has

been no further discovery since the court's last order. Defendant also argues once again that the claim is barred by the contractual statute of limitations, despite its acknowledgment that in the Decision and Order, this Court found that the subcontract provision containing the "pay when paid" provision of the contract, upon which defendant attempted to bar plaintiff's claims were void as against public policy and wholly enforceable against the plaintiff. *See, Lien Law 34; see also, Clifton Steel Corp. v. General Electric*, 80 AD2d 714 (3rd Dept. 1981); *see also, Decision and Order*, pp. 3-4. The defendant also reiterates its argument that the claims, including the new cause of action, do not relate back because the initial pleading gave no notice of the claim and it requires additional proof of facts not encompassed in the initial proceeding. *See, Raymond v. Ryken*, 93 AD3d 1265 (4th Dept. 2012). However, this Court rejected those arguments in the Decision and Order where it allowed amendment of the complaint.

Defendant further claims that the new cause of action has no basis because there is only one possible plaintiff, TAG Mechanical, and that the proposed claim is factually baseless because there has been no diversion of trust monies, indicating that its accounting shows that all funds received from Freshly Squeezed on the project were properly paid. However, in granting the plaintiff's motion to amend the complaint, this Court previously ruled that the new diversion claim relates back to the original claims since its claim "seeks to enforce the same obligation giving rise to plaintiff's claim in this case, namely nonpayment for work it performed on the project." *Decision from the Bench after Oral Argument on February 2, 2016, citing Abrams v. Maryland Casualty Co.*, 300 NY 80 (1949) (attached to February 25, 2016 Order). In considering plaintiff's previous motion to amend the complaint, this Court was required to give leave freely absent prejudice or surprise. *See, Bryndle v. Safety-Kleen Systems, Inc.*, 66 AD3d

1396 (4th Dept. 2009). While the standard in the dismissal motion presently before the Court is a different one, the defendant's argument still fails. The Court must now determine whether the plaintiff has a cause of action for any cognizable claim has not demonstrated that no cognizable claim exists with respect to the new cause of action here. *See, Allen v. City of New York*, 49 AD3d 1126 (2d Dept. 2010); *see also, CPLR §3211(a)(7)*.

With respect to plaintiff's request for sanctions, it alleges that the motion is frivolous and it should be awarded motion costs and reasonable attorney's fees. *See, 22 NYCRR §130-1.1(a)*. Plaintiff has failed to show that the motion made by defendant has undertaken to delay or prolong resolution of the litigation or to maliciously injure the plaintiff. Therefore, the request is denied.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the defendant's motion to dismiss the amended complaint is denied in its entirety, and it is further

ORDERED, that plaintiff's request for sanctions is denied.

ENTER

Dated: June 23, 2016
Syracuse, New York


DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Defendant's Notice of Motion, dated March 17, 2016;
2. Affidavit of Lawrence Dworkin in support of defendant's motion, dated March 16, 2016, and attached exhibits;
3. Defendant's Memorandum of Law in support of motion to dismiss amended complaint, dated March 17, 2016; and
4. Affirmation of Robert M. Cote, Esq. in opposition to defendant's motion, dated April 1, 2016.