

610 W. Realty, LLC v Riverview W. Contr., LLC

2016 NY Slip Op 30946(U)

May 24, 2016

Supreme Court, New York County

Docket Number: 155357/2013

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES

PART 59

Justice

610 WEST REALTY, LLC,

Index No.: 155357/2013

Plaintiff,

Motion Date: 06/17/2016

- v -

Motion Seq. Nos.: 005 & 006

RIVERVIEW WEST CONTRACTING, LLC, B&V
CONTRACTING ENTERPRISES, INC., A-1 TESTING
LABORATORIES, INC., and ACE INSPECTION and
TESTING SERVICES, INC.,

Defendants.

The following papers, numbered 1 to 3 were read on this motion for summary judgment

Table with 2 columns: Document Name and No(s). Rows include Amended Notice of Motion/-Affidavits -Exhibits (1), Answering Affidavits - Exhibits (2), and Replying Affidavits - Exhibits (3).

Cross-Motion: [] Yes [X] No

Plaintiff 610 West Realty, Inc. is the sponsor (Sponsor) of a condominium project located at 603 West 148th Street, New York, New York, comprised of forty-six residential condominium units and also known as The Riverbridge Court Condominium (the Building). Sponsor initially hired non-party BFC Construction Corp. (BFC Construction), then defendant Riverview West Contracting, LLC, as its general contractor, to construct the Building (Riverview West).

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

- 1. CHECK ONE: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

Non-party BFC Construction, as general contractor of Sponsor, accepted a proposal dated November 23, 2003, from defendant A-1 Testing Laboratories Inc. (A-1), under which defendant A-1 offered to perform, among other items, the Fireproofing Inspection for the Building.

Riverview West entered into a subcontract agreement dated June 2, 2005 with defendant B&V Contracting Enterprises, Inc. (B&V) to, among other work, furnish and install all drywall, ceilings, soffits and fire "fire safing and smoke seals" (B&V Subcontract).

In the complaint, Sponsor alleges, inter alia, that B&V installed ineffective and inadequate fire stopping and/or fire proofing, and that B&V thereby breached its contract and was negligent, and as a result of such breach and negligence, plaintiff suffered damages in the form of having to carry out repair work to correct the defective and inadequate work, incurring significant additional cost.¹

In the complaint, Sponsor also alleges, inter alia, that A-1 Testing failed to detect and report the defective and inadequate work that B&V performed, and that A-1 Testing thereby breached its contract and was negligent, and as a result of such breach

¹By Order of July 31, 2015, this Court granted the motion for summary judgment of B&V only to the extent of dismissing the fourth cause of action asserting negligence against such defendant.

and negligence, plaintiff suffered damages in the form of having to carry out repair work to correct the defective and inadequate work. Sponsor also asserts a cause of action for fraudulent conveyance against A-1 and seeks to set aside the sale of the assets from A-t to defendant Ace Inspection & Testing Services, Inc. ("Ace").

Defendant A-1 moves for summary judgment dismissing the complaint against it. It argues that the fifth cause of action for breach of contract fails to state a claim because there is no privity between it and Sponsor and because Sponsor has not alleged facts that show that Sponsor was a third party beneficiary under the Sponsor's prime contract with non-party BFC Construction. It also argues that to the extent that the complaint alleges negligence against it, such claims are insufficient since only economic damages are sought. A-1 argues that in addition, the breach of contract and negligence claims were interposed after the expiration of the six year and three year statute of limitations, respectively. Finally, A-1 argues that Sponsor has no cause of action for fraudulent conveyance against A-1.

Sponsor opposes A-1's motion.

This court agrees with A-1 that Sponsor's complaint states no cause of action for negligence against such defendant since the damages that Sponsor seeks against it are only economic,

i.e., the benefit of its bargain under the Subcontract in the form of additional costs Sponsor incurred in repairing A-1's allegedly inadequate and defective work, rather than damages for any injury to property. See 532 Madison Avenue Gourmet Foods, Inc. v Findlandia Center, Inc., 96 NY2d 280, 291-292 (2001) (limiting the scope of defendant duty to those who have, as a result of their actions, suffered personal injury or property damages, and that holding that plaintiffs' negligence claims based on economic loss fall beyond the scope of the duty owed them by defendants).

This court likewise concurs with A-1, that, affording the complaint every favorable inference, Sponsor states no cause of for breach of contract against A-1 since no privity of contract exists between it and A-1. Unlike the B&V Subcontract, the A-1 Subcontract with BFC Construction contains no language in which A-1 promises to warrant the materials and equipment it provided under such Subcontract to the Sponsor. Nor has the Sponsor established breach of contract based upon its claim that it was a third party beneficiary under the Subcontract between non-party BFC Construction and the A-1. Sponsor does not allege that it reviewed and approved the specifications for A-1's testing and reports, or that it retained control over the budget with respect to such Subcontract, or that it had a representative at the site on a daily basis overseeing A-1's work under such

Subcontract. Compare City School District of City of Newburgh v Hugh Stubbins & Associates, Inc., 85 NY2d 535, 538-539 (1995).

As for the statute of limitations for breach of contract, there are dueling affidavits as to whether A-1 substantially completed its work as of August 2006, or whether, as stated in plaintiff's affidavit, A-1's principal made representation to further perform further services in April 2010. The action was commenced upon filing of the summons and complaint (CPLR § 304), which took place on November 26, 2013. Thus, Sponsor's cause of action for breach of contract was not time-barred as of that date assuming the work under the Subcontract was completed after November 27, 2007. There would be an issue of fact as to timeliness, were the breach of claims not lacking in merit given the absence of any privity.

Turning to Sponsor's cause of action for fraudulent conveyance, such cause of action lacks merit, as a matter of law, "for failure to plead the alleged fraudulent conveyance with the requisite specificity", Sponsor having not specifically alleged in either its complaint or opposition papers, "the value of the transferred property or otherwise showing why the value of the consideration was inadequate" (IDC [Queens] Corp. v Illuminating Experiences, Inc., 220 AD2d 337 [1st Dept 1995]).

Based upon the foregoing, it is

ORDERED that the motion for summary judgment of the defendant

A-1 Testing Laboratories, Inc. is granted in its entirety; and it is further

ORDERED that the complaint against A-1 Testing Laboratories, Inc. is dismissed with costs and disbursements to defendant A-1 Testing Laboratories, Inc. as taxed by the Clerk upon the submission of an appropriate bill of costs and the Clerk is directed to enter judgment accordingly in favor of such defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

This is the decision and order of the court.

Dated: May 24, 2016

ENTER:

~~1-24-16 J.S.C.~~
J.S.C.