

AMEC Constr. Mgt., Inc. v City of New York
2014 NY Slip Op 30293(U)
January 27, 2014
Sup Ct, New York County
Docket Number: 604391/04
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Index Number : 604391/2004
AMEC CONSTRUCTION MANAGEMENT
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 007
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 7

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the accompanying decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
FEB 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/27/14

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

~~LOUIS B. YORK~~
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
AMEC CONSTRUCTION MANAGEMENT, INC.,

Plaintiff,
-against-

Index No. 604391/04
Mot. Seq. Nos. 007

CITY OF NEW YORK, AND MAZZOCCHI
WRECKING, INC.,
Defendants.

DECISION AND ORDER

-----X
MAZZOCCHI WRECKING, INC.,

Plaintiff,
-against-

Index No. 111906/05
Motion Seq. No. 003, 004

EVERGREEN RECYCLING OF CORONA, and CITY
OF NEW YORK,
Defendants,

FILED

-----X
TULLY ENVIRONMENTAL, INC. (named herein and
d/b/a EVERGREEN RECYCLING OF CORONA),

FEB 03 2014

Third-Party Plaintiff,
-against-

NEW YORK
CLERK'S OFFICE
Third-Party Index No. 591292/05

AMEC CONSTRUCTION MANAGEMENT, INC., and
BOVIS LEND LEASE LMB, INC.,
Third-Party Defendant.

-----X

LOUIS B. YORK, JSC.:

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This matter arises in a spate of litigation concerning the massive clean-up efforts in New York City in the aftermath of the September 11, 2001 attack on the World Trade Centers.

Motions under the above-referenced index numbers have been consolidated for decision. Under index No. 604391/04 (the AMEC Complaint), motion sequence No. 007, AMEC Construction Management, Inc. (AMEC) moves, pursuant to CPLR 3211 (a) (6), to dismiss the amended verified answer of defendant Mazzocchi Wrecking, Inc. (Mazzocchi). Under index No. 111906/05, motion sequence No. 003, AMEC, as a third-party defendant, moves, pursuant to CPLR 3211 (a) (5), to dismiss the amended verified complaint of Mazzocchi (Mazzocchi Complaint).¹ Under index No. 591292/05, motion sequence No. 004, third-party defendant Bovis Lend Lease LMB, Inc. (Bovis) seeks an order, pursuant to CPLR 3211 (a) (5) and (7), dismissing the sixth through ninth causes of action of the Mazzocchi Complaint.

OVERVIEW

In response to the September 11, 2001 attacks, New York City declared a state of emergency. Part of the problem facing the City in the aftermath of those tragic events was that the area known as Ground Zero, containing some three billion pounds of dangerously hot and unstable debris, burning underground fires, and victims' remains, needed to be cleaned up. The process of clean-up was immediately commenced with the assistance of four Construction Managers (CMs), AMEC, Bovis, Turner Construction, Inc., and Tully Environmental, Inc. (Tully, and named herein as d/b/a Evergreen Recycling of Corona [EROC]), all coordinating their efforts to direct and control various subcontractors, including Mazzocchi, in the clean-up work. Although the City would not enter into contracts with the CMs for some months, as of

¹ By order of this court filed, August 22, 2006 (Paul G. Feinman, J.) index Nos. 604391/04 and 111906/05 were consolidated for discovery and trial.

October 4, 2001, AMEC entered into a contract with Mazzocchi (the AMEC-Mazzocchi Contract), pursuant to which AMEC authorized Mazzocchi to work at Ground Zero, and AMEC obligated itself to pay for such work. Reimbursement for the work of Mazzocchi, as paid by AMEC, was apparently to come from the City.

The City designated certain “phases” for the work performed at the site: “Phase I” was to be for the period from September 11, 2001 through January 6, 2002, and “Phase II” referred to work undertaken on or after January 7, 2002. The AMEC Complaint, which deals with Phase I payment matters, alleged that AMEC paid Mazzocchi approximately \$13 million as the reasonable value for work performed pursuant to the AMEC-Mazzocchi Contract. Afterward, at the City’s request, AMEC performed a post-performance audit of payments to Mazzocchi, applying the City’s audit standards then in effect. The audit yielded a determination that payments made by AMEC to Mazzocchi exceeded City standards then in effect by approximately \$3 million, and as a result, \$3 million was accounted by the City as against AMEC. The AMEC Complaint sought return of the \$3 million by Mazzocchi, or, in the alternative, payment of the \$3 million owed for Mazzocchi’s work to AMEC by the City. Mazzocchi counter-claimed for \$783,851.44, plus interest, against AMEC for payments due under the AMEC-Mazzocchi Contract, and against the City for the services rendered in the same amount.

The Mazzocchi Complaint, which deals with Phase II payment matters, sought payment from EROC of \$1,374,334,49, plus interest. EROC, in turn, via a third-party complaint, seeks damages from AMEC and Bovis, alleging that, should it be found that Mazzocchi is entitled to recover from EROC, then AMEC and Bovis should be held responsible, based on theories of restitution or implied indemnification, for any such amounts due.

PROCEDURAL BACKGROUND

Pertinently, by prior motions, AMEC moved for summary judgment dismissing the counterclaims of Mazzocchi, and Mazzocchi moved to dismiss the AMEC Complaint. Before those motions were decided, Mazzocchi withdrew its cross claim against the City, and came to a settlement agreement with the City as of January 16, 2013 (Settlement).² That Settlement released the City, but not any of the other litigants, from all claims.

The court then ordered (the Prior Order) that the motion of AMEC for summary judgment dismissing the counterclaims of Mazzocchi was denied, that the motion of Mazzocchi to dismiss the complaint was granted, and that the litigants were granted leave to serve amended complaints so as to replead any remaining causes of action. The court clarified to all parties that counterclaimants (including Mazzocchi) may file amended complaints, and that the order of the court would not have a preclusive effect as to any claims that were not dismissed on the merits. In response, Mazzocchi filed an amended answer, reasserting its claims against AMEC for breach of contract in the amount of \$783,851.44, plus interest (the Answer).

AMEC now moves (CPLR 3211 [a] [6]) to dismiss the Answer based on the doctrine of res judicata. AMEC also moves (CPLR 3211 [a] [5]) to dismiss the Mazzocchi Complaint on the same basis. Bovis moves (CPLR 3211 [a] [5]) to dismiss the sixth through ninth causes of action of the Mazzocchi Complaint as barred by res judicata and the statute of limitations, or to dismiss (CPLR 3211 [a] [7]) those same causes of action for failure to state a claim upon which relief can

² The series of settlements in this matter included: (a) the causes of action asserted by AMEC against the City in the AMEC Complaint; (b) the cross claim asserted by Mazzocchi against the City in the AMEC Complaint; and (c) the cause of action asserted by Mazzocchi against the City in the Mazzocchi Complaint.

be granted, or to dismiss the entire Mazzocchi Complaint (CPLR 1003, 1009, and 3025), and to dismiss the cross claims of EROC against Bovis.

MOTION TO DISMISS THE ANSWER AND THE MAZZOCCHI COMPLAINT

AMEC now moves (CPLR 3211 [a] [6]) to dismiss the Answer and the Mazzocchi Complaint (CPLR 3211 [a] [5]) based on the same theory: the doctrine of res judicata must be applied because Mazzocchi settled its claims against the City, and those claims arose from the same series and transactions as Mazzocchi's counterclaims against AMEC, and the claims in the Mazzocchi Complaint. The motions are denied.

“Under the doctrine of res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred even if based upon different theories or if seeking a different remedy.” *Matter of Eagle Ins. Co. v Facey*, 272 AD2d 399, 400 (2nd Dept 2000), citing *O'Brien v City of Syracuse*, 54 NY2d 353, 356 (1981). Thus, “[a] stipulation of settlement, *which discontinues a claim with prejudice*, is subject to the doctrine of res judicata.” *Matter of State of New York v Seaport Manor A.C.F.*, 19 AD3d 609, 610 (2nd Dept 2005) (emphasis added).

Here, there has been no final conclusion directed to Mazzocchi's counterclaims. Indeed, the Prior Order not only denied the motion to dismiss them, but went on to give leave to replead them for the sake of clarifying the remaining claims. *See e.g. Ott v Barash*, 109 AD2d 254, 262 (2nd Dept 1985) (“[i]t is evident that a general prerequisite to invocation of either res judicata or collateral estoppel is the existence of a final judgment, i.e., a final judicial determination which necessarily decided the very cause of action or issue that a party now seeks to litigate in a

subsequent action or proceeding” [citations omitted]). Moreover, a settlement does not have res judicata effect unless it discontinues a claim with prejudice. *See e.g. Peterson v Forkey*, 50 AD2d 774, 775 (1st Dept 1975) (“[t]he settlement of the previous case prior to the entry of judgment operated to finalize the action without regard to the validity of the original claim, and the action was accordingly considered, in contemplation of law, as if it had never been begun” [citation omitted]). To be sure, the Settlement here specifically contemplates that it would have no effect on the claims that Mazzocchi may have against any other parties.

AMEC, relying on *Tsabbar v Delena* (300 AD2d 196 [1st Dept 2002]) and *Ellis v Abbey & Ellis* (294 AD2d 168 [1st Dept, 2002]), rightly argues that a party cannot avoid the preclusive effect of the doctrine of res judicata by asserting different theories of law from the theories that were the basis for a decision on the merits. However, in both those cases, the matter involved a *new action*. The court in *Tsabbar* specifically took note of the prior and separate action of *Tsabbar v Auld* (289 AD2d 115 [1st Dept 2001]) that brought the same claims on a different legal theory. Meanwhile, in *Ellis*, the court, noting a prior accounting action between the parties, stated that the plaintiff could have asserted that action because “grounds for relief may be pleaded in the alternative and are not barred for inconsistency.” 294 AD2d at 170.

Here, in stark contrast, there has been no prior action (*i.e.* Mazzocchi is simply continuing the current action), court gave full notice to all the parties of the right to replead any remaining causes of action, the counterclaims in the Answer were specifically identified as not subject to dismissal, the Mazzocchi Complaint was not even the subject of a prior motion on the merits, there has been no final judgment in either the AMEC or the Mazzocchi Complaint, and the Settlement did not contemplate any final resolution of either matter with regard to AMEC, or any

of the other parties.

Finally, to the extent that AMEC seeks to apply an interpretation of the Prior Order of this court as if it is a final judgment, that attempt is unavailing. First, as noted above, a decision on a motion is not a final judgment. Further, “[t]he court’s opinion is a statement of the reasons on which the judgment rests. Since it is only what a court adjudicates, not what it says in an opinion, that has any direct legal effect, a judgment of the court controls over an opinion and, if they are at variance, the former prevails and determines the rights of the parties.” *Towley v King Arthur Rings*, 40 NY2d 129, 132-133 (1976) (citations omitted).

The court notes, nonetheless, that while it is clear that res judicata would have no relevance in this matter, especially since, the causes of action against the City, which were settled, were for tort, while the cause of action against AMEC is for breach of contract (*compare Singleton Mgt. v Compere*, 243 AD2d 213, 216 [1st Dept 1998]), in order to avoid a double recovery any damages that may be recovered for breach of the AMEC-Mazzocchi Contract may, in principle, be reduced by the amount of the Settlement. *See General Aniline & Film Corp. v A. Schrader & Son*, 12 NY2d 366, 370-371 (1963) (judicial policy will forestall double recovery).

The motions of AMEC to dismiss the Answer (index No. 604391/04; motion sequence No. 007) and the Mazzocchi Complaint (index No. 111906/05; motion sequence No. 003) are both denied.

MOTIONS TO DISMISS BY BOVIS

Bovis moves, pursuant to CPLR 3211 (a) (5), to dismiss the sixth through ninth causes of action of the Mazzocchi Complaint based on the doctrine of res judicata and due to the applicable statute of limitations. Alternatively, Bovis seeks, pursuant to CPLR 3211 (a) (7), to dismiss those

same causes of action for failure to state a claim upon which relief can be granted. Finally, they seek, pursuant to CPLR 1003, 1009, and 3025, to dismiss the entire Mazzocchi Complaint, and to dismiss the cross claims of EROC against Bovis.

The Mazzocchi Complaint, filed in August of 2005, sought damages in the amount of \$1,374,334.49, plus interest and attorneys' fees and costs, for unpaid work performed in Phase II of the clean-up of Ground Zero. The defendant in that matter was EROC. A third-party complaint was filed in December of 2005 by EROC seeking restitution and/or implied indemnification from AMEC and/or Bovis. After the decision of this court of January 2013 giving the plaintiffs permission to replead any remaining causes of action, Mazzocchi filed the Mazzocchi Complaint. Notably, the Mazzocchi Complaint asserted no causes of action against Bovis whatsoever, nor was Bovis named in any way as a direct defendant.

As a preliminary matter, as discussed above the Prior Order did not have any res judicata effect on any remaining claims of Mazzocchi. As such, the motion to dismiss on the basis of res judicata is denied.

Bovis also seeks, however, to dismiss on the basis of the applicable statute of limitations. The applicable limitations periods of sixth through ninth causes of action of the Mazzocchi Complaint (breach of contract, account stated, quantum meruit, and unjust enrichment, respectively) are all six years. *See* CPLR 213 (2). Bovis maintains that the elapsing of some eleven years since the amounts listed in the Mazzocchi Complaint first became due, and the date of the filing of that Complaint calls for the imposition of the statute of limitations on those claims. The court agrees.

Mazzocchi argues that the relation-back doctrine of CPLR 203 (f) applies to this

situation, as Bovis had notice of the potential claims against it as of the date of the original filing of Mazzocchi's action, or, at the very least, upon the filing of EROC's third-party complaint.

This argument is misplaced.

CPLR 203 (f) provides that:

“[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, *unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.*”

[Emphasis added].

Here, there is no mention whatsoever in Mazzocchi's original complaint of any contract between Mazzocchi and Bovis. Indeed, there is no mention of Bovis. With regard to the third-party complaint, that only gave notice of a potential restitution or indemnification claim; there was no contemplation in any of the papers of direct liability to Mazzocchi. As such, Bovis was not given “notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading” in the original complaint.

In all events, the relation-back doctrine would apply to the third-party complaint, not to Mazzocchi's original complaint. Here, it is not EROC that is submitting an amended complaint. In such a situation, the court could look more closely at the possibility that EROC's complaint somehow gave Bovis a notion of the claims. Rather, Mazzocchi seeks to add direct causes of action that were never hinted at in any pleadings.

Further, Mazzocchi, in asserting the existence of a contract with Bovis, has offered no contract as evidence. Indeed, it is inherently incredible that there could have been such a contract that Mazzocchi failed to mention in any of its papers for some eleven years, or, for that matter, in response to a motion to dismiss the causes of action based on such a contract. *See Mark*

Hampton v Bergreen, 173 AD2d 220, 220 (1st Dept 1991) (inherently incredible, unsupported, or flatly contradicted facts, as well as allegations consisting of bare legal conclusions are not entitled to the presumption of truth and the benefit of every favorable inference on a motion to dismiss).

Notably, although the court is allowed to freely consider affidavits submitted by Mazzocchi to remedy any defects in the complaint (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), Mazzocchi has not even submitted an *affidavit* verifying that a contract exists between Mazzocchi and Bovis.

The remaining arguments with regard to jurisdictional defects, are moot. Mazzocchi was entitled to replead remaining causes of action, not to file new ones. In all events, even if leave to amend the Mazzocchi's Complaint were to be granted, the causes of action would be barred by the applicable statute of limitations. The motion of Bovis to dismiss the sixth through ninth causes of action of the Mazzocchi Complaint is granted.

Accordingly, it is hereby

ORDERED that the motion of plaintiff AMEC Construction Management, Inc. under index No. 604391/04 (motion sequence No. 007), pursuant to CPLR 3211 (a) (6), to dismiss the amended verified answer of defendant Mazzocchi Wrecking, Inc. is denied; and it is further

ORDERED that the motion of plaintiff AMEC Construction Management, Inc. under index No. 111906/05 (motion sequence No. 003), pursuant to CPLR 3211 (a) (5), to dismiss the amended verified complaint of defendant Mazzocchi Wrecking, Inc. is denied; and it is further

ORDERED that the motion of third-party defendant Bovis Lend Lease LMB, Inc. under index No. 591292/05 (motion sequence No. 004), pursuant to CPLR 3211 (a) (5) and (7), to

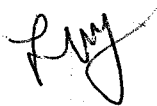
dismiss the sixth through ninth causes of action of the amended verified complaint of defendant Mazzocchi Wrecking, Inc. is granted, and the sixth, seventh, eighth, and ninth causes of action of the complaint bearing the index No. 111906/05 are dismissed; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 205, 71

Thomas Street, on ~~Feb~~ ^{March 5th}, 2014, at 2 a.m./p.m.

Dated: 1/27/14

ENTER:



J.S.C.

FILED

FEB 03 2014

**NEW YORK
COUNTY CLERK'S OFFICE**