

Best Electro-Mech. 2 Inc. v Walison Corp.

2024 NY Slip Op 33735(U)

October 10, 2024

Supreme Court, New York County

Docket Number: Index No. 651016/2024

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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INDEX NO. 651016/2024

BEST ELECTRO-MECHANICAL 2 INC.,ADVANCED MEPF SERVICES CORP.,

MOTION DATE 04/25/2024

Plaintiff,

MOTION SEQ. NO. 001

- v -

WALISON CORP., 280 EAST BURNSIDE ASSOCIATES, L.P., 280 BURNSIDE HOUSING DEVELOPMENT FUND CORPORATION

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS.

Background

This motion arises out of a payment dispute for services rendered on a construction project. Defendant 280 East Burnside Associates, L.P. (“Burnside Associates”) is the owner of a property in the Bronx (the “Property”). Burnside Associates contracted Defendant Walison Corp. (“Walison”) to construct an apartment building at the Property. In November 2015, Walison entered into a subcontractor agreement with Plaintiff Best-Electro-Mechanical 2 Inc. (“Best-Electro”) for the installation of plumbing and heating systems (the “Burnside Subcontract”). While Best-Electro was performing the contracted work, Plaintiff Advanced MEPF Services Corp. (“MEPF”) was formed and assumed the Burnside Subcontract and Best-Electro’s duties under it.

Best-Electro alleges that, alongside with MEPF, they entered into additional subcontracts with Walison for another property in the Bronx (the “Walton Subcontract”). They claim, and it

has not been disputed, that all required work under all the subcontracts was performed by Best-Electro and MEPF to the satisfaction of Walison. They further allege that of the aggregate amount due to Best-Electro of \$1,002,777.59, a remaining balance of \$158,802.59 on the Burnside Subcontract and \$394,947.96 on the Walton Subcontract are to date still unpaid, despite repeated requests for payment.

Best-Electro filed a complaint on February 27, 2024, seeking damages and alleging breach of contract, unjust enrichment, and quantum meruit. The complaint also brings a claim under Article 3 of the New York Lien Law. Defendants Walison, Burnside Associates, and 280 Burnside Housing Development Fund Corporation (collectively, the “Defendants”) bring this present motion to dismiss the complaint in its entirety on the grounds that the claims are time-barred. Defendants move pursuant to CPLR § 3211(a)(1) and (7).

Standard of Review

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, “[i]nitially, the 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.” *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 (1977).

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a “defense founded upon documentary evidence.” Dismissal is only warranted under this provision if “the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

CPLR § 3211(a)(5) allows for a complaint to be dismissed if, among other reasons, it is barred by the statute of limitations. For motions made pursuant to this provision, the defendant has the “initial burden of demonstrating, prima facie, that the time within to commence the cause of action has expired”, at which point the burden then shifts to the plaintiff to “raise a question of fact as to whether the statute of limitations is tolled or otherwise inapplicable.” *Haddad v. Muir*, 215 A.D.3d 641, 642-43 (2nd Dept. 2023).

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, “the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference.” *Avgush v. Town of Yorktown*, 303 A.D.2d 340 (2d Dept. 2003). Dismissal of the complaint is warranted “if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017).

Discussion

There are two different relevant statute of limitations for this motion, the contractual term of six months and the statutory term of six years for breaches of contract. For the reasons given below, the breach of contract claims are timely under both. The unjust enrichment and quantum meruit claims, however, fail as a matter of law and therefore dismissal is proper. While Defendants are correct that an Article 3A violation of the Lien Law must be brought as a class action, dismissal of the claim on these grounds would be improper as the defect is not fatal and Best-Electro should be given the chance to pursue class certification.

I: Statutory Statute of Limitations Does Not Bar the Claim Because There are Triable Issues of Fact as to When the Cause Accrued

Turning first to the six-year statute of limitations for claims of breach of contract pursuant to CPLR § 213, Best-Electro contends that the cause did not accrue until June 2018 when a final payment request was submitted on both projects. Defendants argues that the cause accrued on November 30, 2016, which is the substantial completion date. It is well settled in New York law that the cause of action for a breach of a construction contract “accrues upon substantial completion of the work.” *Eastco Bldg. Servs. Inc. v. New York City Hous. Auth.*, 98 A.D.3d 920 (1st Dept. 2012). As the Court of Appeals noted, in cases where the claim involves a money payment pursuant to a contract, “the statute of limitations [is] triggered when the party that was owed money had the right to demand payment, not when it actually made the demand.” *Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.*, 18 N.Y.3d 765, 770 (2012). Furthermore, when “the right to final payment is subject to a condition, the obligation to pay arises and the cause of action accrues, only when the condition has been fulfilled.” *John J. Kassner & Co. v. New York*, 46 N.Y.2d 544, 550 (1979). Therefore, regardless of when the final demand for payment was actually made, the cause of action in the present case accrued when any condition precedents to Best-Electro’s right to payment were satisfied and Best-Electro had the right to demand payment.

In the Burnside Subcontract, ¶ 4.11, there are seven express condition precedents to the final payment coming due. One of them is “(7) Final Payment to Contractor by Owner under the Prime Contract”, with the Walton Subcontract containing a similar requirement. Therefore, under the terms of the contract, Best-Electro did not have the right to demand final payment until Walison had been themselves paid on the prime contract. Best-Electro has submitted a sworn affidavit from their president David Cerquiera, stating that until August 2018 the requests for payment were met with statements from Walison that they were waiting on the remainder of the

project funding under the prime contract to be released. With no right to demand final payment, the cause of action did not accrue until at least 2018, when taking all facts alleged by Best-Electro as true and giving them the benefit of all favorable inferences. The motion therefore is timely under the CPLR § 213 six-year limitation.

II: Contractual Statute of Limitations Does Not Bar the Claim Because There are Triable Issues of Fact as to the Enforceability of the Clause

Both subcontracts contained a contractual statutory limitation clause that requires claims to be brought “within six (6) months after Contractor receives Subcontractor’s final application for payment or, if this Agreement is earlier terminated, within six (6) months following the date of such earlier termination.” Because the action is statutorily timely, it will be time-barred only if the six-month contractual provision is valid and enforceable. In this circumstance, it is not, for the reasons given below.

Defendants argue that the limitations clause is binding, and the statute of limitations would either have commenced when the temporary certificates of occupancy were issued in 2017 (on the theory that the agreements terminated at that date) or when Best-Electro submitted the request for final payment in June 2022. Best-Electro contests the validity of the limitations clause. They argue that because both contracts contained a limitations clause and a pay-when-paid clause, the shortened statute of limitations is null and void. Under this line of reasoning, because the pay-when-paid clause limits Best-Electro’s right to demand full and final payment until after Walison has themselves been paid on the prime contract, the clause requiring claims to be brought within six months of when Walison receives a demand for final payment from Best-Electro is “unenforceable and inconsistent with the contract.” Best-Electro argues in the

alternative that Walison negotiated in bad faith when they made sporadic payments while promising to pay all open balances in full, and that this bad faith negates the limitations clause.

There is case law to support the argument that a pay-when-paid clause voids a six-month limitations clause in the same agreement. Courts have found that a pay-when-paid clause in a subcontractor agreement can nullify a shortened statute of limitations clause. *See, e.g., D&S Restoration, Inc. v. Wenger Constr. Co., Inc.*, 160 A.D.3d 924, 926 (2nd Dept. 2018); *but see Polar Bear Mech., Inc. v. Walison Corp.*, 2017 N.Y.Misc. LEXIS 2471 (holding that when a pay-when-paid clause is unenforceable, the severability provision in the agreement means that the unenforceable pay-when-paid clause does not void a limitations clause).

In *JC Ryan*, a subcontractor who entered into a contract with both a pay-when-paid clause and a six-month limitations provision brought an action past the six-month time period for unpaid sums. The defendant moved to dismiss the complaint as time barred by the contractual limitation. There, the Second Department upheld the Supreme Court's denial of the motion to dismiss, noting that the two clauses conflict because "the subcontractor's right to bring an action against the contractor [. . .] might not ripen until after the expiration of the six-month limitations period" and that a pay-when-paid clause that "forces the subcontractor to assume the risk that the owner will fail to pay the general contractor is void an unenforceable as contrary to public policy." *JC Ryan EBCO/H&G, LLC v. Lipsky Enters., Inc.*, 78 A.D.3d 788, 789 (2nd Dept. 2010). The present facts are similar to those in *JC Ryan*, because as established above Best-Electro's right to bring a cause of action against Walison did not ripen until after the six-month period, due to the pay-when-paid clause.

Best-Electro cites to *Certified Fence* as support for the contention that a pay-when-paid clause voids a six-month limitations clause. That case involved a similar dispute between a

contractor and a subcontractor with similar clauses in their agreements, and there the Second Department found that the limitations clause “is inconsistent with the pay-when-paid clause and is unenforceable since it reasonably deprives the plaintiff of a course of action.” *Certified Fence Corp. v. Felix Indus., Inc.*, 260 A.D.2d 338 (2nd Dept. 1999). While Defendants are correct in pointing out that *Certified Fence* involved a bankruptcy stay, this fact does not meaningfully distinguish the case at hand. There, the subcontractor could not collect payment from the contractor during the bankruptcy stay and so lost out on the six-months limitation. Here, Best-Electro has submitted a sworn affidavit stating that they were unable to collect payment because Walison claimed not to have been themselves paid, a necessary precondition to Best-Electro’s right to final payment. Best-Electro does allege that Walison diverted some funds from the property owner, but the papers are silent on the matter of when Walison was *fully* paid on the prime contract and Best-Electro has submitted affidavits stating that they were told in response to their payment requests that Walison had not themselves been fully paid.

Regarding the statute of limitations, both statutory and contractual, Best-Electro has at the least made out a case that there are triable issues of fact and therefore the current motion to dismiss fails as to those grounds.

III: The Unjust Enrichment and Quantum Meruit Claims are Subject to Dismissal Because There

is a Written Agreement

Defendants argue that the unjust enrichment and quantum meruit claims fail as a matter of law because of the presence of the written agreement between the parties. Best-Electro does not oppose this argument. The case law is clear that ordinarily, recovery in quasi-contract (including claims for unjust enrichment and quantum meruit) is precluded when there is a written agreement between the parties. *See, e.g., Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d

382, 388 (1987). Therefore, the second, third, fifth, sixth, and eighth causes of action fail as a matter of law and dismissal is proper.

IV: The Article 3A of the N.Y. Lien Law Claim

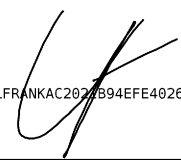
Best-Electro alleges that Walison violated the N.Y. Lien Law in applying trust funds received on the prime contract for purposes other than set forth in Article 3A of the Lien Law. Defendants argue in their motion to dismiss that an Article 3A Lien Law claim must be brought as a class action and supported by factual allegations. Best-Electro does not dispute this in their papers. While “an action to enforce a trust pursuant to Lien Law § 77 must be brought as a class action, the failure to do so is not fatal, and may be cured.” *ADCO Elec. Corp. v. McMahon*, 38 A.D.3d 805, 806-07. Accordingly, Defendants’ motion to dismiss this claim is denied and Best-Electro may seek class certification pursuant to Lien Law § 77(1) and CPLR article 9.

Accordingly, it is hereby

ORDERED that the second, third, fifth, sixth, and eighth causes of action are dismissed; and it is further

ADJUDGED and ORDERED that the defendants’ motion to dismiss the NY Lien Law claim in the seventh cause of action is denied and plaintiff may pursue class action certification consistent with applicable law; and it is further

ADJUDGED that the remainder of the motion is denied.

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LYLE E. FRANK, J.S.C.

10/10/2024
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
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