

Flatbush Constr. Inc. v Shafshak

2019 NY Slip Op 31507(U)

May 17, 2019

Supreme Court, Kings County

Docket Number: 516472/2017

Judge: Carolyn E. Wade

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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 17th day of May 2019

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X
FLATBUSH CONSTRUCTION INC.,

Plaintiff,

Index No. 516472/2017

-against-

Seq 1
DECISION and ORDER

AMR SHAFSHAK, WELLS FARGO BANK, N.A.,
and HSBC BANK USA, NATIONAL ASSOCIATION,

Defendants.
-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of defendants Wells Fargo Bank, N.A. and HSBC Bank USA, National Association's Motion:

Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1
Cross-Motion and Affidavits/Affirmations.....	
Answering Affidavits/Affirmations.....	3
Reply Affidavits/Affirmations.....	4
Memorandum of Law.....	2,5

Upon the foregoing cited papers and after oral argument, defendants Wells Fargo Bank, N.A. and HSBC Bank USA, National Association move, pursuant to CPLR 3212, for an Order dismissing all claims asserted against them with prejudice.

The underlying breach of contract action was commenced by plaintiff Flatbush Construction Inc. ("Flatbush") to recover damages involving a home construction. Flatbush is a home improvement contractor incorporated in New York. Defendant Amr Shafshak ("Shafshak") is the owner of real property located at 537 Marcy Ave, Brooklyn, New York 11206 (the "Property"). The Property is encumbered by a mortgage that secures a loan owned by a mortgage loan trust, for which HSBC Bank USA, National Association ("HSBC") acts as a trustee. Wells Fargo Bank, N.A. ("Wells Fargo") acts as a loan servicer for the trust.

On January 28, 2015, the Property sustained certain damages. In February 2015, Shafshak filed an insurance claim with State Farm Fire and Casualty Company ("State Farm") for said damages. In May 2015, State Farm issued \$145,752.43 in insurance claim funds, which were forwarded to Wells Fargo as an "additional loss payee" on the insurance policy. The claim funds were deposited in a restricted escrow account maintained by Wells Fargo, who would hold the claim funds until the repairs were inspected and verified to ensure that it was completed to the mortgage loan lender's satisfaction.

On May 25, 2015, Shafshak entered into a contract with Flatbush to perform repair work on the Property (the "Contract"). Pursuant to the Contract, Flatbush was to obtain all requisite permits and perform repairs to the Property, as described in the Contract. The Contract required Shafshak to pay Flatbush a total of \$139,000.00 in three installments: (1) \$48,650.00 before starting the job; (2) \$48,650.00 after completing "1 floor"; and (3) \$41,700.00 after the job was complete.

From June to October 2015, Wells Fargo issued five checks, totaling \$139,200.00, all made payable to "FLATBUSH CONSTRUCTION IN & AMR A SHAFSHAK." In March 2016, Flatbush informed Wells Fargo that Shafshak did not pay it for the work that it performed on the Property, pursuant to their Contract. Wells Fargo then notified Shafshak that it could not release any more insurance funds until his dispute with Flatbush was resolved. No additional draws from the Claim Funds have been disbursed by Wells Fargo. To date, \$6,552.43 in claim funds remain in the restricted escrow account maintained for Shafshak's Mortgage Loan.

In August 2017, Flatbush commenced this action against Shafshak, Wells Fargo and HSBC, asserting causes of action for breach of contract, quantum meruit and unjust enrichment. The instant motion ensues.

In support of their motion, Wells Fargo and HSBC claim that Flatbush's breach of contract claim against them fail as a matter of law. They argue that Flatbush has not pleaded the existence of any contract between Flatbush and Wells Fargo and/or HSBC. Wells Fargo and HSBC further allege that Flatbush breached its contract with Shafshak because it started construction on the Property without obtaining permits from New York City (aff of Desellier, at 5).

In regard to Flatbush's remaining claims, Wells Fargo and HSBC submit that since the Contract governs the same work for which Flatbush seeks compensation, it precludes recovery under quantum meruit or unjust enrichment. The banks further argue that they were not unjustly enriched by any services rendered by Flatbush, as Wells Fargo has already disbursed a total of \$139,200.00 to Shafshak and Flatbush for improvements to the Property – in \$200 excess of what Shafshak was required to pay Flatbush for its work under the Contract.

In its opposition, Flatbush contends that it is an intended beneficiary of the mortgage under which Wells Fargo and HSBC had established an escrow agreement relating to its work. Flatbush also claims that defendant Shafshak kept part of the money paid out by Wells Fargo and HSBC, and that Flatbush received only the fourth and fifth checks in the sum of \$42,021.72.

In reply, Wells Fargo and HSBC maintain that Flatbush fails to plead the existence of an enforceable contract with either of the banks. They also assert that Plaintiff improperly raised an unpleaded third-party beneficiary theory of liability as a basis for defeating summary judgment. Wells Fargo and HSBC further argue that, a mortgage is intended to protect the mortgagee bank's interest, not the interests of any third-party. Lastly, the banks submit that Flatbush did not dispute in its opposition that it failed to obtain the requisite permits from the City.

A defendant moving for summary judgment has the initial burden of proffering evidence in admissible form demonstrating, prima facie, that the plaintiff's cause of action has no merit (*see GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

In the instant case, Wells Fargo and HSBC have submitted sufficient evidence to establish, *inter alia*, that (1) the Contract in dispute was entered between Flatbush and Shafshak; (2) Wells Fargo has already issued five checks totaling \$139,200.00 to Shafshak and Flatbush for improvements to the Property; and (3) Flatbush breached the Contract by failing to obtain requisite permits from the city. The burden then shifts to Flatbush to present evidentiary facts

sufficient to raise a genuine triable issue of fact. Flatbush, in its opposition, fails to raise any triable issues of fact to rebut the above showing by Wells Fargo and HSBC.

Therefore, defendants Wells Fargo and HSBC's motion to dismiss is **GRANTED**. The Complaint is hereby dismissed against them.

This constitutes the Decision and Order of the court.



**HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE**

**HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE**



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KINGS COUNTY CLERK
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