

Old Crompond Rd., LLC v County of Westchester
2019 NY Slip Op 34693(U)
December 31, 2019
Supreme Court, Westchester County
Docket Number: Index No. 57579/2016
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
OLD CROMPOND ROAD, LLC,

Plaintiffs

-against-

COUNTY OF WESTCHESTER,

Defendants.
-----X

DECISION AND ORDER

Index No. 57579/2016

Motion Sequence 4

The following papers were considered on the County of Westchester's motion for summary judgment pursuant to CPLR 3212:

Notice of Motion/Affirmation/Exhibits A-L	1-14
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Memorandum of Law in Opposition	28
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Upon the foregoing papers, it is ordered that the motion is DENIED.

The plaintiff, Old Crompond Road, LLC ("OCR") filed this action on May 27, 2016, alleging two causes of action against the defendant, County of Westchester (the "County"). The County previously filed a motion for dismissal of the complaint against it due to failure to state a claim and OCR filed a cross-motion seeking an order pursuant to CPLR 3025[c] to serve and file an amended complaint to conform the pleadings to the proof. This Court granted OCR's motion to serve and file an amended complaint by Decision and Order dated October 18, 2018 and the amended complaint was filed on October 24, 2018.

The first cause of action in the amended complaint alleges that in or about 2007, OCR was designated and approved to develop and construct a twenty-six unit

Affordable Affirmatively Furthering Fair Housing ("AFFH") project on Old Crompond Road, Yorktown Heights, New York. The project was part of the County's plan to develop 750 units to satisfy its requirements per a stipulation of settlement in a federal law suit. The County agreed to perform and pay for certain site work and infrastructure required by the project; to have county contractors, Housing Action Counsel "(HAC)", market the project, find and vet qualified purchasers for the units, and to otherwise aid in the financing, sale and closing of the units. OCR alleges that the County agreed that only three bedroom units were to be constructed.

OCR alleges that, on April 17, 2013, in fulfillment of its construction obligation, the County contracted with Bradhurst Construction ("Bradhurst") to perform the site work, with a scheduled completion date of six months and that OCR was a third-party beneficiary of such contract. OCR asserts that the work took substantially longer due to inexcusable delays by Bradhurst and was not completed until the fall of 2014. OCR alleges that despite numerous requests for the County to speed the construction along and despite the ability of the County to take actions to insure compliance with the contract, the County failed to take action and such failure resulted in a two-year delay and consequential damages in an amount to be determined, but in excess of \$250,000.00.

OCR alleges in the second cause of action that the County required OCR to retain the services of HAC and had an obligation under its Marketing Plan to insure that such consultant was competent and qualified, which the County failed to do or did so negligently. OCR alleges that, despite the promises and representations of the County as to the availability of qualified purchasers and available financing for closings commencing December 2013, such purchasers could not easily be found due to the defendant's and HAC's incompetence and failure to abide by the Marketing Plan requirements, or if found could not qualify for financing and/or could not meet HUD requirements. Therefore, the project, which should have closed out in 2014, still had three units unclosed as of August 2015 and the length of time between contract and closing was inordinate and greater than provided or estimated. OCR alleges that the County also had an obligation under its approved Marketing Plan to preliminarily market

the units and review and supervise HAC to insure fulfillment of HAC's obligations, neither of which it did.

OCR alleges that it was damaged by the County's breach of contract and misrepresentations, by being forced to incur excess carrying costs and loss of use of the proceeds of sales for up to two years and reduced sales prices in an amount to be determined but in excess of \$350,000.00.

Prior to this Court's Decision and Order denying the motion to dismiss and granting the motion to amend the complaint, the County filed a motion for summary judgment. This Court issued a Decision and Order dated June 28, 2019, denying the motion for summary judgment, finding that the County failed to serve or file a response to the amended complaint and therefore, the motion for summary judgement was premature because it was made prior to service of an answer to the amended complaint (see *Johnson v Boro Medical Center Local No. 563*, 89 AD2d 901 [2d Dept 1982] see also *Schoenborn v Kinderhill Corp.*, 98 AD2d 831, 832 [3d Dept 1983]).

The Court further stated that it may have created confusion in its prior Decision and Order, by stating that the County had already filed a motion for summary judgment which would be decided when it was fully submitted; the attorneys reached out to the Court and was told that the motion was still pending and was being transferred to this Court's calendar. That motion referred to the original complaint and not the amended complaint and the Court allowed the County to file an answer to the amended complaint.

The County now files another motion for summary judgment on the amended complaint. The County argues that OCR cannot establish any legal right to bring the action, as it is not a third-party beneficiary to any contract of the County's, nor can it show that the County breached any provision of an agreement relating to the housing development, whether the OCR was a party to the contract or not.

The County asserts that OCR has not raised a proper claim in the first cause of action for breach of contract, since OCR alleges that the County breached a contract that the County had with Bradhurst, under which OCR claims it was a third-party beneficiary. However, the alleged breaches concern Bradhurst's performance under

that agreement. Therefore, the first cause of action, if it exists, would be against Bradhurst and not the County. The County further asserts that OCR does not have status as a third-party beneficiary to that agreement.

The County asserts a second cause of action, which it contends is equally deficient, in that, it claims that the County breached a contract related to the marketing and financing of the affordable housing units. The County asserts that OCR named the wrong party, since OCR contracted with HAC for the marketing and financing of the affordable housing units. Additionally, HAC is a not-for-profit corporation, separate from the county and OCR's contract with HAC was at OCR's own expense and separate from any agreement with the County.

In opposition, OCR asserts that the motion should be dismissed procedurally as time barred because it was filed more than 120 days after the filing of the note of issue and also as duplicative of a prior motion for summary judgment. OCR contends that the grounds for this motion are virtually identical to the grounds in the prior motion and in a separate motion to dismiss and such denials are res judicata as to the issues raised.

OCR also asserts that the complaint sets forth valid causes of action. It contends that the County provided a critical path time line for completion of the work and while the County claims that such schedule is not part of the contract with Bradhurst, it is a document contemplated by and contained within the contract. Neil DeLuca ("DeLuca"), a member of OCR, asserts that OCR's claim is that the County failed in its obligation to complete the construction on time and its failure to enforce its contract with Bradhurst or to have effective enforcement provisions in the contract.

As to the second cause of action, DeLuca further asserts that the County's had an obligation to certify that the designated Marketing Consultant was qualified and experienced and to monitor the Marketing Plan of the Consultant,

In reply, the County argues that OCR's procedural contentions are without merit and asserts that there is no material issue of fact with respect to the plaintiff's first cause of action because the critical path schedule cannot create an addendum or amendment and the only date for completion of the Sales Agreement was December 30, 2014, which deadline was met. The County also asserts that there is no material issue of fact

with respect to the second cause of action, since it fulfilled its limited obligations relating to marketing the units and OCR cannot point to any provision of the Sales Agreement that the County breached.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); see also, *Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

As an initial matter, the Court does not find that the motion is time barred or barred due to res judicata. The Court determined that it bore some responsibility for any confusion in the posture of the case in deciding the last summary judgment motion and permitted the County to file an answer to the amended complaint. This motion could never be timely under OCR's standard because the Court rendered that Decision granting the motion to amend the complaint when the note of issue had already been filed. There was no way for a summary judgment motion to be timely, since the amended complaint was filed more than forty-five days after the notice of issue was filed. Therefore, the County would have had to move to vacate the note of issue and the plaintiff refile, which would simply take up valuable Court resources with delays in the disposition of the case. The Court did not decide the prior summary judgment motion on the merits and the standard for a motion to dismiss is different than a motion for summary judgment.

Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v Lincoln Diner Corp.*, 215

AD2d 546, 546 [2d Dept 1995]), the Court denies the motion as to the first cause of action, but grants the motion as to the second cause of action.

OCR asserts that Bradhurst violated its contract with the County and the County failed to enforce such contract, despite the critical path schedule that was referred to in the contract. Although, the County asserts that the critical path schedule is not part of the Bradhurst contract, a progress schedule is referred to in the contract and contemplated by the contract. OCR's opposition is sufficient to raise an issue as to the schedule and also whether OCR is an intended third-party beneficiary of that contract. In determining third-party beneficiary status, the Court may look at the circumstances as well as the agreement (*Alevoll v Farley*, 223 AD2d 613, 614 [2d Dept 1996]). "[T]he obligation to the third-party beneficiary need not be expressly stated in the contract" (*Id.*). The County argues that, even if OCR is a third-party beneficiary, that it is not the correct defendant and OCR should seek redress with Bradhurst, the County may also be a possible defendant for its alleged failure to enforce its contract. Such redress is not prevented as a matter of law.

The second cause of action relates to the County's failed to ensure that HAC was properly qualified to perform its function and the County's failure to properly oversee HAC's work. The Sale Agreement contains a merger clause, which bars any consideration of claims not contained in the Agreement, such as OCR's claim as to the list of qualified applicants. Further, OCR had independently contracted with HAC prior to the Sale Agreement and knew at the time of the Sale Agreement that HAC would be the marketing consultant. Therefore, there was no reliance on the representations made by the County as to HAC's qualifications and such would be barred by the merger clause.

Additionally, the County has not shown that HAC was not qualified and that it did not meet the eligibility requirements in the marketing plan, nor that the County failed to supervise and oversee under the marketing plan in the Sale Agreement.

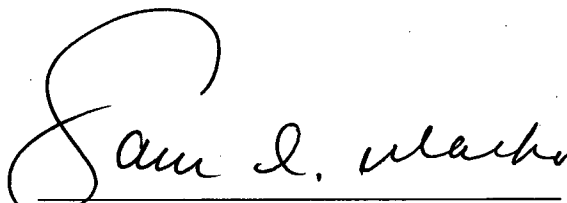
Accordingly, based on the foregoing, it is

ORDERED that the motion for summary judgment is granted in part and denied in part.

The parties are directed to appear before the Settlement Conference Part on February 18, 2020 in Courtroom 1600 at 9:30 a.m..

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
December 31, 2019



HON. SAM D. WALKER, J.S.C.