Louis L. Buttermark & Sons, Inc. v U.S. Tech Const. Corp.
2020 NY Slip Op 32063(U)
June 25, 2020
Supreme Court, New York County
Docket Number: 656174/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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LOUIS L. BUTTERMARK & SONS, INC., individually, and as representative of all trust beneficiaries similarly situated,

Plaintiff,

- v -

U.S. TECH CONSTRUCTION CORP., ANNA LUIS ASHA KHALED, LEOPOLDO BAEZ, PHILADELPHIA INDEMNITY INSURANCE COMPANY, and John Does One through Ten, and other Lien Holders unknown,

Defendants.

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INDEX NO. 656174/2018

MOTION DATE 12/12/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion of plaintiff Louis L. Buttermark & Sons, Inc., individually, and as representative of all trust beneficiaries similarly situated ("Plaintiff") for summary judgment is granted in accord with the following memorandum decision.

Background

This dispute arises from a contract dated August 12, 2016 (the "Agreement") between defendant U.S. Tech Construction Corp. ("US Tech"), as general contractor, and Plaintiff, as subcontractor, to provide plumbing work, labor, services, and materials for a construction project located at 1589 Amsterdam Avenue, New York, New York (the "Project"), and owned by the Dormitory Authority of the State of New York. Defendants Anna Luis Asha Khaled and Leopoldo Baez are owners, and the Vice-President and Chief Executive Officer of US Tech, respectively (complaint ¶¶ 4, 6). On March 12, 2018, prior to commencement of this action,

Plaintiff filed a Notice of Mechanic's Lien with DASNY for non-payment in connection with the Project in the amount of $43,246.77 (the "Mechanic's Lien"). The Mechanic's Lien was extended for one year on March 7, 2019. Pursuant to Lien Law § 21, Defendant Philadelphia Indemnity Insurance Company (the "Surety") filed a surety bond to discharge that lien, under Bond #PB01773900161 (the "Discharge Bond"). Pursuant to State Finance Law § 137(1), the Surety also posted a payment bond, under Bond No. PB01773900115 (the "Payment Bond") in the amount of $3,572,000 in connection with the Project.

Plaintiff commenced this action on December 12, 2018, asserting eight causes of action: (1) foreclosure of the Mechanic's Lien as against the Discharge Bond; (2) breach of contract against US Tech; (3) unjust enrichment and *quantum meruit* against US Tech; (4) account stated against US Tech; (5) attorneys' fees against US Tech; (6) diversion of trust funds pursuant to Article 3-A of the Lien Law against US Tech, Anna Luis Asha Khaled, and Leopoldo Baez; (7) demand for payment under the Payment Bond; and (8) attorneys' fees against the Surety. On January 23, 2019, all the defendants appeared in the action by filing a joint answer denying Plaintiff's claims and asserting five affirmative defenses (NYSCEF Doc. No. 4).

Plaintiff now moves for summary judgment against US Tech and the Surety ("Defendants"), as follows: (i) against the Surety on the first cause of action for lien foreclosure, pursuant to the Discharge Bond; (ii) against US Tech on the second cause of action for breach of contract; (iii) against US Tech on the fourth cause of action for an account stated; (iv) against the Surety on the seventh cause of action pursuant to the Payment Bond; (v) against the Surety on the eighth cause of action for attorneys' fees pursuant to State Finance Law 137.4 (c); (vi) setting this matter down for an inquest with respect to attorneys' fees, and (vii) severing the remaining causes of action. Defendants oppose the motion.

In support of its motion, Plaintiff submits an affirmation of its counsel, Leonard J. Catanzaro, Esq., dated August 6, 2019, supported by copies of: the summons and complaint; the Answer; Mechanic's Lien and extension; Discharge Bond; and Payment Bond. Plaintiff also submits an affidavit of Louis L. Buttermark ("Buttermark"), dated August 6, 2019, President of the Plaintiff, which attaches copies of: the Agreement; an account analysis setting forth the amounts billed and payments received by Plaintiff; invoices and other requests for payments sent to US Tech; change orders and change order logs; copies of cancelled checks for payments from US Tech to Plaintiff; and emails and letters demonstrating the approval of change orders. Buttermark attests to: the formation of the Agreement between Plaintiff and US Tech; Plaintiff's performance and furnishing of work, labor, services, and materials under the Agreement and approved change orders in the amount of $94,546.77; Plaintiff's demands for payment; and US Tech's failure to make payment in full, leaving a balance due and owing of $43,246.77.

Defendants oppose the motion on the grounds that all controversies between the parties are subject to mandatory binding arbitration and Plaintiff must pursue its claims in arbitration rather than before this court. Defendants also dispute the amounts due to Plaintiff at this time. In support of their position, Defendants submit an affirmation of its counsel, Michael M. Rabinowitz, Esq., and the affidavit of Mohammed Aziz ("Aziz"), a project manager for US Tech, which is supported by a copy of the Agreement and a one-page document that Aziz represents is "US Tech's accounting for Buttermark for the Project" (Aziz Aff. Exs. A-B). Aziz acknowledges that Plaintiff performed work and approved change orders for the Project and is currently owed payment (Aziz Aff. ¶¶ 5-11), but disputes the amounts due to Plaintiff for the work performed, stating that:

> [A] review of the records maintained by US Tech reveals that at the conclusion of this Project, the sum of $36,438.59 will be due and owing to Buttermark . . . . According to

> the records maintained by US Tech, the approved change orders only total $37,738.59 and not the greater sum claimed by Buttermark."

(Aziz Aff. ¶¶ 6-7.)

Finally, Aziz asserts that US Tech is currently awaiting a $25,000 payment that "will be paid to US Tech in the final payment requisition by the project owner," and that all amounts owed to Plaintiff are subject to 10% retainage, which is held until the Project is complete.

Standard of Review

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). "Regardless of the sufficiency of the opposing papers, in the absence of admissible evidence sufficient to preclude any material issue of fact, summary judgment is unavailable" (*Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157, 157 [1st Dept 1996]).

Discussion

In opposition to Plaintiff's motion, Defendants raise a threshold issue, arguing that the controversy between the parties is subject to mandatory binding arbitration between the parties. Section 6.1 of the Agreement states that "[a]ny claim arising out of or related to this Subcontract except those waived in this Subcontract shall be subject to mediation as a condition precedent to

binding dispute resolution," and section 6.2 designates "Arbitration pursuant to § 6.3 of this Agreement" as the method of dispute. Section 6.3 states as follows:

> §6.3 ARBITRATION
>
> § 6.3.1 If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution in Section 6.2, any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

Plaintiff contends that Defendants have waived their right to arbitration because they did not interpose an arbitration defense in the Answer or move to compel arbitration.

The proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue (*Buchanan Capital Markets, LLC v DeLucca*, 150 AD3d 436, 437 [1st Dept 2017]). New York has a "long and strong public policy favoring arbitration" (*Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 49 [1997]). Nevertheless, "a right to arbitration may be modified, waived or abandoned" (*Stark v Molod Splitz De Santis & Stark, P.C.*, 9 NY3d 59, 66 [2007]). Once waived, the right to arbitrate cannot be regained (*Sherill v Grayco Bldrs.*, 64 NY2d 261, 274 [1985]. "[W]hether a party has waived arbitration by litigation-related conduct is an issue for the courts to determine, not the arbitrator (*Cusimano v Schnurr*, 26 NY3d 391, 401 n 3 [2015]).

A litigant may not compel arbitration when "its use of the courts is clearly inconsistent with its later claim that the parties were obligated to settle their differences by arbitration" (*Cusimano*, 26 NY3d at 400 [internal citations omitted]). The failure to raise an arbitration defense in its answer is not an automatic waiver of the right to arbitration (*see, Island Cash*

Register v Data Term. Sys., 244 AD2d 117, 120-21 [1st Dept 1998]), but courts have found that a defendant who asserted affirmative defenses and counterclaims in its answer but did not plead the right to arbitration, and subsequently did not amend its answer, had waived its right to arbitration (*Rusch Factors, Inc. v Fairview Mfg. Co.*, 34 AD2d 635, 635-36 [1st Dept 1970]), as had a defendant that failed to raise the defense in its answer or by motion to compel arbitration (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 371-72, *rearg denied* 5 NY3d 746 [2005]). Here, Defendants filed the Answer on January 23, 2019, asserting affirmative defenses that did not include a right to arbitration defense. Thereafter, Defendants did not amend their complaint, move to compel arbitration, or assert any right to arbitration until it filed its opposition to the present motion nearly eight months later. Significantly, Defendants have not moved to compel arbitration in opposition to the present motion. These actions are inconsistent with Defendants' claim that the parties are obligated to settle their differences by arbitration, and it is the finding of this court that the Defendants have waived arbitration.

Nevertheless, Plaintiff has not demonstrated its entitlement to summary judgment because a question of fact exists regarding the amount currently owed to the Plaintiff, specifically with respect to retainage withheld pursuant to the terms of the Agreement. Section § 15.3 of the Agreement indicates that amounts due to the Plaintiff are subject to 10% retainage, the release of which is subject to completion of the Project or other terms set forth in the agreement between US Tech and the owners of the project, which is not in evidence before this court (Buttermark Aff. Ex. F at 1 and § 11.9). The Buttermark Affidavit and supporting documentation are sufficient to demonstrate that Plaintiff performed work and supplied labor and materials pursuant to the Agreement and approved change orders in the amount of $94,546.37, with a remaining balance of $43,246.77 after crediting payments from US Tech. US Tech has

submitted no documentation or other evidence that adequately refutes the amounts claimed to be owed, but it is unclear whether Plaintiff's demand includes retainage. Plaintiff does not address this point in its submissions. No party has submitted evidence indicating that the Project is complete or that retainage is otherwise due to Plaintiff at this time. Therefore, there is a question of material fact regarding the amount due. The motion for summary judgment must, therefore, be denied.[1]

Accordingly, it is

ORDERED that the motion for summary judgment is denied, subject to renewal upon submission of additional documentation regarding retainage; and it is further

ORDERED that a telephonic status conference shall be held on July 23, 2020, at 2:00 p.m.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

June 25, 2020								
DATE						LOUIS L. NOCK, J.S.C.		
CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION		
		GRANTED	x	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

[1] With respect to Defendants' argument that they are not bound to pay Plaintiff until they receive $25,000 from another party, the court notes that pay-when-paid provisions are void and unenforceable in New York (*West-Fair Elec. Contractors v Aetna Cas. & Sur. Co.*, 87 NY2d 148 [1995]).