Suffolk County Water Auth. v Hendrickson Bros., Inc.
2017 NY Slip Op 31882(U)
September 7, 2017
Supreme Court, Suffolk County
Docket Number: 17997/1988
Judge: James Hudson

Short Form Order

Supreme Court of the County of Suffolk
State of New York - Part XLVI

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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SUFFOLK COUNTY WATER AUTHORITY,

Plaintiff,

-against-

HENDRICKSON BROS., INC.,

Defendant.

x----------x

INDEX NO.:17997/1988

SEQ. NOS.:004-MD; CASEDISP
005-MD; CASEDISP

Carman Callahan & Ingham, LLP
Attorneys for Defendants
Town of Islip and
Suffolk County Water Authority
266 Main Street
Farmingdale, NY 11735

Devitt Spellman Barrett, LLP
Attorneys for Defendant
50 Route 111
Smithtown, NY 11787

Rivkin Radler, LLP
Attorneys for Hartford
926 RXR Plaza
Uniondale, NY 11556

Upon the following papers numbered 1 to 31read on this Motion/Order to Show Cause to Restore and Cross Motion to Intervene; Notice of Motion/ Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers 18-31; Answering Affidavits and supporting papers 15-17;~~Replying Affidavits and supporting papers 0; Other 0; (and after hearing counsel in support and opposed to the motion)~~, it is

ORDERED, that Plaintiff's motion to restore the action to the Court's calendar, and to substitute Hendrickson Bros, Inc./Davis Construction Corporation, a Joint Venture for the Defendant Hendrickson Bros., Inc is denied; and it is further

ORDERED, that the cross motion by Hartford Accident and Indemnity Co. to intervene is denied as academic.

In this breach of contract action, Plaintiff Suffolk County Water Authority commenced an action against Hendrickson Brothers, Inc. to recover damages for unworkmanlike performance of a sewer installation contract which was executed by Suffolk County, Defendant Hendrickson Brothers, Inc. and nonparty Davis Construction Corp., dated September 27, 1978. The record reveals that on March 5, 1999, the parties negotiated a global Settlement Agreement and Release ("the Settlement Agreement"), whereby, *inter alia*, this action would be discontinued with prejudice, as well as five additional actions which were commenced against Defendant.[1] The Settlement Agreement provided that payment of the damages in the total amount of $4,800,000.00 would be shared between CIGNA Insurance Company and Hartford Accident and Indemnity Company, and apportioned among the towns, Plaintiff, and the Bethpage Water District.

Paragraph 11 (c) of the Settlement Agreement provides, in part:

> The parties acknowledge two Suffolk County Southwest Sewer District joint venture sewer contracts in the Town of Islip, specifically contracts 4002-3 and 4004-5. Both these contracts were executed by Hendrickson Brothers and Davis Construction Corp. Hendrickson Brothers represents that the joint venture has been dissolved. Islip and Suffolk County Water Authority have equitably apportioned their alleged road and water main damages on a 50/50 basis between these two contractors. They will seek the balance of their damages against Davis only and, pursuant to Section 15-107 of the General Obligations Law of the State of New York, herewith fully release and discharge Hendrickson Brothers from any and all Underlying Claims arising out of the Sewer Construction Work under contracts 4002-3 and 4004-5 * * *.

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[1] The additional actions which were discontinued with prejudice pursuant to the Settlement Agreement and Release, dated March 5, 1999, are as follows:

Town of Hempstead v Hendrickson, Index No. 85/16673
Town of Hempstead v Hendrickson, Index No. 88/6886
Town of Babylon v Hendrickson, Index No. 87/24711
Town of Islip v Hendrickson, Index No. 88/17997
Bethpage Water District v Hendrickson, Index No. 96/21568

A stipulation of discontinuance was filed in the office of the Suffolk County Clerk on May 7, 1999.

Plaintiff now moves to restore the instant matter to the Court's active calendar and to substitute nonparty Hendrickson Brothers, Inc./Davis Construction Corporation, a Joint Venture, in the place and stead of Defendant Hendrickson Brothers, Inc. Nonparty Hartford Accident and Indemnity Co. ("Hartford") cross-moves to intervene in this action as of right pursuant to CPLR 1012 (a) (2), or, in the alternative, by permission in accordance with CPLR 1013, denying Plaintiff's motion to restore this action and substitute the Joint Venture for Defendant Hendrickson.

In support of the motion, Plaintiff submits, *inter alia*, copies of the underlying contracts, copies of insurance policies, the complaint, the Settlement Agreement and Release, and correspondence. Plaintiff's counsel relies upon ***Arroyo v Board of Education of City of New York*** (110 AD3d 17, 970 NYS2d 229 [2d Dept 2013]), which held that courts do not possess the power to dismiss an action for general delay where the Plaintiff has not been served with a 90 (ninety) day demand to serve and file a note of issue pursuant to CPLR 3216 (b). In that action the Plaintiffs, after beginning discovery, failed to appear at a status conference and the matter was marked off the calendar and later marked as disposed. More than 12 years later, Plaintiffs moved to restore the action to the active pre-note of issue calendar and set the matter down for a preliminary conference. The Court also found that laches was not a basis for dismissing the complaint. Plaintiff's counsel affirms that inasmuch as no note was filed and it was not served with a 90 (ninety) day demand, that it is entitled to restoration of the instant action. Counsel further affirms that inasmuch as Defendant was properly served with the summons and complaint, that notice was given to the joint venture.

In opposition, Defendant submits its attorney's affirmation and a copy of the stipulation discontinuing the instant action with prejudice on March 5, 1999. Defendant's attorney affirms that Plaintiff is not entitled to restore the instant action inasmuch as a motion cannot be made in a terminated action. Unlike in ***Arroyo***, *supra*, the action was not merely marked off the trial calendar, and the instant action cannot be characterized as "dormant." Rather, this motion must be addressed to a pending matter. Counsel relies upon ***Salvador v Town of Lake George Zoning Board***, 130 AD3d 1334, 14 NYS3d 233 (3d Dept 2015), wherein the Plaintiff sought to restore an action which was discontinued with prejudice by a stipulation of settlement. There, the Court denied the motion, holding that where a settlement agreement contains an express stipulation of discontinuance or actual entry of judgment in accordance with the terms of the settlement, commencement of a plenary action is necessary to enforce the settlement since the court does not retain the power to exercise supervisory control over previously terminated actions and proceedings.

Counsel further contends that this Court never obtained jurisdiction over the unnamed joint venture. Counsel states that during the pendency of the instant action, that it did not represent the joint venture. The joint venture was never a concern during the litigation, and discovery was never demanded in connection with the joint venture. In addition, Plaintiff cannot avoid the failure to commence a timely action against the joint venture by alleging that service on Defendant in the individual corporate action against it was sufficient to obtain jurisdiction over a different non-party, notwithstanding that Plaintiff discontinued the action against Defendant with prejudice on March 5, 1999. The action was not commenced against Hendrickson Bros., Inc. in its capacity as a member of a joint venture, the other member of the joint venture, Davis Construction Corporation, was not named in the action against Hendrickson Bros., Inc., and the complaint does not reference joint venture contracts. In addition, the Settlement Agreement provided that Islip and Suffolk County Water Authority will seek the balance of their damages against Davis only. In support of its contention that the Court has no jurisdiction over the joint venture, Defendant relies upon ***Weiner v Weiner*** (107 AD3d 976, 966 NYS2d 895 [2d Dept 2013]), where it was held that a court has no power to grant relief against an entity not named as a party and not properly summoned before the court. Defendant further contends that Plaintiff never commenced an action against the joint venture and the court never obtained jurisdiction over the joint venture, and the statute of limitations has long since expired. Defendant also argues that Plaintiff has failed to adduce any evidentiary proof to suggest that the joint venture is viable and capable of being sued in the discontinued action.

The key factor to a court's retention of supervisory power over an action and its ability to aid in enforcement of a stipulation was whether the action had actually terminated. (***Teitelbaum Holdings, Ltd. v Gold***, 11 NY3d 393, 870 NYS2d 835 [2008]). "A settlement agreement would terminate an action if it contained an express stipulation of discontinuance or if a judgment was actually entered in accordance with its terms" (***DiBella v Martz***, 58 AD3d 935, 936, 871 NYS2d 453 [3d Dept 2009]). Here, the parties entered into and filed a stipulation of discontinuance, which terminated the action (*see*, ***Lazare v Pfizer, Inc.***, 257 AD2d 498, 682 NYS2d 850 [1st Dept 1999]). In addition, the parties entered into a settlement agreement which provides that the Defendant was "fully, completely, and forever released and discharged, with prejudice." The Court finds that Plaintiff's reliance on ***Arroyo*** is misplaced. Unlike ***Arroyo***, the instant action was discontinued with prejudice by the parties, and is not considered to be dormant. Accordingly, as the instant action was terminated by the parties, the Plaintiff cannot seek relief by motion, but must instead bring a plenary action for enforcement of the terms of the Settlement Agreement (***Salvador v Town of Lake George Zoning Board***, *supra*).

It is well settled that "[a] joint venture ... is in a sense a partnership for a limited purpose, and it has long been recognized that the legal consequences of a joint venture are equivalent to

those of a partnership," and, as a result, it is proper to look to the Partnership Law to resolve disputes involving joint ventures (***Gramercy Equities Corp. v Dumont***, 72 NY2d 560, 565, 534 NYS2d 908 [1988]; ***Sagus Marine Corp. v Donald G. Rynne & Co.***, 207 AD2d 701, 702, 616 NYS2d 496 [1st Dept 1994]). Section 62 (2) of the Partnership Law provides that: "Dissolution is caused: ... 2. In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time." In addition, a partnership may be dissolved at any time by any partner (***De Martino v Pensavalle***, 56 AD2d 589, 391 NYS2d 461 [2d Dept 1977]).

The Settlement Agreement reveals that the parties acknowledged that the joint venture was dissolved at some time prior to executing the Agreement in March 1999. Accordingly, the six (6) year limitations period in which Plaintiff could have timely brought this claim for breach of contract (*see*, ***Sagus Marine Corp.***, 207 AD2d at 702) began to run in March 1999 when the joint venture ceased to exist, rendering the instant application to substitute the joint venture for Defendant Hendrickson Bros. Inc. untimely.

The Court notes that Plaintiff cited the following cases in addition to the above-cited cases in support of its motion, which the court considered and reviewed but found unnecessary to apply: ***Suffolk County Water Authority v J.D. Posillico, Inc.***, 191 AD2d 422, 593 NYS2d 998 (2d Dept 1993); ***Town of Babylon v Lizza***, 191 AD2d 425, 592 NYS2d 1001 (2d Dept 1993); ***Town of Oyster Bay v Lizza Industries***, 22 NY3d 1024, 981 NYS2d 643 (2013); ***First American Corporation v Price Waterhouse, LLP***, 154 F3d 16 (2d Cir. 1998); ***Connell v Hayden***, 83 AD2d 30, 443 NYS2d 383 (2d Dept 1981); ***Hayes v Apples & Bells, Inc.***, 213 AD2d 1000, 624 NYS2d 490 (4th Dept 1991); ***Brown v Sagamore Hotel***, 184 AD2d 47, 590 NYS2d 34 (3rd Dept 1992); ***Foy v 1120 Avenue of the Americas Associates***, 223 AD2d 232, 646 NYS2d 547 (2d Dept 1996); ***Green v Gross and Levine***, LLP, 101 AD3d 1079, 1080, 958 NYS2d 399 (2d Dept 2012); ***Arlen v Nanuet Inc. v Siegel***, 26 NY2d 346, 310 NYS2d 465 (1970); ***Yeager v Transvision, Inc.***, 277 AD 986, 99 NYS2d 858 (2d Dept 1950); ***Merrick v New York Subways Advertising Co.***, 14 Misc2d 456, 178 NYS2d 814 (NY Cty, 1958); ***Sugarman v Glasser***, 62 Misc. 2d 1037, 310 NYS2d 591 (NY Cty, 1970); ***Pedersen v Manitowoc Company***, 25 NY2d 412, 306 NYS2d 903 (1969); ***Zuckerman v Antonucci***, 124 Misc2d 971, 478 NY2d 578 (Qns Cty, 1984)***; Liberty Associates v Etkin***, 69 AD3d 681, 893 NYS2d 564 (2d Dept 20100; ***Fanelli v Adler***, 131 Ad2d 631, 516 NYS2d 716 (2d Dept 1987); ***Benvenuto v Taubman***, 690 F. Supp 149, 1988 U.S. Dist. LEXIS 6933 (EDNY 1988); ***NAB Asset Venture IV v Orangeburg Equities***, 299 AD2d 528, 751 NYS2d 41 (2d Dept 2002); ***Cahill v Regan***, 5 NY2d 292, 184 NYS2D 348 (1959); ***Plath v Justus***, 28 NY2d 16, 319 NYS2d 433 (1971); ***Morales v Solomon Management Co., LLC***, 38 AD3d 381, 832 NYS2d 195 (1st Dept 2007); ***Lexington Insurance Co. v Combustion Engineering Inc.***, 264 AD2d 319, 693

NYS2d 146 (1st Dept 1999), ***Kaminsky v Gamache***, 298 AD2d 361, 751 NYS2d 254 (2nd Dept 2002); ***Nau v Vulcan Rail and Const. Co.***, 286 NY 188, 1941 N.Y. LEXIS 1429 (1941); ***Dolitsky's Dry Cleaners Inc. v Y L Jericho Dry Cleaners, Inc.***, 203 AD2d 322, 610 NYS2d 302 (2nd Dept 1994); ***Hank Lemui Trust Co. of New York v Thoms***, 117 AD3d 555, 986 NYS2d 439 (1st Dept 2014); ***Nikolaus v Gasiorowski***, 72 AD2d 834, 421 NYS2d 71 (3rd Dept 1979); ***Weiss v Kanarek***, 136 Misc. 848, 241 NYS 345 (Kings Cty 1930); ***Park Avenue Bank v Cong and Yeshiva Ohel Yehoshea***, 907 NYS2d 571, 20 Misc, 3d 446 (Kings Cty 2010; and ***Buywise Holding, LLC v Harris***, 31 AD3d 681, 821 NYS2d 213 (2nd Dept 2006).

Accordingly, Plaintiff's motion to restore the action and to substitute the non-party joint venture in the place of Defendant is denied. The cross motion by Hartford is denied as academic.

The foregoing constitutes the decision and Order of the Court.

DATED: SEPTEMBER 7, 2017
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.

x Final Disposition _____ Non-Final Disposition