Greystone Bldg. & Dev. Corp. v Makro Gen. Contrs., Inc.
2018 NY Slip Op 33172(U)
December 4, 2018
Supreme Court, New York County
Docket Number: 450271/2016
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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GREYSTONE BUILDING & DEVELOPMENT CORP.,

Plaintiff,

- v -

MAKRO GENERAL CONTRACTORS, INC.,THE NEW YORK CITY TRANSIT AUTHORITY, HERCULES ARGYRIOU, SAFECO INSURANCE COMPANY OF AMERICA

Defendant.

- against - :

THEODORE MELITTAS, : Additional Defendant : On Counterclaim

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INDEX NO. 450271/2016

MOTION DATE 06/01/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 134, 135, 136, 138[1]

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

Plaintiff's motion for summary judgment is denied. Defendants Makro General Contractors and Hercules Argyriou (the principal of Makro, together with Makro "defendants") cross-motion to dismiss the Complaint pursuant to an agreed upon shortening of the time to bring an action, contained in Article 17 of the subcontract, is granted. Defendant Makro and non-party New York City Transit Authority ("NYCTA")[2] entered into a contract for various construction work. Plaintiff and Makro thereafter entered into a subcontract. Plaintiff filed this action as a

[1] Plaintiff submitted NYSEF documents 139 and 140 is further support of its motion for summary judgment. Said submission was without leave of the Court and improper. Those documents were not considered by this Court.
[2] Although the Complaint was also brought against NYCTA, the Complaint was discontinued as to NYCTA by stipulation dated May 23, 2018.

"collection case" and sought payments allegedly due under the subcontract. Defendant Makro disputes that it owes plaintiff money, asserts counterclaims against plaintiff for an alleged breach of contract, and seeks $941,016 based upon plaintiff' alleged failure to perform work for various change orders as required by the subcontract.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 324 [1986]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In the instant motion plaintiff seeks summary judgment against Marko on the first (breach of contract), second (*quantum meruit*) and fifth (recovery of bond from surety) causes of action. The motion is denied in all respects. There remain significant material issues of fact in dispute regarding plaintiff's performance under the subcontract and whether plaintiff earned the fees it seeks. In addition, the surety, defendant Safeco, was never served with the pleadings. Thus, summary judgment on the fifth cause of action is "premature" as admitted by plaintiff in its reply, and is denied.

Defendant Marko's cross-motion to dismiss is granted. Article 17, entitled Disputes, of the subcontract provides:

> Any dispute or claim arising out of this Contract, or from breach of this Contract, and which is not resolved by the terms and provisions of the Principal Contract, shall be submitted to the Judicial court within the County and State of the Contractor's designated principal place of business, and not arbitration, for decision. The Subcontractor agrees to participate in, join in, and be bound by any proceeding, be it judicial, administrative, arbitration or other, which directly or indirectly relates to this Subcontract or project and for which the Contractor demands, by written notice, that the Subcontractor participate. Any claim or action by Subcontractor against Contractor must be commenced within (1) year after substantial completion of this Subcontract, and in no event after final payment to the Subcontractor.

In support of the motion for summary judgment, plaintiff submitted the affidavit of Theodore Melittas, plaintiff's president. Mr. Melittas states in paragraph 18 that plaintiff substantially completed all work by September 30, 2013. He further states that 100% of the work under the subcontract was completed by August 30, 2014. In addition, NYCTA issued a certificate of substantial completion on the entire project, including the work under the subcontract, on October 28, 2014.

Accordingly, plaintiff believed that it was entitled to payment by September 30, 2013 and despite ongoing negotiations with Marko, plaintiff did not file an action, despite not being paid. Article 17 of the subcontract states in plain language that any claim or action by plaintiff must be brought within one year after substantial completion of the subcontract. Although plaintiff argues that Marko disputes performance of the contract, plaintiff nevertheless believed that it had substantially completed its portion of the project by September 30, 2013 and in any event, substantial completion of the entire project was no later than October 28, 2014. Even if the parties were negotiating, nothing prevented plaintiff from commencing an action or seeking an extension of the one-year limitation in Article 17 or constituted a waiver of the one-year

limitation. Here, there was nothing contained in the subcontract, or occurred as part of the negotiations, that inhibited plaintiff from pursuing its rights under the subcontract.

Accordingly, as plaintiff failed to commence this action within the contractually required time period, it cannot maintain its causes of action for breach of contract and *quantum meruit*. Similarly, the third cause of action for lien foreclosure based upon the amount owed under the subcontract or *quantum meruit* must also be dismissed.

The fourth cause of action for breach of Article 3A of the Lien Law is also dismissed.[3] First, the pleading is deficient as it fails to be set forth as a representative action as required. Although failure to satisfy all the requirements under CPLR 901(a) may not be fatal and may be cured in certain circumstances (*ADCO Elec. Corp. v McMahon*, 38 AD3d 805 [2d Dept 2007]), here, not only has plaintiff failed to move for class certification in the more than twenty-four months since the Amended Complaint was deemed filed (in addition to the twelve months since the original Complaint containing this cause of action was first filed) the cause of action does not allege *any* of the required pleadings under CPLR 901(a). In fact, the Amended Complaint does not allege (1) common questions of law or fact common to the class; (2) that the claims/defenses of the representative are typical of the class; (3) or that the representative will protect the interest of the class. In sum, plaintiff has not pled nor made this a class action, has not done anything to advance a class theory in nearly three years, moved to certify a class, or protected a potential class for three years. In response to the motion for summary judgment on this cause of action, plaintiff merely stated that the pleading could be remedied but did not seek to do so or offer any substantive argument.

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[3] The Court notes that the Amended Complaint did not assert any conversion theory against Hercules Argyriou. The only claim against Hercules Argyriou personally was part of the allegation for diversion of trust funds.

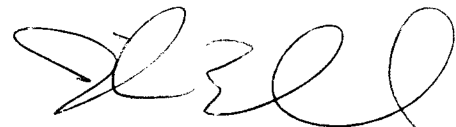
In addition, given that the Court has dismissed the breach of contract and *quantum meruit* claims, plaintiff will not be able to act as a class representative as it will not have common questions of law and the claims will not be typical of the potential class. Accordingly, moving defendants motion to dismiss Counts 1 through 4 against them is granted. As moving defendants have asserted counterclaims that have not been the subject of the instant motion practice, the parties are to appear in Room 574 on December 19, 2018 for a conference. Accordingly, it is therefore

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants Makro and Argyriou's motion to dismiss the Amended Complaint as to them is granted; and it is further

ORDERED that the parties are to appear in Room 574 on December 19, 2018 for a preliminary conference.

This constitutes the decision and order of the Court.



12/4/2018
DATE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ DENIED	☐ GRANTED IN PART	☒ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE