

Etkin v Katselnik & Katselnik Group, Inc.

2018 NY Slip Op 30052(U)

January 9, 2018

Supreme Court, New York County

Docket Number: 654961/2016

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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WILLIAM ETKIN,

Plaintiff,

Index No. 654961/2016

-against-

DECISION AND ORDER

KATSELSNIK & KATSELSNIK GROUP, INC.,

Motion Seq. 001

Defendant.

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KATSELSNIK & KATSELSNIK GROUP, INC.,

Third-Party Plaintiff,

-against-

RD POWER TECH ELECTRIC CORP.,
TRISTATE PAINTING & WALL TREATMENT, LLC,
TOP DRAWER CUSTOM CABINETRY,
GOLDEN WOOD FLOORS, BERKSHIRE CARPET,
LTD., and NICE FLOORS CORP.,

Third-Party Defendants.

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TRISTATE PAINTING & WALL TREATMENT, LLC,

Fourth-Party Plaintiff,

-against-

KATSELSNIK & KATSELSNIK GROUP, INC.,
LEON KATSELSNIK, ARKADI KATSELSNIK, and
DAWN QUEALLY,

Fourth-Party Defendants.

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Arthur F. Engoron, Justice

In compliance with CPLR 2219 (a), this Court states that the following papers, numbered 1 to 5, were used on defendant Katselnik & Katselnik's motion, pursuant to CPLR 3211(a)(1), CPLR 3211(a)(7), CPLR 3016(b), NY Lien Law § 77 and 22 NYCRR § 130-1.1(a) and (c) to dismiss counterclaims and the amended fourth-party complaint by Tristate Painting & Wall Treatment and to impose sanctions against Tristate and its counsel of record:

Papers Numbered:

Notice of Motion.....	1
Affirmation in Support of Motion – Exhibits (Memorandum of Law).....	2
Affirmation in Opposition.....	3
Reply Affirmation in Further Support of Motion	4

Upon the foregoing papers, third-party plaintiff / fourth-party defendant Katselnik & Katselnik, Inc.'s motion is granted in part and denied in part.

Background

On September 20, 2016, Mr. William Etkin ("Etkin"), the owner of residential property at 500 West 21st Street, Unit 7A, New York, NY, commenced this action against general contractor Katselnik & Katselnik, Inc. ("K&K") for breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief arising out of certain defective or otherwise deficient construction that was purportedly furnished by K&K and several of its trade subcontractors at Etkin's residence. Etkin contends that K&K repeatedly breached its contract with Etkin by, among other things, failing to adequately complete work, failing to obtain written approval of change orders as required by the parties' agreement, and failing to pay subcontractors, resulting in the filing of a mechanics' lien against the premises.

In response to Etkin's claims, K&K interposed counterclaims (breach of contract, breach of implied covenant of good faith and fair dealing, tortious interference with contract, and declaratory relief) arising out of Etkin's entrance into separate agreements with one or more of K&K's subcontractors without K&K's consent, as well as Etkin's non-payment of certain monies allegedly owed to K&K for work completed on the project. K&K also joined several third-party defendants, including Tristate Painting and Wall Treatment, Inc. ("Tristate"), seeking, among other things, contractual indemnification in the event that any portion of Etkin's claim of defective or deficient work is upheld with respect to the performance of one or more of K&K's subcontractors.

In addition, K&K filed a third-party complaint against Tristate and five other trade subcontractors associated with the project (RD Power Tech Electric Corp., Top Drawer Custom Cabinetry, Golden Wood Floors, Berkshire Carpet, Ltd., and Nice Floors Corp.) for breach of contract, breach of implied covenant of good faith and fair dealing, tortious interference with contract, and contractual indemnification.

In response to K&K's third-party complaint, Tristate interposed an answer thereto, and, after improperly filing a third-party complaint, filed an amended fourth-party complaint by way of stipulation against K&K, Leon Katselnik, Arkadi Katselnik, and Dawn Queally (together, "the K&K Parties.") Within its pleadings, Tristate asserts counterclaims and fourth-party claims against the K&K Parties for breach of contract, fraud, unjust enrichment, and breach of constructive trust pursuant to NY Lien Law § 3A, arising out of Etkin's project as well as three other construction projects for which Tristate performed work as a subcontractor of K&K:

1. 201 West 17th Street, New York, NY ("VESTA")
2. 819 Madison Avenue, New York, NY ("ISAIA")
3. 119 West 24th Street, New York, NY ("ALLEY")

The ISAIA and ALLEY projects are the subjects of Final Lien Waiver and Release instruments executed by Tristate in favor of K&K on December 7, 2015 and March 14, 2016, respectively.

Instant Motion

By Notice of Motion dated April 17, 2017, K&K now moves, pursuant to CPLR 3211 (a)(1), CPLR 3211 (a)(7), CPLR 3016 (b), NY Lien Law § 77, and 22 NYCRR § 130-1.1(a) and (c), to dismiss third-party defendant / fourth-party plaintiff Tristate's counterclaims and amended fourth-party complaint and to impose sanctions against Tristate and its counsel of record, Solomos & Storms, for refusing to discontinue allegedly patently frivolous causes of action against K&K.

Discussion

Tristate's counterclaims, which are the subject of K&K's motion to dismiss, are as follows:

1. Breach of contract (against K&K) arising out of the Etkin project (500 West 21st Street)
2. Breach of contract (against K&K) arising out of the VESTA project (201 West 17th Street)
3. Breach of contract & fraud (against K&K and Leon Katselnik) arising out the ISAIA project (819 Madison Avenue)
4. Breach of contract & fraud (against K&K and Arkadi Katselnik) arising out of the ALLEY project (119 West 24th Street)

5. Breach of constructive trust (against K&K, Leon Katselnik, Arkadi Katselnik, and Dawn Queally) arising out of the Etkin, VESTA, ISAIA, and ALLEY projects, pursuant to NY Lien Law § 3A.
6. Unjust enrichment (against K&K, Leon Katselnik and Arkadi Katselnik) arising out of Etkin, VESTA, ISAIA, and ALLEY projects.

The causes of action in Tristate's amended fourth-party complaint, that are also the subject of K&K's motion to dismiss, are as follows:

1. Breach of contract & fraud (against Leon Katselnik) arising out the ISAIA project (819 Madison Avenue)
2. Breach of contract & fraud (against Arkadi Katselnik) arising out the ALLEY project (119 West 24th Street)
3. Breach of constructive trust (against Leon Katselnik, Arkadi Katselnik, and Dawn Queally) arising out of Etkin, VESTA, ISAIA, and ALLEY projects, pursuant to NY Lien Law § 3A
4. Unjust enrichment (against Leon Katselnik and Arkadi Katselnik) arising out of Etkin, VESTA, ISAIA, and ALLEY projects.

I. K&K's request to dismiss Tristate's Third and Fourth Counterclaims for breach of contract and fraud arising out of the ISAIA and ALLEY projects, pursuant to CPLR 3211 (a)(1) is granted.

Dismissal of a complaint pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. See Leon v Martinez, 84 NY2d 83, 88 (1994); See Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept. 2013). ("Dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"). The documentary evidence must be unambiguous, authentic, and undeniable. See Fountanetta v Doe, 73AD3d 78 (2nd Dept 2010). ("To succeed on a [CPLR 3211(a)(1)] motion... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim.")

In the case at hand, K&K cites Tristate's Final Lien Waiver and Release instruments as documentary evidence and contends that all of Tristate's counterclaims and Fourth-Party Claims with respect to the ISAIA and ALLEY construction projects should be dismissed as a matter of law. The instruments executed by Tristate unambiguously release "any and all" claims against K&K and the project owners in connection with Tristate's subcontracts/purchase orders for the projects referenced in the Final Lien Waiver and Release instruments:

The undersigned Subcontractor [Tristate] is to receive a final payment of \$44,985.00 from the Owner on account of the Subcontractor...In consideration of the same, the Subcontractor does hereby waive, to the full extent of this payment and all prior payments received hereby, all right of stop notice and liens, including a mechanic's lien under the Lien Law of the State of New York, with respect to or against the Premises and the improvements thereon. In further consideration of such final payment, the Subcontractor releases any and all claims against the Owner and General Contractor with respect to all labor, materials, equipment and other services which Subcontractor or any of its sub-subcontractors, suppliers, vendors, agents, employees or other representatives have furnished in connection with the above described subcontract/purchase order as of the date of Subcontractor's execution of this FINAL LIEN WAIVER AND RELEASE.

Tristate contends that the cited Lien Waivers are unenforceable because they were entered into prior to payment and procured fraudulently by K&K. Lien Law § 34 states that lien waivers entered into prior to payment "shall be void as against public policy and wholly unenforceable." The language of the ISAIA project waiver makes clear that it was not executed prior to payment: both the waiver and the corresponding payment are dated November 7, 2015. The language of the ALLEY project waiver makes clear that it too was not executed prior to payment: the waiver is dated March 14, 2016 and the check is dated February 24, 2016. The court has considered Tristate's arguments that the lien waivers were procured by fraud and finds them to be unavailing.

Thus, as the documentary evidence conclusively establishes as a matter of law a defense to the asserted claims, K&K's request to dismiss Tristate's third and fourth counterclaims for breach of contract and fraud arising out of the ISAIA and ALLEY projects is hereby granted.

II. K&K's request, pursuant to Lien Law § 77, to dismiss Tristate's Fifth Counterclaim, for breach of constructive trust, is denied.

Tristate contends that K&K has failed and refused to pay Tristate the full amount due for the jobs for which it was subcontracted. The payments that K&K did receive for the jobs on Mr. Etkin's properties qualify as trust funds, pursuant to Lien Law § 3, which "creates 'trust funds out of certain construction payments or funds to assure payments of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction.'" Aspro Mech. Contr. v Fleet Bank, 1 NY3d324, 328 (2004), quoting Caristo Constr. Corp. v Diners Fin. Corp., 21 NY2d 507, 512 (1968).

K&K contends that Tristate's constructive trust claim is procedurally defective, pursuant to Lien Law § 77, but fails to satisfy its burden to prove that claim. Although the portion of Lien Law § 77 cited by K&K states that the "practice, pleadings, forms and procedure" in an action to enforce a trust "shall conform as nearly as may be to the practice, pleadings, forms and procedure in a class action," Tristate correctly points out constructive trust claims need not be brought under a class action. See ADCO Elec. Corp. v McMahan, 38 AD3d 805, 807 (2nd Dept. 2007).

K&K's additional request to dismiss fraud claims pursuant to CPLR 3211(a)(7) are also denied. Tristate alleges in detail that K&K fraudulently diverted a portion of the aforementioned trust fund for non-trust purposes rather than for the payment of Tristate and does not fail to state a cause of action.

III. K&K's request to dismiss Tristate's Sixth Counterclaim, for unjust enrichment, pursuant to CPLR 3211 (a)(7), is denied.

Dismissal of a complaint pursuant to CPLR 3211(a)(7) is only warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. See Leon v Martinez, *supra*, 84 NY2d at 87-88; See also Monroe v Monroe, 50 NY2d 481, 484 (1989). The court's inquiry is limited to whether plaintiff has stated a cause of action and not whether it may ultimately be successful on the merits. See Stukuls v State of New York, 42 NY2d 272, 275 (1977); See also EBC I, Inc v Goldman, Sachs & Co., 5 NY3d11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" if what is intended to be proved and the material elements of a case of action (CPLR 3013). See Rogers v Earl, 249 AD2d 990 (4th Dept 1998).

K&K contends that Tristate's cause of action for unjust enrichment must be dismissed as a matter of law, because, as K&K correctly asserts, a party plaintiff cannot recover against another for unjust enrichment in quasi-contract where he/she had actually contracted with the same party to perform the subject work; "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." Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 572 (2005).

However, Tristate's unjust enrichment claims arise out of work that Tristate performed without a written contract. They are therefore not duplicative of its breach of contract claims. Thus, the motion, pursuant to CPLR 3211(a)(7), to dismiss Tristate's Sixth Counterclaim for unjust enrichment is hereby denied.

IV. K&K's request to dismiss the First through Fourth Claims of Tristate's Amended Fourth-Party Complaint is denied.

K&K contends that, pursuant to CPLR 3211(a)(7), Tristate's claims against the individual fourth-party defendants should be dismissed for failing to state causes of action. The court has considered the party's arguments and finds them to be unavailing, as Tristate has properly pled claims and explicitly stated its causes of action against K&K's owners and officers. The request to dismiss the First through Fourth Claims of Tristate's Amended Fourth-Party Complaint is hereby denied.

V. K&K's request, pursuant to 22 NYCRR 130-1.1, to impose sanctions against Tristate and its counsel of record, Solomos and Storms, for refusal to discontinue patently frivolous and otherwise legally barred causes of action against K&K and the K&K Parties is denied.

K&K moves, pursuant to 22 NYCRR 130-1.1, to impose sanctions on Tristate for its refusal to discontinue what the defendant alleges are legally frivolous causes of action against the K&K parties. The Court, pursuant to 22 NYCRR 130-1.1 may, in its discretion, impose sanctions as reimbursement for expenses resulting from frivolous conduct. After careful consideration, the court finds that Tristate's conduct is not frivolous, as it is neither "completely without merit in law;" nor is it "undertaken primarily to delay or prolong the resolution of litigation;" nor does it assert material factual statements that are false. In the court's discretion, the request to impose sanctions is denied.

Conclusion

Third-party plaintiff / fourth-party defendant K&K's motion is granted in part and denied in part. K&K's request to dismiss Pursuant to CPLR 3211 (a)(1), Tristate's Third and Fourth Counterclaims for breach of contract and fraud arising out of the ISAIA and ALLEY projects, is granted. Pursuant to Lien Law § 77, K&K's request to dismiss Tristate's Fifth Counterclaim for breach of constructive trust as procedurally defective is denied. Pursuant to CPLR 3211 (a)(7), K&K's request to dismiss Tristate's Sixth Counterclaim for unjust enrichment is denied. K&K's request to dismiss the First through Fourth Claims of Tristate's Amended Fourth-Party Complaint is denied. K&K's request to impose sanctions pursuant to 22 NYCRR 130-1.1 against Tristate and its counsel of record, Solomos and Storms, for refusal to discontinue patently frivolous and otherwise legally barred causes of action against K&K and the K&K Parties is denied. The clerk is hereby directed to enter judgment accordingly.

Dated: 1/9/18



Arthur F. Engoron, J.S.C.