Benfield Light. Inc. v A.J.S. Project Mgt., Inc.
2016 NY Slip Op 30953(U)
May 19, 2016
Supeme Court, New York County
Docket Number: 155975/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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BENFIELD LIGHTING INC.,

Plaintiff,

- against -

A.J.S. PROJECT MANAGEMENT, INC., TELIMAN HOLDING CORP., MCM PRODUCTS USA, INC., WESTCHESTER-FIRE INSURANCE COMPANY, and JOHN and JANE DOES, both individuals, corporations, LLCs, etc.,

Defendants.

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Index No. 155975/15

Motion seq. nos. 001, 002

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Joshua G. Oberman, Esq.
Donald J. Carbone, Esq.
Goetz Fitzpatrick LLP
One Penn Plaza, Ste. 3100
New York, NY 10119-0196
212-695-8100

For defendants:
Ernest Edward Badway, Esq.
Lauren J. Talan, Esq.
Fox Rothschild LLP
100 Park Ave., 15th fl.
New York, NY 10017
212-878-7900

By notice of motion, defendants Teliman Holding Corp. (Teliman), MCM Products USA, Inc. (MCM), and Westchester-Fire Insurance Company (Westchester) (collectively "defendants") move pursuant to CPLR 3211(a)(7) for an order dismissing the complaint against them. Plaintiff opposes. (Mot. seq. no. 001).

By notice of motion, plaintiff moves pursuant to CPLR 1003 and 3025(b) for an order granting it leave to amend its complaint. Defendants oppose. (Mot. seq. no. 002). The motions are consolidated for disposition.

I. BACKGROUND

Defendant A.J.S. Project Management, Inc. (AJS) was the general contractor hired by MCM, lessee of property in Manhattan owned by Teliman, to perform renovation work at the

premises. Between October 2014 and February 2015, AJS hired plaintiff to provide lighting and electrical supplies for the project. Upon AJS's alleged default in paying plaintiff, on April 27, 2015, plaintiff filed a notice of mechanic's lien on the property for $120,353.16, naming Teliman as the property owner, and served the notice on Teliman and MCM. (NYSCEF 15, 28).

On May 18, 2015, pursuant to its contract with AJS, MCM filed a bond executed by its surety, Westchester, whereby MCM and Westchester jointly and severally undertook and became bound in the sum of $132,388.48, conditioned for the payment of any and all judgments rendered against the property in plaintiff's favor. (NYSCEF 14, 16). Thereafter, pursuant to Lien Law § 19(4), MCM requested that the lien be discharged. (NYSCEF 14).

On or about June 12, 2015, plaintiff commenced this action seeking to foreclose on the "lien bond" as against all defendants (fifth cause of action), alleging, in pertinent part, that its "supplies were provided at the specific request and knowledge of AJS, MCM, and Teliman . . . and with the understanding that [it] was to be paid for the supplies it provided." (NYSCEF 1).

During the pendency of this motion to dismiss, the action was discontinued without prejudice as to Teliman and MCM. (NYSCEF 8). As the stipulation of discontinuance renders defendants' motion moot to the extent that it seeks dismissal as against MCM and Teliman, I address plaintiff's motion first, as it seeks to re-add those defendants.

II. PLAINTIFF'S MOTION TO AMEND

A. Contentions

Plaintiff contends that it mistakenly discontinued the action as against MCM and Teliman, and observes that pursuant to the bond, MCM is jointly and severally liable with Westchester for any judgment in its favor. It denies that the amendment will result in prejudice,

as all non-AJS defendants are represented by the same counsel, and in any event, Teliman and MCM were previously named. (NYSCEF 28).

In response, defendants argue that absent any allegation of a contractual relationship with plaintiff, plaintiff may not foreclose on the bond. As plaintiff admits that it was hired by AJS, neither property owner Teliman, nor lessee MCM may be held contractually liable absent any allegation of privity or of some connection to the work it performed for AJS. Moreover, they assert that the lien was, in the first instance, invalid, as plaintiff never obtained their consent, explicit or implied, for the improvements at the premises, and that plaintiff's allegation to the contrary is unsupported. Defendants claim that they would be prejudiced by the amendment as they would have to litigate this same issue. (NYSCEF 41).

B. Analysis

1. Governing standard

A motion for leave to amend pleadings pursuant to CPLR 3025(b) is left to the sound discretion of the trial court, and should be freely granted absent prejudice or surprise. (*MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]). The motion must be supported by an affidavit of merits and evidentiary proof. (*Greentech Research LLC v Wissman*, 104 AD3d 540, 541 [1st Dept 2013]). A court should deny leave to amend if the amended pleading cannot withstand a motion to dismiss (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 [2002]), or if the amendment is patently without merit or palpably insufficient (*Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 886 [2d Dept 2013]; *Bryndle v Safety-Kleen Sys., Inc.*, 66 AD3d 1396, 1396 [4th Dept 2009]).

2. Teliman

> A contractor, subcontractor, laborer, materialman, . . . [etc.], who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, . . . or materials upon the real property improved or to be improved and upon such improvement, ...

(Lien Law § 3). A mechanic's lien is invalid unless the owner or its agent requested or consented to the lienor's services. Rhe required consent "is not mere acquiescence . . . . [there] must be some affirmative act by the owner." (*P. Delany & Co. v Duvoli*, 278 NY 328, 331 [1938]; *Creech v Rufa*, 101 AD3d 1224, 1225 [3d Dept 2012]; *Vardon, Inc. v Suga Dev., LLC*, 36 AD3d 897, 898-899 [2d Dept 2007]; *Aetna El. Co. v Deeves*, 125 AD 842, 843 [1st Dept 1908]).

An owner or contractor may "execute as a principal[] a bond . . . conditioned for the payment of any judgment or judgments which may be recovered in any action brought for the enforcement of any and all claims," and upon approval and filing of such bond, "an order shall be made by such court, judge or justice discharging such property from the lien . . . ." (Lien Law § 37[1], [4]). "Where the lien no longer attaches to real property due to the filing of a bond under the Lien Law, . . . the owners of the real property are no longer necessary parties to the action." (*M. Gold & Son, Inc. v A.J. Eckert Inc.*, 246 AD2d 746, 748 [3d Dept 1998]; *Norden Elec., Inc. v Ideal Elec. Supply Corp.*, 154 AD2d 580, 581 [2d Dept 1989]; *Melniker v Grae*, 82 AD2d 798, 799 [2d Dept 1981]; *see also Tri-City Elec., Co., Inc. v People*, 63 NY2d 969, 971 [1984], *rearg denied* 64 NY2d 755).

Here, it is undisputed that the lien was discharged and that plaintiff seeks recovery pursuant to the bond, not the lien. Thus, Teliman need not be a party and plaintiff's proposed addition of it is palpably insufficient. (*See M. Gold & Son, Inc.*, 246 AD2d at 747 [complaint

properly dismissed as against property owners who "were not necessary parties to the litigation because the bond had effectively replaced the lien"]; *see also Danica Group LLC v Atl. Ct. LLC*, 23 Misc 3d 1111[A], 2009 NY Slip Op 50708[U], *2 [Sup Ct, Kings County 2009] [same]).

3. MCM

Pursuant to Lien Law § 37(7), upon filing a bond discharging a mechanic's lien, the plaintiff "shall join as parties defendant, the principal and surety on the bond . . . [among others]." (*See also Bryant Equip. Corp. v A-1 Moore Contr. Corp.*, 51 AD2d 792 [2d Dept 1976]). The lienor may then proceed in foreclosure against the debtor alone, or may "bring an action in equity against the debtor and the surety on the bond . . . ." (*Grawer Bear Constr. Corp. v Bellino Constr. Co., Inc.*, 195 AD2d 499, 500 [2d Dept 1993]).

Here, the bond reflects that MCM and Westchester are, respectively, principal and surety on the undertaking. Thus, plaintiff establishes that the proposed addition of MCM, a proper party pursuant to Lien Law § 37(7), is not without merit. (*See Harley v Plant*, 210 NY 405, 409 [1914] [surety on discharge bond proper, but not necessary, party to foreclosure action]).

Notwithstanding the parties' dispute as to whether MCM consented to plaintiff's work, the validity of the lien should not be resolved on the pleadings. (*See Lane Constr. Co. v Chayat*, 117 AD3d 992, 993 [2d Dept 2014] [issue of fact as to lien's validity not properly resolved on motion to dismiss]; *Habinc v McTaggart*, 54 AD2d 799, 800 [3d Dept 1976] [relief sought required testing of validity of lien, "a question dehors the mere sufficiency of the complaint"]).

III. DEFENDANTS' MOTION TO DISMISS

Defendants raise the same arguments they advance in opposition to plaintiff's motion to amend. (NYSCEF 5). In response, plaintiff claims that defendants fail to address why dismissal

is warranted as against Westchester, the surety, particularly as it is obligated to pay any judgment in favor of plaintiff notwithstanding its lack of privity. (NYSCEF 13, 19). In reply, defendants emphasize that the lien was invalid, as plaintiff never obtained their consent for the improvements at the premises, and thus it cannot recover on the bond executed by Westchester, who is MCM's, not plaintiff's, surety. (NYSCEF 30-31, 34).

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

For the reasons set forth above, II.B.3., and as Westchester is a proper party to this action (Lien Law § 37[7]; *supra*), and as defendants raise, at best, a factual issue regarding the lien's validity, defendants fail to satisfy their burden of establishing that plaintiff has no cause of action against Westchester.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an order dismissing the complaint as against defendants Teliman Holding Corp., MCM Products USA, Inc., and Westchester-Fire Insurance Company is denied; it is further

ORDERED, that plaintiff's motion for an order granting it leave to amend the complaint

is granted, in part, as follows: leave is granted to amend the caption to reflect the addition of MCM Products USA, Inc. as a party defendant, and to amend the fifth cause of action to reflect said addition, and to this extent the amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; it is further

ORDERED, that leave to amend the complaint is denied with respect to the proposed addition of Teliman Holding Corp. to the caption, and the proposed amendment to the fifth cause of action reflecting said addition, which is hereby stricken; it is further

ORDERED, that a supplemental summons and amended complaint, in the form annexed to motion papers subject to the above terms, shall be served, in accordance with the Civil Practice Law and Rules, upon MCM Products USA, Inc. within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED, that MCM Products USA, Inc. shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service.

ENTER:

Barbara Jaffe, JSC

DATED: May 19, 2016
New York, New York