Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.
2017 NY Slip Op 32296(U)
October 27, 2017
Supreme Court, New York County
Docket Number: 155201/12
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63
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FERRO FABRICATORS, INC. d/b/a GREG'S IRON WORKS, INC.,

Plaintiff,

-against-

Index No. 155201/12

1807-1811 PARK AVENUE DEVELOPMENT CORP., COUNTRY BANK, ESF PROPERTY, INC., BUSHWICK METALS, LLC, TRI-STATE LUMBER, INC., TREMONT ELECTRIC CO INC, W.M. SANFARDINO ELECTRIC LTD., SERGI'S IMAGES, INC., CAPITAL ONE, N.A., and JOHN DOE #1 through #10 (said names being fictitious it being the intention to designate any and all occupants, tenants, persons or corporations, if any, having or claiming any interest in or upon the premises being foreclosed herein).

Defendants.

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ELLEN M. COIN, J.:

This action arises out of the construction of a warehouse (the Project) located at 101,103 and 105 East 123rd Street in Manhattan, Block 1772 and Lots 1, 2, and 3 (Premises), for which plaintiff Ferro Fabricators, Inc. d/b/a Greg's Iron Works, Inc. (Ferro) provided structural steel manufacturing and installation. Defendant 1807-1811 Park Avenue Development Corp. (Dev. Corp.) is the owner of the premises and defendant ESF Property, Inc. (ESF) (together, Owners) was formed to administer the Project. Ferro now moves, pursuant to CPLR 3212 (a), for summary judgment: (a) on its first cause of action, seeking to foreclose on a mechanic's lien as against Dev. Corp., and requesting the court to order a referee to award Ferro not less than

$461,707.97, plus interest, costs, disbursements, and attorney's fees; (b) on its second cause of action, alleging breach of contract, as against ESF; (c) on its third cause of action, for quantum meruit, as against ESF and Dev. Corp., (d) on its fourth cause of action, alleging unjust enrichment, as against ESF and Dev. Corp., and (e) on its fifth cause of action, pursuant to Lien Law § 45, for a determination that Ferro's lien is superior and shall be accorded first priority above all other liens, mortgages, and encumbrances of record. Dev. Corp. and ESF cross-move for summary judgment: (a) dismissing the complaint, as against them; and (b) as to liability, on their counterclaim for breach of contract. Defendant Capital One, N.A. (Capital One) cross-moves for summary judgment dismissing the complaint, as against it.

Citing *Brill v City of New York* (2 NY3d 648 [2004]), Ferro contends that the cross-motions are untimely, because they were served more than 120 days after the note of issue was filed. In *Brill*, the court held that an initial motion for summary judgment, brought more than 120 days after the filing of the note of issue, without good cause for the delay, was untimely. The same is not necessarily true of a cross-motion. Where a cross-motion raises the identical issue as the initial motion, as, for example, a cross-motion to dismiss a complaint, as to which the plaintiff has moved for summary judgment, it may be served more than 120 days after the filing of the note of issue, so long as it is filed in compliance with CPLR 2215. *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628-629 (1st Dept 2015); *Brill & Meisel v Brown,* 113 AD3d 435, 435 (1st Dept 2014); *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281-282 (1st Dept 2006). The rationale of these cases is that pursuant to CPLR 3212 (b), when a party has moved for summary judgment, a court may search the record and grant summary judgment to a party that has not cross-moved for such relief. *Filannino*, 34 AD3d at 281, citing *Dunham v*

Hilco Constr. Co., 89 NY2d 425, 429-430 (1996). Accordingly, the cross-motion of Capital One is timely, as it raises the identical issue as that branch of Ferro's motion that seeks judgment as to the priority of its lien. Additionally, those branches of the cross-motions of Dev. Corp. and ESF, which seek dismissal of the complaint, are also timely. So, too, are those branches of Dev. Corp.'s and ESF's cross-motions that seek summary judgment on their breach of contract counterclaim, which alleges that plaintiff is liable for certain losses that these defendants have suffered. That, and those parties' other counterclaims, raise at least some of the same issues as are raised by Ferro's claims.

On a motion for summary judgment the function of the court is to ascertain whether there are disputed issues, not to resolve them. *Sillman v Twentieth Century Fox Film Corp.,* 3 NY2d 395, 404 (1957); *Passos v MTA Bus Co.*, 129 AD3d 481, 483 (1st Dept 2015). Summary judgment should be denied where there is "a bona fide issue raised by evidentiary facts." *Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 (1978). Indeed, summary judgment must be denied where it is even "arguable" that there is a triable issue. *De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 404 (1st Dept 2017), quoting *Gibson v American Export Isbrandsten Lines*, 125 AD2d 65, 74 (1st Dept 1987).

The major dispute between Owners and Ferro is whether Ferro's work significantly delayed completion of the Project. *See e.g.* Sheats aff, ¶ 10. Gregory Dec, the principal of Ferro, states in his affidavit that he never received a work schedule, and that there was no such schedule. Gerard Flynn, a principal of Dev. Corp. and ESF, testified at his deposition that "[w]hen they [Ferro] signed the contract or before they signed, they were given a schedule and a timeline, and they didn't keep to that." Lin affirmation, exhibit Y at 317. On April 12, 2012,

ESF sent Ferro a 72-hour notice, stating, in part, "your entire scope [of work was to have been] substantially completed by April 15, 2012." *Id.* at 275. However, when Mr. Flynn was asked whether, prior to that letter, he was aware of any communication to Ferro, "indicating a specific timeline for any work to be done," he replied, "I don't really clearly recall. I remember some conversations." When asked whether any written schedule had been provided to Ferro, he replied, "I don't know." *Id.* at 275-276. In his May 22, 2017 affidavit, Mr. Flynn avers, "I was present during a meeting with Timothy O'Donnell, Gregory Dec and Eliot Sosinov [Ferro's project manager] where Timothy O'Donnell went over the schedule." G. Flynn aff, ¶ 8. Mr. O'Donnell states in his affidavit:

> "I understand . . . that Ferro claims that it never had a schedule for its work. This is not truthful. I worked almost full time in a project office trailer at the jobsite. Above my desk hung an enlarged version of a project schedule [exhibit AA]. I met with Elliot Sosinov and Gregory Dec, [and] looked at and discussed this schedule whenever I could see them on site. I do not have any personal knowledge of whether the schedule was mailed to them, but when I spoke with them and we looked at the schedule, their behavior was such that I concluded that they were familiar with the document and could converse about the timeframes involved for their work."

O'Donnell aff, ¶ 30. It is at least arguable that the affidavits of Messrs. Flynn and O'Donnell suffice to raise a triable issue as to whether Ferro had, and failed to comply with, a schedule for its work.

Owners argue that dismissal of the complaint is also warranted because Ferro willfully exaggerated the amount that it is owed. *See Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, 394 (1st Dept 2006) (contractor that wilfully exaggerates lien not entitled to any recovery). Here, too, factual disputes bar a grant of summary judgment. For example, Gregory Dec avers that Jennifer Flynn was not present at a discussion of two change orders, that,

he claims, were approved. Ms. Flynn avers that she was present at that discussion. and that one of those change orders was in fact not approved. J. Flynn aff (5/22/17), ¶¶ 2 and 3. Mr. Dec avers that Mr. O'Donnell approved one or more change orders. G. Flynn avers that Mr. O'Donnell did not authorize any change orders, but merely confirmed the presence of Ferro's workers. In sum, Ferro's motion for summary judgment as against Owners is denied, as is Owners' cross-motion for summary judgment, except with respect to Ferro's third and fourth causes of action.

Ferro's claims for quantum meruit and unjust enrichment (its third and fourth causes of action) are dismissed, because both of those claims are quasi-contractual claims, which are unavailable where, as here, a written contract governs the same matters. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987); *Douglas Elliman, LLC v East Coast Realtors, Inc.*, 149 AD3d 544, 544 (1st Dept 2017).

It is undisputed that Ferro filed its mechanic's lien and notice of pendency prior to Capital One's recording of its mortgage on October 22, 2013. It also is undisputed that defendant Country Bank did not file its prior mortgage on the same property in compliance with Lien Law § 22, which governs the recording of building loans and provides that if a building loan is not properly recorded, a subsequently filed mechanic's lien takes priority over it. *See Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, 21 NY3d 352, 362 (2013). Capital One, which stands in the shoes of Country Bank, argues that the Country Bank loan was not a building loan within the meaning of Lien Law § 2 (13). Therefore, Capital One claims, Country Bank's mortgage had priority over Ferro's subsequently filed lien, although it was not recorded pursuant to Lien Law § 22.

Lien Law § 2 (13) provides, in relevant part:

> "The term 'building loan contract,' when used in this chapter means a contract whereby a party thereto, in this chapter termed 'lender,' in consideration of the express promise of an owner to make an improvement upon real property, agrees to make advances to or for the account of such owner to be secured by a mortgage on such real property...."

Dev. Corp. acquired the Premises from the New York City Economic Development Corporation (NYCECD) by deed dated May 5, 1999. The deed provides, among other terms, that within six months Dev. Corp. would commence construction of a building with at least 18,708 square feet of floor area, and complete such construction within three years. Lin Affirmation, exhibit B at 1. On June 10, 2008, Dev. Corp. and NYCECD entered into a "Modification of Covenants and Restrictions," which granted Dev. Corp. an additional two years to complete construction. Lin Affirmation, exhibit C at 2. Simultaneously therewith, Dev. Corp. entered into a "Building Loan Note" and a "Building Loan First Mortgage" with nonparty Banco Popular North America (Banco Popular). Silvestro Affirmation, exhibit C. On July 12, 2011, Banco Popular assigned its mortgage on the Premises to Country Bank. Lin Affirmation, exhibit F. It appears that the Banco Popular notes were not fully funded, and Dev. Corp. failed to commence construction within the time set forth in the June 2008 Modification. On July 13, 2011, Dev. Corp. and two affiliated corporations entered into a "Consolidated, Amended and Restated Mortgage Note" (Note) and a "Consolidated, Amended and Restated Mortgage, Assignment Of Leases and Rents, Spreader and Security Agreement" (Consolidated Assignment) with Country Bank. Silvestro Affirmation, exhibits E, F. The dispositive issue, as between Ferro and Capital One, is whether the July 13, 2011 transactions constitute a building loan.

The Consolidated Assignment provides:

> "WHEREAS Mortgagor has requested that Mortgagee make a loan to Mortgagor
>
> . . .
>
> NOW THEREFORE, in consideration of the making of the Loan . . . Mortgagor . . . shall fully and timely comply with all terms and conditions of the NYCEDC Covenants and Restrictions," ... [defined as] "the Indenture dated as of May 5, 1999 . . . as amended by (I) the Modification of Covenants and Restrictions dated as of June 10, 2008 . . . and (ii) Second Modification of Covenants and Restrictions dated on or about July 5, 2011 and intended to be recorded in the office of the City Register, New York County."

Silvestro affirmation, exhibit F at 1, 11. The NYCECD "Covenants and Restrictions" obligate Dev. Corp. to construct the required building on the Premises. Accordingly, the Consolidated Assignment is a building loan, inasmuch as it contains an "express promise of an owner to make an improvement upon real property," in consideration of which Country Bank made "advances to or for the account of [Dev. Corp. and its two affiliates, which were] to be secured by a mortgage on such real property...." Lien Law § 2 (13).

As stated above, it is undisputed that Country Bank did not file its mortgage in compliance with Lien Law § 22. Consequently, Ferro's mechanic's lien has priority over Capital One's subsequently filed mortgage.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Ferro Fabricators, Inc. d/b/a Greg's Iron Works, Inc., for summary judgment is granted to the extent that on the Fifth Cause of Action the court determines that the lien of Ferro Fabricators, Inc. has priority over all other liens, mortgages, and encumbrances of record, and the motion is otherwise denied; and it is further

ORDERED that the summary judgment cross-motions of defendants 1807-1811 Park Avenue Development Corp. and ESF Property, Inc. are granted to the extent that the Third and

Fourth Causes of Action in the complaint are dismissed, and the cross-motions are otherwise denied; and it is further

ORDERED that the motion for summary judgment of defendant Capital One, N.A. is denied.

Dated: October 27, 2017

ENTER:

Ellen M. Coin A.J.S.C.

HON. ELLEN M. COIN