

Ridge Park LLC v DHC Contr. Inc.
2019 NY Slip Op 31313(U)
April 17, 2019
Supreme Court, Kings County
Docket Number: 519064/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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THE RIDGE PARK LLC,

Plaintiff,

Decision and order

- against -

Index No. 519064/18

DHC CONTRACTING INC., FUNG TAI CONSTRUCTION
INC., ABC CORPS 1-5, ALEX CHAN and ZHI P.
CHEN a/k/a MARK CHEN,

Defendants,

April 17, 2019

ms # 2

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PRESENT: HON. LEON RUCHELSMAN

The defendant Fung Tai Construction Inc., has moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On May 18, 2018 the plaintiff and defendant entered into a contract whereby the plaintiff hired defendant DHC Contracting to build a six story mixed use building located at 7504 Bay Parkway in Kings County. The plaintiff gave DHC a deposit of \$120,000. The plaintiff never entered into any contract with defendant Fung Tai Construction. Approximately two months later the plaintiff fired defendant DHC unhappy with the work it performed and demanded a return of the down payment. This lawsuit followed and the plaintiff also sued Fung Tai on the grounds various permits for work at the site were secure by Fung Tai and that Fung Tai was involved in a scheme to defraud the plaintiff. This motion by Fung Tai to dismiss has now been filed.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The complaint that was filed and that which the motion to dismiss is based only contains one cause of action against Fung Tai, a cause of action for unjust enrichment. Unjust enrichment is a quasi-contract recovery mechanism and the plaintiff must demonstrate the defendant was enriched, at plaintiff's expense and that it is against equity and good conscience to permit the defendant to retain what the plaintiff seeks to recover (Georgia Malone & Co., Inc., v. Ralph Rieder, 86 AD3d 406, 926 NYS2d 494 [1st Dept., 2011]). Unjust enrichment is not available if the

relationship between the parties is too attenuated (Mandarin Trading Ltd., v. Wildenstein, 16 NY3d 173, 919 NYS2d 465 [2011]). Admittedly, in this case there is no relationship between the plaintiff and Fung Tai at all. Further, the amended complaint, which the defendant did not have an opportunity to move to dismiss does not create any such relationship. That complaint seeks to add the cause of action of aiding and abetting fraud on the part of Fung Tai. It is well settled that to state a claim for aiding and abetting fraud the plaintiff must allege the existence of an underlying fraud, knowledge of this fraud on the part of the aider and abettor and substantial assistance by the aider and abettor in achieving the fraud (see, Stanfield Offshore Leveraged Assets Ltd., v. Metropolitan Life Insurance Company, 64 AD3d 472, 883 NYS2d 486 [1st Dept., 2009]). Further, substantial assistance exists when "a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed" and where the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated (id). However, there are no allegations in the complaint which describe with any factual predicates the nature of any behavior of Fung Tai which amounts to fraud. The amended complaint states that "Defendant Fung Tai substantially assisted Defendants DHC, Chan and Chen on the achievement of the fraud by holding themselves out to be an authorized Contractor of

Plaintiff" (see, First Amended Complaint, § 57). Even if true that allegation does not consist of fraud, rather, whether Fung Tai had the authority to secure any permits is a matter between the plaintiff and DHC Construction. Moreover, the amended complaint further lacks any basis to conclude that any of Fung Tai's conduct proximately caused any damage to plaintiff. Again, if Fung Tai secured permits in an unauthorized manner that impropriety should fall upon DHC Contracting, the party contractually bound with the plaintiff.

Therefore, the plaintiff has failed to establish any connection with Fung Tai and consequently, the motion of Fung Tai seeking to dismiss the complaint is granted.

So ordered.

ENTER



DATED: April 17, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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 2019 MAY -6 AM 8:27