Design Dev. NYC, Inc. v Central Park Taekwondo, LLC
2022 NY Slip Op 33019(U)
September 6, 2022
Supreme Court, New York County
Docket Number: Index No. 155745/2015
Judge: Alexander Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** **PART** **18**

Justice

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DESIGN DEVELOPMENT NYC, INC.,

Plaintiff,

- v -

CENTRAL PARK TAEKWONDO, LLC, THE RUXTON TOWER LIMITED PARTNERSHIP, WESTCHESTER FIRE INSURANCE COMPANY

Defendants.

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INDEX NO. 155745/2015

MOTION DATE 12/15/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendants move pursuant to CPLR 3211 (a) (7) to dismiss all claims in the amended complaint insofar as asserted against defendant The Ruxton Tower Limited Partnership (Ruxton or the owner); and to dismiss the second and third causes of action in the amended complaint against all defendants pursuant to CPLR 3211 (a) (7) or, alternatively, pursuant to CPLR 3212.

In determining dismissal under CPLR Rule 3211 (a) (7), the "complaint is to be afforded a liberal construction" (Goldfarb v Schwartz, 26 AD3d 462, 463 [2d Dept 2006]). The "allegations are presumed to be true and accorded every favorable inference" (Godfrey v Spano, 13 NY3d 358, 373 [2009]). "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]).

The amended complaint alleges that plaintiff entered into a contract with defendant Central Park Taekwondo LLC (CPT) to perform construction and renovation work, labor, and services at CPT's commercial unit located at 50 West 72nd Street in New York, New York. Plaintiff alleges it performed the work but that defendants failed to submit full payment of the contract price, resulting in a balance of $197,634.69. Plaintiff filed a notice of mechanic's lien on November 20, 2014 and alleges that defendant Westchester Fire Insurance Company (WFIC) is a bonding company that bonded the mechanic's lien, discharging the lien (see NYSCEF Doc No 57, amended complaint).

In support of dismissal of, inter alia, the first and fourth causes of action, defendants argue that "upon the filing of a bond to discharge a mechanic's lien, the mechanic's lien is detached from the property and transferred to the bond" (NYSCEF Doc No 144 at 6-7). Consequently, defendants argue that plaintiff's recourse is against the bond and not against the property, and the property owner, The Ruxton, is no longer a necessary party to the case. This Court agrees with the rationale set forth in Doma Inc. v 885 Park Ave. Corp. (59 Misc 3d 703 [Sup Ct, NY County 2018] [Freed, J.]) and finds that the complaint should be dismissed against The Ruxton because, since the bonding, the action now "deals with the surety and not the real property" (id. at 706).[1]

Further, the first cause of action for breach of contract cannot be saved under plaintiff's theory that the owner is a third-party beneficiary to the contract. The single case cited by plaintiff does not support the proposition that a purported "third-party beneficiary" is responsible for various obligations set forth in a contract (e.g., an obligation to pay), as opposed to a non-party that sues to recover a benefit from the contract between others (as intended in the term "third-

[1] The Court also notes that the plaintiff stipulated to vacate the notice of pendency filed against the property (see NYSCEF Doc No 143).

party *beneficiary*"). The single case cited by plaintiff does not support the proposition that a beneficiary of a contract becomes a party to a contract and can be sued for failing to perform under a contract for which it is not a signatory.

The Court also rejects plaintiff's arguments in opposition that the motion is untimely. A motion to dismiss pursuant to CPLR 3211 (a) (7), "may be made at any time" (Goldberg v Torim, 181 AD3d 443, 444 [1st Dept 2020]) and is not subject to the language in the preliminary conference order or the last compliance conference order with language imposing a deadline to file a "dispositive motion" (see NYSCEF Doc Nos 36 and 111) because the authority to impose such a deadline is derived only from CPLR 3212 (a). Therefore, this Court agrees with other decisions in this court that the "dispositive motion" deadline encompasses summary judgment motions made pursuant to CPLR 3212 (see Nationwide Prop. & Cas. Ins. Co. v Johnson, 67 Misc 3d 1209[A], 2020 NY Slip Op 50477[U], *2 [Sup Ct, NY County 2020] [Lebovits, J.]; Kritzer v Ventura Ins. Brokerage, Inc., 50 Misc 3d 832, 835-38 [Sup Ct, NY County 2015] [Billings, J.]; but see Thomsen v Suffolk County Police Dept., 50 AD3d 1015, 1016-17 [2d Dept 2008]).

The instant CPLR 3211 (a) (7) motion also does not violate the "single-motion rule" because this motion is asserted against the amended complaint. The amended complaint includes different causes of action, like the fourth cause of action to foreclose on the mechanic's lien, which was not explicitly asserted in the original complaint (compare NYSCEF Doc Nos. 1 and 57). While both the original and amended complaint asserted breach of contract as its first cause of action, the claims are based on a different set of facts and allegations. Indeed, one of the main reasons plaintiff sought leave to amend the complaint was "to add a new party, Westchester Fire Insurance Company, the bonding company which discharged the mechanic's lien" (NYSCEF Doc No 86, decision and order on mot seq no 3). The instant argument for dismissing the

amended complaint, namely that the owner is no longer a necessary party after the lien has been bonded, could not have been asserted at the time the first motion to dismiss was made because there were no such allegations in the original complaint.

The branch of the motion to dismiss the second and third causes of action is granted as unopposed. The Court declines to award defendants their request for a 22 NYCRR § 130-1.1 sanction in the form of attorneys' fees for plaintiff's counsel's failure to respond to the request to voluntarily discontinue those claims months before this motion was made.

Accordingly, it is hereby ORDERED the branch of the motion by defendant The Ruxton Tower Limited Partnership to dismiss the complaint herein is granted and the complaint is dismissed in its entirety insofar as asserted 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 branch of the motion to dismiss the second and third causes of action are granted as unopposed; and it is further

ORDERED that the action is severed and the first and fourth causes of action shall continue against the remaining defendants; and it is further

ORDERED that the balance of the motion and any relief requested not addressed herein is denied.

This constitutes the decision and order of the Court.

9/6/2022
DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE