

Harding Steel, Inc. v BDM Solutions LLC

2020 NY Slip Op 30814(U)

March 17, 2020

Supreme Court, New York County

Docket Number: 656026/2019

Judge: Barry R. Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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HARDING STEEL, INC.,

Plaintiff,

- v -

BDM SOLUTIONS LLC, DIONYSSIOS MAROULIS, 2269
FIRST AVENUE OWNER LLC, JOHN AND JANE DOES 1-
10 AND OTHERS SIMILARLY SITUATED

Defendant.

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INDEX NO. 656026/2019
MOTION DATE 02/18/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 25, 26, 27, 28, 29, 30

were read on this motion to/for

DISMISSAL

HON. BARRY R. OSTRAGER

Before the Court is a pre-answer motion by defendant 2269 First Avenue Owner LLC, the owner ("the Owner") of the subject property at 2269 First Avenue in Manhattan ("the Property") to dismiss all claims asserted against it in this action pursuant to CPLR 3211(a)(7) for failure to state a cause of action. For the reasons stated below, the motion is granted.

The underlying facts are straightforward, and the facts relevant to this motion are for the most part undisputed. Pursuant to a standard form AIA contract dated May 2014, the Owner retained defendant BDM Solutions LLC ("BDM") to complete a major construction project ("the Project") at the Property (NYSCEF Doc. No. 26). BDM in turn entered into an AIA contract with plaintiff Harding Steel, Inc. ("Harding") in September of 2017 to install parking lifts at the Property as part of the Project (NYSCEF Doc. No. 3). Defendant Dionyssios Maroulis ("Maroulis"), the principal of BDM, signed the contract with Harding.

Harding commenced this action on October 17, 2019, claiming that it had fully performed its obligations under its contract with BDM and that the sum of \$108,650.00 remained due and owing. Harding also claims it is entitled to attorney's fees pursuant to its contract based on the nonpayment. In its Complaint (NYSCEF Doc. No. 2), Harding asserted ten causes of action. The only two causes of action asserted against the Owner are the Sixth Cause of Action for unjust enrichment and the Seventh Cause of Action for *quantum meruit*. Both of those causes of action are asserted jointly against the Owner and BDM, and both seek to recover damages in the amount of \$108,650.00 on the theory that the Owner benefitted from Harding's work and that Harding remains unpaid.

The remaining causes of action asserted in the Complaint are for breach of contract, promissory estoppel, breach of the covenant of good faith and fair dealing, and account stated against BDM (the 1st, 2nd, 8th and 10th causes of action), breach of constructive trust, breach of fiduciary duty, and fraud against BDM and its principal Maroulis (the 3rd, 4th, and 5th causes of action), and tortious interference with contractual relations against Maroulis (9th cause of action). BDM and Maroulis have answered the Complaint and asserted two cross-claims against the Owner for breach of contract and indemnification (NYSCEF Doc. No. 8), contending that the Owner is liable for any sums which the Court may find BDM owes to Harding. BDM and Maroulis have not submitted any papers in connection with this motion.

The Owner argues that because the two claims asserted against it sound in quasi-contract and involve the same subject matter as the written contract between Harding and BDM, the claims are barred as a matter of law. The Owner relies for that proposition on the decision by the Court of Appeals in *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 (1987) which held that it is impermissible to seek damages sounding in quasi contract where the suing party

has full performed under a valid written agreement. The Owner argues that the *Clark-Fitzpatrick* decision precludes claims, such as those asserted here, against non-signatory third parties. *Maor v Blue Sand Intl., Inc.*, 143 AD3d 579 (1st Dep't 2016).

Harding opposes the motion, relying primarily on statements purportedly made by the Owner in a related action commenced by BDM against the Owner and its predecessor-in-interest PS 85, LLC under Index Number 655824/2018 ("the 2018 action"). Harding is not a party to the 2018 action but points to the complaint in that action. There, BDM contends that it originally entered into a contract with PS 85 in July 2013, that PS 85 transferred its obligations to the Owner in 2014 when the Property was transferred, and that the Owner wrongfully terminated its contract with BDM effective May 30, 2018 with over \$2M still due and owing to BDM.

As relevant to this motion, Harding contends that the Owner in the 2018 action represented that BDM abandoned the Project in April 2018, after which time the Owner established a direct relationship with all the subcontractors, including Harding. Moreover, since Harding provided services for the Project which the Owner accepted, a relationship was established between Harding and the Owner that provides a basis for the quasi-contract claims.

In reply, the Owner asserts that Harding in its opposition did not in any way discredit, or even address, the above-referenced cases on which the Owner relies for dismissal of the quasi-contract claims. And as to the claim that the parties established a direct relationship, the Owner correctly notes that it made no such allegation in its pleadings in the 2018 action specific to Harding. Moreover, the claim is defeated by the documentary evidence. Specifically, Harding in its Notice of Lien filed in the amount of \$197,650.00 confirmed that it had completed its services as of March 30, 2018 (NYSCEF Doc. No. 4), and BDM confirmed in the 2018 action that the

Owner did not terminate the BDM contract until two months later, on May 30, 2018 (Index No. 655824/18, NYSCEF Doc. No. 1, ¶22).

Under these circumstances, the controlling law mandates the dismissal of Harding's quasi-contract claims against the Owner on the ground that the services at issue were provided pursuant to the terms of Harding's contract with BDM when that contract was in full force and effect. As the Court of Appeals clearly stated in *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987): "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Relying on the pronouncement of that precise principle of law by the Court of Appeals, the First Department in *Maor v Blue Sand Intl., Inc.*, 143 AD3d 579 (1st Dep't 2016) reversed the trial court and dismissed quasi-contract claims that related to the same subject as the contract stating that: "Here, the unjust enrichment claim cannot be maintained, since there can be no quasi-contract claim against a third-party nonsignatory to a contract that covers the subject matter of the claim (see *Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]; *Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313 [1st Dept 1995])." Therefore, the Owner, as a third-party nonsignatory to the contract between Harding and BDM is entitled to the dismissal of the claims against it.

Accordingly, it is hereby

ORDERED that the motion by defendant 2269 First Avenue Owner LLC is granted, and the Clerk is directed to sever and dismiss those portions of the Sixth Cause of Action for unjust enrichment and the Seventh Cause of Action for *quantum meruit* as asserted against 2269 First Avenue Owner LLC, and the balance of those causes of action as asserted against defendant

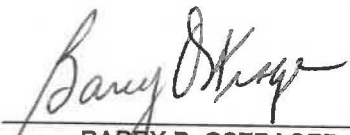
BDM Solutions LLC shall continue, along with the other causes of action asserted in the complaint.

This decision logically mandates the dismissal of the cross-claims for breach of contract and indemnification asserted by BDM against the Owner in its Answer relating to the failure of the Owner to pay Harding (NYSCEF Doc. No. 8). The Owner cannot be liable to indemnify BDM for damages asserted by Harding when the Court has found that the Owner has no liability to Harding for any damages. And should BDM have any breach of contract claim against the Owner that remains, BDM has asserted breach of contract claims against the Owner in the 2018 action and is free at this time to pursue those claims in the 2018 action. Accordingly, it is further

ORDERED, that the first cross-claim by BDM Solutions LLC against the 2269 First Avenue Owner LLC sounding in breach of contract is dismissed without prejudice, and the second cross-claim for indemnification is dismissed on the merits pursuant to this decision.

Unless circumstances require an adjournment, the remaining parties shall appear for a preliminary conference on April 7, 2020 at 9:30 a.m. when the related action was previously scheduled to be heard.

3/17/2020
DATE


BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE