

Honorio v Urban Atelier Group LLC
2024 NY Slip Op 35718(U)
October 11, 2024
Supreme Court, Bronx County
Docket Number: Index No. 806000-2021E
Judge: Myrna Socorro
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York
County of Bronx

-----X
Armando Cesar Salazar Honorio

Plaintiff

Index No. 806000-2021E

Motion seq #1

-against-

Urban Atelier Group LLC, 2461 Broadway LLC
2461 Broadway PM LLC, AARE Broadway
Investors LLC, AARE Broadway LLC, UWS
AA BSD LLC, 2461 D&O LLC, Hampshire
Properties LLC, Construction Realty Safety
Group Inc., Proto P&H Services Corp., The
ERA Condominium Board of Managers of the
ERA Condominium and S & F Electrical
Service LLC,

Defendants

-----X
Urban Atelier Group LLC, 2461 Broadway LLC
2461 Broadway PM LLC, AARE Broadway
Investors LLC, AARE Broadway LLC, UWS
AA BSD LLC, and 2461 D&O LLC,

Third Party Plaintiffs

-against-

Defalco Construction Inc.,

Third Party Defendant

-----X
Urban Atelier Group LLC, 2461 Broadway LLC
2461 Broadway PM LLC, AARE Broadway
Investors LLC, AARE Broadway LLC, UWS
AA BSD LLC, and 2461 D&O LLC,

Second Third Party Plaintiffs

-against-

S&F Electrical Service, LLC,

Second Third-Party Defendant

-----X
Defalco Construction Inc.,

Third Third Party Plaintiff

-against-

Get Paid NY, Inc.,

Third Third Party Defendant

Recitation as required by CPLR §2219 of the papers filed by Third Third-Party Defendant, Get Paid NY Inc., in the above captioned action for dismissal of the Third Third Party Summons and Complaint, marked submitted on March 13, 2024

Papers	NYSCEF Doc. No.
Notice of Motion, Affirmation in Support and Exhibits	#86-98
Affirmation in Opposition and Exhibits	#101-107
Reply Affirmation	#108

Plaintiff commenced this action upon the filing of the Summons and Complaint on April 30, 2021 (NYSCEF Doc. #1). Defendants Urban Atelier Group LLC, 2461 Broadway LLC, 2461 Broadway PMC LLC, AARE Broadway Investors LLC, AARE Broadway LLC, UWS AA BSD LLC, and 2461 D&O LLC (hereinafter referred to as “Urban defendants”) appeared by their attorneys Tyson & Mendes on July 16, 2021 (NYSCEF Doc. #8). Defendant Construction Realty Safety Group Inc., appeared by their attorneys Law Office of Erin M. McGinnis, PLLC on June 15, 2021 and filed their Answer (NYSCEF Doc. #3)

On November 18, 2021, “Urban Defendants” filed their Third Party Summons and Complaint against Defalco Construction Inc. (NYSCEF Doc. #24). On January 27, 2022, Third-Party Defendant, Defalco Construction Inc., appeared by their attorneys, Montfort, Healy, McGuire & Salley LLP, and filed their Answer (NYSCEF Doc. #29).

On March 28, 2022 a Stipulation of Discontinuance was filed (NYSCEF Doc. #30) wherein the action was discontinued by plaintiff as against 2461 Broadway PM LLC, and Hampshire Properties LLC.

On June 21, 2022, “Urban Defendants”, filed their Second Third-Party Summons and Complaint against S&F Electrical Service LLC. (NYSCEF Doc. #42). On August 12, 2022, Second Third-Party Defendant S&F Electrical appeared by their attorneys, Camacho Mauro LLP and filed their Answer (NYSCEF Doc. #47)

On August 19, 2022, plaintiff filed their Supplemental Summons and Complaint wherein Second Third-Party defendant, S&F Electrical Service LLC was named as a primary defendant (NYSCEF

Doc. #52).

On April 10, 2023, Third-Party Defendant, filed a Third Third-Party Summons and Complaint against Get Paid NY, Inc. (NYSCEF Doc. #72). On July 20, 2023, Third Third-Party Defendant, Get Paid NY Inc., appeared by their attorneys, Golden, Rothschild, Spagnola, Lundell, Boylan, Garubo & Bell PC and filed their Answer (NYSCEF Doc. #78).

As to discovery in the action, a Preliminary Conference Order was issued on November 4, 2021 (NYSCEF Doc. #26). On June 23, 2022 a Stipulation was entered into between the parties representing Plaintiff, "Urban defendants", Construction Realty and Defalco Construction as to outstanding discovery (NYSCEF Doc. #45). On August 15, 2023 a Stipulation was "So Ordered" by the Court, and provisions for discovery were provided as to Third-Third Party Defendant, Get Paid NY Inc. (NYSCEF Doc. #83).

On November 13, 2023, Third Third-Party Defendant Get Paid NY Inc., filed the instant motion, pursuant to CPLR §3211(a)(1) and §3211(a)(7) seeking dismissal of Third Third-Party Defendant, Defalco Construction Inc.'s Third Third-Party Summons and Complaint. Get Paid NY claims that based on the subcontract between Defalco Construction and Get Paid NY Inc., that Defalco has breached said contract as any controversy between these parties is to be submitted to arbitration. Further, Get Paid NY claims that Defalco Constructions's claim for contribution and indemnification are barred pursuant to Workmen's Compensation Law based on the contract and because there is no grave injury.

Defalco Construction in its opposition claims that pursuant to CPLR §3211(e), any motion to dismiss a cause of action under §3211(a) is to be made before service of the responsive pleading is required unless the motion is based upon §3211(a)(2) [subject matter jurisdiction]; §3211(a)(7) [failure to state a cause of action]; and §3211(a)(10) [nonjoinder of a necessary party].

CPLR §3211(a) provides that:

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or
-
7. The pleading fails to state a cause of action. . ."

As to CPLR §3211(a)(1), §3211(a)(7), and If this Court were to treat this motion as a motion for summary judgment, the motion is **DENIED**.

Third Third Party Defendant Get Paid NY waived its purported right to arbitration by failing to assert it as an affirmative defense in the answer *Rush Factors Inc. v Fairview Mfg Co*, 34 AD2d 635 (1st Dept. 1970). The Court in *Rusch* held that the defendant waived its right to arbitrate by failing to assert it in its answer and by affirmatively seeking relief and counterclaims. The Third-Third Party Defendant Get Paid not only failed to raise as an affirmative defense the right to arbitrate, it also claimed counterclaims. In addition, Get Paid does not provide any documentary evidence that it submitted this matter for arbitration pursuant to Article 8 of the contract between Defalco and Get Paid.

The Court has reviewed the cases cited by Third-Third Party Defendant, Get Paid in its Reply Affirmation at Paragraph #8. However, the Court does not concur with said statements. As Third Third-Party Defendant Get Paid NY failed to claim the arbitration as an affirmative defense, failed to raise it in a pre-Answer motion, and participated in discovery conference with the Court (see NYSCEF Doc. #83) , Get Paid waived its right to arbitrate and it “may not be unilaterally recalled” *Hyde v Jewish Home Lifecare*, 149 AD 3d 674; 53 NYS 3d 57 (1st Dept. 2017)¹.

Further, pursuant to CPLR §3211(e), the motion based on CPLR §3211(a)(1) is waived unless it is raised in the motion filed before the Answer or is a defense raised in the Answer. As Get Paid did not raise the issue of 3211(a)(1) in a motion prior to the Answer, nor did it preserve it as an affirmative defense in the Answer, it is deemed untimely. .

Lastly as to CPLR §3211(a)(7), a court accepts the facts as alleged in the complaint as true, and accords the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory *Leon v Martinez*, 84 NY2d 83 (1994).

Accordingly, it is hereby

ORDERED that Third Third-Party Defendant’s motion is hereby **DENIED**; and it is further

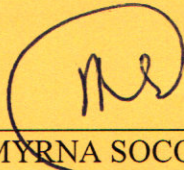
1

. The cases cited by the movant are prior to 2017 and from the Second Department, while *Hyde* was a decision from the First Department in 2017, which is controlling in this Court.

ORDERED that Third Third-Party Plaintiff shall file Notice of Entry within thirty (30) days of this Decision and Order.

This constitutes the Decision and Order of the Court.

Dated: October 11, 2024



HON. MYRNA SOCORRO, J.S.C.