

**Masterfund LLC v MacQuesten Constr. Mgt., LLC**

2020 NY Slip Op 33521(U)

October 26, 2020

Supreme Court, Kings County

Docket Number: 510403/20

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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MASTERFUND LLC, as assignee of NEW ERA  
MECHANICAL CORP.,

Plaintiffs, Decision and order

- against -

Index No. 510403/20

MACQUESTEN CONSTRUCTION MANAGMENT, LLC,  
and SENECA INSURANCE COMPANY, INC.,

Defendants, October 26, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendant MacQuesten Construction Management (hereinafter "MCM") and Seneca Insurance Company have moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds documentary evidence bars the causes of action contained in the complaint. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a companion case, this lawsuit concerns a construction site located at 697 Van Sideren Avenue/180 New Lots Avenue in Kings County. MCM, a contractor, entered into two contracts with New Era Mechanical Corp., a mechanical subcontractor on April 5, 2016. The plaintiff Masterfund is the assignee of New Era. One of the contracts was a plumbing contract and the other an HVAC contract. During June and July 2017 New Era executed twenty eight separate releases which released MCM from any claims. Seventeen releases concerned the plumbing contract and eleven the HVAC contract. Two years later

during July 2019 MCM fired New Era for the failure to adequately perform pursuant to the contracts. On July 24, 2019 New Era filed a Mechanic's Lien in the amount of \$1,093,760.90 for work performed concerning the plumbing contract and two days later on July 26, 2019 filed a Mechanic's Lien for the HVAC contract in an amount of \$665,592. Moreover, on the same day New Era assigned both liens to an entity called Masterfund LLC. On October 7, 2019 MCM and defendant Seneca Insurance Company Inc., discharged both liens.

Masterfund commenced this action alleging breach of contract and Foreclosure of Mechanic's Lien bonds. Specifically, the complaint alleges that although New Era signed waivers it had "no intention to relinquish its right to payment for work actually performed or to waive any potential claim associated with the Work subject to that progress payment or under the New Era Subcontracts" (see, Verified Complaint, ¶17). The plaintiff asserts that New Era was paid for work performed even after the releases were signed which demonstrates a "course of conduct" (see, Verified Complaint, ¶20) between the parties whereby the plaintiff is entitled to be compensated for the work performed. Further, the complaint seeks to foreclose the bonds to Discharge New Era's Notices of Liens. The defendants have moved seeking to dismiss the lawsuit on the grounds the waivers foreclose any relief.

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, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [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]).

The defendants argue that "courts in New York have repeatedly held that a release executed by a subcontractor bars a subcontractor's subsequent action for work performed on the Project prior to the date of the release. A waiver signed by a subcontractor stating that it would make no further claim of 'any nature' for additional payment precludes the subcontractor's subsequent lawsuit against the contractor for work under the release" (see, Memorandum in Support of Motion to Dismiss, pages 4,5). The case cited in support of that proposition, Tri-State Environmental Contracting, Inc., v. PT & L Contracting Corp., 5 AD3d 127, 774 NYS2d 118 [1<sup>st</sup> Dept., 2004] does not support the contention the release signed in this case waives all claims for

further payment. In Tri-State the subcontractor signed numerous waivers, some denominated as a "full and final waiver and lien" and some denominated as "partial waivers of liens" (id). The court acknowledged that the precise language of each waiver was not determinative as to its nature because some full and final waivers noted that the work had not been completed. The court explained the determinative factor whether a waiver intended to in fact waive all claims is whether the waivers evince "an understanding that further payments are to be made" (id). However, if no such language is contained in the waiver then indeed such waiver will be viewed as a final waiver which bars any claim for further compensation.

In this case, other than the amounts contained in each waiver, they are identical in all material respects. There is no indication at all that the last waiver executed as to each contract was intended to be a final waiver barring claims for breach of contract (see, C & A Construction LLC v. G. Builders LLC, 67 Misc3d 1241, 129 NYS2d 267 [Supreme Court, New York County 2020]). Thus, there are surely questions of fact whether there was an intention to waive all future claims. The defendants assert that the waivers are "logically susceptible of only one interpretation, namely: in consideration of a substantial amount of money, Plaintiff decided to discharge Defendants from any causes of action" (Reply Memorandum, page 4).


However, a more logical understanding is the plaintiff agreed to waive any claims concerning the work performed and the payment made expressed in the particular release. Indeed, there can be little logic in plaintiff waiving claims for close to two million dollars for no apparent reason, especially where the waiver allegedly waiving such future claims is identical to the waivers that logically waive claims following payment.

Thus, there are surely questions concerning the nature of these waivers and consequently, the motion seeking to dismiss the complaint is denied.

So ordered.

ENTER:

DATED: October 26, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC