

Posillico Envtl., Inc. v National Grid Generation LLC
2012 NY Slip Op 32972(U)
December 12, 2012
Sup Ct, Suffolk County
Docket Number: 16186-11
Judge: Daniel Martin
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY**

INDEX NO.: 16186-11

PRESENT:

HON. DANIEL MARTIN

Motion Date: 09/04/12, 10/02/12

Submitted: 10/02/12

Motion Sequence Nos: 2 - motD

3- MD

POSILLICO ENVIRONMENTAL, INC.,
and GODWIN PUMPS OF AMERICA,
INC.,

Plaintiffs,

-against-

NATIONAL GRID GENERATION LLC,
f/k/a MARKET GENERATION LLC,
f/k/a KEYSpan CORPORATE
SERVICES LLC, HYDRAULITALL
INC., and "John Doe 1" through "John
Doe 10" as their interests may appear,

Defendants.

PLAINTIFF'S ATTY:

Agovino & Asselta, LLP.

330 Old Country Road, Suite 201

Mineola, New York 11501

DEFENDANTS ATTY:

Cullen & Dykman LLP

Garden City Center

100 Quentin Roosevelt Boulevard

Garden City, New York 11530

_____ x

The following named papers have been read on this motion:

Notice of Motion/Order to Show Cause	X
Notice of Cross-Motion	X
Answering Affidavits	X
Replying Affidavits	X

ORDERED that plaintiff's motion pursuant to CPLR 3211 to dismiss defendant's affirmative defenses is granted with regard to the first, second, fifth and sixth enumerated defenses and denied with regard to the third and fourth enumerated defenses, and it is further

ORDERED that plaintiff's motion pursuant to CPLR 3211 to dismiss defendant's counterclaim is denied, and it is further

ORDERED that defendant's motion pursuant CPLR 2221(d) for leave to reargue this Court's Order and Decision dated April 10, 2012 is denied.

This action, which was commenced on May 20, 2011, is to foreclose a series of mechanic's liens filed against certain real property located in Port Jefferson, New York and owned by defendant National Grid Generation LLC ("National Grid"). In each of the first five causes of action in the complaint, plaintiff Posillico Environmental, Inc. ("the plaintiff") alleges that its equipment was used by defendant Hydraulital Inc. ("Hydraulital"), pursuant to a contract between Hydraulital and National Grid, to perform dredging work at the property in 2008; that its equipment was used, as such, for the improvement of the property and with the knowledge and consent of National Grid; that Hydraulital refused to pay the plaintiff the reasonable rental value of the equipment, *i.e.*, \$30,400.00 per month, despite due demand; that the plaintiff duly served and filed a notice of mechanic's lien against the property; and that each lien was timely continued and redocketed, most recently by order dated May 21, 2010 for a period of one year.

This case was subject to a prior motion by defendant to dismiss the complaint pursuant to CPLR 3211(a)(7), which resulted in this Court's Decision and Order dated April 10, 2012.

This is a motion by plaintiff to dismiss defendant's affirmative defenses and counterclaim pursuant to CPLR 3211. Defendant responds in opposition and cross-moves for leave to reargue, pursuant to CPLR 2221(d), this Court's Decision and Order dated April 10, 2012 denying its motion for CPLR 3211(a)(7) relief.

Plaintiff's motion to dismiss affirmative defenses and counterclaims

In asserting that defendant's affirmative defenses and counterclaims should be dismissed, plaintiff seeks to invoke the "Law of the Case Rule." It does so to no avail. The Court of Appeals has defined this rule in *Martin v. City of Cohoes*, 37 N.Y.2d 162, where the Court found:

The doctrine of the "law of the case" is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned .

The only *issue* determined in this case, as established by the Court's prior decision, is that plaintiff's complaint is sufficient - on its face - to withstand defendant's motion to dismiss pursuant to CPLR 3211(a)(7). Thus plaintiff has no prior determination of this Court on which to rely as a factual ground in its motion to dismiss the affirmative defenses.

In asserting that defendant's counterclaim should be dismissed, plaintiff also seeks to invoke the "Law of the Case Rule," as its sole ground under CPLR 3211. It likewise does so to no avail.

As to the defendant's affirmative defenses, the parameters of CPLR 3018(b) apply. A party is required to plead all matter which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading. In addition to certain specified defenses the statute does not confine itself to those enumerated. The measure to be applied is whether, but for the notice such affirmative defenses provide, the adverse party would be surprised or does the defenses raise issues of fact not otherwise appearing on the prior pleading, here - the complaint.

Defendant's enumerated affirmative defenses, as they are found in its answer and counterclaim, are considered here.

1. The two named plaintiffs are improperly joined as plaintiffs

This language describes a misjoinder issue for which the CPLR provides other remedies. It is not properly presented as an affirmative defense.

2. Plaintiff Posillico is judicially estopped from asserting that it is a material man with respect to the Nation Grid project

To the extent that defendant relies upon the Court's prior Order and Decision as the basis for a claim of "judicial estoppel" or the law of the case, there is no basis for that reliance. This affirmative defense is not properly stated, especially since the third affirmative defense provides adequate notice to the plaintiff of the matter defendant intends to present.

3. Neither plaintiff was a materialman with respect to the National Grid project

This affirmative defense, sounding on the issue of standing, is properly plead.

4. Not yet having the benefit of discovery in this action, defendant National Grid alleges that the mechanic's liens being asserted in this action were never properly established and, if they were, they lapsed because they were never properly extended

This affirmative defense, sounding on the issue of standing, is properly plead.

5. By their actions plaintiffs are estopped from pursuing their claims in this action

This affirmative defense does not raise issues of fact not appearing on the face of a prior pleading. It is not properly plead.

6. To the extent that plaintiffs are seeking equitable relief in this action, they come into Court with unclean hands

This affirmative defense does not raise issues of fact not appearing on the face of a prior pleading. It is not properly plead.

Defendant's cross-motion to reargue

Defendant National Grid Generation LLC moves for an order granting leave to reargue, pursuant to CPLR2221(d), alleging that the Court, in its order and decision May 22, 2012, which denied its motion to dismiss the complaint for failure to state a cause of action (CPLR 3211(a)(7), ignored certain facts established by defendant itself. Thereupon, it is asserted that the Court failed to apply certain case law interpreting the Lien Law to those facts. Defendant maintains throughout its submission that the facts of this case are as educed by defendant.

The “facts in this case” have yet to be determined. The “facts” on defendant’s dismissal motion pursuant to CPLR 3211(a)(7) are contained within the complaint and were adjudged on the sole measure of whether, on the face of the complaint, they state a cause of action. Under our rules of pleading a complaint should not be dismissed on such a CPLR 3211 motion, so long as, when plaintiff is given the benefit of every possible favorable inference, a cause of action exists. *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, citing CPLR 3211©.

The arguments of the parties are permeated with the tacit suggestion that the prior Order was made on a CPLR 3212 - summary judgment treatment of the matter presented. It was not. The *Rovello* Court found, at 40 N.Y.2d 633, 635, that:

As amended in 1973, CPLR 3211 (subd [c]) explicitly requires that if the court decides to treat a CPLR 3211 (subd [a]) motion as one for summary judgment, it must first provide adequate notice to the parties, and thus give them an opportunity to make an appropriate record (see Nineteenth Ann Report of NY Judicial Conference, 1974, pp 62-63; see, also *Mareno v. Kibbe*, 32 A.D.2d 825.) Since no such precaution need be taken if the motion is not so treated, affidavits received on an unconverted motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support for the pleading. (Emphasis supplied)

This Court’s original decision and order was made on a motion to dismiss pursuant to CPLR 3211(a)(7) on the sole question of whether the complaint in this action states a cause of action. At no time was it converted to a motion for summary judgment relief. No notice was given, nor intended to be given, to the parties of summary judgment treatment. Indeed, the decision, in its penultimate paragraph, contains wording evincing the Court’s extension to the pleading of every possible inference that a cause of action exists, e.g., “so long as,” and “it may also be deemed.”

Defendant has presented nothing which sustains its burden under CPLR 2221(d). Its motion for leave to reargue must be denied.

So Ordered.

Dated: December 12, 2012
Riverhead, NY



HON. DANIEL MARTIN, A.J.S.C.