

TPE Inc. v Bass Plumbing & Heating Corp.

2013 NY Slip Op 33330(U)

August 13, 2013

Sup Ct, Queens County

Docket Number: 700713/2013

Judge: Orin R. Kitzes

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES
Justice

IA Part 17

-----x
TPE INC. D/b/a THE PLUMBING EXCHANGE,

Index
Number 700713/ 2013

Plaintiff,

-against-

Motion
Date June 21, 2013

BASS PLUMBING & HEATING CORP., TURNER
CONSTRUCTION COMPANY, DELTA AIR LINES
INC., PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, CITY OF NEW YORK, NYC DEPARTMENT
OF BUSINESS SERVICES, and John Does 1
through 10, being fictitious names of
persons or entities having an interest
in the property at issue in this action,

Motion
Seq. No. 1 & 3

Defendants.

-----x

FILED
AUG 15 2013
COUNTY CLERK
QUEENS COUNTY

The following papers numbered E9 to E51 read on this motion by
defendant Port Authority of New York and New Jersey (Port
Authority) to dismiss the complaint pursuant to CPLR 3211(a)(2);
and by defendants Turner Construction Company (Turner) and Delta
Airlines, Inc. (Delta) pursuant to CPLR 3211 and Lien Law § 19(6)
dismissing the second and third causes of action.

	Papers Numbered
Notice of Motion (seq 1)- Affidavits - Exhibits..	E9-E23
Memorandum of Law.....	E20
Answering Affidavits - Exhibits.....	E47
Memorandum of Law.....	E46
Reply Memorandum of Law.....	E53
Notice of Motion (seq 3)- Affidavits - Exhibits..	E32-E39
Memorandum of Law.....	E33
Answering Affidavits - Exhibits.....	E48-E49
Reply Affidavits.....	E50-E51

Upon the foregoing papers, it is ordered that the motions sequences 1 and 3 are consolidated for purposes of disposition, and are determined as follows:

This action seeks to recover monies due for plaintiff's work on a construction project for the property located at JFK Airport, Concourse B, Delta Terminal in Queens, New York. The City of New York owns the property and leased it to the Port Authority. The Port Authority leased the property to Delta. Delta retained defendant Turner Construction, the general contractor, to perform renovations and expansion of the property. Then Turner contracted with defendant Bass Plumbing & Heating Corp. (Bass Plumbing), the subcontractor, to perform and furnish all the work, labor, services, materials, plant, equipment, tools, scaffolds, appliances and other things necessary for the plumbing work on the project. Thereafter, plaintiff, as a sub-subcontractor, was hired by Bass Plumbing to provide plumbing labor, materials and supplies on the project. Plaintiff seeks \$123,005.62 plus interest, costs and disbursements on its breach of contract and unjust enrichment causes of action as well as foreclosure of the mechanics lien. The mechanic's lien, dated September 13, 2012, was filed against the leasehold interests of Delta and the Port Authority, and the fee simple interest of the City of New York.

Port Authority moves to dismiss the cause of action to foreclose the mechanic's lien pursuant to CPLR 3211(a)(2) on the ground that plaintiff's failure to satisfy the conditions precedent necessary to commence this action deprives this court of subject matter jurisdiction. (Unconsol. Laws §§ 7101, 7107 and 7108). Plaintiff acknowledges that a notice of claim has not been filed against the Port Authority.

Causes of action against the Port Authority must be commenced within one year after the cause of action accrues and in a suit for monetary damages, a notice of claim must be served upon the Port Authority at least sixty days before such suit is commenced (Unconsol. Laws § 7107). The failure to satisfy these conditions results in the "withdrawal of [Port Authority's] consent to suit and compels the dismissal of the action for lack of subject matter jurisdiction" (*Lyons v Port Auth.*, 228 AD2d 250, 251 [1st Dept 1996]; see also *Ofulue v Port Auth.*, 307 AD2d 258, 259 [2d Dept 2003]; *Giannone v Port Auth. of New York & New Jersey*, 127 AD2d 818, 819 [2d Dept 1987]).

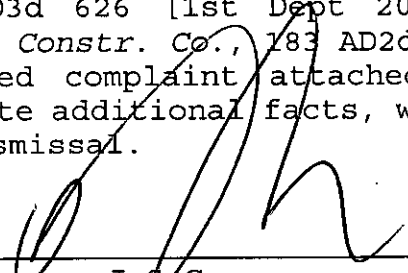
Notwithstanding the fact that the condition precedent was not met, the mechanic's lien must be discharged as argued by the moving parties. It is well settled law that a private mechanic's lien cannot be asserted on the leasehold interests of property owned by

the City of New York even where the property is leased to a private entity (Lien Law § 2[7]; *In re Paerdegat Boat and Racquet Club, Inc.*, 57 NY2d 966 [1982]; *PMNC v Brothers Insulation Co.*, 266 AD2d 293 [2d Dept 1999]). Petitioners argument that a mechanic's lien may attach to the property by virtue of the property being leased to the Port Authority, which then leased the property to Delta, is unavailing. The court "may not rely on . . . equitable principles to expand the [Lien Law]'s general scope and purpose" (*Plattsburgh Quarries, Inc. v Markoff*, 164 AD2d 30 [3d Dept 1990], *app den* 77 NY2d 809 [1991]).

Accordingly, the mechanic's lien is discharged and the second cause of action to foreclose on the mechanic's lien is dismissed. In addition, to the extent that any claim is asserted against the Port Authority, they are dismissed as against the Port Authority.

The branch of the motion by Turner and Delta, pursuant to CPLR 3211, seeking to dismiss the third cause of action, which seeks recovery in quantum meruit or unjust enrichment, is granted. Where, as here, a valid and enforceable written contract exists governing the subject matter in dispute, a claim for quantum meruit may not be maintained against the parties in privity of contract or against non-contracting parties (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]; *Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Co.*, 64 AD3d 565, 577 [2d Dept 2012]). In addition, there is no evidence that Turner or Delta expressly undertook to pay for plaintiff's work (*CPN Mech., Inc. v Madison Park Owner LLC*, 94 AD3d 626 [1st Dept 2012]; *Metropolitan Electric Mfg. Co. v Herbert Constr. Co.*, 183 AD2d 758 [2d Dept 1992]). The proposed amended complaint attached to plaintiff's opposing papers fails to state additional facts, which would save this cause of action from dismissal.

Dated: August 13, 2013



 J.S.C.