Central Constr. Mgt., LLC v Durham
2024 NY Slip Op 34214(U)
November 25, 2024
Supreme Court, New York County
Docket Number: Index No. 654983/2018
Judge: Louis L. Nock

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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CENTRAL CONSTRUCTION MANAGEMENT, LLC,

Plaintiff,

- v -

SYLVIA DURHAM, AS PRESIDENT OF THE BOARD OF MANAGERS OF THE ST. TROPEZ CONDOMINIUM, and THE ST. TROPEZ CONDOMINIUM,

Defendants.

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INDEX NO. 654983/2018

MOTION DATE 08/21/2023

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, and 315

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, plaintiff's motion for partial summary judgment on the first cause of action for breach of contract and dismissing defendants' remaining counterclaims is granted in part, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 290, 297-298, 315) and the exhibits attached thereto, in which the court concurs, as summarized herein.

This action arises out of a construction contract between plaintiff and defendant the St. Tropez Condominium (the "Condo"), pursuant to which plaintiff agreed to perform certain exterior and related work on the Condo building (AIA contract, NYSCEF Doc. No. 299). As relevant herein, the contract provides that the Condo could terminate the contract either for cause (*id.*, § 14.2) or for the Condo's convenience (*id.*, § 14.4). In the case of a termination for convenience, upon receipt of written notice from the Condo, plaintiff was to cease operations,

take necessary actions to protect and preserve the work that had been done, and terminate any existing subcontracts and purchase orders except for work to be completed prior to the termination date (*id.*, § 14.4.2). Per the rider to the contract, in the case of such a termination, plaintiff was entitled to "the portion of the Contract Sum properly allocable to the work duly and properly performed by [plaintiff] prior to the date of such termination less the aggregate amount of all payments theretofore made to [plaintiff] and any other sums that may be due and owing by [plaintiff] to [the Condo]" (*id.*, Rider, § 14.01). Both parties agreed to waive claims for consequential damages, specifically including any consequential damages arising out of the termination of the agreement (*id.*, § 15.1.6).

On May 4, 2018, the Condo sent plaintiff a 10-day notice of termination (May 4 notice, NYSCEF Doc. No. 300). The notice did not specify the cause for termination, or whether it was for the Condo's convenience (*id.*). The Condo sent a follow-up notice on May 15, 2018 (NYSCEF Doc. No. 301), which was similarly lacking in detail. Invoices for the costs associated with demobilization and retainage were issued by plaintiff (invoices, NYSCEF Doc. No. 302, 303). A month later, plaintiff provided the Condo with an itemized statement for final billing, showing a total outstanding owed in the amount of $483,973.98 (final billing statement, NYSCEF Doc. No. 304). Upon the Condo's request, plaintiff also provided a verified itemized statement pursuant to Lien Law § 38, showing a final outstanding balance of $439,684.85 (Lien Law statement, NYSCEF Doc. No. 305). Defendants have refused to pay the balance.

Plaintiff states that it was unable to remove certain construction and safety equipment until the new contractor was able to install its own safety equipment (Kalamaras aff., NYSCEF Doc. No. 298, ¶ 44). Also, defendants had refused to schedule access to the elevator for plaintiff to remove its equipment (*id.*, ¶ 47). Defendants assert that plaintiff failed to timely demobilize,

filed an illegal lien on the property, and forced the Condo to remove certain equipment itself and, thus, plaintiff was asserted to be ineligible for the remaining balance (Durham EBT tr, NYSCEF Doc. No. 306 at 170).

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff has established prima facie entitlement to summary judgment by submission of the contract, the affidavit of its managing member Kalamaras, and the final invoices and related documentation, which together establish the facts of plaintiff's performance under the contract and defendants' breach thereof (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). In opposition, defendants fail to raise a triable issue of material fact. Defendants rely on

an affidavit from defendant Sylvia Durham, President of the Condo's Board of Managers, previously submitted in this action, in which she states that plaintiff abandoned some of its equipment at the building, which delayed the resumption of the project (Durham aff., NYSCEF Doc. No. 126). However, to the extent that defendants challenge the amount of plaintiff's damages, they submit no record evidence challenging plaintiff's entitlement to some amount of damages under the contract. Defendants vaguely assert that plaintiff may owe them something; but such allegation is entirely speculative (*e.g. Schloss v Steinberg*, 100 AD3d 476 [1st Dept 2012] ["Plaintiff's speculative arguments are insufficient to raise triable issues of fact"]). *Paragon Restoration Group, Inc. v Cambridge Sq. Condominiums* (42 AD3d 905, 906 [4th Dept 2007]), cited by defendants, is not to the contrary, as there, the court granted plaintiff summary judgment as to liability following a termination for convenience, but held that factual issues remained as to the amount of the plaintiff's claimed damages. As set forth below, no such factual issues exist at present.

Defendants argue that plaintiff cannot establish a prima facie case for breach of contract as there are, in fact, several ways in which plaintiff failed to perform, as well as the delay caused by plaintiff's failure to timely demobilize. However, complete demobilization is not a stated condition precedent to plaintiff's entitlement to damages under Article 14 of the contract. Moreover, defendants expressly waived any claims for delay in the contract, specifically, any claims for consequential damages for "losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons" (AIA contract, NYSCEF Doc. No. 299, § 15.1.6). The remaining claims for damages allegedly caused by plaintiff are unsupported by any documentary evidence of same, save for a letter from defendants' prior counsel from June of 2018 (NYSCEF Doc. No. 117) disputing the

amount that is not based on personal knowledge or supported by documentary evidence. The opponent of a motion for summary judgment must marshal and lay bare its own evidence to withstand the motion (*Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 711 [2d Dept 2007]).

Turning to the counterclaims, the first counterclaim for breach of contract must be dismissed (*Tishman Const. Corp., Inc. v City of New York*, 228 AD2d 292, 293 [1st Dept 1996] ["Where the City elects to terminate for convenience, as provided in section 15, whether with or without cause, it cannot counterclaim for the cost of curing any alleged default"]). The third counterclaim for abuse of process states that plaintiff improperly filed a lien against the common elements of the Condo and then commenced an improper lien foreclosure action thereon. Lien Law §§ 39, 39-a provide a remedy "against fictitious, groundless and fraudulent liens by unscrupulous lienors" (*E-J Elec. Installation Co. v Miller & Raved, Inc.*, 51 AD2d 264, 265 [1st Dept 1976]). Therefore, an abuse of process counterclaim based thereon must be dismissed (*id.* at 266). Contrary to defendants' argument, *Key Bank of N. New York, N.A. v Lake Placid Co.* (103 AD2d 19, 31 [3d Dept 1984], *appeal dismissed* 64 NY2d 644 [1984]) stands for the same conclusion. Moreover, as the lien, though allegedly improper, was filed in pursuit of amounts allegedly unpaid to plaintiff, defendant cannot allege process issued for an improper purpose (*id.* at 26-27). Finally, as the court in the lien foreclosure action already denied defendants' claim for attorneys' fees in that proceeding (decision and order, NYSCEF Doc. No. 310), defendants cannot recover them herein in the guise of damages on a abuse of process claim.

The fourth counterclaim for negligence, however, is not subject to dismissal at this time. Plaintiff argues that defendants have set up a claim duplicative of that for breach of contract, yet the allegations in support of the counterclaim allege that when plaintiff demobilized from the

building it caused damage to one of the units (amended answer, NYSCEF Doc. No. 292, ¶¶ 243-249). As this occurred after the contract had already been terminated, the claims cannot be duplicative. Plaintiff makes no other arguments in favor of dismissal.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment in its favor is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of $439,684.85, with interest thereon at the statutory rate from June 22, 2018, through entry of judgment, as calculated by the Clerk, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that so much of the motion as seeks dismissal of the first, third, and fourth counterclaims is granted to the extent of dismissing the first and third counterclaims, and otherwise denied; and it is further

ORDERED that the fourth counterclaim is severed and shall continue.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

11/25/2024
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**