

Resetarits Constr. Corp. v Norfolk S. Ry. Co.
2023 NY Slip Op 35326(U)
June 23, 2023
Supreme Court, Erie County
Docket Number: Index No. 808585/2022
Judge: Timothy J. Walker
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STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY

RESETARITS CONSTRUCTION CORPORATION,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
and WNY GALBO, INC.,

Defendants.

PHILADELPHIA INDEMNITY INSURANCE
COMPANY,

Plaintiff -Intervenor,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **LIPSITZ GREEN SCIME CAMBRIA LLP**

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WALKER, J.

Defendant, Norfolk Southern Railway Company (“Norfolk Southern”), has applied for an order (Motion 4; Doc. 79) dismissing the third cause of action in Plaintiff, Resetarits Construction Corporation’s, Amended Complaint (Doc. 74). Norfolk Southern has also applied for an order (Motion 5; Doc. 82) dismissing Plaintiff-Intervenor, Philadelphia Indemnity Insurance Company’s (“Philadelphia”) Intervenor Complaint (Doc. 77).

BACKGROUND

This action arises out of the construction of the Norfolk Southern Bison Yard Car Shop located in the Town of Cheektowaga, New York (“Project”).

On April 6, 2021, following a competitive bidding process, Resetarits and Norfolk Southern entered into Contract No. 144007681 related to the Project, whereby Resetarits agreed to act as the general contractor for the Project (“Contract”) (Doc. 52).

In bidding on the Project, Resetarits alleges that certain terms of the Contract as well as Norfolk Southern’s responses to Requests for Information led it “to believe that if contaminated soils were present on site, they would be handled and disposed of by Norfolk Southern at its costs” (Doc. 74, ¶17). Accordingly, Resetarits did not include an allowance for the removal of contaminated soils in its bid on the Project (*Id.*, at ¶18).

The Project contemplated the use of topsoil, but Resetarits alleges that Norfolk Southern precluded bidders (including itself) and subcontractors from inspecting the Project site (“Site”) pre-bid to ascertain whether contaminated soils and sufficient quantities of uncontaminated topsoil were present on the Site (*Id.*, at ¶¶19-20, 23). However, shortly after entering into the Contract, Resetarits inspected the Site which, according to Resetarits, “revealed the absence of topsoil on site sufficient to complete the [P]roject” (*Id.*, at ¶25).

Resetarits further alleges that when certain excavation work began, it encountered contaminated soils (*Id.*, at ¶29). Norfolk Southern disputes that any soils were contaminated, but directed Resetarits to remove certain soils anyway (*Id.*, at ¶30). Issues related to, *inter alia*, the handling of the allegedly contaminated soils led to Norfolk Southern to issue multiple stop work orders and eventually a written notice of termination, terminating the Contract.

Norfolk Southern largely disagrees with Resetarits’ description of events leading up to Resetarits’ expulsion from the Site, contending that “[t]he Project experienced multiple delays due to RCC’s [i.e., Resetarits’] mismanagement and multiple failures to perform under the Project Contract such as its refusal to follow the directions of Norfolk Southern’s engineer and its failure to cure defects” (Doc. 80, ¶8). Norfolk Southern further contends that “[o]n June 27, 2022, RCC was observed using equipment in an unapproved and unsafe manner such that Norfolk Southern had no choice but to expel RCC from the Project site to protect the safety of RCC’s personnel, Norfolk Southern’s personnel, and the structural integrity of the building” (*Id.*, at ¶10).

Philadelphia issued a performance bond in connection with the Project (“Bond”), and Norfolk Southern “began reporting RCC’s failure to properly perform under the [Contract] to

PIIC [i.e., Philadelphia] months before the June 27, 2022, safety violation that resulted in RCC's removal from Norfolk Southern's property" (*Id.*, at ¶11).

Norfolk Southern asserted a claim against the Bond arising out of Resetarits' alleged defective work and material breach of the Contract. On February 2, 2023, Philadelphia denied the claim (Doc. 75; Doc. 80, ¶21). As a result, in February 2023, Norfolk Southern commenced an action against Philadelphia in the United States District Court for the Western District of New York alleging that Philadelphia's denial of the claim constituted a breach of the Bond (*see Norfolk Southern Railway Co. v. Philadelphia Indemnity Insurance Co.*, Case No. 1:23-cv-119) ("Federal Action") (Doc. 86).

Resetarits commenced this action on July 26, 2022 (Doc. 2), and on April 13, 2023, this court granted it leave to amend the Complaint to include a claim for declaratory relief (Doc. 68).

On May 4, 2023, Philadelphia filed its Intervenor Complaint in this action, seeking a declaratory judgment that all of its obligations under the Bond are discharged (Doc. 77).

DISCUSSION

Norfolk Southern's Motion to Dismiss the Third Cause of Action of Resetarits' Amended Complaint (Motion 4; Doc. 79)

The Third Cause of Action of Resetarits' Amended Complaint seeks a declaration "that Norfolk Southern terminated the Contract with RCC [i.e., Resetarits] for convenience and/or wrongfully, vitiating PIC's [i.e., Philadelphia's] obligations under the Bond" (Doc. 74, ¶110).

Norfolk Southern contends that the Third Cause of Action should be dismissed, because claims for declaratory relief are disfavored and Resetarits lacks capacity to have brought the claim.

This court acknowledges that “[a]s a general rule, a court should not entertain an action for declaratory judgment where there is no necessity for doing so” (*Holtzman v. Supreme Ct. of State of N.Y.*, 152 A.D.2d 724, 725 [2d Dept. 1989]), and that “it is an abuse of discretion to entertain jurisdiction when another action is pending in which all factual and legal issues can be determined or where other full and adequate remedies exist” (*Id.*).

These rules, however, do not render claims for declaratory relief “disfavored”, as Norfolk Southern contends (Doc. 81, p. 5). Claims for declaratory relief are common in New York as “a means to establish the respective legal rights of the parties to a justiciable controversy” (*Little Cherry, LLC v. Cherry St. Owner LLC*, No. 654136/2016, 2018 N.Y. Misc. LEXIS 4374 *10 [Sup. Ct. N.Y. Cty. 2018], *aff’d* 210 A.D.3d 476 [1st Dept. 2022]). Declaratory judgments serve to “quiet[] or stabiliz[e] an uncertain disputed jurial relation either as to present or prospective obligations” (*Id.*).

“It is well established that a declaration is a discretionary remedy” (*County of Monroe v. Clough Harbour & Associates, LLP*, 154 A.D.3d 1281, 1282 [4th Dept. 2017]). “[W]here a cause of action is sufficient to invoke the Court’s power to ‘render a declaratory judgment . . . as to the rights and other legal relations of the parties to **a justiciable controversy**’ . . . a motion to dismiss that cause of action should be denied” (*Plaza Drive Group of CNY, LLC v. Town of Sennett*, 115 A.D.3d 1165, 1166 [4th Dept. 2014]) (emphasis added).

In granting leave to Resetarits to amend its Complaint to assert the Third cause of Action for declaratory relief, this court has already determined that a justiciable controversy exists. This court stated the following in its Decision and Order, dated April 13, 2023, approximately ten (10) weeks ago:

The proposed amended complaint seeks a determination as to whether the termination of the contract (“Contract”) between Plaintiff and Defendant, Norfolk Southern Railway Company (“Norfolk”) was “for convenience” and/or whether it was “wrongful.” It sets forth facts that did not exist at the time Plaintiff filed its original complaint on July 26, 2022 (Doc No. 2), and which arose after the initial pleading stage ended (namely, on October 20, 2022 when Plaintiff filed its Reply to Norfolk's counterclaims) (Doc No. 9). These new facts raise legally justiciable issues between Plaintiff and Norfolk.

(Doc. 68, p. 2).

Nothing has changed in the past ten (10) weeks - the subject of the Third Cause of Action continues to assert a justiciable controversy between Resetarits and Norfolk Southern; that is, whether Norfolk Southern terminated the Contract for convenience or otherwise wrongfully.

Moreover, Norfolk Southern incorrectly relies on case law holding “that a declaratory judgment action should not be entertained if another action between the **same parties** raising the same issues was actually pending at the time of its commencement” (*Ithaca Textiles, Inc. v. Waverly Lingerie Sales Co.*, 24 A.D.2d 133, 134 [3d Dept. 1965]) (emphasis added), because Resetarits is not a party to the Federal Action.

Turning to the issue of standing, Norfolk Southern contends that Resetarits lacks capacity to have asserted the Third Cause of Action, because Resetarits seeks to raise Philadelphia’s legal rights (*Society of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 772 [1991] [when determining whether a party has standing to bring a claim, there is “a general prohibition on a party raising the legal rights of another”]).

The court finds that Norfolk Southern places too fine a point on the Third Cause of Action and otherwise disagrees with Norfolk Southern’s characterization of it. While the court

acknowledges some overlap between the Third Cause of Action and the Federal Action, the Third Cause of Action does not seek to adjudicate Philadelphia's claims. Rather, the Third Cause of Action relates to whether Norfolk Southern terminated the Contract with Resetarits for convenience or otherwise improperly, which invoke fact determinations directly between Resetarits and Norfolk Southern. That such fact determinations may impact obligations under the Bond does not preclude Resetarits from pursuing the lawfully recognized remedy of a declaratory action against Norfolk Southern.

When considering a motion to dismiss a declaratory judgment claim for failure to state a cause of action, "the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him" (*Clough Harbour & Associates, LLP*, 154 A.D.3d at 1282). Resetarits has "presented" "a proper case . . . for invoking the jurisdiction of the court to make a declaratory judgment."

Norfolk Southern's Motion to Dismiss Philadelphia's Intervenor Complaint (Motion 5; Doc. 82)

Norfolk Southern's motion is grounded on CPLR 3211(a)(4), which provides that dismissal may be granted where,

[t]here is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires

CPLR 3211(a)(4) should not be invoked unless "the two causes are essentially the same. If they aren't, there is no duplication and the purpose of the provision falls" (Siegel, *New York Practice*, 6th Ed., §262).

The Federal Action and the matter before this court are not “essentially the same” for the purpose of invoking CPLR 3211(a)(4). Resetarits is not a party to the Federal Action, and most of Resetarits’ claims in the action pending before this court are not before the court in the Federal Action. Indeed, Norfolk Southern recognized as much when it stated the following in a brief it submitted in the Federal Action:

Here, although PIIC was recently improperly granted permission to intervene in the State Court (a matter which is under appeal), the Contractor is not a party to this federal litigation. And even if the State Court is not reversed on appeal, **the parties in this federal action are not litigating substantially the same issues as those raised in the State Court** and the relief sought in the State Court (declaratory [sic] relief) is **not the same as the relief sought in this federal action** (money damages for PIIC’s breach of its contract with Norfolk Southern). As such, this federal action and the pending State Court claims are not parallel and PIIC’s motion fails. (emphasis added).

(Doc. 88, p. 4).

Moreover, when this court granted Philadelphia’s motion to intervene in this action in its Decision and Order, dated April 13, 2023, it necessarily found that a justiciable controversy exists. Nothing in the past approximate ten (10) weeks has occurred to alter that determination.

In light of the foregoing, it is hereby

ORDERED, that Norfolk Southern’s application to dismiss the Third Cause of Action of Resetarits’ Amended Complaint is denied; and it is further

ORDERED, that Norfolk Southern’s application to dismiss Philadelphia’s Intervenor Complaint is denied.

This constitutes the Decision and Order of this court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this court shall not

constitute notice of entry.

Dated: June 23, 2023
Buffalo, New York

A handwritten signature in blue ink, appearing to be "TJ Walker", is written over a faint circular stamp.

HON. TIMOTHY J. WALKER, J.C.C.

Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District