

Agolli v PS Contr. of NJ Inc.

2017 NY Slip Op 32495(U)

November 14, 2017

Supreme Court, New York County

Docket Number: 160843/2015

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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BLENDI AGOLLI and PERCY BONILLA,
individually and on behalf of all other
persons similarly situated who were
employed by PS CONTRACTING OF NJ INC.,
ZORIA HOUSING, LLC, and/or TECHNICO
CONSTRUCTION SERVICES INC. and/or any
other entities affiliated with or
controlled by PS CONTRACTING OF NJ
INC., ZORIA HOUSING, LLC, and/or
TECHNICO CONSTRUCTION SERVICES INC.,

Index No. 160843/2015

Plaintiffs

- against -

DECISION AND ORDER

PS CONTRACTING OF NJ INC., ZORIA
HOUSING, LLC, TECHNICO CONSTRUCTION
SERVICES INC., US SPECIALTY INSURANCE
CO., and JOHN DOE BONDING COMPANY,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiffs bring this class action for breach of contract on behalf of themselves and all other similarly situated persons who furnished labor to defendants PS Contracting of NJ Inc., Zoria Housing, LLC, and Technico Construction Services Inc. Plaintiffs claim these defendants breached their public work contracts with the New York City Housing Authority (NYCHA) when defendants failed to pay plaintiffs prevailing wage rates, supplemental benefits, and overtime wages as required by the New York Labor Law. Defendants PS Contracting, Zoria Housing, and US Specialty Insurance Co. move to dismiss the complaint based on its failure to state a claim and based on documentary evidence. C.P.L.R. §

3211(a)(1) and (7).

I. PLAINTIFFS' CLAIMS

Plaintiffs allege that Zoria Housing and Technico Construction Services entered contracts with NYCHA around 2009 to manage and perform construction projects at various real property sites owned by NYCHA. The two named plaintiffs performed construction work for PS Contracting, a subcontractor for Zoria Housing and Technico Construction Services on these public work projects. The alleged class includes workers for any one of these three defendants. Plaintiffs claim that Labor Law § 220 required Zoria Housing and Technico Construction Services, themselves or through their subcontractor PS Contracting, to pay laborers working on these projects "not less than the prevailing rate of wages," N.Y. Labor Law § 220(3)(a), supplemental benefits, N.Y. Labor Law § 220(3)(a), and prevailing "premium wages" for "overtime work." N.Y. Labor Law § 220(2). Each contract for the projects included a schedule of prevailing wage and benefit rates. Plaintiffs also claim that US Specialty Insurance issued a payment bond to Zoria Housing and that defendant "John Doe Bonding Company" issued a payment bond to Technico Construction Services for these projects, thus assuming joint and several liability to pay plaintiffs any wages owed.

II. DISMISSAL UNDER C.P.L.R. § 3211(a)(7)

When evaluating defendants' motion to dismiss the complaint under C.P.L.R. § 3211(a)(7), the court must accept plaintiffs' allegations as true, liberally construe them, and draw all

reasonable inferences in plaintiffs' favor. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d 815, 816 (1st Dep't 2015). Dismissal is warranted only if the complaint fails to allege facts that fit within any cognizable legal theory. ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 227; Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Mill Financial, LLC v. Gillett, 122 A.D.3d 98, 103 (1st Dep't 2014).

Defendants maintain that the complaint lacks the specificity required to state a claim for breach of contract. The complaint identifies the parties and projects covered by the contracts under which plaintiffs claim. The complaint alleges that those contracts obligated defendants to pay plaintiffs prevailing wages and benefits according to Labor Law § 220 as third party beneficiaries of those contractual obligations, which defendants violated by failing to pay plaintiffs the required wages and benefits. Dabrowski v. ABAX Inc., 64 A.D.3d 426, 427 (1st Dep't 2009); Stennett v. Moveway Transfer & Stor., Inc., 97 A.D.3d 655, 657 (2d Dep't 2012); Maldonado v. Olympia Mech. Piping & Heating Corp., 8 A.D.3d 348, 350 (2d Dep't 2004). At this pleading stage, before any disclosure, plaintiffs need not specifically identify the contracts under which plaintiffs claim, as long as

they have identified the construction projects that the contracts cover and specified that the complaint refers to the contracts requiring defendants to pay plaintiffs prevailing wages according to Labor Law § 220. Tokhtaman v. Human Care, LLC, 149 A.D.3d 476, 478 (1st Dep't 2017). Defendants do not articulate what further specificity is required. Since plaintiffs adequately plead their claims for breach of contract, the court denies defendants' motion under C.P.L.R. § 3211(a)(7).

III. DISMISSAL UNDER C.P.L.R. § 3211(a)(1)

The contract by Zoria Housing and Technico Construction Services with NYCHA for the "Kingsborough Houses and Kingsborough Extension" project, which the parties agree is representative of all the contracts between these two defendants and NYCHA on which plaintiffs rely, provides in Section 43:

SECTION 43 - PREVAILING WAGE RATES

(a) The Contractor shall pay to all laborers and mechanics employed in the Work not less than the wages prevailing in the locality of the Project, as predetermined by the Secretary of Labor of the United States pursuant to federal wage rate requirements set forth at 40 U.S.C. 3141 et seq. (formerly known as the Davis-Bacon Act) and other related laws and regulations.

Aff. of Lakhi Zoria Ex. B, at 24. The contract further provides in Section 49:

SECTION 49 - LABOR STANDARDS PROVISIONS - APPLICABLE TO FEDERALLY FUNDED CONTRACTS

The following Labor Standards Provisions, found in Section 5.5(a) of Title 29 of the Code of Federal Regulations ("CFR"), are applicable to federally-funded contracts and shall be deemed to supplement and not supersede any other provisions in this Contract:

(9) DISPUTES CONCERNING LABOR STANDARDS

Disputes arising out of the labor standards provisions of this Contract shall not be subject to the general disputes clause of this Contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 C.F.R. parts 5, 6, 7. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the Authority, the U.S. Department of Labor, or the employees or their representatives.

Id. at 30, 33. Defendants maintain that Section 49 of the contract requires plaintiffs to resolve their dispute over prevailing wage rates, supplemental benefits, and overtime wages under the procedures set forth in 29 C.F.R. Parts 5-7. The contract's terms, however, do not support defendants' interpretation.

Section 49 is entitled "LABOR STANDARDS PROVISIONS" and refers to its subsections, which include subsection 9, as "Labor Standards Provisions." Zoria Aff. Ex. B, at 30. Neither subsection 9 nor any of Section 49's other subsections refers to prevailing wage rates, supplemental benefits, or overtime.

Section 43, on the other hand, which is entitled "PREVAILING WAGE RATES" and refers to prevailing wages, wage rate requirements, and supplemental benefits, neither is referred to as a "Labor Standards Provision" nor refers to any such provision. Id. at 24. Thus the contract's plain terms do not require plaintiffs to resolve their breach of contract dispute over the prevailing wage rates, supplemental benefits, and overtime promised in Section 43 according to the procedures in 29 C.F.R. Parts 5-7.

Even if plaintiffs' dispute is considered to be over labor standards to which Section 49(9) applies, plaintiffs still may maintain their claims in this action, because the federal regulations' enforcement provisions in Title 29, 29 C.F.R. § 5.6, authorize only federal governmental agencies to initiate administrative enforcement proceedings. Section 5.6 does not afford workers any right to initiate or participate in enforcement proceedings. Cox v. NAP Constr. Co., Inc., 10 N.Y.3d 592, 606 (2008). Section 5.11, which specifically pertains to the resolution of disputes over payment of prevailing and overtime wages, excludes workers from initiating those procedures. They only "may be initiated upon the [United States Department of Labor Wage and Hour Division] Administrator's own motion, upon referral of the dispute by a Federal Agency . . . , or upon request of the contractor or subcontractor." 29 C.F.R. § 5.11(a).

The only administrative procedures in 29 C.F.R. Parts 5-7 available to workers are to challenge the prevailing wage and benefit rates to be paid on a particular public work project. 29 C.F.R. §§ 7.2(b), 7.5. Plaintiffs do not challenge the prevailing wage and benefit rate schedules in the public work project contracts. Plaintiffs challenge defendants' nonpayment of those very wage and benefit rates.

Consequently, 29 C.F.R. Parts 5-7 do not provide any administrative remedies for plaintiffs to invoke or exhaust that address their claims in this action. Because plaintiffs' dispute

over prevailing wage rates, supplemental benefits, and overtime wages is not a dispute over labor standards under defendants' contract and, even if the dispute were over labor standards, it is not a dispute that plaintiffs may resolve pursuant to 29 C.F.R. Parts 5-7, the court denies defendants' motion under C.P.L.R. § 3211(a)(1).

IV. CONCLUSION

For all the reasons explained above, the court denies the motion by defendants PS Contracting of NJ Inc., Zoria Housing, LLC, and US Specialty Insurance Co. to dismiss the complaint. C.P.L.R. § 3211(a)(1) and (7). Those defendants shall serve and file an answer to the complaint within 10 days after service of this order with notice of entry unless plaintiffs agree to a longer period. C.P.L.R. § 3211(f).

DATED: November 14, 2017.



LUCY BILLINGS, J.S.C.

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