

9703, LLC v Rise Dev. Partners, LLC

2023 NY Slip Op 31820(U)

May 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 502282/2021

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

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

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9703, LLC,

Plaintiff,

Decision and order

- against -

Index No. 502282/2021

RISE DEVELOPMENT PARTNERS, LLC,

Defendants,

May 25, 2023

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RISE DEVELOPMENT PARTNERS, LLC,

Third Party Plaintiff,

- against -

DMITRY SLOBODYANSKY, individually and d/b/a
ONSITE CONSULTING MANAGEMENT, and ONSITE
CONSULTING AND MANAGEMENT, INC.,

Third Party Defendants,

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff has moved pursuant to CPLR §3212 seeking partial summary judgement the defendant breached the agreement by failing to deliver the construction as promised in a timely manner. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff is the owner of property located at 312 97th Street in Kings County. On April 8, 2019 the plaintiff entered into a construction contract with the defendant wherein the defendant agreed to construct a six story residential and commercial building by June 17, 2020. According to the complaint due to shut-down orders mandated in the wake of the COVID-19 pandemic the plaintiff extended the completion date to August 1,

2020. The construction was actually completed on November 15, 2020 (see, Complaint, ¶8 [NYSCEF Doc. No. 1]). The plaintiff asserts that delay resulted in lost rents and other costs of \$118,730. The plaintiff now seeks summary judgement arguing there are no questions of fact the defendant breached the agreement by delaying the construction of the project and that the court should conclude such breach occurred. The defendant has opposed the motion arguing there are questions of fact. Further, the plaintiff seeks to dismiss the third party complaint filed by defendant Rise Development.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

Dmitry Slobodyansky the plaintiff's representative submitted an affidavit wherein he acknowledges that due to the COVID-19 shutdowns the completion date was extended from June 17, 2020 to August 1, 2020 (see, Affidavit of Dmitry Slobodyansky, ¶ 9 [NYSCEF Doc. No. 22]). However, there is no evidence the

plaintiff was made aware of August 1, 2020 as the new completion date. The plaintiff has submitted two emails sent by the plaintiff to the defendant complaining about delays and notably both emails were sent after August 1, 2020. Furthermore, a text message was sent by Dmitry Slobodyansky to the defendants dated September 9, 2020 complaining the job was still not completed and urging completion to avoid plaintiff suffering any further losses (see, Emails and Texts submitted as Exhibits R and S [NYSCEF Doc. Nos. 73 & 74]). Thus, there are surely questions of fact whether the plaintiff still contemplated the continued obligations of the defendant pursuant to the contract. Moreover, there are also questions of fact whether the defendant even knew about any new imposed deadline. Thus, there can be no summary determination the defendant breached the contract by failing to finish the work by August 1, 2020. Consequently, the motion seeking summary judgement regarding the breach of contract cause of action is denied.

The defendant has filed a third party summons and complaint against the third party defendants. The basis for the third party complaint is that the third party defendants breached a consulting agreement executed between Rise and third party defendant Onsite Consulting. The third party complaint alleges causes of action for breach of contract, negligence and indemnification and contribution.

First, there has been no evidence presented that Onsite actually executed any agreement in this case. Rather, Rise argues that "although not a signatory to the contract, Onsite assumed obligations under the contract, and therefore should be liable for any bad faith or breach of duty under the Contract" (see, Memorandum in Opposition, page 16 [NYSCEF Doc. No. 67]). Thus, to the extent the defendant is arguing that the two entities, namely plaintiff and Onsite are really one and that obligations flowing from one are incumbent upon the other, a "heavy burden" of evidence must be presented (Etex Apparel Inc., v. Tractor International Corp., 83 AD3d 587, 922 NYS2d 315 [1st Dept., 2011]). The Second Department in explaining the definition of an 'alter ego entity' held that a party must demonstrate that one entity controls the "day to day" activities of the other (Constantine v. Premier Cab Corp., 295 AD2d 303, 743 NYS2d 516 [2d Dept., 2002]).

Thus, conclusory assertions that one corporation acted as the alter ego of another are insufficient to allow claims to be pursued against that corporation (Morris v. New York State Department of Taxation and Finance, 82 NY2d 135, 603 NYS2d 807 [1993]). The factors that must be examined to determine whether such alter ego relationship exists includes whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence

of separate paraphernalia that are part of the corporate form (see, John John LLC v. Exit 63 Development LLC, 35 AD3d 540, 826 NYS2d 657 [2d Dept., 2006]). Thus, where it is alleged that two companies maintained the same directors, did not distinguish between the debts and obligations of both companies and that both companies were operated as a single economic entity then sufficient allegations of an alter ego relationship have been presented (UBS Securities LLC v. Highland Capital Management L.P., 93 AD3d 489, 940 NYS2d 74 [1st Dept., 2012]).

The third party complaint does not describe the relationship between Onsite and the plaintiff at all. The third party complaint merely states that defendant paid Onsite for services rendered. While that may establish a claim for unjust enrichment, any assertions that Onsite is the alter ego of the plaintiff are conclusory and cannot support defendant's causes of action for breach of contract, negligence or indemnification. Indeed, the defendant asserts it maintains a claim for unjust enrichment and argues that "Rise paid Onsite in full for its services and Onsite failed to appropriately manage the Project. Onsite unfairly benefitted from Rise's efforts pursuant to the Contract. It is inequitable that Onsite should retain its full consulting fee while Rise is held liable for delays under the contract" (see, Memorandum in Opposition, page 16 [NYSCEF Doc. No. 67]). However, curiously, the third party

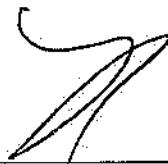
complaint does not assert a cause of action for unjust enrichment.

Therefore, the motion seeking to dismiss the third party complaint is granted. The defendant may file an amended third party complaint within sixty days of receipt of this order.

So ordered.

ENTER:

DATED: May 25, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC