Metropolis HVAC Contrs. Inc. v J & Z Mech. Constr. Corp.
2019 NY Slip Op 32780(U)
September 12, 2019
Supreme Court, Kings County
Docket Number: 504988/17
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
---x
METROPOLIS HVAC CONTRACTORS INC.,
Plaintiff,

Decision and order

- against -

Index No. 504988/17

J & Z MECHANICAL CONSTRUCTION CORP., GERALD CAMPBELL JR., individually, CENTRIGUGAL ASSOCIATES GROUP, STEPHEN YAGER, individually, 421 KENT DEVELOPMENT LLC, a.k.a. XIN DEVELOPMENT MANAGEMENT EAST LLC, ARCH INSURANCE COMPANY, JOHN/JANE DOES 1-10, fictitious names, and ABC COMPANIES 1-10, fictitious names,

ms #5

Defendants,

September 12, 2019
---x
J & Z MECHANICAL CONSTRUCTION CORP.,
Third Party Plaintiff,

- against -

WONDER WORKS CONSTRUCTION CORP.,
Third Party Defendant,
---x

PRESENT: HON. LEON RUCHELSMAN

The defendant 421 Kent Development LLC has moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff opposes the motion. Papers were submitted by the parties and argument held and after reviewing all the arguments this court now makes the following determination.

This lawsuit concerns a construction project located at 421 Kent Avenue in Kings County. The owner of the property, defendant 421 Kent entered into a contract with third party defendant Wonder Works who was hired to serve as the construction manager. Wonder Works entered into a contract with defendant

Centrifugal Associates Group, which entered into a sub-contract with defendant J and Z Mechanical Construction Corp., which entered into a sub-contract with the plaintiff. The plaintiff alleges it is owed approximately $1,641,562.25 for work performed. Plaintiff has sued the defendants seeking recovery of the amount owed. The defendant 421 Kent has now moved seeking to dismiss the complaint arguing they had no contractual relationship with the plaintiff and cannot be responsible for any of the amount owed to them.

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]).

It is well settled that a plaintiff may file an action for quantum meruit as an alternative to a breach of contract claim (see, Thompson v. Horowitz, 141 AD3d 642, 37 NYS3d 266 [2d Dept., 2016]). "To be entitled to recover damages under the theory of quantum meruit, a plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered" (F and M General Contracting v. Oncel, 132 AD3d 946, 18 NYS3d 678 [2d Dept., 2015]).

Notwithstanding, it is well settled that a subcontractor that performed construction work under express contract with general contractor or another subcontractor could not recover damages on a theory of quantum meruit since an express contract governs the work involved (see, R & B Design Convepts Inc., v. Mwenger Construction Company Inc., 153 AD3d 864, 60 NYS3d 364 [2d Dept., 2017]). The plaintiff argues the defendant acted with more interest than a passive owner and directed the work of many of the subcontractors. Further, the plaintiff argues that Section 5.4 of the contract between the owner and the construction manager "stated 'Construction manager hereby assigns to Owner...all its interests in any Subcontracts now existing or

hereinafter entered into by Construction Manager for perfprmance of any part of the Work..." (see, Affirmation in Opposition, ¶ 62). However, the plaintiff failed to include the continuation of that very sentence which states "which assignment will be effective upon acceptance by Owner in writing and only as to those Subcontracts that Owner designates in said writing and upon payment for materials pre-purchased by Construction Manager and delivered to Owner" (see, Agreement for Construction Management Services between 41` Kent Development LLC and Wonder Works Construction Corp., dated October 29, 2013, ¶5.4). There is no evidence presented the owner accepted any assignments in writing that would impose any requirements upon them. Thus, plaintiff's argument that "since the Defendant Kent was communicating directly with the subcontractors and specifically directing them and giving them orders for work to be done it can be concluded that the Construction Manager assigned those contracts to Defendant Kent - the Owner and therefore requiring the Owner to compensate the subcontractors for work done and materials delivered" (see, Affirmation in Opposition, ¶ 64) is entirely irrelevant since there can be no implied assignment if the contract expressly requires all assignment to be in writing. Indeed, there mere fact the owner exercised interest and even directed some of the work to be performed, if true, does not establish a duty upon the owner to pay. It is true, as pointed

out by the plaintiff, that sometimes an owner can be responsible for obligations to a subcontractor even where privity is lacking where the owner had direct dealings and a special relationship with the subcontractor (Vertical Progression Inc., v. Canyon-Johnson Urban Funds, 126 AD3d 784, 5 NYS3d 470 [2d Dept., 2015]). However, the Verified Complaint does not allege any such special relationship. The Verified Complaint concedes there is no privity between the plaintiff and the owner (see, Verified Complaint, ¶ 37). Rather, the Verified Complaint merely states that "equity and good conscience dictate that Metropolis be compensated for the Work completed on the Property by all those who have been unjustly enriched therefrom" (id at ¶ 40). That is wholly insufficient to establish such special relationship. The e-mails submitted demonstrating the owner was deeply involved in the construction does not support any such special relationship. Those eleven emails, not all of which are directed to the plaintiff, really concern the delay of the project and constitute an interest in completing the project as soon as possible. They do not truly touch upon directing the work in such an intimate way whereby such relationship is established demanding the owner pay for the work performed by the plaintiff. For similar reasons the Verified Complaint and other evidence submitted does not establish "reliance or inducement" sufficient to impose an unjust enrichment, which is really a quasi contract claim, between the

parties (see, Georgia Malone and Company v. Reider, 19 NY3d 511, 950 NYS2d 333 [2012]).

Therefore, based on the foregoing, Kent 421's motion seeking to dismiss the Verified Complaint as to them is hereby granted.

So ordered.

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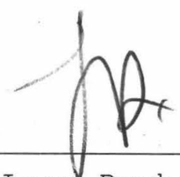

DATED: September 12, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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