

<b>Westbury Hotel, LLC v D.B.E. Electric Corp.</b>
2012 NY Slip Op 31377(U)
May 9, 2012
Sup Ct, Nassau County
Docket Number: 018359/10
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 018359/10

MOTION DATE: April 10, 2012  
Motion Sequence # 001, 002

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WESTBURY HOTEL, LLC, individually, and,  
as assignee and subrogee, on behalf of  
MACCARONE PLUMBING, INC. and all  
other lienors, claimants and creditors similarly  
situated entitled to share in funds received by  
D.B.E. ELECTRIC CORP. from Westbury Hotel,  
LLC, in connection with the improvement of  
real property owned by Westbury Hotel, LLC in  
the County of Nassau, under Article 3-A of the  
New York State Lien Law,,

Plaintiff,

-against-

D.B.E. ELECTRIC CORP., JANAK N. SHAH and  
SHAILESH PARIKH and "JOHN DOE #1" through  
"JOHN DOE #10",

Defendants.

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D.B.E. ELECTRIC CORP. and JANAK N. SHAH,  
and other similarly situated trust fund beneficiaries,

Third-Party Plaintiffs,

-against-

HMB MANAGEMENT INC., ATUL PATEL and  
MAHENDRA PATEL,

Third-Party Defendants.

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The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affirmation/Affidavit in Opposition.....	XXXXXXXXXX
Affirmation in Support.....	X
Memorandum of Law.....	XX

Motion by plaintiff Westbury Hotel, LLC for summary judgment declaring that the settlement agreement dated January 15, 2010 is in full force and effect is **denied**. Motion by plaintiff to dismiss all counterclaims and third party claims asserted by defendants D.B.E. Electric Corp. and Janak Shah and all counterclaims asserted by defendant Shailesh Parikh is **denied**. Plaintiff's alternative motion for leave to serve an amended complaint is **granted** to the extent indicated below. Cross-motion by defendants D.B.E. Electric Corp. and Janak Shah to sever the case against them from the case against defendant Shailesh Parikh is **denied**.

Plaintiff Westbury Hotel LLC is the owner of the Westbury Hampton Inn Hotel in Jericho. On February 1, 2008, Westbury entered into a construction contract with defendant D.B.E. Electric Corp to construct a hotel for \$4,229,600. The project was to be completed by August 31, 2008. During the course of construction, Westbury requested certain extra work which DBE performed. Westbury claims that the agreed upon price for the extra work was \$321,298.

At some point in the project, Westbury began paying subcontractors directly. Westbury claims that it paid \$2,501,400 to subcontractors. Eventually, a dispute arose between Westbury and DBE concerning the quality of the work and the amount Westbury was required to pay to subcontractors.

On January 15, 2010, Westbury and its affiliate, third party defendant HMB Management Inc, entered into a settlement agreement with DBE. Pursuant to the settlement agreement, Westbury agreed to deposit up to \$350,000 into escrow for the payment of subcontractors, vendors, and suppliers. DBE provided a one year warranty for all work performed and on all equipment, except for the boiler. DBE provided a five year warranty on the roof and a one year warranty on the elevator. The parties released each other from all claims arising from the construction contract, and DBE assigned to Westbury all of its rights under the contract.

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DBE claims that it signed the settlement agreement under duress because of financial distress and Westbury's refusal to continue paying the subcontractors. Additionally, DBE claims that defendant Janak Shah, DBE's president, received a physical threat from one of the subcontractors.

This action was commenced November 10, 2010. Westbury alleges that DBE failed to complete the work, performed certain work inadequately, and failed to pay subcontractors as required by the contract. Westbury further alleges that it incurred costs to pay off mechanic's liens and was required to hire another contractor to complete the project. Westbury requests a declaratory judgment that the settlement agreement was not the product of fraud, duress, undue influence, or illegality. Plaintiff also asserts claims for breach of the settlement agreement and the construction contract and for conversion of trust funds in violation of Article 3-A of the Lien Law.

In their answer, defendants DBE Electric and Janak Shah counterclaim against Westbury and assert a third party claim against HMB Management Inc for a declaratory judgment that the settlement agreement was procured by economic duress. Defendants also assert counterclaims and third party claims for breach of the construction contract by failing to pay for work performed, diversion of trust funds, unjust enrichment, and misrepresentation as to Westbury's intention to pay for extra work.

In his answer, defendant Shailesh Parikh asserts counterclaims against Westbury for work performed as a hotel project consultant, lighting fixture materials supplied to the project, and diversion of trust funds. Although defendant Parikh filed a separate answer, he is represented by the same attorney as represents defendants DBE and Shah.

Plaintiff Westbury moves for summary judgment declaring that the settlement agreement dated January 15, 2010 is in full force and effect. Additionally, plaintiff moves to dismiss all counterclaims and third party claims asserted by defendants D.B.E. Electric Corp. and Janak Shah and all counterclaims asserted by defendant Shailesh Parikh. Alternatively, plaintiff moves for leave to serve an amended complaint asserting claims against all defendants for fraudulent inducement of the construction contract, as well as claims against Parikh for breach of contract, negligence, and common law indemnity. Defendants D.B.E. Electric Corp. and Janak Shah cross move to sever the case against them from the case against defendant Shailesh Parikh.

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

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to demonstrate the absence of any material issues of fact (JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers(Id).

A contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of free will (Sitar v Sitar, 61 AD3d 739, 742 [2d Dept 2009]). There is no duress, however, where the alleged coercion was to exercise a legal right (Madey v Carman, 51 AD3d 985 [2d Dept. 2008]). A failure to repudiate an agreement in prompt fashion, or acceptance of benefits under the agreement, belies an economic duress claim (Philips South Beach v ZC Specialty Ins., 55 AD3d 493 [1<sup>st</sup> Dept. 2008]).

On this motion for summary judgment, it is plaintiff's burden to establish prima facie that DBE was not compelled to enter into the January 2010 settlement agreement by Westbury's wrongful refusal to pay for work performed pursuant to the change orders. In his affidavit, Westbury's officer, third party defendant Mahendra Patel, states that "the negotiations culminated" in the settlement agreement. Patel's affidavit gives no substance as to the tenor of the negotiations, including discussions as to Westbury's obligation to continue paying subcontractors, DBE's financial condition, and other circumstances surrounding the negotiation of the settlement agreement. The court concludes that plaintiff Westbury failed to carry its prima facie burden. Plaintiff's motion for summary judgment declaring the settlement agreement is in full force and effect is **denied** as premature and not properly supported by affidavit. Plaintiff's motion to dismiss all counterclaims and third party claims asserted by defendants D.B.E. Electric Corp. and Janak Shah and all counterclaims asserted by defendant Shailesh Parikh is similarly **denied** with leave to renew upon proper papers at the conclusion of discovery.

Plaintiff's motion for leave to serve an amended complaint is **granted** to the extent that the amended complaint is deemed served in the form annexed as exhibit F to plaintiff's motion. Defendants have failed to show the need for a severance for either convenience or to avoid prejudice (CPLR § 603). Accordingly, defendants D.B.E. Electric Corp and Janak Shah's cross-motion to sever the case against them from the case against defendant Shailesh Parikh is **denied**.

So ordered.

Dated MAY 09 2012

  
J.S.C.

**ENTERED**

**MAY 11 2012**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE