

**Michael Anthony Contr. Corp. v Queens N.Y. Realty
LLC**

2017 NY Slip Op 33571(U)

February 10, 2017

Supreme Court, Nassau County

Docket Number: Index No. 604986-14

Judge: Jerome C. Murphy

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publication.

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

MICHAEL ANTHONY CONTRACTING CORP.,

Plaintiff,

- against -

**QUEENS N.Y. REALTY LLC, MIDRE CONTRACTING
CORP., ACTION STORE FRONTS INC., ROMAN IRON
WORKS INC., MAX HOROWITZ & SON INC.,
PRIME LIGHT ELECTRICAL CONSTRUCTION
MAINTENANCE INC., and SURETEC INSURANCE
COMPANY,**

Defendants

- and -

MICHAEL PERNA,

**Additional Defendants on Counterclaims pursuant to
CPLR 3019(d).**

TRIAL/IAS PART 18

Index No.: 604986-14

Motion Date: 11/29/16

Sequence Nos.: 002, 003

MG, MG

DECISION AND ORDER

QUEENS N.Y. REALTY LLC, on behalf of itself and as subrogee of all other persons similarly situated as trust fund beneficiaries of Lien Law Trusts of third-party defendant Michael Anthony Contracting Corp.,

Third-Party Plaintiff,

- against -

MICHAEL ANTHONY CONTRACTING CORP.,
MICHAEL PERNA, HYMAN HAYES ASSOCIATES,
LLC, MYLES HYMAN, TYNDALL INDUSTRIES,
LLC, DENNIS SERNA, M/E ENGINEERING, P.C.,
F. JOSEPH STRAUB, P.E., HIG SERVICES, INC.,
LONG ISLAND CONCRETE INC., HART ROOFING
& WATERPROOFING, INC., MONTEC INDUSTRIES,
INC., and JOHN DOES #1-10, inclusive, as those persons
and entities having an interest in the trust funds received,
or to be received by Michael Anthony Contracting Corp.,
for the improvement of the property located at 105-12
101st Avenue, Queens County, New York (a/k/a Block
9423, Lot 6 on the Land and Tax Map of Queens County,
New York),

Third-Party Defendants.

The following papers were read on this motion:

Sequence No. 002:

Notice of Motion, Corrected Notice of Motion, Affirmation and Exhibits..... 1

Sequence No. 003:

Notice of Motion, Affidavit of Claire Murphy and Exhibits..... 2

Memorandum of Law..... 3

PRELIMINARY STATEMENT

In Sequence No. 002, third-party defendants, Tyndall Industries, LLC and Dennis Serna, bring this application for an order: (1) dismissing the second amended third-party complaint and

dismissing the cross-claims against third-party defendants, Tyndall Industries, LLC and Dennis Serna pursuant to CPLR § 3211(a)(1), (3) and (a)(7) and Business Corporation Law § 1312; (2) in the event that the Court does not grant third-party defendants, Tyndall Industries, LLC and Dennis Serna's application, said third-party defendants request for an extension of time to serve answer to the second amended third-party complaint and a reply to the cross-claims; and (3) the granting of such other relief as this Court finds just and equitable. No opposition to this application has been submitted by any other parties.

In Sequence No. 003, third-party defendant, Montec Industries, Inc., brings this application for an order: (1) pursuant to CPLR § 3211(a)(7), dismissing the present third-party complaint against Montec Industries, Inc. for failure of the third-party plaintiff to obtain leave of court or a stipulation of all parties who had appeared prior to amending the original third-party complaint (and adding Montec as a third-party defendant); or, in the alternative; (2) pursuant to CPLR § 3211(a)(7), dismissing the present third-party complaint because impleader is not available under CPLR § 100 in respect of the causes of action against Montec Industries, Inc., or in the alternative; (3) pursuant to CPLR § 3211(8), dismissing the present third-party complaint against Montec Industries, Inc. on the basis of defective service; and (4) granting such other and further relief as to this Court may deem just and proper. No opposition to this application has been submitted by any other parties.

BACKGROUND

Michael Anthony Contracting Corp. ("Michael Anthony") commenced this action to recover from Queens N.Y. Realty LLC ("Queens N.Y.") unpaid billings in connection with the construction of Mason Eye Surgery Center, 105-12 101st Avenue, Queens, New York. The other defendants are holders of liens filed against the premises in connection with the construction project.

Queens N.Y. has now filed a Second Amended Third-Party Complaint against multiple third-party defendants, including Tyndall Industries, LLC ("Tyndall"); Dennis Serna, and Montec Industries, Inc. Tyndall and its principal, Serna, move to dismiss the Complaint on the ground that they never entered into a contract with Queens N.Y. Rather, they annex as Exhs. "5" and "6" copies of Owner's Representative Agreements, dated October 22, 2013 and December 19, 2013,

between Dr. Benjamin Mason and Tyndall Industries, Inc. Third-party plaintiff has not opposed this motion, and has not produced any evidence of an agreement between Queens N.Y. and Tyndall, much less with the principal of Tyndall, individually.

Third-party defendant Montec Industries, Inc. ("Montec") moves in Motion Sequence No. 3 to dismiss the third-party complaint on the ground that third-party plaintiff has not obtained leave of court, or a stipulation of all appearing parties, before amending the original third-party complaint, and adding Montec as an additional third-party defendant. Alternatively, movant seeks dismissal pursuant to CPLR §3211(a)(7), because impleader is not available under CPLR § 1007 with respect to the causes of action asserted against it; or dismissing the third-party complaint pursuant to CPLR § 3211(8) based upon defective service.

Montec submits an affidavit of Claire Murphy, the office manager. She asserts that on March 3, 2016, the Amended Third-Party Summons and Complaint were delivered to Paula O'Dowd, who works in the same building as Montec, but for a different company. On August 25, 2016, the Second Amended Third-Party Summons and Complaint, with Notice of Commencement of Action Subject to Mandatory Electronic Filing, along with the original Summons and Complaint, Verified Answer with Counterclaims, and additional documents were delivered to Cassie Wilkins, an office assistant employed by Montec.

Montec argues that the service of the Amended Third-Party Complaint was not made with leave of court, or within 20 days of service of the original, in accordance with CPLR §§ 1003 and 3025(a) requires dismissal of the claim against the new third-party defendant Montec.

DISCUSSION

Motion Sequence No. 2, in which third-party defendants Tyndall and Serna seek dismissal of the Second Amended Third-Party Complaint against them, is granted. They have established by documentary evidence that the contracts which they entered into with respect to the projects were not with third-party plaintiff, but with Dr. Benjamin Mason, who is not a party to the action.

Parenthetically, the assertion by these defendants that there is no record of Queens N.Y. Realty LLC in the Division of Corporations of the New York State Department of State, is incorrect. An entity search for "Queens N.Y. Realty LLC" (without a comma before LLC),

reflects an active entity with a filing date of September 22, 2011.

Motion Sequence No. 3 on behalf of Montec is also granted. Third-party plaintiff failed to make valid service upon Montec Industries, Inc. when they served an individual with no relationship to the company, who happened to work for another company in the same building. The Second Amended Summons and Complaint, served more than 5 months after the putative original service, added Montec as an additional party, and was not served with leave of court or a stipulation of all previously served parties.

In addition, service upon a corporation is governed by CPLR § 311, which provides for service upon an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. The uncontradicted affidavit of Ms. Murphy states that the individual who was served was an office assistant, and not a party authorized to accept service on behalf of the corporation.

To the extent that requested relief has not been granted, it is specifically denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
February 10, 2017

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

FEB 16 2017

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**