

Footman v D'Onofrio Gen. Contrs. Corp.
2022 NY Slip Op 30046(U)
January 7, 2022
Supreme Court, New York County
Docket Number: Index No. 156910/2021
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

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ERIC FOOTMAN,

Plaintiff,

- v -

D'ONOFRIO GENERAL CONTRACTORS CORP., SUNSET PARK GENERAL CONTRACTORS, LLC

Defendant.

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INDEX NO. 156910/2021
MOTION DATE 10/22/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is

The following read on defendant – D’ONOFRIO GENERAL CONTRACTORS CORP., motion to dismiss per CPLR 3211(a)(1) and/or CPLR 3211(a)(7). A summons and non – verified complaint were submitted stating the single cause of action for i) breach of prevailing wage contracts for the putative class in an amount to be determined at trial. Defendant – SUNSET PARK GENERAL CONTRACTS, LLC, submitted an answer on or about September 28, 2021 (see NYSCEF Doc. No. 13). Defendant – D’ONOFRIO GENERAL CONTRACTORS CORP., submits this pre-answer motion to dismiss.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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” (see Leon v. Martinez, 84 N.Y.2d 83 [1994]).

On a motion to dismiss based upon documentary evidence, defendant must present evidence which “utterly refutes” plaintiff’s allegations and establishes a defense as a matter of law (see *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]).

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

The affidavit from Jerry D’Onofrio Jr., owner of defendant D’ONOFRIO GENERAL CONTRACTORS CORP., affirms, “[p]laintiff was never employed by D’Onofrio” (see NYSCEF Doc. No. 17 Par. 2).

The affidavit of Jerry D’Onofrio III, owner of defendant SUNSET PARK GENERAL CONTRACTORS, LLC, affirms, “[p]laintiff was employed solely by Sunset at all relevant times” (see NYSCEF Doc. No. 16 Par. 2).

Plaintiff’s memorandum of law states,

“Plaintiff alleges that D’Onofrio, in addition to Co-Defendant Sunset Park General Contractors, LLC, entered into contracts with government agencies and utility companies to perform various types of construction work (“Prevailing Wage Contracts”). Plaintiff alleges that these Prevailing Wage Contracts require the payment of prevailing wages and supplemental benefits to workers who furnish labor in furtherance of these contracts. Plaintiff alleges that he and Putative Class members furnished labor in furtherance of the Prevailing Wage Contracts but were not compensated at the applicable prevailing wage and benefit rates for all hours worked. Accordingly, Plaintiff commenced this putative class action as a third-party beneficiary to the Prevailing Wage Contracts alleging that D’Onofrio and Sunset Park breached these contracts by failing to pay prevailing wages and benefits” (see NYSCEF Doc. No. 19).

The memorandum in opposition states, “[p]laintiff alleges facts sufficient to support a claim that D’Onofrio and Sunset Park are joint employers. The Complaint specifically states that D’Onofrio and Sunset Park ‘operated and continues to operate business’ at the same addresses and locations as each other, specifically identifying five different locations” (see NYSCEF Doc. No. 19 P. 13).

Plaintiff’s memorandum in opposition continues, “[p]laintiff alleges that he ‘received materials, assignments, and instruction from D’Onofrio,’ ‘would go to D’Onofrio’s yards’ and ‘observed D’Onofrio’s vehicles, owners, materials and employees’ while there” (see NYSCEF Doc. No. 19 P. 13). Plaintiff’s attorney quotes the unverified complaint through the memorandum in opposition.

However the court notes that Plaintiff’s complaint is not verified nor does plaintiff – Eric Footman submit an affidavit related to the instant motion.

Defendant contends, “[i]n order to recover as a third-party beneficiary to a contract, a plaintiff must establish: (1) the existence of a valid and binding contract between other parties; (2) that the contract was intended for the plaintiff’s benefit; and (3) that the benefit to the plaintiff is sufficiently immediate to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost” (see *Saratoga Schenectady Gastroenterology Assocs., P.C. v. Bette & Cring, LLC*, 921 N.Y.S.2d 393 [3d Dep’t 2011]; *LaSalle Nat’l Bank v. Ernst & Young LLP*, 729 N.Y.S.2d 671, 676 [1st Dep’t 2001]).

Plaintiff does not submit a contract of any kind in this litigation, nor submit an affidavit to purport any facts in relation to third-party beneficiary claims. Plaintiff further does not provide statutes, case law, affidavits, or contracts about a class action.

This court notes that the owners of the two defendants have the same last name of D’Onofrio however the companies appear distinct.

ORDERED that the motion of defendant D’ONOFRIO GENERAL CONTRACTORS CORP., to dismiss the complaint herein is GRANTED and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

1/7/2022
DATE 
LAURENCE LOVE, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE