

Power Air Conditioning Corp. v Batirest 229 LLC

2017 NY Slip Op 30750(U)

April 13, 2017

Supreme Court, New York County

Docket Number: 156497/2016

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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POWER AIR CONDITIONING CORP.,

Plaintiff,

DECISION/ORDER
Index No. 156497/2016

-against-

BATIREST 229 LLC, AGL INDUSTRIES, INC.,
PIZZAROTTI IBC LLC, GMC CONTRACTING &
ESTIMATING SERVICE, INC., LITHOS CONSTRUCTION
SOLUTIONS, INC. and "JOHN DOE" and "JANE DOE"
1-200, said names being fictitious, intended to be any person
in possession of or claiming interest in or lien against the
property described in the verified complaint, and whose
interest may not be protected under applicable emergency
rent laws, whose names are currently unknown to Plaintiff
but will be discovered during the course of discovery in
this action,

Defendants.

-----X
BATIREST 229 LLC,

Counterclaim and Cross-Claim Plaintiff,

-against-

DON EMANUEL, IBC BUSINESS GROUPS LLC d/b/a
IBC GROUPS LLC, RANCE MACFARLAND and
ANDREAS CHRISTOFAKIS,

Counterclaim and Cross-Claim Defendants.

-----X
HON. CYNTHIA KERN, J.:

Plaintiff Power Air Conditioning Corp. commenced the instant action against defendants to recover certain sums it is allegedly owed for work it performed on a construction project. In its answer to plaintiff's complaint, defendant Batirest 229 LLC ("Batirest") asserted claims against Power and its officer Don Emanuel ("Emanuel") and against Pizzarotti IBC LLC and IBC Business Groups LLC d/b/a IBC Groups LLC (collectively "IBC"), IBC's officer Rance MacFarland ("MacFarland"), Lithos Construction Solutions Inc. ("Lithos") and Lithos' officer Andreas Christofakis ("Christofakis"). Emanuel now moves for an Order

pursuant to CPLR § 3211(a)(1) and (7) dismissing Batirest's counterclaims asserted against him. IBC and MacFarland separately move for an Order pursuant to CPLR § 3211(a)(1) and (7) dismissing Batirest's cross-claim for unjust enrichment asserted against IBC and Batirest's claims asserted against MacFarland. Further, Lithos and Christofakis separately move for an Order pursuant to CPLR § 3211(a)(1) and (7) dismissing Batirest's cross-claim for unjust enrichment asserted against Lithos and Batirest's claims asserted against Christofakis. These three motions are consolidated for the purpose of disposition. For the reasons set forth below, the portions of the motions for Orders dismissing Batirest's claims based on General Construction Law § 25-b against Emanuel, MacFarland and Christofakis and the portion of the motion of Lithos and Christofakis for an Order dismissing Batirest's cross-claims for unjust enrichment against Lithos are granted but the motions are otherwise denied.

The relevant facts are as follows. Batirest owns premises located at 229 East 60th Street, New York, New York (the "premises"). In or around February 2014, plaintiff entered into a subcontract agreement with IBC, then the general contractor for a construction project at the premises (the "project"), to work on the project. Thereafter, in or around August 2015, Batirest terminated IBC as general contractor and hired Lithos as the new general contractor on the project. Plaintiff then entered into new subcontract agreements with Lithos and into an agreement with Batirest itself, which incorporated plaintiff's agreements with Lithos and required Batirest to pay plaintiff certain amounts for its work on the project. Batirest allegedly failed to pay plaintiff, IBC and Lithos the amounts due for their work on the project and plaintiff, IBC and Lithos thus filed mechanic's liens against the premises. These liens were verified and filed by Emanuel, MacFarland and Christofakis, the individual officers of plaintiff, IBC and Lithos, respectively. Plaintiff commenced the instant action seeking to foreclose on its lien and recover damages for breach of contract and an account stated against Batirest. In its answer, Batirest asserted claims for breach of contract and unjust enrichment against plaintiff, IBC and Lithos and claims for willful exaggeration of mechanic's lien and violation of General Construction Law § 25-b against plaintiff, IBC, Lithos, Emanuel, MacFarland and Christofakis.

The court first considers the portions of the motions to dismiss Batirest’s claims for willful exaggeration of mechanic’s lien against Emanuel, MacFarland and Christofakis only pursuant to CPLR § 3211(a)(1) and (7) on the ground that they cannot be held personally liable for these claims. On a motion pursuant to CPLR § 3211(a)(7) addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, “conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). Further, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff’s claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995).

It is well-settled that “a corporate officer is not normally liable in his or her personal capacity on contracts executed on behalf of the corporation unless the officer expresses some intention to be personally bound, for the officer is in effect an agent of the corporate principal.” *W. Joseph McPhillips, Inc. v. Ellis*, 278 A.D.2d 682, 683 (1st Dept 2000). “Personal liability will be imposed, however, upon corporate officers who commit or participate in the commission of a tort, even if the commission or participation is for the corporation’s benefit.” *Id.* The “‘commission of a tort’ doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act.” *Peguero v. 601 Realty Corp.*, 58 A.D.3d 556 (1st Dept 2009)(internal citation omitted). Courts have specifically held that corporate officers may be held personally liable if they participated in the tortious conduct of filing a willfully exaggerated mechanic’s lien, which is void pursuant to Lien Law § 39, on behalf of the corporation. *See Greenway*

Plaza Off. Park-1 v. Metro Constr. Servs., 4 A.D.3d 328, 329-30 (2^d Dept 2004) (holding that the corporate officer who allegedly filed a willfully exaggerated mechanic’s lien could be held personally liable).

In the present case, the court denies the portions of the motions to dismiss Batirest’s claims for willful exaggeration of mechanic’s lien against Emanuel, MacFarland and Christofakis as Batirest’s answer sufficiently alleges that Emanuel, MacFarland and Christofakis personally participated in the “commission of a tort.” Specifically, Batirest alleges that Emanuel, MacFarland and Christofakis personally participated in the allegedly tortious conduct of filing willfully exaggerated mechanic’s liens on behalf of lienors plaintiff, IBC and Lithos, respectively, by intentionally inflating the amounts of the liens, including by adding amounts for work the corporations did not perform and subsequently verifying and filing said liens.

Christofakis’ argument that, because his verification of Lithos’ lien states that “[t]he source of your deponent’s [Christofakis’] information and the grounds of deponent’s belief as to all matters not therein stated upon deponent’s knowledge are as follows: Conversations between the officers and counsel and/or employees and books and records kept in the ordinary course of business,” he intended to disclaim personal knowledge of or responsibility for the contents of the lien and thus “did not take on, superadd or substitute his personal liability for that of Lithos” is without merit. As discussed above, “[p]ersonal liability will be imposed...upon corporate officers who commit or participate in the commission of a tort.” See *W. Joseph McPhillips, Inc.*, 278 A.D.2d at 683. For the purpose of determining this motion to dismiss, the court must take the allegations in Batirest’s answer that Christofakis himself intentionally inflated the amount of the lien and subsequently verified and filed said lien despite his knowledge that the lien was exaggerated as true. Thus, despite Christofakis’ alleged disclaimer of personal liability, Batirest’s answer sufficiently states a claim for willful exaggeration of mechanic’s lien against Christofakis individually based on the “commission of a tort” doctrine.

Further, Christofakis’ attempt to distinguish *Greenway Plaza Off. Park-1* from the instant action on the ground that in *Greenway Plaza Off. Park-1* there were defects in the lien is without merit. Although the Second Department noted in *Greenway Plaza Off. Park-1* that the plaintiff claimed that the individual officer defendant improperly filed the lien, the basis for liability was clearly the alleged willful exaggeration

of the mechanic's lien, not any irregularities in the filing of the lien. See *Greenway Plaza Off. Park-1*, 4 A.D.3d at 329-30.

Christofakis' and MacFarland's argument that corporate officers may not be held personally liable for the willful exaggeration of a mechanic's lien because such personal liability is not provided for in Lien Law §§ 39 and 39-a, which sets forth the exclusive remedies for the willful exaggeration of a mechanic's liens, is also without merit. The Second Department has specifically held that corporate officers may be held personally liable for the willful exaggeration of a mechanic's lien based on the "commission of a tort" doctrine. See *Greenway Plaza Off. Park-1*, 4 A.D.3d at 329-30.

The portion of Emanuel's motion to dismiss Batirest's claim for willful exaggeration of mechanic's lien against him pursuant to CPLR § 3211(a)(1) based on the contract between Batirest and plaintiff is denied as said contract does not definitively dispose of Batirest's claim. Although Emanuel contends that the contract proves that plaintiff's lien was not willfully exaggerated as the amount of the lien is equivalent to the amount plaintiff was to be paid pursuant to the contract if it timely completed its work on the project, Batirest alleges that plaintiff did not perform under its contract with Batirest and thus knew it was not entitled to the sums set forth in the contract.

The court next considers the portions of the motions to dismiss Batirest's claims based on General Construction Law § 25-b against Emanuel, MacFarland and Christofakis. General Construction Law § 25-b provides that "[i]njury to property' is an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract." Batirest's claims based on General Construction Law § 25-b are solely based on the aforementioned officers' alleged filing of willfully exaggerated mechanic's liens. However, the remedies for the willful exaggeration of a mechanic's lien set forth in Lien Law §§ 39 and 39-a are exclusive. See *E-J Elec. Installation Co. v. Miller & Raved*, 51 A.D.2d 264, 266-67 (dismissing all of the defendant's counterclaims based on its allegation that plaintiff willfully exaggerated the mechanic's lien other than its counterclaim pursuant to Lien Law §§ 39 and 39-a). Thus, the court must dismiss Batirest's claims based on General Construction Law § 25-b against Emanuel, MacFarland and Christofakis. To the extent that Batirest has cited case law holding that the willful exaggeration of a

mechanic's lien constitutes an injury to property actionable pursuant to General Construction Law § 25-b, the court declines to follow this case law, which is not binding on the court. See *Neptune Estates, LLC v. Big Poll & Son Const., LLC*, 961 N.Y.S.2d 896, 903 (Sup Ct, Kings County 2013).

The court next considers the portion of IBC's motion to dismiss Batirest's cross-claims for unjust enrichment against it on the ground that this cross-claims is duplicative of Batirest's cross-claim for breach of contract. "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." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987). "However, a party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue." *Curtis Props. Corp. v. Greif Cos.*, 236 A.D.2d 237, 239 (1st Dept 1997).

In the present case, the court denies the portion of IBC's motion to dismiss Batirest's cross-claim for unjust enrichment against it on the ground that there is a bona fide dispute as to the existence of a written contract between Batirest and IBC. Batirest has provided the affidavit of John Landrum Bryant ("Bryant"), its managing member, stating that he is not aware of any written contract between Batirest and IBC.

IBC's argument that Bryant's statement in his affidavit that Batirest agreed with IBC's "revised cost estimate" on or about December 5, 2013 is an admission that there is a written contract covering the dispute at issue is without merit as Bryant stated immediately thereafter that "IBC never presented any written terms or proposed form of contract for review or execution." Further, IBC has not produced a copy of this "revised cost estimate" or provided any other evidence that this agreement was written or of the terms of this agreement.

However, the court grants the portion of Lithos' motion to dismiss Batirest's cross-claim for unjust enrichment against it on the ground that this claim is duplicative of its cross-claim for breach of contract, which Batirest does not oppose.

Based on the foregoing, the portions of the motions for Orders dismissing Batirest's claims based on General Construction Law § 25-b against Emanuel, MacFarland and Christofakis and the portion of the

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motion of Lithos and Christofakis for an Order dismissing Batirest's cross-claim for unjust enrichment against Lithos are granted but the motions are otherwise denied. This constitutes the decision and order of the court.

DATE: 4/13/17

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