AWI Sec. & Investigations, Inc. v Whitestone Constr. Corp.
2017 NY Slip Op 30928(U)
April 28, 2017
Supreme Court, Bronx County
Docket Number: 303759/2014
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA- 19A

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AWI SECURITY AND INVESTIGATIONS, INC.,

Plaintiff(s),

- against - INDEX NO: 303759/2014

WHITESTONE CONSTRUCTION CORP., DECISION/ORDER

Defendant(s).

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HON. DOUGLAS E. MCKEON

Defendant's motion to dismiss the complaint under CPLR 3211 is granted.

Defendant, which provides general construction services, retained plaintiff to provide security services at three New-York-City-Public-School-construction sites and one New-York-City-Housing-Authority-construction site. Four contracts, one for each construction site, were entered into between the parties. The first contract, dated March 29, 2005, pertained to a project at PS 125; the second contract, dated July 21, 2010, pertained to a project at the Soundview Houses; the third contract, dated March 4, 2011, pertained to a project at IS 139; and the fourth contract, dated August 8, 2011, pertained to IS 246K. Each contract contained the following clause:

"33.5 Limitation on Suit.

No claim or action by [plaintiff] arising out of or related to this Agreement

> shall lie or be maintained against [defendant] unless such action is commenced no later than six (6) months after either (a) the cause of action accrues, (b) the termination or conclusion of this Agreement, or (c) the last day [plaintiff] performed any physical work at the Project Site, whichever of the proceeding [sic] events shall occur first." (Emphasis added).

On July 11, 2014, plaintiff commenced this action against defendant seeking to recover damages for defendant's alleged failure to pay plaintiff for security services it rendered at the four construction sites. According to the complaint, plaintiff performed security services at the construction sites in 2011 through April 2012. Asserting causes of action for breach of contract, breach of fiduciary duty, and account stated, plaintiff sought the principal sum of $231,650.37.

In lieu of answering the complaint, defendant moved to dismiss it under CPLR 3211, arguing that the action was not commenced within the statute of limitations provided by the contracts. Specifically, defendant contended that the action was commenced more than two years after plaintiff last performed work at one of the construction sites, the earliest of the three events listed in the "Limitations on Suit" provision. In support of its motion, defendant submitted the summons and complaint, the four contracts, and the affidavit of defendant's vice president. The vice president, among other things, authenticated the contracts.

Plaintiff opposed the motion, arguing that, by virtue of General Municipal Law ("GML") § 106-b(2), defendant has a continuing and ongoing obligation to

disburse to plaintiff funds that defendant received from the City of New York for work performed at the four construction sites. Plaintiff also argued that the statute of limitations for its claims has been extended under General Obligation Law ("GOL") § 17-101 because defendant's counsel acknowledged in writing in June 2012 that any amounts owing to plaintiff were not yet due and that plaintiff has not been alerted by defendant that the amounts are owed.

In support of its opposition, plaintiff submitted a letter of June 5, 2012, from defendant's counsel to plaintiff's counsel, in which defendant's counsel wrote, among other things, that defendant advised him "that the amounts claimed due by [plaintiff] with respect to PS 125M are not yet due in that [plaintiff's] claims were included in a change order which had not yet been approved by [New York City School Construction Authority]." Plaintiff also submitted the affidavit of its chairman, who averred that plaintiff billed defendant approximately $230,000 for overhead and profit for security services provided at the four construction sites; that the City of New York disbursed funds to defendant for work performed at the four construction sites; and that defendant has not paid plaintiff.

In reply, defendant denied that it was paid in full for the work at the four construction sites. Defendant was only paid by the City of New York on two of the construction projects and, to the extent plaintiff is entitled to any of those proceeds, defendant is entitled to an off set because plaintiff is contractually required to indemnify defendant for losses or damages that may arise as a result

of a prevailing wage class action lawsuit brought by former employees of plaintiff against, among other parties, defendant.[1] Defendant argues that counsel's June 5, 2012 letter did not extend the contractually–specified statute of limitation because counsel did not acknowledge that defendant owed plaintiff any money. The reply is accompanied by an additional affidavit from defendant's vice president in which she averred that defendant was only paid by the City of New York for work on the Soundview and IS 246K projects.

On a motion to dismiss a complaint under CPLR 3211(a)(5) on the ground that the action is time-barred, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue expired prior to the commencement of the action (Lebedev v Blavatnik, 144 AD3d 24 [1st Dept. 2016]). If the defendant meets its initial burden, the burden shifts to plaintiff to raise a triable issue of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the limitations period (Quinn v McCabe, Collins, McGeough & Fowler, LLP, 138 AD3d 1085 [2nd Dept. 2016]).

Here, defendant made a *prima facie* showing that plaintiff's time to sue expired prior to the commencement of the action. The above-referenced "Limitation on Suit" provision, present verbeitum in each of the four contracts, is

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[1]See Angah v A.W.I. Security & Investigation, Inc., New York County index number 151032/2012.

clear: "No claim or action by [plaintiff] arising out of or related to th[e] [contract] shall lie or be maintained against [defendant] unless such action is commenced no later than six (6) months after either: (a) the cause of action accrued, (b) the termination or conclusion of th[e] [contract], or (c) the last day [plaintiff] performed any physical work at the [project site], whichever of the proceeding [sic] events shall occur first." (Emphasis added). Given the manner in which the parties have litigated this motion, the court will treat the last day plaintiff performed work for defendant as the earliest of the three events. Per the complaint, the last day plaintiff performed physical work under the contracts was in April 2012, and the action was not commenced until July 2014. Thus, the action was not commenced with the six months dictated by the contracts. Defendant therefore met its initial burden.

In opposition, plaintiff failed to raise a triable issue of fact regarding whether the action is not time-barred. Initially, the court notes that plaintiff does not challenge the six-month contractual limitations period as the product of overreaching by defendant or that it is unreasonably short (see Executive Plaza, LLC v Peerless Ins. Co., 22 NY3d 511 [2014]).

Plaintiff's contention that GML § 106-b(2) imposes on defendant an ongoing obligation to pay plaintiff is without merit. The purpose of that statutory provision is to promote prompt payment by contractors to their subcontractors upon receipt of payment from the public owner of a construction project (see

Biser et. al., New York Construction Law Manual § 1:30 [2nd ed]). Nothing in GML § 106-b(2) supports the construction thereof expounded by plaintiff: that, for statute of limitation purposes, the prompt-payment provision creates an ongoing obligation on the part of a contractor to disburse payments received from a public owner to substractors, such that a failure to do so constitutes a continuing breach. Similarly, nothing in that provision purports to supersede or displace a contractual statute of limitations. Notably GML § 106-b(2) specifies the consequence of a contractor's failure to comply with the prompt-payment requirement: interest on amounts due to the subcontractor "commence[s]" on the day immediately following the expiration of the prompt-payment window (i.e., seven days after receipt of payment from the public owner) and "accru[es]" until the date of payment by the contractor to the subcontractor. The Legislature could have specified special statute of limitations rules for a cause of action affected by or relating to a contractor's breach of GML § 106-b(2), but it did not do so.

Plaintiff's argument that the statute of limitations applicable to its causes of action was extended under GOL § 17-101 by virtue of defendant's counsel's letter of June 5, 2012 fares no better.

GOL § 17-101 provides that: "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under

the [CPLR]..." "The writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (Lew Mottis Demolition Co. Inc., v Bd. of Ed. of City of New York, 40 NY2d 516 [1976]). The writing on which plaintiff relies, the June 5, 2012 letter of defendant's counsel, does not recognize an existing debt, and contains matter that is inconsistent with an intention on the part of defendant to pay a debt.

Accordingly, it is hereby ordered that the motion is granted and the complaint is dismissed; and it is further,

ORDERED that the clerk is directed to enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: April 28, 2017
Bronx, New York

Douglas E. McKeon, J.S.C.