

Electrotech Serv. Equip. Corp. v Top Shelf Elec. Corp.

2023 NY Slip Op 31264(U)

April 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 526651/2022

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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ELECTROTECH SERVICE EQUIPMENT CORPORATION,
Plaintiffs,

Decision and order

- against -

Index No. 526651/2022

TOP SHELF ELECTRIC CORP. AND EULER HERMES
NORTH AMERICA INSURANCE COMPANY,
Defendants;

April 17, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff has moved seeking to dismiss counterclaims and affirmative defenses filed by the defendant. The defendant opposes the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

The plaintiff and the defendant entered into contracts whereby the plaintiff promised to supply the defendant with electrical equipment for construction projects at 50 Hudson Yards in New York County and 9 Dekalb Avenue in Kings County. The plaintiff filed a mechanic's lien alleging they are owed sums pursuant to those agreements. Further, the plaintiff commenced this action and has asserted causes of action to foreclose the mechanic's lien, breach of contract, unjust enrichment, quantum meruit, account stated and a violation of General Business Law §756-a (see, First Verified Amended Complaint [NYSCEF Doc. No. 11]). The defendant has filed an answer and alleges that in fact the plaintiff was paid for all of its services and has filed a

baseless and exaggerated mechanic's lien. In fact, the defendant asserts it overpaid the plaintiff at least \$600,000 and further seeks retainage fees due to the plaintiff's failure to provide close-out documentation. The defendant filed six counterclaims including breach of contract, unjust enrichment, conversion, wilful exaggeration of a mechanic's lien, abuse of process and specific performance based upon the allegations of overpayment and retainage fees. In addition, the defendant has asserted seventeen affirmative defenses. The plaintiff has now moved seeking to dismiss the counterclaims and affirmative defenses.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as true, whether the party can succeed upon any reasonable view of those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the counterclaims are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the counterclaims will later survive a motion for summary judgment, or whether the defendant 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, Redwood Property

Holdings, LLC v. Christopher, 211 AD3d 758, 177 NYS3d 895 [2d Dept., 2022]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id). The counterclaim does not provide any of the actual provisions that were allegedly breached by the plaintiff. To be sure, the breach of contract cause of action of the First Verified Amended Complaint also fails to include the specific provisions that were breached by the defendant. In any event, the provisions of a contract must be disclosed so that the court can evaluate whether a cause of action has been alleged (Barker v. Time Warner Cable Inc., 83 AD3d 750, 923 NYS2d 118 [2d Dept., 2011]). Since no such provisions are noted the motion seeking to dismiss the breach of contract counterclaim is granted.

The next counterclaim is for unjust enrichment. It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim

(see, Corseello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Since the defendant has already pled a breach of contract claim the unjust enrichment claims is duplicitive and the motion to dismiss this counterclaim is granted. Once again, the First Verified Amended Complaint contains a cause of action for unjust enrichment acknowledging the very same contracts between the parties. In any event since such contracts exist the motion seeking to dismiss the counterclaim for unjust enrichment is granted.

The third counterclaim is for conversion. It is well settled that to establish a claim for conversion the plaintiff must show the legal right to an identifiable item or items and that the defendant has exercised unauthorized control and ownership over the items (Giardini v. Settanni, 159 AD3d 874, 70 NYS3d 57 [2d Dept., 2018]). As the Court of Appeals explained "a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession...Two key elements of conversion are (1) plaintiff's possessory right or interest in the property...and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see, Colavito v. New

York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006])). Therefore, where a defendant "interfered with plaintiff's right to possess the property" (Hillcrest Homes, LLC v. Albion Mobile Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred. The plaintiff has adequately presented claims for conversion. Consequently, the motion seeking to dismiss this counterclaim is denied.

The next counterclaim alleges the wilful exaggeration of the mechanic's lien. It is well settled that whether the lien amount contained in a mechanic's lien is exaggerated is generally a question of fact (Executive Towers at Lido LLC v. Metro Construction Services, 303 AD2d 545, 756 NYS2d 461 [2d Dept., 2003])). As the court stated in Aaron v. Great Bay Contracting Inc., 290 AD2d 326, 736 NYS2d 359 [1st Dept., 2002] "the validity of the lien plainly turns on a dispute as to whether respondent has completed the work required by the contract, and, accordingly, must await trial of the foreclosure action" (id). Thus, a determination that a lien was willfully exaggerated generally cannot be decided summarily (see, Scarano Architect, PLLC v. 6322 Holding Corp., 35 Misc3d 1228(A), 954 NYS2d 761 [Supreme Court Kings County 2012])). There are exceptions where the evidence of such exaggeration is "conclusive" (see, LMF-RS Contracting Inc., v. Nevzet Kaljic, 126 AD3d 436, 2 NYS3d 351 [1st Dept., 2015])).

The defendant has adequately alleged the exaggeration of the lien in a non-conclusory fashion. Therefore, the motion seeking to dismiss this counterclaim is granted.

The next counterclaim alleges abuse of process. In Neptune Estates, LLC, v. Big Poll & Son Construction LLC, 39 Misc3d 649, 961 NYS2d 896 [Supreme Court Kings County 2013] the court enumerated seven causes of action that one could pursue upon the filing of an exaggerated Mechanic's Lien. The court explained that "a number of common law remedies are available to a property owner where damages result from the wilful exaggeration of a lien. For example, a lienor that wilfully exaggerated a lien may be liable for: '(1) fraud; (2) disparagement (sometimes called slander of title); (3) interference with contract (to extent such lien interferes with existing contracts); (4) interference with prospective business advantage (to extent such lien interferes with potential deals); (5) extortion; (6) malicious prosecution; and (7) malicious abuse of process'" (id). Clearly, the above available causes of action are all torts. Indeed, in Greenway Plaza Office Park-1 LLC v. Metro Construction Services Inc., 4 AD3d 328, 771 NYS2d 532 [2d Dept., 2004] the court specifically permitted a tort action against a corporate officer who wilfully exaggerated a mechanic's lien. Further, lower courts have likewise concluded that the wilful exaggeration of a mechanic's lien is a tort (see, Power Air Conditioning Corp., v. Batirst,

229 LLC, 2017 WL 1375262 [Supreme Court New York County 2017], Honest & Quality Corp., v. 21214 Northern LLC, 2020 WL 2790716 [Supreme Court New York County 2020]). Therefore, the motion seeking to dismiss the counterclaim for abuse of process resulting from the filing of such Mechanic's Lien is denied.

The last counterclaim seeks specific performance requiring the plaintiff to provide close out documentation regarding its work. The plaintiff opposes the motion on the grounds all such information has been provided and that the defendant has failed to specify the nature of all documentation sought. First, the plaintiff cannot assert all information sought has been furnished and then argue the documents sought have not been sufficiently defined. The plaintiff cannot confirm all documents have been provided if the plaintiff does not know the nature of all the documents sought. Moreover, facts contained in the counterclaim are deemed true (see, Transcan Systems Inc., v. Seldat Distribution Inc., 209 AD3d 911, 177 NYS2d 252 [2d Dept., 2022]) and merely disputing the facts alleges is not grounds for its dismissal. Therefore, the motion seeking to dismiss this counterclaim is denied. Thus, the motion seeking to dismiss the breach of contract and unjust enrichment counterclaims is granted. The motion seeking to dismiss the remaining counterclaims is denied.


Concerning the motion seeking to dismiss the affirmative

defenses, it is well settled the movant bears the burden demonstrating the affirmative defenses are without merit as a matter of law (Gonzalez v. Wingate at Beacon, 137 AD3d 747, 26 NYS3d 562 [2d Dept., 2016]). In this case the crux of the objection to the affirmative defenses is their conclusory nature and the fact they fail to explain the defenses in any detail. Thus, admittedly, there is no argument they are without merit per se. Therefore, the parties shall engage in discovery and the nature of the defenses will be explored with more elaboration. The plaintiff shall be afforded an opportunity to make any substantive motion regarding the affirmative defenses at the conclusion of all discovery.

So ordered.

ENTER:

DATED: April 17, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC