

G Builders IV LLC v Madison Park Owner, LLC

2011 NY Slip Op 33102(U)

November 28, 2011

Sup Ct, NY County

Docket Number: 650172/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16
PART 16

G Builders IV, LLC

INDEX NO. 650172/10

- v -
MADISON Park
owner

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted and
the complaint is dismissed in accordance
with the accompanying memorandum
decision

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Dated: November 28, 2011
NOV 28 2011

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X
G BUILDERS IV LLC,

Plaintiff,

-against-

Index No. 650172/10
Motion Seq. Nos. 003 & 004

MADISON PARK OWNER, LLC, PLATTE RIVER
INSURANCE COMPANY, ARCHITECTURAL
HARDWARE, INC., ARTISAN STONeworks
CORP., COOL SHEET METAL, INC., CADDEL INC.,
(doing Business as DIRECT FLOORING), FIRE
STOP SOLUTIONS, INC., J.M.A. TILE & STONE
CORP., NEAT HEAT, INC., PROGRESSIVE
WOODWORKING, INC., ROCHE PMO, SECURITY
BY DESIGN, SIMPLICITY ELECTRICAL
CONTRACTORS INC., THOMAS S. BROWN
ASSOCIATES, INC., TRI STATE DISMANTLING
CORP, WIRE WORKS BUSINESS SYSTEMS,
INC., and WELLS FARGO BANK, NATIONAL
ASSOCIATION,

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Defendants.

-----X
SCHLESINGER, J.

The dispute here between plaintiff G Builders IV LLC ("G Builders") and the moving defendants Madison Park Owner, LLC ("Madison Park") and Platte River Insurance Company ("Platte River"), the surety whose bond has discharged the mechanic's liens, has been a particularly virulent one. Many motions have been brought, argued and appealed. An arbitration between these same parties has been moving along on a kind of parallel track. It appears to be similarly heated.

What began here as a negotiated and signed contract in March 2007 between Madison Park, the owner of property located at 15 East 26th Street in New York City, and G Builders, the construction manager for the conversion of luxury condominiums, has

instead been converted into a battle that not only involved charges of illegal behavior but actually resulted in an indictment for grand larceny and from there to four guilty pleas to serious crimes. It is this criminal behavior that forms the predicate for the dispositive motion now before this Court, a motion brought by Madison Park and Platte River to dismiss the complaint of G Builders, to discharge and vacate a multimillion dollar mechanic's lien, and for a legal determination that G Builders cannot assert any claims against Madison Park for any construction work performed for the 15 East 26th Street project.

Madison Park and its surety ask for this extraordinary relief because they wish the Court to accept as fact that G Builders, while not actually the party who pled guilty to criminal behavior related to work at this site, is for all intents and purposes that same party and therefore should be precluded from using the legal system to attempt to collect money from the victim of their criminal behavior, the moving party Madison Park. I accept this invitation and make such a finding as well as the legal principle that follows, which is that criminal behavior cannot and should not lead to financial gain. The evidence which leads to this finding is overwhelming and conclusive. The remainder of this decision will demonstrate that point.

The best place to begin this discussion, even though chronologically it is one of the last events, is with the indictments announced by the New York County District Attorney on January 27, 2010. That indictment charged three individuals, George Figliolia, Isaac Stareshefsky and John Krupa, as well as the entity The Builders Group, with Grand Larceny in the First Degree regarding stealing property valued in excess of one million dollars, Grand Larceny in the Second Degree regarding property valued in excess of fifty

thousand dollars, and a Scheme to Defraud in the First Degree. The period of time specified in the first two Grand Larceny counts began in September 1, 2006 and January 1, 2007 and ended on December 31, 2008.

Soon after the announcement of this indictment, on February 22, 2010, G Builders, who was then a claimant in an arbitration between it and Madison Park, petitioned this Court to stay that arbitration pursuant to CPLR §7502©. The application, which was supported by an affirmation from counsel for G Builders, informed me that the above three individuals, Figliolia, Stareshesky and Krupa, who were officers of G Builders, had been indicted. Counsel further indicated that the indictment concerned claims that the charged defendants had defrauded owners and subcontractors on this project. I stated the following in my decision granting the stay over the opposition of Madison Park:

It has been made clear to me that if this arbitration was to proceed in all aspects ... more likely than not the three individuals named would have to give testimony... In order to either prove their claim or in order to defend against various counterclaims it would certainly be in their interest to give testimony.

I then noted that the criminal indictment could lead to prison time and therefore these men would likely elect not to give testimony and to instead invoke their Fifth Amendment privilege. I characterized this dilemma as a Hobson's choice.

On April 15, 2011, Builders Group pled guilty to all six counts of the indictment. The plea agreement included a payment of restitution in the amount of two million dollars, which according to the Assistant District Attorney had been paid. Counsel for Builders Group accepted as "correct" the prosecutor's statement that Count One involved a theft of over one million dollars from Walter & Samuels Corporation from September 1, 2006 to

December 31, 2008 through overbilling of a New York County based company. George Figliolia, John Krupa and Isaac Stareshefsky also pled guilty to felonies on that day.

It is now relevant to look at the contract between Madison Park and G Builders. It was signed in March 2007 for the project described as "Luxury Condominium Corporation at 15 East 26th Street, New York". The owner's agent is identified as Walter & Samuels, the entity identified at Builders Group's plea to be the victim of the theft of over one million dollars. Thus, one million of the two million dollar restitution was to be paid to Madison Group, Walter & Samuels' principal.

The contract was signed in two places by George Figliolia. First he signed on behalf of G Builders as President, the same manner in which he was identified by counsel for G Builders in its motion to stay arbitration. The second place is for GJF Construction Corp. as guarantor for the full performance of the Construction Manager.

But then how does Builders Group fit into all of this? Builders Group, according to counsel for G Builders, is a d/b/a of GJF, the guarantor of the contract, whose President and CEO was George Figliolia. Also, contrary to the earlier representation, counsel in a subsequent affidavit of May 18, 2011 (¶ 32) stated that the three employees who had pled guilty were not employees of G Builders, but rather were employees of GJF (the d/b/a of Builders Group). Also, it was Figliolia who, on behalf of Builders Group and identifying himself as its sole shareholder, consented to that company's pleading guilty to the indictment.

So the better question is, who is G Builders? Although Figliolia signed the contract as President on its behalf as Construction Manager for the project, it appears they had no employees and, as can soon be seen, all activity on the project was conducted by Builders Group.

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Builders Group's website highlighted as one of its projects 15 Madison Square North and featured photographs of that site. In Reply, it is also learned from documents produced during discovery in the arbitration that: 1) communications related to this project were sent on Builders Group letterhead, whose CFO was Isaac Stareshefsky who pled guilty to a "D" felony; 2) an internal accounting document of G Builders entitled "Check Detail By Job" identifies this project's Construction Manager as GJF; 3) the meeting minutes at this project were recorded and maintained by Builders Group. Multiple items that were discussed at these meetings referred to "BG" (presumably Builders Group) to perform various functions. Some of these functions included to "take over coordination of the client direct vendors," "prepare preliminary draft of GMP", "BG & Client Rep. to begin to schedule an after Project Business Meeting."

Also, there are various agreements with subcontractors for work on the Project that were entered into by Builders Group. These include contracts with Maspeth Steel and Alliance Services as subcontractors and vendors. Further, the e-mail address for those working on the Project was "GBuildersGroup.com" and all communications sent to Madison Park were sent from that same e-mail address. Also, monthly progress reports were issued by Builders Group. No documents in the name of "G Builders" related to the work were offered by its counsel.

So in other words, it is difficult to see who G Builders was or what precisely its role was on this project since nothing emanated from it, no employees worked for it, and no publicity regarding the project named it. I conclude therefore that either G Builders was merely a dummy corporation set up by Figliolia to sign the contract as Construction Manager and do nothing else, or it was the principal whose clearly identified agent,

Builders Group, did everything on its behalf. One of the few things we know for sure is that Figliolia, who was promised a sentence of 1-3 years in prison at his plea, was President of "both" entities and signed and guaranteed the contract wearing both hats. So he signed as President of G Builders, as Construction Manager, and as President of GJF which was a d/b/a of Builders Group. Finally, we know from the plea minutes that under the first count of the Indictment, Builders Group stole over one million dollars from Madison Park's agent Walter T. Samuels during the contract period and was ordered to pay one million dollars as restitution. Clearly, this restitution refers to this project, one that Builders Group was inextricably tied to.

To suggest that G Builders by its signature to the contract as Construction Manager without any other activity on the project, an entity owned and controlled by Figliolia, can insulate itself from the consequences of Figliolia's criminal behavior in the name of his other corporate entity Builders Group, is completely unconvincing.

It must be emphasized here that the admitted criminal behavior by Figliolia and his corporate entities and employees goes to the very core of the work done pursuant to this contract. In an article of April 15, 2011 (the date of the pleas) by Charles Bagli in the New York Times, the scheme underlying the indictment was described as follows:

its executives stole millions of dollars from clients
at condominiums and other projects in the New
York City area by submitting fake invoices and
taking kickbacks from its subcontractors.

The two projects that were identified were this project at 15 Madison North and the other Ulysses Management at 1 Rockefeller Plaza.

Thus, this is a situation where corruption tainted an otherwise legal contract. Under such circumstances, the perpetrator of such behavior cannot be allowed to reap any further

profits from its unlawful activities. Allowing this action to proceed in any venue, in court or before an arbitration panel, would be wrong and would be condoning this behavior.

In *McConnell v. Commonwealth Pictures Corp.*, 7 NY2d 465 (1960), a perfectly legal contract was involved at the outset of the controversy. It was a contract wherein plaintiff would try and procure contracts with a motion picture producer and defendant would get the distribution rights for certain movies. Plaintiff did procure such a deal and was paid \$10,000 by the defendant, pursuant to their contract. But defendant later refused to pay any more under the contract because, as asserted in its defense, the plaintiff had procured the distribution rights by bribing a representative of the producer with a bribe of \$10,000. Thus, it was alleged that the money paid by defendant to the plaintiff was used as the bribe.

The question before the courts was whether the plaintiff could enforce a contract that started out honest but turned bad. The high court said (at p 469):

Proper and consistent application of a prime and long-settled public policy closes the doors of our courts to those who sue to collect the rewards of corruption.

That certainly is the case here. Similar to what the *McConnell* court said (at p 470): "We are not working here with narrow questions of technical law. We are applying fundamental concepts of morality and fair dealing not to be weakened by exceptions." Further, that Court made it clear (at p 471) that not just any small illegality in the performance of an otherwise lawful contract will bar enforcement of the contract. "There must at least be a direct connection between the illegal transaction and the obligation sued upon."

Certainly, that is the situation here. The unlawful acts admitted to by Figliolia and his corporate entities affect all aspects of the work on the project. Finally, the Court of Appeals stated (at p 471):

Consistent with public morality and settled public policy, we hold that a party will be denied recovery even on a contract valid on its face, if it appears that he has resorted to gravely immoral and illegal conduct in accomplishing its performance.

No one could argue that this is the undeniable fact here.

In opposing this motion, several of the subcontractors have voiced concern that the dismissal of G Builders' claims will jeopardize their own claims. However, there should be no danger of that. Each of the subcontractors allowed to intervene here has filed its own lien, which should and will protect it. Those liens have not been discharged by the filing of Platte River's bond. Therefore, by my now discharging and vacating the multimillion dollar mechanic's lien, the other claims by subcontractors should not be affected.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant Madison Park Owner, LLC and Platte River Insurance Company (seq. 004) is granted and the Clerk is directed to enter judgment dismissing the complaint in its entirety; and it is further

ORDERED that the Mechanic's Lien Discharge Bond No. 41087600 given by Madison Park Owner, LLC, as principal and Platte River Insurance Company as surety, filed with the County Clerk on October 19, 2009 in the sum of \$10,568,527.73 is discharged and vacated; and it is further

ORDERED that the motion by (seq. 003) Madison Park Owner, LLC and Platte River Insurance Co. to discharge the G Builders lien filed with the County Clerk on or about August 10, 2009 and to discharge the bond filed by Madison Park (No. 41087600) is moot.

Dated: November 28, 2011

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J.S.C.
ALICE SCHLESINGER

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