

Railroad Constr. Co. v Macton Corp.

2020 NY Slip Op 34119(U)

December 10, 2020

Supreme Court, New York County

Docket Number: 650073/2019

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

RAILROAD CONSTRUCTION CO., AMCC CORP. (A JOINT VENTURE), Plaintiff, INDEX NO. 650073/2019 MOTION DATE 02/25/2020 MOTION SEQ. NO. 003 004 005

- v -

MACTON CORPORATION, Defendant. DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 79, 80, 81

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 72, 73, 74, 75, 76, 77, 78, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for EXAMINATION ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 120

were read on this motion to/for DISCOVERY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff (motion sequence number 003), pursuant to CPLR 3211 (a) (3) and (5) and BCL § 1312, for an order dismissing defendant's counterclaims is denied; and it is further

ORDERED that the motion of plaintiff (motion sequence number 003), pursuant CPLR 3211(a)(5) to dismiss the counterclaims seeking damages against the plaintiff to the extent of any and all

claims through July 31, 2018 is granted, there being no opposition thereto; and it is further

ORDERED that the motion of defendant (motion sequence number 004), pursuant to CPLR 3108 and CPLR 3111, for an order granting an open commission to John C. Shepherd and Timothy H. Brenes, as nonparty witnesses is granted; and it is further

ORDERED that the motion of defendant (motion sequence number) 004, pursuant to CPLR 3108 and CPLR 3111, for an open commission appointing a Judge of the Connecticut State Superior Court, or other person authorized by the State of Connecticut, to issue a subpoena to John C. Shepherd and Timothy H. Brenes is granted; and it is further

ORDERED that the motion of defendant (motion sequence number 005), pursuant to CPLR 3124, for an order directing plaintiff comply with the prior order of this court dated November 12, 2019 is denied as moot; and it is further

ORDERED that the motion of defendant (motion sequence number 005), pursuant to CPLR 3216, for sanctions against plaintiff is denied; and it is further

ORDERED that plaintiff shall serve and file a reply to the counterclaims that accrue after July 31, 2018, interposed in the amended answer of defendant, within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to submit to 59nyef@nuycourts.gov and NYSCEF a proposed discovery compliance conference order or a competing proposed discovery compliance conference order on January 25, 2021.

DECISION

In this commercial construction contract action to recover damages for breach of contract, plaintiff Railroad Construction, Co. and AMCC Corp. (A Joint Venture), moves under motion sequence 003, for an order pursuant to Business Corporation Law (BCL) 1312, CPLR 53211 (a) (3) and (5), to dismiss defendant, Macton Corporation's counterclaims (motion sequence number 003).

In motion sequence number 004, defendant moves for an order pursuant to CPLR 3108 and 3111, directing the issuance of an open commission to enable it to take depositions of nonparty witnesses, and to request the Connecticut Superior Court to issue a subpoena requiring such nonparties to appear for depositions.

In motion sequence 005, defendant moves for an order pursuant to CPLR 3124 and 3126, directing compliance with the prior preliminary conference order, and for sanctions in the form of attorneys' fees.

Background

On October 14, 2016, plaintiff, a general contractor, entered into a contract with the Long Island Railroad Company (LIRR) for,

among other things, the construction of a new repair shop (the project). Thereafter, on April 12, 2018, plaintiff and defendant, a subcontractor, entered into a subcontract whereby defendant agreed to fabricate and supply certain specialty rail work for the project for the sum of \$3,659,800.00. Plaintiff alleges that defendant breached the subcontract by failing to timely and properly complete its work (NYSCEF Doc. No 6; complaint at 1, ¶¶ 28-32). Defendant argues that plaintiff breached the subcontract by failing to make timely payments for labor and materials furnished by defendant, which failure was the direct and proximate cause of defendant's failure to complete its subcontract (NYSCEF Doc. No 46; amended answer at 6, ¶¶ 29-31).

Plaintiff commenced a prior action in this court, under Index Number 160107/2018 against defendant and filed an order to show cause seeking specific performance of the subcontract (NYSCEF Doc. No 28; order to show cause). On December 14, 2018, this court granted plaintiff's order to show cause, on default, to the extent that defendant was directed to perform its obligations under the subcontract (NYSCEF Doc. No. 42; decision and order dated December 14, 2018). On January 4, 2019, plaintiff commenced the instant breach of contract action seeking \$6,300,000.00 in damages (NYSCEF Doc No 1; complaint).

DISCUSSION

Plaintiff moves for an order, dismissing the two counterclaims interposed by defendant in its amended answer, (1) pursuant to BCL § 1312 and CPLR 3211 (a) (3) based upon a lack of standing; and (2) pursuant to CPLR 3211 (a) (5) based upon the doctrines of collateral estoppel and res judicata. Plaintiff also alleges that defendant has released and waived its alleged damages against plaintiff in the prior action, therefore it is precluded from maintaining the counterclaims in this action (NYSCEF Doc No. 46; amended answer at 5, ¶¶ 25-28; at 6, ¶¶ 29-31).

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994]).

On a motion to dismiss based upon the alleged lack of standing, pursuant to CPLR 3211 (a) (3), the burden is on the moving party to establish, prima facie, a lack of standing as a matter of law (Salem v Fischman, 60 Misc 3d 1214 (A) [Sup Ct, New York County 2018]). To defeat the motion, the opposing party must submit evidence which raises a question of fact as to its standing (Deutsche Bank Natl. Trust Co. v Haller, 100 AD3d 680 [2d Dept 2012]).

BCL § 1312 provides that "[a] foreign corporation doing business in this state without authority may not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state" (BCL § 1312 [a]).

Pursuant to CPLR 3211 (a) (5), a party may move for judgment dismissing one or more causes of action on the ground that the cause of action may not be maintained because of collateral estoppel and/or res judicata (Pine Street Associates, L.P. v Hicks, 35 Misc3d 1231(A) [Sup Ct, New York County, 2012]).

Here, in its first counterclaim, defendant alleges that plaintiff breached the subcontract by failing to pay \$1,419,900.35 for labor and materials furnished by defendant pursuant to the subcontract (amended answer, at 6 ¶ 28). In its second counterclaim, defendant alleges that plaintiff's failure to pay entitles it to pre-judgment interest (id., at 6, ¶ 29).

Collateral Estoppel and Res Judicata

In support of its motion to dismiss, plaintiff argues that the doctrines of collateral estoppel and res judicata bar defendant's counterclaims as a result of this court's order dated December 14, 2018 and issued in a prior action between the parties.

The equitable doctrine of estoppel only applies if the issue in the second action is identical to an issue which was raised, decided and material in the first action (Pine Street Associates,

L.P., 35 Misc.3d 1231(A) [Sup Ct New York County 2012]). The proponent of collateral estoppel has the burden to demonstrate the identical and decisive issue, while the burden rests on the opponent to establish the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (Pine Street Associates, L.P., 35 Misc.3d 1231(A) [Sup Ct New York County 2012]).

"The issue of whether a party has had a full and fair opportunity to contest the prior decision requires consideration of the realities of litigation." (Chambers v City of New York, 309 AD2d 81 [2d Dept 2003]). Here, plaintiff relies on the fact that it obtained a default judgment in the prior action, however, it is well settled that collateral estoppel applies only to matters actually litigated and determined (Id.). An issue is not actually litigated if there has been a default (Id., citing Kaufman v Lilly & Co., 65 NY2d 449, 455 [1985]).

Therefore, that portion of the motion of plaintiff under motion sequence no. 003, for an order to dismiss the counterclaims based upon collateral estoppel, pursuant to CPLR 3211 (a) (5) shall be denied.

Next, plaintiff argues that the court should dismiss the counterclaims under the doctrine of res judicata, or claim preclusion. Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior

action between the same parties involving the same subject matter (Pitcock v Kasowitz, Benson, Torres, & Friedman, LLP, 27 Misc.3d 1238(A), 2010 NY Slip Op 51093 (U), Sup Ct, New York County [2010]). In the instant case, as set forth above, the prior judgment was based upon the default of defendant, and therefore was not a judgment on the merits. Therefore, the motion of plaintiff under motion sequence no. 003, for an order dismissing defendant's counterclaims based on res judicata, pursuant to CPLR 3211 (a) (5) shall be denied.

Waiver and Release

Plaintiff also argues that despite having sent defendant a notice to cure, defendant continued to delay the project and failed to resolve its deficient work. Nonetheless, plaintiff claims that it paid defendant a total of \$1,284,948.35. In connection with this payment, defendant signed a partial waiver and release of lien for any and all claims through July 31, 2018 (NYSCEF Doc. #62; waiver and release).

Upon a review of the waiver and release, and there being no opposition thereto, plaintiff's motion is granted to the extent that defendant's counterclaims seeking damages against the plaintiff for any and all claims through July 31, 2018, shall be dismissed.

Standing

Plaintiff argues that defendant's counterclaims are barred by BCL § 1312 and CPLR 3211 (a) (3) because defendant has failed to file its New York State corporate taxes and has not filed required annual reports. However, an unauthorized foreign corporation is permitted to assert and litigate a counterclaim where, as here, the counterclaims are based on the same transaction or occurrence (Tri Terminal Corp. v CITC Indus., Inc., 100 Misc. 2d 477 [Sup Ct 1979]). On that basis, plaintiff's motion for an order dismissing the counterclaims based upon a lack of standing pursuant to BCL § 1312 and CPLR 3211 (a) (3) shall be denied.

Motion Sequence 004

Defendant seeks a court order pursuant to CPLR 3108 and 3111, directing the issuance of an open commission to enable defendant to take depositions of John C. Shepherd and Timothy H. Brenes, as non-party witnesses. Defendant also seeks an order of this court that requests the Superior Court of the State of Connecticut issue a subpoena to the nonparties, requiring the nonparties to appear for depositions.

CPLR 3108 provides as follows:

"A deposition may be taken on written questions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state. A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state."

CPLR 3111 provides as follows:

"Production of things at the examination

"The notice or subpoena may require the production of books, papers and other things in the possession, custody or control of the person to be examined to be marked as exhibits, and used on the examination. The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery."

"To be entitled to issuance of commission, the moving party is required to demonstrate that the witness outside of New York would not cooperate with a notice of deposition, would not voluntarily come within New York, or that the judicial imprimatur accompanying a commission would be necessary or helpful when seeking the assistance of the foreign court in compelling the witness to attend the examination." (Smith v Smith, 41 Misc3d 412 [Sup Ct, Kings County 2013][citations omitted]). A commission to examine a witness out of the state may permit use of oral questions (open commission) or written questions (sealed commission) (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 7B; CPLR 3108.5).

Here, defendant contends that the principal of the company is deceased and that when the company went out of business, all employees left for employment elsewhere. Defendant stated that there are no known witnesses to its performance under the subcontract in New York and that two material witnesses, who have knowledge of the financial history of the subcontract are employed by BBM Railway, a company located in Oxford, Connecticut.

Defendant claims that BBM Railway is the replacement company that was hired by plaintiff to complete the defendant's work. Moreover, defendant has been advised by BBM Railway's general counsel, that without a subpoena, the two witnesses will not be permitted by their employer to testify. In opposition, plaintiff argues defendant's request is premature, improper and immaterial and unnecessary.

Under the circumstances of this case, defendant may proceed by open commission. In addition to defendant having satisfied its burden, the record is devoid of any proof that plaintiff would not have an equal opportunity to examine and cross-examine the witnesses in Connecticut. Therefore, the motion of defendant (motion sequence number 004) for an order directing the open commission for the issuance of a subpoena for the purposes of taking the depositions of John C. Shepherd and Timothy H. Brenes, shall be granted.

Motion Sequence 005

Defendant moves for an order (1) pursuant to CPLR 3124, directing plaintiff to comply with the prior order of this court dated November 12, 2019; and (2) pursuant to CPLR 3126, granting it sanctions in the form of attorneys' fees.

By preliminary conference order dated November 12, 2019, this court directed plaintiff to provide defendant with access to the site for inspection within 45 days of the date of such order. On

August 11, 2020, defendant informed the court that the site inspection has been conducted. Therefore, that portion of defendant's motion sequence 005, seeking compliance of the prior order of this court has been rendered moot. The portion of the motion of defendant seeking sanctions against the plaintiff shall likewise be denied, as defendant has not shown that sanctions are warranted.

12/10/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF APPROPRIATE: