

<b>Paik Constr., Inc. v Porven Real Estate, Inc.</b>
2017 NY Slip Op 30103(U)
January 13, 2017
Supreme Court, New York County
Docket Number: 653046/14
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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PAIK CONSTRUCTION, INC.

Plaintiff

**DECISION AND ORDER**

v

Index No. 653046/14

PORVEN REAL ESTATE, INC.

Defendant.

Motion Seq. 002

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**NANCY M. BANNON, J.:**

I. INTRODUCTION

In this action to recover damages for breach of contract, the plaintiff moves for summary judgment on the complaint and dismissing the defendants' counterclaims. The defendant opposes the motion. The motion is granted to the extent that the plaintiff is awarded summary judgment on the issue of liability on the second cause of action and dismissing the counterclaims, and the motion is otherwise denied.

II. BACKGROUND

The defendant landowner entered into a contract (the construction contract) with the plaintiff, pursuant to which the plaintiff agreed to act as general contractor in connection with a construction project in Manhattan in consideration of the sum of \$17,942,760.54. The construction contract provided that the

defendant could terminate the contract for its own convenience, but that if it did, it would be obligated to pay the plaintiff, as liquidated damages, overhead and profit on the contractual work not yet executed, payment for the work actually executed, and the costs incurred by the plaintiff by reason of such termination. It is undisputed that the defendant gave notice to the plaintiff that it was terminating the construction contract on the basis of its own convenience.

After the plaintiff informed the defendant that it would be seeking to enforce the defendant's express obligation to pay liquidated damages under the construction contract, which allegedly totaled more than \$1 million, the parties entered into what they characterized as a termination agreement, which acknowledged that the termination notice was based on the defendant's convenience. The termination agreement provided that the plaintiff would complete the foundation work, continue to provide general contracting work with respect thereto, and requisition and be paid for such work in accordance with both the construction contract and other additional terms. The termination agreement provided that the defendant would immediately assume "all responsibilities for any remaining obligations" that the plaintiff assumed under the both the construction contract and "subagreements," defined as the "various agreements with subcontractors, vendors and suppliers

for the work, labor and installation" of the project. The defendant also agreed "to settle any Subcontractor termination costs or claims." The plaintiff agreed, within one week of execution of the termination agreement, to provide documentation with respect to the subagreements to Faithful + Gould (F&G), a professional construction consultant retained as the defendant's agent to conduct a due diligence review of the project. The defendant agreed to pay the plaintiff the sum of \$500,000, along with one outstanding requisition, and make payment on an ongoing basis for the completion of the foundation work, plus certain cost overruns not captured in the initial payment applications for payment. The termination agreement also provided that, "[i]n consideration of and upon the full compliance by the [defendant] of the aforesaid terms and conditions set forth in this Termination Agreement, [the plaintiff] agrees to execute a lien waiver and release in the form set forth as Exhibit B attached hereto."

The plaintiff commenced the instant action to recover damages for breach of contract. The first cause of action alleges that the defendant breached the termination agreement by wrongfully withholding the sum of \$68,311.56 that was due and owing under that agreement. The second cause of action alleges that, since the termination agreement was an executory accord within the meaning of the General Obligations Law that remained

unsatisfied by virtue of the defendant's withholding of the amounts due thereunder, the plaintiff was alternatively entitled to recover the sum of \$446,950.32 for breach of the underlying construction contract. The third cause of action seeks an award of an attorney's fee under the termination agreement. The defendant answered the complaint, denying all substantive allegations of wrongdoing, and asserted two counterclaims, alleging breach of the termination agreement and negligent misrepresentation. Specifically, the defendant asserted that the plaintiff did not provide F&G with documentation concerning the performance of and payment on a sub-subcontract between its subcontractor N. Sampogna & Son Corp. (Sampogna) and sub-subcontractor Metal Partners Rebar LLC (MPR), as purportedly required by the termination agreement, and that the plaintiff's provision of a lien waiver executed by Sampogna constituted a negligent misrepresentation by the plaintiff.

The plaintiff now moves for summary judgment on the complaint and dismissing the counterclaims. In support of its motion, it submits the pleadings, an affidavit of its principal explaining in detail the course of its relationship with the defendant, the construction contract, the termination agreement, the documentation it provided to the defendant pursuant to the termination agreement, requisitions, copies of letters and e-mail correspondence, and an attorney's affirmation. In opposition,

the defendant submits the affidavit of F&G's project manager Leonrard Barone, an attorney's affirmation, a copy of an e-mail exchange between counsel for the parties, and a memorandum of law. The plaintiff submits an attorney's affirmation in reply.

### III. DISCUSSION

#### A. SUMMARY JUDGMENT ON THE COMPLAINT

The plaintiff established its prima facie entitlement to judgment as a matter of law on the second cause of action, which seeks to enforce the underlying construction contract, by demonstrating that the termination agreement was an executory accord, it performed all of its obligations thereunder, and the defendant failed to satisfy the accord by wrongfully withholding the sum of \$68,311.56 that was due and owing to the plaintiff thereunder.

An executory accord is "an agreement embodying a promise express or implied to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any . . . contract [or] obligation . . . , and a promise express or implied to render such performance in satisfaction or in discharge of such contract [or] obligation." General Obligations Law § 15-501(1). As long as the agreement is in writing, an executory accord remains effective as the basis of an action even

where, as here, satisfaction of the accord is to occur subsequent to the making of the accord. See General Obligations Law § 15-501(2). "If an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his [or her] rights under the . . . contract [or] obligation . . . which is the subject of the accord, or to assert his [or her] right under the accord." General Obligations Law § 15-501(3); see American Bank & Trust Co. v Koplik, 87 AD2d 351, 355 (1<sup>st</sup> Dept. 1982). "'Generally, it is assumed that one does not surrender an existing obligation for a promise to perform in the future.'" Id., quoting Goldbard v Empire State Mut. Life Ins. Co., 5 AD2d 230, 236 (1<sup>st</sup> Dept 1958).

Where an obligor satisfies its obligations under an accord, further legal recourse by the obligee is barred by the doctrine of accord and satisfaction.

"An accord and satisfaction, as its name implies, has two components. An accord is an agreement that a stipulated performance will be accepted, in the future, in lieu of an existing claim. Execution of the agreement is a satisfaction. The distinctive feature of an accord and satisfaction is that the obligee does not intend to discharge the existing claim merely upon the making of the accord; what is bargained for is the performance, or satisfaction. If the satisfaction is not tendered, the obligee may sue under the original claim or for breach of the accord." Denburg v Parker Chapin Flattau & Klimpl, 82 NY2d 375, 383 (1993).

The plaintiff demonstrated that, inasmuch as the termination agreement obligated it to execute a lien waiver and release only

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"upon the full compliance by the [defendant] of the . . . terms and conditions set forth in this . . . Agreement," the termination agreement was an executory accord, since that provision embodies the parties' intent, which governs the determination of whether an executory accord was intended. See American Bank & Trust Co. v Koplik, supra. The same language establishes that the termination agreement was not a substituted agreement, a superseding agreement, or a novation barring enforcement of the underlying construction contract in the event that the defendant failed to satisfy its obligations under the termination agreement. See Denburg v Parker Chapin Flattau & Klimpl, supra; Board of Mgrs. of Alexandria Condominium v Broadway/72nd Assocs., 285 AD2d 422, 424 (1<sup>st</sup> Dept. 2001); American Bank & Trust Co. v Koplik, supra. Indeed, the indicia of the creation of a substituted agreement (see generally Wyckoff v Searle Holdings, Inc., 2013 WL 2143771 [Sup Ct, N.Y. County 2013], affd 111 AD3d 546 [1<sup>st</sup> Dept. 2013]) are absent here, as there is neither a provision for the release of the parties immediately upon execution of the termination agreement, nor a merger clause extinguishing all prior agreements so as to render the new agreement as the sole agreement between the parties.

The plaintiff established, prima facie, that the defendant failed to satisfy the accord by paying all amounts due thereunder. The plaintiff demonstrated that the defendant

improperly withheld the sum of \$19,215.00 for allegedly deficient work of one of the plaintiff's subcontractors that was undertaken prior to the execution of the termination agreement by showing that the termination agreement obligated the defendant to assume all responsibilities that the plaintiff had previously assumed under the construction contract and any subagreements. It further demonstrated that the defendant improperly withheld the sum of \$29,186.56 that was claimed by MPR, since the plaintiff made a showing that it obligated itself neither to the defendant nor MPR for that amount, and that the only entities who could be held statutorily or contractually obligated to MPR were the defendant itself and Sampogna, respectively. See Lien Law § 3; Underhill Constr. Corp. v. New York Tel. Co., 56 AD2d 760, 760 (1<sup>st</sup> Dept. 1977). In addition, the plaintiff, by showing that there was no contractual or equitable basis for the defendant's withholding of \$20,000.00 in order to pay itself for legal fees that the defendant allegedly incurred, demonstrated that the defendant was not entitled to unilaterally withhold that sum from the plaintiff.

In opposition to the plaintiff's showing, the defendant failed to raise a triable issue of fact. The affidavit of F&G's project manager, in which he alleges that the plaintiff's foundation work prior to the execution of the termination agreement was deficient, is insufficient to rebut the defendant's

written concession and the acknowledgment in the termination agreement that it sought to terminate the construction contract on the basis of convenience, rather than cause. Thus, it failed to raise a triable issue of fact as to whether the plaintiff is barred from enforcing the construction contract on that ground. Nor do the defendant's submissions raise a triable issue of fact as to whether the execution of the termination agreement created a superseding agreement, substituted agreement, or novation, since they point to no contrary evidence of the parties' intent. In addition, its submissions are insufficient to raise a triable issue of fact as to whether its withholding of money claimed by the plaintiff was consistent with its obligations under the termination agreement and, thus, whether it satisfied the accord reflected in that agreement. The defendant's allegation that the plaintiff breached the termination agreement by failing to timely provide documentation concerning MPR is belied by the e-mail sent by F&G's lead project manager to the plaintiff's principal, conceding that the plaintiff had "fully complied with ownerships [sic] requests." In any event, the terms of the termination agreement itself only obligated the plaintiff to provide documentation with respect to sub-agreements, as defined therein, and not to agreements between its subcontractors and sub-subcontractors with whom it did not directly contract and over whom it had no authority.

Since the plaintiff elected to enforce its rights under the underlying construction contract, it has elected to forego enforcement of the termination agreement itself. See Plant City Steel Corp. v National Mach. Exch., 23 NY2d 472, 477 (1969); American Bank & Trust Co. v Koplik, supra. Consequently, there is no basis for an award of summary judgment on the first cause of action.

The award of an attorney's fee, as sought in the third cause of action, must await the trial on the issue of damages.

#### B. SUMMARY JUDGMENT ON THE DEFENDANT'S COUNTERCLAIMS

For the same reasons as apply to the branch of the plaintiff's motion addressing the second cause of action, the plaintiff established its entitlement to judgment as a matter of law dismissing the first counterclaim, which alleges that the plaintiff breach the termination agreement by failing to provide all required documentation, and the defendants failed to raise a triable issue of fact in opposition to that showing.

The plaintiff also established its prima facie entitlement to judgment as a matter of law dismissing the second counterclaim, which alleges that its provision, to F&G, of a waiver of lien executed by Sampogna negligently misrepresented that Sampogna satisfied all obligations to sub-subcontractors, including MPR, despite the fact that Sampogna still owed MPR under a sub-subcontract.

"A claim for negligent misrepresentation requires the [counterclaim] plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the [counterclaim] defendant to impart correct information to the [counterclaim] plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007). The plaintiff demonstrated, prima facie, that it provided the defendant with Sampogna's waiver of lien solely to establish that it owed no outstanding obligation to Sampogna, not that Sampogna owed no outstanding obligation to MPR. In any event, the plaintiff further showed that (a) it did not make the representations set forth in Sampogna's waiver of lien, which were instead made by Sampogna, (b) it had no duty to investigate whether MPR's invoices to Sampogna remained due and payable, and (c) the defendant had no basis for relying on the plaintiff as to the veracity of representations made by Sampogna in connection with MPR.

Moreover, since the plaintiff showed that it was not in privity with MPR, it established, prima facie, that Sampogna's waiver of lien precludes MPR from asserting a lien against the defendant in the first instance (see Peri Formwork Sys., Inc. v Lumbermens Mut. Cas. Co., 112 AD3d 171, 176-177 [2<sup>nd</sup> Dept. 2013]) and, thus, even if Sampogna's statement in the waiver of lien

were untrue, the defendant cannot be held liable to MPR in connection with any work performed by MPR under the sub-subcontract. Consequently, the plaintiff has shown that the defendant's second counterclaim improperly seeks to recover, from the plaintiff, a purported obligation to MPR for which the defendant cannot not be held responsible.

In opposition to the plaintiff's showing in this regard, the defendant failed to raise a triable issue of fact, inasmuch as neither Barone's affidavit nor any of its submissions presented evidence that the plaintiff knew that Sampogna had not paid MPR, that the plaintiff drafted Sampogna's waiver of lien, or that the plaintiff assumed a special duty to investigate the status of the Sampogna/MPR sub-subcontract and report its findings to the defendant. Nor did the defendants' submissions reveal the existence of a contract directly between the plaintiff and MPR, or present facts from which it could be inferred that the defendant had a special relationship with the plaintiff. Moreover, the defendant has not identified, and research has not revealed, any persuasive authority for the proposition that MPR has a right to assert a lien against the defendant's property or make a claim against the defendant for money damages solely by virtue of Sampogna's alleged failure to pay MPR under the sub-subcontract. Hence, even if the defendant could establish its right to recover for negligent misrepresentation, it cannot show

that it would have been damaged by such a misrepresentation.

IV. CONCLUSION

Accordingly, upon the papers submitted and the reasons set forth herein, it is

ORDERED that the branch of the plaintiff's motion which is for summary judgment on the issue of liability on the second cause of action is granted, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

**Dated: January 13, 2017**



J.S.C.  
**HON. NANCY M. BANNON**