

Façade Tech., LLC v CNY Constr. 701 LLC
2020 NY Slip Op 31767(U)
June 5, 2020
Supreme Court, New York County
Docket Number: 653587/2019
Judge: Barry Ostrager
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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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FAÇADE TECHNOLOGY, LLC, individually and as class representative for all others in the authorized class of subcontractors and materialmen who performed work at 701 Seventh Avenue, New York, NY for the benefit of CNY Construction 701 LLC

Plaintiffs,

- v -

CNY CONSTRUCTION 701 LLC, CNY GROUP LLC, CNY CONSTRUCTION LLC, KENNETH COLAO, STEVEN COLAO, DENNIS PRUDE, 701 SEVENTH PROPERTY OWNER LLC, 20 TSQ GROUND Co LLC, 20 TSQ LESSEE LLC, METAL SALES CO, INC., HARDER SERVICES INC., SIGNATURE METAL & MARBLE LLC, OLDCASTLE BUILDING ENVELOPE, INC., KINGS COUNTY WATERPROOFING CORP., SERVICE GLASS & STOREFRONT CO., INC., JOHN DOES #1-10, JOHN DOES #11-20, JOHN DOES #21-30,

Defendants.

INDEX NO.	653587/2019
MOTION DATE	
MOTION SEQ. NO.	001, 002 and 003

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Presently before the Court are three pre-answer motions to dismiss the Complaint by three groups of defendants named in the complaint by Plaintiff Facade Technology LLC (“Facade”), a subcontractor hired to perform deca-million dollar services on a 42-story, 500-foot high, multi-use building at 701 Seventh Avenue in Manhattan. Plaintiff entered into a contract with the general contractor defendant CNY Construction 701 LLC to provide certain curtain wall, window wall, and metal panel work and to furnish certain associated labor and materials (NYSCEF Doc. No. 2). The Complaint is principally directed at the general contractor defendant CNY Construction 701 LLC and the purportedly related entities CNY Group LLC and CNY Construction LLC (together, “CNY”) and seeks delay damages notwithstanding a no damages

for delay provision in the relevant contract. The Complaint alleges “cardinal changes” that added tens of millions of dollars to changes in the scope of work, as well as unanticipated delays to Plaintiff’s start date, the removal of the material hoist needed for Facade’s installation work, and CNY’s alleged commandeering of Facade’s swings. The claims against the three individual defendants Kenneth Colao, Steven Colao and, Dennis Prude (“the Individual Defendants”) are entirely predicated upon an alleged Lien Law claim that the Individual Defendants, as principals of CNY, received monies from the Owner of the property payable to subcontractors which they failed to pay over to the subcontractors. The Complaint also contains an alleged insurance fraud claim, as well as a fraud claim related to the cardinal changes.

In motion sequence 002, the CNY defendants and the Individual Defendants seek to dismiss the Complaint against them on the grounds that, *inter alia*, the contract has a no delay for damages clause; there is no basis for the Lien Law claim; Plaintiff has no standing to assert an insurance fraud claim; and Plaintiff committed an event of default under the operative construction contract barring its right to damages. Motion 002 is granted in part and denied in part as set forth below.

The claims against defendants CNY Group LLC and CNY Construction are dismissed because these entities have no contractual relationship with Plaintiff, as the contracting party is clearly identified as only CNY Construction 701 LLC and there is no basis to pierce the corporate veils of these separate LLC’s. Plaintiff’s claim for insurance fraud is also dismissed because Plaintiff has no standing to assert an insurance fraud claim against the CNY defendants.

Applying the familiar standard applicable to pre-answer motions to dismiss, Plaintiff has stated a claim against CNY and the Individual Defendants for a violation of Section 3A of the Lien Law. There is insufficient documentary evidence refuting Plaintiff’s Lien Law claim.

The Court denies dismissal of the contract-related claims against the general contractor CNY Construction 701 LLC (the First, Second and Fourth Causes of Action). Accepting all the allegations of the Complaint as true, Plaintiff has alleged sufficient facts to come within the exceptions to the strict application of the no damages for delay provision of the contract with CNY as articulated in *Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297 (1986). Accepting the allegations in the Complaint as true, Plaintiff has stated a claim that the scope of the alleged cardinal changes could not have been within the contemplation of the parties at the time of contracting. Whether there were cardinal changes that dramatically affected the scope of the work is a fact-based inquiry that cannot be resolved on a pre-answer motion to dismiss. The conclusory claims for fraud in the fifth cause of action are simply a restatement of the breach of contract claims and thus are dismissed as duplicative.

It is undisputed that CNY purported to terminate Plaintiff for cause, specifically, because Plaintiff was in financial distress. But Plaintiff contends at the pleading stage that its financial distress was caused by the claims Plaintiff is asserting here. Plaintiff has the right to pursue these claims, without prejudice to defendants' motion for summary judgment following the completion of discovery. In short, motion sequence 002 is granted in part and denied in part as reflected above.

Motion sequences 001 and 003 are motions by the owner (701 Seventh Property LLC) and the two lessees (20 TSQ Lessee LLC and 20 TSQ Groundco LLC) to dismiss the Complaint against them for lack of privity of contact with the Plaintiff subcontractor and lack of any duty of good faith and fair dealing. Plaintiff's conclusory allegations that these defendants directed CNY to make the alleged cardinal changes are insufficient as a matter of law to hold these defendants liable. The Eighth Cause of Action for foreclosure on the mechanic's liens is also

dismissed, as it appears the liens were bonded and discharged, and these parties in any event owe no monies to Plaintiff as non-parties to the contract. Thus, motion sequences 001 and 003 are granted dismissing all claims

Accordingly, it is hereby,

ORDERED that motion sequence 002 is granted in part and denied in part. The Clerk is directed to sever and dismiss all claims against defendants CNY Group LLC and CNY Construction; the Clerk is further directed to sever and dismiss count six for insurance fraud and count five for fraud relating to a cardinal change in their entirety. Dismissal of count one for breach of contract against defendant CNY Construction 701 LLC, count two for delay against defendant CNY Construction 701 LLC, and count seven for a violation of Section 3A of the Lien Law, against defendants CNY Construction 701 LLC and Kenneth Colao, Steven Colao and Dennis Prude is denied and those claims shall proceed to discovery; and it is further

ORDERED that motion sequence 001 by defendants 20 TSQ GroundCo LLC and 20 TSQ Lessee LLC is granted. The Clerk is directed to sever and dismiss all claims (count three and count eight) against 20 TSQ GroundCo LLC and 20 TSQ Lessee LLC; and it is further

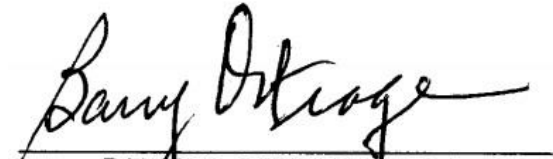
ORDERED that motion sequence 003 by defendant 701 Seventh Property Owner LLC is granted. The Clerk is directed to sever and dismiss all claims (count three and count eight) against 701 Seventh Property Owner LLC; and it is further

ORDERED that the remaining defendants shall Answer the Complaint by July 6, 2020; and it is further

ORDERED that counsel shall then draft a Preliminary Conference Order using the form available on the Part 61 website <http://ww2.nycourts.gov/courts/comdiv/ny/newyork.shtml> with

a Note of Issue deadline 22 months after the completion of the PC Order. Counsel shall appear for a conference to review the PC Order on a September 9, 2020 at 9:30 a.m.

Dated: June 5, 2020



BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE