Everlast Drywall Constr., Inc. v Westmere Fire Dist.
2018 NY Slip Op 33738(U)
December 14, 2018
Supreme Court, Albany County
Docket Number: Index No. A00455/2014
Judge: Roger D. McDonough
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

EVERLAST DRYWALL CONSTRUCTION, INC.,

Plaintiff,

-against-

DECISION AND ORDER
Index No.: A00455/2014
RJI No.: 01-17-124854

THE WESTMERE FIRE DISTRICT, LIBERTY MUTUAL INSURANCE COMPANY, SAFECO INSURANCE COMPANY OF AMERICAN, GENERAL INSURANCE COMPANY OF AMERICA,

Defendants.

(Supreme Court, Albany County All Purpose Term)

Appearances:

LAW OFFICE OF CARL J. DEPALMA
Attorneys for Plaintiff
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Roger D. McDonough, J.:

Plaintiff moves to strike defendants' answers. Alternatively, plaintiff seeks a Court order compelling defendants to provide discovery responses. Defendants oppose the motion but indicate that they have no objection to that portion of the motion that seeks production of documents within a reasonable time frame. At or on the return date of plaintiff's discovery motion, the defendants moved to dismiss the complaint. The grounds for dismissal included a

statute of limitations defense. Plaintiff opposes defendant's motion and cross-moves to amend the complaint. Defendant opposes the cross-motion. Pursuant to the parties' multiple requests and stipulations, the return date for all three motions was adjourned to October 10, 2018.[1]

Background

Plaintiff had a contract with an entity known as DooleyMack Constructors of New York, LLC ("DooleyMack"). The contract called for plaintiff to be a subcontractor to DooleyMack on a project known as the "Westmere Fire District Project, Westmere Fire House Phase II", ("the Project"). Plaintiff entered into the contract in April of 2011. DooleyMack was terminated from the Project on January 28, 2012. The record reveals that the latest that plaintiff could have performed work on the Project was January 28, 2012. Plaintiff filed a Mechanic's Lien on March 21, 2012 wherein it indicated that payment under the contract with DooleyMack was already due. The plaintiff maintains that defendants were obligated to promptly pay all undisputed amounts due plaintiff under plaintiff's contract with DooleyMack.

Defendant, Safeco Insurance Company of America ("Safeco") as surety, issued payment and performance bonds on behalf of DooleyMack. The roles played by defendants, Liberty Mutual Insurance Company and General Insurance Company of America are entirely unclear from the complaint and proposed amended complaint.

Plaintiff commenced the instant litigation in June of 2014. Defendants' answers included the affirmative defense of statute of limitations. The plaintiff served discovery demands upon defendants in October of 2014. Eventually, nearly four years after the discovery demands were served, the instant motion practice ensued.

Discussion

Plaintiff's Discovery Motion

Plaintiff maintains that the significant passage of time and defendants' repeated ignorance of plaintiff's queries, necessitates a finding that defendants' answers be stricken. Additionally, plaintiff's counsel maintains that his emails and telephone calls demonstrate his good faith

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[1] Plaintiff's final submission consists of an affirmation made on October 12, 2018. In the absence of any objection or claim of prejudice, the Court will overlook the untimeliness of the affirmation.

efforts to resolve the dispute without court intervention. Defendants maintain that discovery was delayed by the parties engagement in settlement discussions up to June of 2017. The defendants further maintain that responding to the discovery demands would constitute a waste of money in light of the clear statute of limitations defenses that exist here. Finally, defendants maintain that they will provide discovery responses in the event that the Court denies their motion to dismiss the complaint. In reply, plaintiff's counsel stresses that defendants have had years to make their motion to dismiss and that their actions/inactions are clearly willful and contumacious.

The Court is equally displeased with defendants' unwillingness to supply basic discovery responses as well as plaintiff's counsel's lengthy delay in bringing the matter to the Court's attention and/or securing a discovery Order from the Court. Nevertheless, the Court cannot conclude that the striking of pleadings is warranted as there has been an insufficient showing that defendants' failures were willful and contumacious (*see*, Jenkins v City of New York, 13 AD3d 342 [2nd Dept. 2004]). Rather, the unwillingness to provide discovery responses strikes the Court as a predictable result of both counsel's failure to properly bring the matter before the Court for resolution. Additionally, the Court notes that the parties were directed to provide the Court with a proposed scheduling order some time ago (due by November of 2017) and both failed to respond. Both parties then proceeded to ignore a March 5, 2018 query from the Court as to the status of the case. Under these circumstances, and in the absence of any violation of a Court discovery order, the Court finds that the extreme remedy of striking defendants' answer is wholly inappropriate.

As to the alternative relief of a Court order compelling discovery responses, the Court reserves decision at this time.

Defendants' Motion to Dismiss on Statute of Limitations Grounds and Plaintiff's Cross-Motion to Amend the Complaint

Plaintiff's complaint brought a single cause of action against all defendants for violations of New York's Lien Law in the form of failing to meet trust fund requirements. Defendants maintain that plaintiff was obligated, pursuant to Lien Law § 77, to commence this action within one year from the date on which final payment under plaintiff's contract became due. The defendants further maintain that the key date is March 21, 2012 when plaintiff filed the subject

Mechanic's Lien. Accordingly, defendants assert that the action had to have been timely commenced by March 21, 2013. As the action was not actually commenced until late June of 2014, defendants maintain that is clearly untimely. The defendants also note that Town Law § 180 requires, *inter alia*, that a claimant file a lawsuit against a fire district within 18 months of the date of claim accrual. Accordingly, defendants contend that the action had to have been timely commenced by September 21, 2013 as to the fire district. As the action was not actually commenced until late June of 2014, defendants maintain that is clearly untimely under Town Law § 180.

In opposition, plaintiff has cross-moved to amend the complaint in order to add a bond claim and expand its lien law trust violation claim. Additionally, plaintiff has not disputed the validity of defendants' statute of limitations arguments. Rather, plaintiff maintains that defendants should be estopped from claiming the defense based on their failure to bring the instant motion to dismiss until approximately four years after the litigation commenced.

In reply, defendants stress that the causes of action in the amended complaint are also untimely. They further note that plaintiff's claim of estoppel is wholly without merit.

The Court finds that defendants have clearly established that the sole cause of action in the original complaint must be dismissed on statute of limitations grounds. Plaintiff did not meaningfully challenge the applicability of the statute of limitations but rather has pursued an estoppel theory. However, said estoppel theory is wholly without merit as there has not even been an allegation that defendants took any action to induce plaintiff to refrain from filing a timely action (*see*, Kotecki's Grandview Grove Corp. v Acadia Insurance Company, 158 AD3d 1306, 1307-1308 [4th Dept. 2018]). Plaintiff's reliance on wholly unrelated Notice of Claim caselaw was unpersuasive. Additionally, for the reasons set forth above the motion to serve a proposed amended complaint must be denied as to the first cause of action set forth in said pleading. Accordingly, as this was the sole cause of action against defendant, the Westmere Fire District, the complaint must be dismissed as against said defendant.

As to the bond claim, the Court has not been persuaded that said cause of action is patently without merit. Defendants' conclusory statement regarding the applicability of the prior version of State Finance Law § 137 was unpersuasive and not necessarily an interpretation that

this Court would adopt. Further, in light of said dispute, it was incumbent upon defendants to provide the Court with proof as to when the project was completed and when the Westmere Fire District approved it. Further, the Court has not been persuaded by the documentary evidence that plaintiff's bond claim is patently meritless in terms of the contents and conditions precedent involved with plaintiff's purported December of 2012 claim under the bond. Finally, defendants have not adequately alleged, much less demonstrated that they would be in any way prejudiced or surprised by the amended pleading. In sum, as there have been insufficient allegations of prejudice and/or surprise and the bond claim is not patently devoid of merit, the Court must partially grant the cross-motion to serve an amended complaint (*see*, Belair Care Center, Inc. v Cool Insuring Agency, Inc., 161 AD3d 1263, 1265 [3rd Dept. 2018]).

Defendants' Motion to Dismiss for Failure to State a Cause of Action

Plaintiff has explicitly acknowledged the original complaint's failure to state a cause of action by filing the instant cross-motion to amend the complaint. The Court notes that plaintiff has not raised any opposition as to defendants' motion as it pertains to defendants, Liberty Mutual Insurance Company and General Insurance Company of America. Additionally, as plaintiff has dropped said complaints from the caption of the proposed amended complaint as well as from the titles of both causes of action of said pleading, the Court finds that defendants' motion to dismiss must be granted as to both defendants. From the onset of the motion practice it was entirely unclear to the Court what involvement, if any, said defendants had to the litigation.

The parties' remaining arguments and requests for relief have been considered and found to be lacking in merit and/or unnecessary to reach in light of the Court's findings.

Based upon the foregoing it is hereby

ORDERED that plaintiff's motion to dismiss is hereby denied in its entirety; and it is further

ORDERED that the Court reserves on the motion to compel pending discussions with counsel at a Court conference to be held on January 3, 2019 at 11:00 a.m. and it is further

ORDERED that defendants' motion to dismiss the complaint on statute of limitations grounds is hereby granted as to the first cause of action of the complaint and as to defendant, the Westmere Fire District; and it is further

ORDERED that plaintiff's motion to dismiss for failure to state a cause of action is hereby granted as to defendants, Liberty Mutual Insurance Company and General Insurance Company of America; and it is further

ORDERED that plaintiff's cross-motion is hereby granted solely to the extent that plaintiff may serve an amended complaint solely against Safeco alleging the second cause of action ("bond claim") set forth in the proposed amended complaint; and it is further

ORDERED that plaintiff's cross-motion is otherwise denied.

This shall constitute the Decision and Order of the Court. The original decision and order is being returned to the counsel for defendants who is directed to enter this Decision and Order without notice and to serve plaintiff's counsel with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of the Decision and Order to the County Clerk. As this is an E-file matter, the Court will not provide the County Clerk with any hard copies of the motion papers. The signing of the Decision and Order and delivery of a copy of the Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER.

Dated: Albany, New York
December 14, 2018

Roger D. McDonough
Supreme Court Justice

Papers Considered[2]:

1. Plaintiff's Notice of Motion to Strike Pleading or Compel Discovery, dated, April 10, 2018;
2. Affirmation of Carl J. DePalma, Esq., dated April 10, 2018, with annexed exhibits;
3. Affirmation of Patricia A. Wager, Esq., dated June 7, 2018[3];
4. Reply Affirmation of Carl J. DePalma, Esq., dated June 11, 2018;
5. Defendants' Notice of Motion to Dismiss, dated June 14, 2018;
6. Affirmation of Patricia A. Wager, Esq., dated June 14, 2018, with annexed exhibits;
7. Plaintiff's Notice of Cross-Motion, dated August 17, 2018;
8. Affirmation of Carl J. DePalma, Esq., dated August 17, 2018, with annexed exhibits;
9. Affirmation of Patricia A. Wager, Esq., dated September 25, 2018, with annexed exhibits;
10. Reply Affirmation of Carl J. DePalma, Esq., dated October 12, 2018.

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[2] The moving parties also submitted memoranda of law in support of their respective positions.

[3] The Court did not consider defendants' counsel's sur-reply affirmation on plaintiff's discovery motion. Sur-replies are not recognized by the CPLR or this Court. Additionally, defendants' counsel did not secure plaintiff's counsel's consent or this Court's permission to file a sur-reply. Similarly, the Court did not consider plaintiff's counsel's sur-reply challenging defense counsel's sur-reply.