

NKN Constr., Inc. v DPC New York, Inc.
2019 NY Slip Op 30597(U)
March 8, 2019
Supreme Court, New York County
Docket Number: 653113/2018
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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NKN CONSTRUCTION, INC.,

Plaintiff,

- v -

DPC NEW YORK, INC.,

Defendant.

INDEX NO. 653113/2018

MOTION DATE 02/19/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendant’s motion for summary judgment is denied, and plaintiff’s cross-motion for summary judgment is granted as set forth herein.

In this action, plaintiff, NKN Construction, Inc. (“NKN”), sues to recover \$218,156.57 allegedly owed for labor and materials that it provided to defendant, DPC New York, Inc. (“DPC”), pursuant to a construction subcontract between them (the “Contract”), at premises located at 305 East 46th Street, New York, NY (the “Project”).

The facts, simply stated, and mostly gleaned from the settlement agreement, are as follows. The building that was the subject of the Project is owned by GPT Properties Trust (“GPT”) and managed by The RMR Group LLC, f/k/a Reit Management & Research LLC (“RMR”). RMR entered into a construction contract with Shamrock Acoustics, Inc. d/b/a SCI General Construction Services (“SCI”) to perform certain work as contractor at the Project (the “SCI Contract”). Pursuant to the SCI Contract, SCI was prohibited from subcontracting its obligations under the SCI Contract without the consent of RMR. Despite this provision, on or about July 20, 2015, without the consent of RMR, SCI entered into an agreement with DPC whereby DPC would perform the construction services as SCI’s subcontractor (the “DPC Contract”). Thereafter, on September 13, 2016, DPC and NKN entered into the Contract whereby NKN agreed to furnish certain labor and materials for the Project as DPC’s subcontractor for the sum of \$555,000, subject to additions and deductions resulting from changes in NKN’s scope of work as agreed upon through written change orders.

Allegedly, issues arose between DPC and SCI, and as a result DPC elected to leave the Project and agreed that SCI would use the remaining DPC Contract balance to pay any monies due to NKN. NKN alleges that at the request of DPC and pursuant to approved change orders, NKN performed additional work between September 2016 and October 2017 totaling \$126,006.57, making the total due to NKN under the Contract \$681,006.57 (\$555,000 plus \$126,006.57 equals \$681,006.57). NKN further alleges that it received the following payments for its work pursuant

to the Contract: \$115,000 from DPC and \$31,000 from SCI on behalf of DPC, leaving \$535,006.57 still due and owing to NKN.

In or about May 2017, NKN filed a notice of mechanic's lien against the Project. Thereafter, in or about October 2017, in an effort to avoid litigation and to remove NKN's mechanic's lien, NKN, DPC, SCI, and RMR on behalf of GPT began negotiating a settlement agreement. The negotiations resulted in a settlement agreement and general release dated October 31, 2017 (the "Settlement Agreement") whereby NKN was to: (i) receive \$316,850 from RMR and SCI; (ii) provide a release or satisfaction of its mechanic's lien; and (iii) execute a release agreeing to voluntarily release all claims with respect to RMR, GPT, or SCI that in any way relate to NKN's construction services provided at the Project. NKN alleges that in or about November 2017 it received the \$316,850 from RMR and SCI and that upon receipt it released its mechanic's lien.

The complaint alleges four causes of action, to wit: breach of contract (first cause of action); account stated (second cause of action); unjust enrichment (third cause of action); and quantum meruit (fourth cause of action). NKN alleges that it is owed an unpaid balance of \$218,156.57, consisting of the \$681,006.57 Contract price, less the \$115,000 payment from DPC, less the \$31,000 payment from SCI on behalf of DPC, and less the \$316,850 payment from RMR and SCI paid pursuant to the Settlement Agreement.

In its answer, DPC admits that it entered into the Contract with NKN and otherwise denies the material allegations of the complaint. DPC also asserts the following three affirmative defenses: (i) pursuant to the Settlement Agreement, NKN agreed to release DPC from any further claims arising out of the Project (first affirmative defenses); (ii) NKN engaged in improper conduct to obtain the Project and has unclean hands (second affirmative defense); and (iii) NKN engaged in improper conduct with employees of DPC to obtain the Project and obtained improper payments and change orders (third affirmative defense). Additionally, DPC asserts two counterclaims, to wit: breach of contract (first counterclaim); and breach of the duty of loyalty and care (second counterclaim). In support of its counterclaims, DPC alleges that NKN breached the Contract by failing to complete its work pursuant the Contract, by failing to perform properly its work pursuant to the Contract, and by refusing, despite demand, to repair or correct work and to use union personnel, all of which resulted in damages to the Project requiring repairs in an amount not less than \$200,000. DPC further alleges that NKN had a duty of loyalty and care and a duty to perform its work properly and that NKN breached said duty by engaging in improper conduct to obtain the Project and by submitting improper documents to DPC, such as submitting improper requests for change orders and improper applications for payment.

Pursuant to CPLR 3212, DPC now moves for summary judgment dismissing the action on the ground that, pursuant to the Settlement Agreement, NKN released DPC from any further claims arising out of the Project. In response, NKN cross-moves for summary judgment on its breach of contract cause of action and to dismiss DPC's affirmative defenses and counterclaims, arguing that the Settlement Agreement did not effectuate a release of any claims NKN had against DPC.

Discussion

The Court's function on a summary judgment motion is issue finding, not issue determination. See Farias v Simon, 122 AD3d 466, 468 (1st Dep't 2014) ("A court's function on a motion for

summary judgment involves issue finding rather than issue determination”). Because summary judgment is a drastic remedy, it should not be granted where triable issues of fact exist, even if such issues are only “arguable” or “debatable.” See Stone v Goodson, 8 NY2d 8, 12-13 (1960) (“It now seems well established that if the issue is fairly debatable a motion for summary judgment must be denied”). “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Once that burden is met, the opponent must tender evidence in admissible form “sufficient to require a trial of material questions of fact on which he rests his claim ...mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” Zuckerman v City of New York, 49 NY2d 447, 562 (1980).

DPC’s Motion

In support of its motion, DPC argues that the Settlement Agreement precludes NKN’s claims against DPC. The relevant portion of the Settlement Agreement reads as follows,

Subject only to the provisions contained herein, NKN voluntarily agrees to release all known and unknown claims... that they may presently have with respect to RMR, GPT, or SCI, ... *and all persons acting by, through, under or in concert with any of them...* that in any way relate to the construction services provided at the construction project located at 305 East 46th Street, New York, New York 10017...

(Pepe Affidavit in Support, Exhibit C, ¶ 5.i) (emphasis added). It is undisputed that DPC did not execute the Settlement Agreement, however, DPC argues that the Settlement Agreement still inures to its benefit and serves to release it from any of NKN’s claims because DPC acted through and under SCI as its subcontractor and because the Settlement Agreement precludes any claims NKN had arising out of the Project, including claims arising from its relationship with DPC. DPC further argues that it was the intent of all parties to the Settlement Agreement that DPC was to be included in and benefit from it as the intent of the Settlement Agreement was to have a far-reaching effect to release any claims relating to the Project, including those relating to DPC. In support, DPC points to certain email communications dated October 16, 2017 and October 18, 2017, among the parties to the Settlement Agreement wherein Andrew Cooper (“Cooper”), the drafter of the Settlement Agreement and counsel to RMR, discusses the inclusion of DPC. Specifically, in an email dated October 18, 2017, Cooper writes to Peter McMahan of DPC, in pertinent part, “our expectation was that [DPC] would participate in this agreement since it allowed RMR to mitigate the damages associated with the NKN lien thereby reducing any potential liability of either [DPC] or SCI... it would appear that this agreement also provided DPC with a significant benefit without corresponding costs or obligations.”

In opposition to DPC’s motion and in support of its own cross-motion, NKN argues that the Settlement Agreement did not intend to include DPC as a releasee. To support that argument NKN submitted a copy of an email from Cooper dated October 18, 2017, that included as an attachment a draft of the Settlement Agreement. The draft Settlement Agreement attached to the email explicitly states that NKN “agrees to release all known and unknown claims... that they may presently have with respect to RMR, GPT, SCI *or DPC*” (Siddiqi Affirmation in Opposition, Exhibit B) (emphasis added). NKN also included DPC’s response to Cooper’s

email, also dated October 18, 2017, wherein Peter McMahan of DPC responds to Cooper, objecting to the draft Settlement Agreement. Last but not least, NKN includes a copy of an email from Cooper to NKN's counsel and the representatives of SCI and RMR dated October 31, 2017, that specifically states, "[p]lease review the attached final revised Settlement and Release Agreement. As with the prior version, I removed any reference to DPC in this agreement..." The draft Settlement Agreement attached to Cooper's October 31, 2017 email explicitly removed any reference to DPC being released by NKN.

As a general rule, a release that is unambiguous will constitute a complete bar to an action on a claim that is the subject of the release, absent fraud, mistake, or duress. Global Precast, Inc. v Stonewall Constr. Corp., 78 Ad3d 432, 432 (1st Dept 2010). "However, when the evidence in the record including, inter alia, the circumstances surrounding the release, as well as the parties' course of dealings, evinces that the parties' intentions were not reflected in the general terms of the release, the release does not conclusively establish a defense as a matter of law." Intl. Asbestos Removal v Beys Specialty, Inc., 135 AD3d 486, 486 (1st Dept 2016). Additionally, "[t]he meaning and coverage of a general release depends on the controversy being settled and upon the purpose for which the release was actually given... A release may not be read to cover matters which the parties did not desire or intend to dispose of." Structural Processing Corp. v Farboil Co., 234 AD2d 284, 284 (2nd Dept 1996) (quoting Lefrak SBN Assocs. V Kennedy Galleries, 203 AD2d 256, 257 (2nd Dept 1994)). Here, DPC's argument that it is a party to the Settlement Agreement is belied by the contents of the emails provided by NKN. The emails clearly show that the parties to the Settlement Agreement moved from a draft that included DPC to a final draft that expressly excluded DPC; this move clearly indicates that the intent of the parties was not to release DPC. In any event, this Court believes the italicized language quoted above is referring to agents and representatives of RMR, GPT and SCI, not to separate actors such as DPC.

In addition, DPC has failed to make out a prima facie case, as it failed to provide this Court with a copy of the Settlement Agreement signed by SCI. "[T]he burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it." Amica Mut. Ins. Co. v Kingston Oil Supply Corp., 134 Ad3d 750, 752 (2nd Dept 2015) (quoting Paz v Singer Co., 151 AD2d 234, 235 (1st Dept 1989)).

Accordingly, DPC's motion for summary judgment dismissing the action is denied.

NKN's Cross-Motion


NKN has established entitlement to summary judgment as a matter of law on its breach of contract cause of action against DPC to recover the sum of \$218,156.57, by submitting, inter alia, the pleadings; the Contract; the Settlement Agreement; change orders and invoices totaling \$126,006.57; the affidavit of Azhar Shabbir, project manager employed by NKN; and various email correspondence between NKN, DPC, SCI, RMR, and Cooper. NKN's submissions establish that DPC and NKN entered into the Contract and that DPC failed to pay as agreed. Additionally, NKN has sufficiently illustrated that DPC's affirmative defenses and counterclaims are without merit.

DPC has failed to provide evidentiary proof sufficient to create any material issue of fact in opposition, and the affirmative defenses and counterclaims that DPC pleads are either not defenses or they do not have admissible factual support. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980). As discussed above, the Settlement Agreement does not release claims between the parties that the Contract governs, for which no separate release was contemplated (other than the earlier draft versions of the Settlement Agreement); as such, DPC's first affirmative defense is without merit. DPC's second and third affirmative defenses, based upon NKN's improper conduct and unclean hands, are both equitable in nature and are unavailable in an action at law exclusively for damages. Furthermore, the third affirmative defense fails to meet the requirements of CPLR 3016(b). Additionally, DPC's counterclaims are subject to dismissal. NKN argues that: (i) it did not breach the Contract; (ii) no fiduciary relationship existed between the parties; (iii) DPC failed to show damages on either counterclaim; (iv) DPC's allegations regarding NKN's breach of the Contract are not supported by the record; and (v) DPC failed to plead its second counterclaim for breach of duty with particularity. In response to NKN's motion for summary judgment, DPC failed to tender evidence illustrating the existence of an issue of fact; indeed, DPC's motion papers are entirely silent as to these specific arguments raised by NKN and do not oppose them; as such, DPC's counterclaims are subject to dismissal. See Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 (1975) ("Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed admitted, and where there are cross motions for summary judgment, in the absence of either party challenging the verity of the alleged facts, ... there is, in effect, a concession that no question of fact exists) (citations omitted).

NKN has failed to justify its request for attorney's fees.

Conclusion

DPC's motion is denied and NKN's cross-motion is granted. The Clerk is hereby directed to enter judgment in favor of plaintiff NKN Construction Inc. and against defendant DPC New York Inc. in the amount of \$218,156.57, plus costs and disbursements.

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