

Norwegian Bldr. & Excavator, LLC v Primax Constr., Inc.
2018 NY Slip Op 33696(U)
May 4, 2018
Supreme Court, Albany County
Docket Number: 900091-17
Judge: Richard M. Platkin
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STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

NORWEGIAN BUILDER & EXCAVATOR, LLC,

Plaintiff,

-against-

DECISION & ORDER

PRIMAX CONSTRUCTION, INC.,
COLONIE DG, LLC
BILL SEYMOUR
MARIE LUCAS
and JOHN DOE NO. "1"
through JOHN DOE NO. "5",

Defendants.

Index No. 900091-17

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Plaintiff Norwegian Builder & Excavator, LLC (“Norwegian”), a subcontractor, commenced this commercial construction action seeking to recover the sum of \$242,283 for site work allegedly performed in the construction of a Dollar General store in Colonie, New York. Norwegian sues the general contractor, Primax Construction Inc. (“Primax”), certain alleged officers of Primax, and Colonie DG, LLC (“Colonie DG”), which is the former owner of the real property upon which the Dollar General was constructed.

The complaint asserts five causes of action: (1) breach of the construction contract between Primax and Norwegian; (2) quantum meruit/unjust enrichment; (3) account stated; (4) trust fund violations; and (5) lien foreclosure. The first three causes of action are directed solely at Primax; the fourth cause of action is directed at Primax and the alleged officers of the corporation; and the fifth cause of action is directed at all defendants.

Following the completion of fact discovery and in accordance with a scheduling order dated December 15, 2017, Norwegian filed a note of issue on February 23, 2018. By notice of motion dated March 12, 2018, defendants move for an order striking the jury demand contained in the note of issue. Specifically, defendants claim that Norwegian has waived its right to a jury trial by joining legal and equitable causes of action arising from the same transaction.

In support of the motion, defendants rely upon *Edward Joy Co. v McGuire & Bennett*, (221 AD2d 891 [3d Dept 1995]). The plaintiff in *Edward Joy*, a subcontractor, joined “three causes of action for breach of contract against . . . [the] general contractor, with a cause of action against all defendants seeking foreclosure of plaintiff’s mechanic’s lien” (*id.* at 891). In affirming Supreme Court’s determination to strike the jury demand from the note of issue filed

by plaintiff, the Appellate Division, Third Department explained “that by joining legal and equitable causes of action arising out of the same transaction, plaintiff waived its right to a trial by jury” (*id.* at 892).

In opposing the instant motion, Norwegian argues that its equitable claims arise out of a transaction that is separate and distinct from the legal claims. Specifically, Norwegian maintains that its legal claims arise out of the business relationship with Primax, whereas the lien foreclosure claim arises out of Colonie DG’s ownership (or prior ownership) of the real property allegedly improved by Norwegian’s labor and materials. Norwegian further contends that the equitable relief that it seeks is merely incidental to its legal claims seeking the recovery of monetary damages under a contractual theory.

The Court concludes that Norwegian’s arguments in opposition to the motion are foreclosed by *Edward Joy*. While Norwegian argues that its Lien Law claim against all defendants is distinct from the claims at law against Primax, the same could be said in *Edward Joy*, wherein the plaintiff-subcontractor’s lien foreclosure claim was directed at all defendants, including the owner of the improved property (*see id.* at 891 [contract claims against general contractor and lien foreclosure claim against owner “aris(e) out of the same transaction”]; *cf. Lex Tenants Corp. v Gramercy N. Assoc.*, 284 AD2d 278, 278 [1st Dept 2001] [legal relief for breaches of cooperative offering plan and equitable relief for breaches of proprietary lease arise from separate transactions]; *Poley v Rochester Community Sav. Bank*, 184 AD2d 1027, 1027 [4th Dept 1992] [claim of being fraudulently induced into employment contract is distinct from wrongful termination claim]).

Likewise, Norwegian's equitable claim for lien foreclosure is no more incidental to its legal claims than the identical equitable claim in *Edward Joy* (see 221 AD2d at 891-892). In fact, given that Primax is in the process of winding down its business (see Laurilliard Reply Aff., ¶ 5), Norwegian's rights under its alleged mechanic's lien may well become plaintiff's primary form of relief in this action.

In seeking to avoid the clear precedential effect of *Edward Joy*, Norwegian dismisses this "twenty-year old case" on the ground that the Third Department's decision "does not address [Norwegian's] arguments" and "does not address the trend in the law requiring a [c]ourt to analyze the crux of the issue presented before applying precedent which appears to be going out of favor" (Haspel Aff., ¶ 24). However, this Court is obliged to follow the precedent of the Third Department irrespective of recent trends in the law, the particular legal arguments that were (or were not made) on appeal, or whether the precedent appears to be falling "out of favor" (see generally *Matter of Patrick BB.*, 284 AD2d 636, 639 [3d Dept 2001]; *Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 [2d Dept 1984]). Thus, Norwegian's arguments are more appropriately directed to the Appellate Division should Norwegian ultimately be aggrieved by the striking of its demand for a jury trial.

Accordingly, it is

ORDERED that defendants' motion is granted, and plaintiff's demand for a jury trial is hereby stricken from the note of issue.

This constitutes the Decision & Order of the Court. The original Decision & Order is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, Northeast's counsel shall promptly serve notice of entry on all other parties to this action (see Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: Albany, New York
May 4, 2018



RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Document Nos. 22-32.

