Dominguez v WRS Envtl. Servs. Inc.
2019 NY Slip Op 31601(U)
June 3, 2019
Supreme Court, New York County
Docket Number: 157820/2017
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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RAFAEL DOMINGUEZ, individually and on behalf of all other persons similarly situated who were employed by WRS ENVIRONMENTAL SERVICES, INC., and/or any other entities affiliated with, controlling, or controlled by WRS ENVIROMENTAL SERVICES, INC.,

Index No. 157820/2017

Decision and Order

Plaintiffs,

- against -

WRS ENVIRONMENTAL SERVICES INC. and JOHN DOE BONDING COMPANY,

Defendants.

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HON. DAVID B. COHEN, J.:

Defendant WRS Environmental Services. Inc. (WRS) moves to dismiss plaintiffs' complaint, pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7), as against it. Plaintiffs oppose the motion.

BACKGROUND

Defendant WRS performs environmental cleanup services such as asbestos, lead, microbial, and hazardous remediation and provides emergency response and disaster recovery services with expertise in emergency spill response, national disaster response, wastewater treatment, dewatering, hazardous and non-hazardous waste management, hazardous waste remediation, asbestos and lead abatement and groundwater and soil testing treatment (*see* Ranghelli aff, ¶ 4). WRS is an environmental contractor and does not hold licenses to do construction work in New York or New Jersey (*see id.*, ¶ 5). Plaintiffs Rafael Dominguez (Dominguez), Brett Volpe (Volpe) and Thomas Moran (Moran) are former employees of WRS. Dominguez worked for WRS from May 1, 2013 to July 31, 2013. Volpe worked for WRS from

May 28, 2013 to February 6, 2015 (with last day of actual work on November 25, 2014). Moran worked for WRS from April 24, 2013 to December 8, 2014. (Hodell aff, ¶¶ 4, 6, 8). On September 1, 2017, Dominguez filed a putative class action lawsuit against WRS to recover wages and benefits that he claims he and the members of the putative class were statutorily and or contractually entitled to for work on projects in New York and New Jersey. Plaintiffs allege WRS performed work on projects for

i) Consolidated Edison of New York, Inc. (ConEd) in New York (ConEd Projects);

ii) Keyspan Corporate Services LLC d/b/a National Grid (NG) in New York (NG Projects);

iii) PSEG Long Island, LLC (PSEG LI) in New York (PSEG LI Projects); and

iv) Public Service Electric and Gas Company (PSEG NJ) in New Jersey (PSEG NJ Projects)

(collectively referred to as the Utility Projects). Plaintiffs allege "upon information and believe (sic)" that "since at least August 31, 2011, [WRS] has been a party to various contracts with [ConEd], [NG], [PSEG LI] and [PSEG NJ] to perform clean-up, waste removal, restoration, and remediation work at the sites of the Utility Projects" (collectively the Utility Contracts) (Amended Complaint [Compl.], ¶ 12). Plaintiffs further allege "upon information and belief," that the Utility Contracts that govern the Utility Projects in New York and New Jersey contain a provision that requires WRS to pay workers "prevailing wage and supplemental benefits" as set by the New York and New Jersey Departments of Labor (Compl., ¶¶ 13-18).

Plaintiffs allege that they worked for WRS at the sites of the Utility Projects and, thus, are third-party beneficiaries of the alleged promise to pay prevailing wages (Compl., ¶¶ 2, 15, 21). Plaintiffs also allege that WRS violated the New Jersey Prevailing Wage Act, NJSA 34:11-

56.40, by paying them "less than the prevailing rate of wages and supplemental benefits to which [they were] . . . entitled for the labor [they] furnished to WRS [on] Utility Projects located in New Jersey" (Compl., ¶¶ 33). In plaintiffs' complaint, the first cause of action for breach of contract and second cause of action for failure to pay the prevailing wage are alleged against only WRS.[1]

DISCUSSION

The standard of review on a motion to dismiss pursuant to CPLR 3211 is well established. The court must assume the truth of the allegations in the pleading and "resolve all inferences which reasonably flow therefrom in favor of the pleading" (*Sanders v Winship*, 57 NY2d 391, 394 [1982]). In assessing a complaint, the Court must "determine simply whether the facts alleged fit within any cognizable legal theory" (*Morone v Morone*, 50 NY2d 481, 484 [1980]). "[T]he allegations of a complaint, supplemented by a plaintiff's additional submissions, if any, must be given their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). If the facts stated are sufficient to support any cognizable legal theory, the motion to dismiss should be denied (*Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995]). "On a motion to dismiss pursuant to CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Morgenthow & Latham v Bank of NY Co.*, 305 AD2d 74, 78 [2003] [internal quotation marks and citations omitted]). Pursuant to CPLR 3211(a) (3) to dismiss a complaint based upon the plaintiff's alleged lack of standing, the initial burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law (*see HSBC Mtge. Corp. (USA) v MacPherson*, 89 AD3d 1061 [2d Dept 2011]). Pursuant to CPLR

[1] In plaintiffs' complaint, there is a third cause of action of suretyship against defendant John Doe Bonding Company.

3211 (a) (7), a dismissal is warranted when "the pleading fails to state a cause of action" (*see also Leon v Martinez*, 84 NY2d 83, 88 [1994]).

WRS moves to dismiss plaintiffs' first cause of action for breach of contract on the grounds that the documents upon which it is based refute plaintiffs' claims, plaintiffs lack standing, and /or plaintiffs have failed to state a cause of action. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009] *affd* 14 NY3d 901 [2010]). Plaintiffs' breach of contract claim is based on their alleged status as third-party beneficiaries because they were not parties to any of the contracts between WRS and any of the companies at issue.

A party who seeks to enforce a contract as a third-party beneficiary must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (*Alicea v The City of New York*, 145 AD2d 315, 317 [1st Dept 1988]). "The best evidence, however, of whether the contracting parties intended a benefit to accrue to a third party can be ascertained from the words of the contract itself" (Alicea, 145 AD2d at 318). "Where a provision in the contract expressly negates enforcement by third parties, that provision is controlling" (*Edward B. Fitzpatrick, Jr. Constr. Corp. v County of Suffolk*, 138 AD2d 446, 449-450 [2d Dept 1988]).

Here, the documentary evidence i.e. the contracts at issue, demonstrate that there is no prevailing wage contract term for which any plaintiffs were a third-party beneficiary. All the contracts at issue contain a no third-party beneficiary clause. The contract between WRS and

ConEd specifically states, "[t]here are no third-party beneficiaries of the [c]ontract" (Ranghelli aff, exhibit A). NG's Standards General Conditions dated June 4, 2012 applicable to the contract between WRS and NG specifically states, "This Agreement is not intended to, and does not, create any rights or benefits to individuals or entities other than Owner and Environmental Remediator" (Ranghelli aff, exhibit B). The contract between WRS and Servco retained the NG terms until a new agreement was negotiated, therefore NG's aforementioned provision also applied to Servco (*see id*, exhibit B, D). The 2010 and 2014 contracts between WRS and PSEG NJ specifically state,

> "Contractor's status shall be that of Independent Contractor, and the Contractor, it employees, agents, or Subcontractors shall not, for any reason or purpose, be deemed to be a subcontractor, agent, partner, or employee of the Company. **This Contract creates no rights or benefits between the Company and any person or entity other than the Contractor.**"

(Ranghelli aff, exhibit C, ¶ 19A [emphasis added]). The relevant provisions in the contracts at issue expressly negate any intent to permit enforcement of its terms by third parties such as plaintiffs, and therefore they have no standing to bring an action regarding any of the contracts (*see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786-787 [2006] [holding that the "plaintiffs lack standing to bring this action" because "plaintiffs failed to establish that the LDA was intended for their benefit . . . .[as] the LDA explicitly negates any intent to permit its enforcement by third parties such as plaintiffs"]; *Board. of Mgrs. of the Alexandria Condominium v Broadway/72nd Assoc.*, 285 AD2d 422, 424 [1st Dept 2001] [holding that "the CM contract, by its own terms, expressly negates enforcement of the contract by third parties, and that provision is controlling"]; *Matter of Baltia Air Lines v CIBC Oppenheimer Corp.*, 273 AD2d 55, 56 [1st Dept 2000] [holding that [the] "plaintiff has no standing to sue for such alleged breach as a third-party beneficiary of the clearing agreement, the express terms of which negate

any implication of third-party beneficiary rights"]).

Plaintiffs' reliance on (*Agolli v PS Contr. of NJ Inc.*, 2017 NY Slip Op 32495[U] [Sup Ct, NY County 2017]) and other cases relating to public works contracts are misplaced because plaintiffs did not make any allegations in their amended complaint demonstrating that the contracts under which they are owed prevailing wages are public works contracts. Where workers on a public works project claim they have not been paid prevailing wages pursuant to Labor Law § 220, they have two options: (1) enforce their employer's statutory obligations to pay prevailing wages by complying with the statutory mechanism under Labor Law § 220 (7), including filing a complaint with the New York State Department of Labor and awaiting a determination before filing a lawsuit under section 220; or (2) file a third-party beneficiary breach of contract claim against their employer (*see Wright v Herb Wright Stucco, Inc.*, 50 NY2d 837 [1980]; *Winsch v Esposito Bldg. Specialty, Inc.*, 48 AD3d 558 [2d Dept 2008]). Here, the documentary evidence shows that the contracts at issue were not public works contracts subject to the requirements of Labor Law § 220. The contracts at issue are with private utility companies, not the states of New York or New Jersey (*see* Smith Affirmation, exhibits A-D). Therefore the branch of defendant WRS's motion to dismiss the first cause of action is granted.

WRS moves to dismiss the second cause of action for failure to pay the prevailing wage on the grounds that plaintiffs lack standing and cannot state a claim for violation of the New Jersey Prevailing Wage Act or the Labor Disputes in Public Utilities Act. The New Jersey Prevailing Wage Act requires a public body to be a party to the contract to trigger the prevailing wage requirement (N.J. Stat. § 34:11-56.27). The statute provides:

> "Every contract in excess of the prevailing wage contract threshold amount for any public work to which any public body is a party or for public work to be done on property or premises owned by a public body or leased or to be leased by a public body shall contain a provision stating the prevailing wage rate which can be paid (as shall be designated by

> the commissioner) to the workers employed in the performance of the contract and the contract shall contain a stipulation that such workers shall be paid not less than such prevailing wage rate."

(*id.*). A "public body" is defined as "the State of New Jersey, any of its political subdivisions, any authority created by the Legislature of the State of New Jersey and any instrumentality or agency of the State of New Jersey or of any of its political subdivisions" (N.J. Stat. § 34:11-56.26). Plaintiffs have not alleged in their amended complaint that WRS contracted with a "public body" as defined by the act and the publicly available information shows that PSEG NJ is a subsidiary of PSEG Services Enterprise Corporation, which is an investor owned energy company that is publicly traded on the New York Stock Exchange (*see* Smith affirmation at ¶ 4, Ex. C; *Foundation for Fair Contr., Ltd. v New Jersey State Dept. of Labor--Wage & Hour Compliance Div.*, 316 NJ Super 437, 447 720 A2d 619, 624 [Super Ct, App Div 1998]) (holding that the New Jersey "Legislature has recognized that the Prevailing Wage Act does not cover contracts made between private parties").

Plaintiffs argue that their claim is based on the Labor Disputes in Public Utilities Act (N.J. Stat. § 34:13B-2.1), which mandates that constructor contractors engaged in construction work on a public utility shall pay prevailing wages (plaintiffs' opposition memorandum at 16-17). The statute states:

> "Any employee employed by a construction contractor engaged in construction work on a public utility shall be paid the wage rate for their craft or trade as determined by the Commissioner of Labor and Workforce Development pursuant to the provisions of the "New Jersey Prevailing Wage Act," P.L.1963, c. 150 (C.34:11-56.25 et seq.).
>
> "A construction contractor **who is found by the Commissioner of Labor and Workforce Development to be in violation of the provisions of this section** shall be subject to the provisions of sections 11 and 12 of P.L.1963, c. 150 (C.34:1156.35 and 34:11-56.36) which apply to an employer for a violation of P.L.1963, c. 150."

(N.J. Stat. § 34:13B-2.1 [emphasis added]). Plaintiffs' claim fails by the statute's plain language because plaintiffs have not alleged in their amended complaint that the Commissioner of Labor

and Workforce Development found that WRS violated any provision of this statute. Therefore, the branch of defendant WRS's motion to dismiss the second cause of action is granted.

Regarding the request for class certification, dismissal is appropriate where the complaint, on its face, cannot support a class action pursuant to the requirements of CPLR 901(a) (*see Wojciechowski v Republic Steel Corp.*, 67 AD2d 830, 831 [4th Dept 1979] ["While a decision as to the propriety of the class would ordinarily follow a motion and a hearing under CPLR 902, we find no fault with the procedure followed where, as here, it appears conclusively from the complaint and from the affidavits that there was as a matter of law no basis for class action relief."]. A request for class certification may be denied where questions of law and fact affecting the particular class members would not be common to the class proposed (*see Williams v Blum*, 93 AD2d 755 [1st Dept 1983]; *MFT Inv. Co. v Diversified Data Servs. & Sciences*, 52 AD2d 761 [1st Dept 1976]). In determining whether the commonality requirement of CPLR 901 is met, courts look to whether the "use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (*Friar v Vanguard Holding Corp.*, 78 AD2d 83 [2d Dept 1980] [internal quotation marks and citations omitted).

Here, the claims asserted individually are not legally viable as the substantive claims against WRS are dismissed. (*Ellington v EMI Music, Inc.*, 33 Misc 3d 1209[A], 2011 NY Slip Op 51827[U], *5 [Sup Ct, NY County 2011] [finding that "the branches of the motion to dismiss the class action claims are granted on the ground that the same claims asserted by the plaintiff individually are not legally viable and have been dismissed"]. In addition, plaintiffs have not alleged in the amended complaint that all members of the requested putative class worked on all the alleged projects in both New York and New Jersey. Also, the claims relating to the New

York and New Jersey projects involve application of different state laws. Furthermore, the claims for each of the Utility Projects involve different parties with whom WRS contracted with different contracts and even different contracts for various time periods. Moreover, a class would involve, of necessity, an individual evaluation of the jobs worked by each member of the purported class and a calculation of any damages of each member of the class. Therefore, the class certification is dismissed.

The court has considered the remaining arguments and finds them unavailing. Therefore, defendant WRS's motion is granted in its entirety.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant WRS Environmental Services. Inc.'s motion to dismiss is granted and the complaint is dismissed in its entirety against said defendant with costs and disbursements to said defendant as taxed by the Clerk of the Court; and the Clerk is directed to enter judgment accordingly in favor of said defendant, and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption, and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change of the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh

Dated: 6-3-2019

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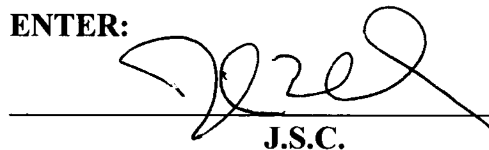

J.S.C.

HON. DAVID B. COHEN
J.S.C.