

**Vanguard Constr. & Dev. Co., Inc., v B.A.B. Mech. Servs., Inc.**

2016 NY Slip Op 31563(U)

August 16, 2016

Supreme Court, New York County

Docket Number: 152264/15

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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VANGUARD CONSTRUCTION & DEVELOPMENT  
CO., INC.,

Plaintiff,

Index No. 152264/15

**DECISION/ORDER**

-against-

B.A.B. MECHANICAL SERVICES, INC. and  
BENJAMIN BRANCATO,

Defendants.  
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**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavits in Opposition.....	<u>2</u>
Affidavits in Reply.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Vanguard Construction & Development Co., Inc. (“Vanguard”) commenced the instant action against defendants B.A.B. Mechanical Services, Inc. (“BAB”) and Benjamin Brancato (“Brancato”) asserting causes of action for breach of contract, indemnification, fraud, negligence, breach of the duty of good faith and fair dealing and violation of New York’s Lien Law arising out of two projects for which plaintiff was hired as contractor. Vanguard now moves for an Order (1) pursuant to CPLR § 2221(d) granting it leave to reargue the portion of a decision issued by this court dated September 18, 2015 (the “Decision”) which dismissed plaintiff’s eleventh and twelfth causes of action and, upon reargument, reinstating said claims; (2) pursuant to CPLR § 3025(b) granting it leave to serve an amended complaint to add claims

and additional defendants; and (3) pursuant to CPLR §§ 305(a) and (c) granting it leave to serve a supplemental and amended summons. For the reasons set forth below, plaintiff's motion is granted in part and denied in part.

The relevant facts and procedural history of this case are as follows. Plaintiff was retained as general contractor for the Tenant Build-Out Amida Care Project located at 225 West 34<sup>th</sup> Street, New York, New York (the "Amida Project"). In or around June 2014, plaintiff entered into a contract with BAB, as subcontractor, pursuant to which BAB was to provide all labor and materials necessary to complete certain HVAC-related work for the Amida Project for the base amount of \$800,000.00 (the "Amida Contract"). Thereafter, BAB entered into contracts with certain sub-subcontractors and suppliers, including S.R. Mechanical/Design Corp. ("SR Mechanical"), pursuant to which they would supply and install insulation, ductwork, duct collars and ceiling grids for the Amida Project.

Plaintiff alleges that at some point, it became apparent that BAB could not properly perform its contractual obligations under the Amida Contract as a result of which plaintiff terminated BAB from the Amida Project. Additionally, plaintiff alleges that due to BAB's failure to perform pursuant to the Amida Contract, it was forced to pay BAB's sub-subcontractors and suppliers with respect to the Amida Project and to repair BAB's negligent and defective work performed on the Amida Project.

Plaintiff was also retained as general contractor for the Blue Ridge Gymnasium/IT Office, 14<sup>th</sup> Floor Project located at 660 Madison Avenue, New York, New York (the "Blue Ridge Project"). In or around August 2014, plaintiff entered into a contract with BAB, as subcontractor, pursuant to which BAB was to provide all labor and materials necessary to complete various HVAC and sheet metal-related work for the Blue Ridge Project for the base

amount of \$315,000.00 (the “Blue Ridge Contract”). Thereafter, BAB entered into contracts with certain sub-subcontractors and suppliers pursuant to which they were to furnish and/or install refrigerant piping, ceiling-hung air handlers, drain lines, ductwork, building automation and low voltage control devices for the Blue Ridge Project.

Plaintiff alleges that at some point, it became apparent that BAB could not properly perform its contractual obligations under the Blue Ridge Contract as a result of which plaintiff terminated BAB from the Blue Ridge Project. Additionally, plaintiff alleges that due to BAB’s failure to perform pursuant to the Blue Ridge Contract, it was forced to pay BAB’s sub-subcontractors and suppliers with respect to the Blue Ridge Project and to repair BAB’s negligent and defective work performed on the Blue Ridge Project.

On or about December 17, 2014, non-party SR Mechanical commenced an action entitled *S.R. Mechanical/Design Corp. v. 14 So. Williamsport Holdings, LLC, et al.*, in New York County under Index No. 162371/2014 (the “December 2014 Action”) alleging causes of action against, *inter alia*, Vanguard, BAB and Brancato, the owner and president of BAB, for, *inter alia*, breach of contract and trust fund diversion in violation of Article 3-A of the Lien Law arising out of the Amida Project and a project which involved the improvement of real property located at 501 Madison Avenue, New York, New York (the “501 Madison Project”). The December 2014 Action was voluntarily discontinued as against Vanguard with prejudice on May 12, 2015.

In or around March 2015, almost four months after the December 2014 Action was commenced, plaintiff commenced the instant action asserting twelve causes of action against BAB and Brancato based on BAB’s alleged failure to perform its contractual obligations pursuant to the Amida Contract and the Blue Ridge Contract. Thereafter, defendants moved for  
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an Order pursuant to CPLR §§ 3211(a)(3), (4) and (7) dismissing the complaint in its entirety as

against defendant Brancato and dismissing the complaint's fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action as against BAB. In the Decision, this court, in pertinent part, dismissed the complaint's eleventh and twelfth causes of action for trust fund diversion in violation of Article 3-A of the Lien Law relating to the Amida Project and the Blue Ridge Project without prejudice on the ground that the December 2014 Action was pending for the same relief. Specifically, in coming to such conclusion, the court relied on Lien Law § 77(2) which provides that an action to enforce a trust "may be maintained at any time during the improvement of real property...provided no other such action is pending at the time of the commencement thereof."

The court first turns to Vanguard's motion for leave to reargue this court's Decision dismissing plaintiff's eleventh and twelfth causes of action. On a motion for leave to reargue, the movant must show that the court overlooked or misapprehended matters of fact or law. *See* CPLR § 2221(d)(2).

In the instant action, the court grants plaintiff's motion for leave to reargue that portion of the Decision dismissing plaintiff's twelfth cause of action for trust fund diversion in violation of Article 3-A of the Lien Law relating to the Blue Ridge Project on the ground that plaintiff has demonstrated that this court overlooked or misapprehended matters of fact. Here, plaintiff has demonstrated that this court improperly dismissed the twelfth cause of action pursuant to Lien Law § 77(2) because there was no other action pending to enforce a trust relating to the Blue Ridge Project. It is undisputed by the parties that the trust fund diversion claims brought in the December 2014 Action by SR Mechanical only relate to the Amida Project and the 501 Madison Project but not the Blue Ridge Project. Thus, upon reargument, this court reverses its prior Decision and denies defendants' motion to dismiss the twelfth cause of action.

However, this court denies plaintiff's motion for leave to reargue that portion of the Decision dismissing plaintiff's eleventh cause of action for trust fund diversion in violation of Article 3-A of the Lien Law relating to the Amida Project on the ground that plaintiff has failed to demonstrate that this court overlooked or misapprehended matters of fact or law. Initially, plaintiff asserts that this court improperly dismissed the eleventh cause of action pursuant to Lien Law § 77(2) because said cause of action was separate and distinct from the claim for trust fund diversion asserted in the December 2014 Action. However, such assertion is without merit. The complaint in this action alleges that in the December 2014 Action, SR Mechanical has asserted a claim for trust fund diversion in violation of Article 3-A of the Lien Law relating to the Amida Project. Further, the complaint in the December 2014 Action establishes that the fourth cause of action is indeed seeking that relief. The fourth cause of action is labeled "Violation of Construction Trust Funds" and alleges a violation of Article 3-A of the Lien Law based on the allegations that BAB and Brancato "misappropriat[ed]...funds received which were to be held in trust." Thus, as Lien Law § 77(2) provides that an action to enforce a trust may only be maintained if "no other such action is pending at the time of the commencement thereof," Vanguard may not maintain its claim for trust fund diversion in violation of Article 3-A of the Lien Law relating to the Amida Project until such time when SR Mechanical's claim for such relief against BAB and Brancato in the December 2014 Action is resolved.

Further, plaintiff's assertion that the court should reinstate the eleventh cause of action to the extent it was dismissed pursuant to CPLR § 3211(a)(4) on the ground that CPLR § 3211(a)(4) is no longer applicable is without merit. CPLR § 3211(a)(4) provides for dismissal of an action or claim when there is another action or claim pending between the same parties for the same relief. Plaintiff asserts that as Vanguard is no longer a party to the December 2014

Action, the two actions do not have substantial identity of parties and thus, the eleventh cause of action cannot be dismissed. However, such assertion is without merit as this court dismissed the eleventh cause of action pursuant to Lien Law § 77(2) and not merely based on CPLR § 3211(a)(4).

The court next turns to Vanguard's motion for leave to amend its complaint. Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1<sup>st</sup> Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *Id.*

In the instant action, Vanguard's motion to amend the complaint to add B&L Consulting Management Inc. ("B&L") and Ben Esposito ("Esposito") as defendants in the action and to add claims against B&L, Esposito, BAB and Brancato, which represent non-party Johnson Controls Inc.'s ("Johnson") claims against said defendants is granted on the ground that such amendments are not palpably insufficient or patently devoid of merit. Plaintiff asserts that in or around 2014, Johnson entered into purchase order agreements with B&L, Esposito, BAB and Brancato pursuant to which Johnson would furnish labor and materials on the Blue Ridge Project and that despite due demand, BAB, Brancato, B&L and Esposito have failed to pay Johnson the funds it is owed. Plaintiff further asserts that on or about September 10, 2015, Johnson and Vanguard entered into an agreement pursuant to which Johnson assigned to Vanguard its interest in any causes of action and/or claims arising out of Johnson's Blue Ridge Project purchase order agreements with B&L, Esposito, BAB and Brancato. Thus, the court sees no reason why

Vanguard should not be permitted to amend the complaint to add Johnson's assigned claims for breach of contract, unjust enrichment and quantum meruit and to add B&L and Esposito as defendants in this action and defendants have failed to provide any evidence that such amendments are palpably insufficient or patently devoid of merit.

To the extent defendants assert in opposition that plaintiff should not be permitted to amend the complaint based on plaintiff's alleged failure to respond to outstanding discovery and plaintiff's delay in seeking to amend the complaint, such assertion is without merit. All outstanding discovery issues should be addressed at a court conference during which the court will schedule the production of any outstanding discovery. Further, defendants have failed to provide any case law which supports the proposition that outstanding discovery is a basis for denying a motion to amend a pleading. Moreover, although plaintiff waited over seven months before making the instant motion to amend the complaint, the court finds that such delay should not prevent plaintiff from amending the complaint as defendants have failed to establish any prejudice due to said delay.

Finally, the court turns to Vanguard's motion for leave to supplement and amend the summons in this action. Pursuant to CPLR § 305(a), "[w]here, upon order of the court..., a new party is joined in the action and the joinder is not made upon the new party's motion, a supplemental summons specifying the pleading which the new party must answer shall be filed with the clerk of the court and served upon such party." Additionally, pursuant to CPLR § 305(c), "[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced."

Esposito as defendants in this action, plaintiff's motion for leave to serve a supplemental summons on said defendants is granted pursuant to CPLR § 305(a). Additionally, plaintiff's motion to amend the summons already served on BAB and Brancato is granted pursuant to CPLR § 305(c).

Accordingly, it is hereby

ORDERED that plaintiff is granted leave to reargue only the portion of this court's Decision that dismissed plaintiff's twelfth cause of action and, upon reargument, this court reverses such determination and reinstates the twelfth cause of action; and it is further

ORDERED that plaintiff's motion to amend the complaint to add B&L and Esposito as additional defendants in this action is granted; and it is further

ORDERED that plaintiff's motion to amend the complaint to add claims for breach of contract, unjust enrichment and quantum meruit, which represent Johnson's assigned claims against BAB, Brancato, B&L and Esposito, is granted; and it is further

ORDERED that an amended summons and the Amended Complaint, in the form annexed to plaintiff's motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have already appeared in the action; and it is further

ORDERED that a supplemental summons and the Amended Complaint, in the form annexed to plaintiff's motion papers, shall be served, in accordance with the CPLR, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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VANGUARD CONSTRUCTION & DEVELOPMENT

CO., INC.,

Plaintiff,

-against-

B.A.B. MECHANICAL SERVICES, INC., BENJAMIN  
BRANCATO, B&L CONSULTING MANAGEMENT,  
INC. and BEN ESPOSITO,

Defendants.

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And it is further

ORDERED that the parties shall contact Part 55 to schedule a discovery conference at  
such time when the newly added defendants have appeared in the action; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry  
upon the Clerk in the General Clerk's Office (Room 119), who is directed to mark the court's  
records to reflect the additional parties. This constitutes the decision and order of the court.

Dated: 8/16/16

Enter:   
HON. CYNTHIA S. KERN  
J.S.C.