Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.
2011 NY Slip Op 34117(U)
October 4, 2011
Supreme Court, County of Bronx
Docket Number: 14633/04
Judge: Howard H. Sherman
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 FILED Aug 13 2012 Bronx County Clerk 8/13/12

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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

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STRONGBACK CORPORATION

Plaintiff,

-against-

N.E.D. CAMBRIDGE AVENUE DEVELOPMENT CORP., KINGDOM ASSOCIATES INC., and "JOHN DOE 1" through "JOHN DOE 10", inclusive, as those persons and entities having an interest in real property located at 3214, 3216, 3218, 3220 Cambridge Avenue, Bronx, New York 10463 and CHRISTOPHER GEORGOULIS & GEORGOULIS & ASSOCIATES, PLLC and JOHN MUNOZ,

Defendants.

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Index No. 14633/04

DECISION

Present:

Hon. Howard H. Sherman
J.S.C.

The following papers numbered 1 to 3 read on this motion noticed on January 4, 2011 and duly submitted on the Motion Calendar of February 10, 2011.

	PAPERS NUMBERED	
Notice of Motion - Exhibits 1 - 9 and Affidavits Annexed	1	
Notice of Cross Motion	2	
Replying Affidavit and Exhibits/Opposition to Cross Motion	3	

Upon the foregoing papers this motion by defendant N.E.D. Cambridge Development Corp. for an order disqualifying the firm of Georgoulis & Associates, PLLC and Chris Georgoulis, Esq. from representing plaintiff and for a stay and the cross-motion of plaintiff and co-defendants Georgoulis & Associates, Christopher Georgoulis and John Munoz for an order dismissing defendant N.E.D. Cambridge Ave. Development Corp.'s motion and the fifth and sixth counterclaims pursuant to CPLR 3212 are decided in accordance with the accompanying decision/order filed herewith.

This constitutes the decision/order of this court.

Dated: October 4, 2011
Bronx, New York

Howard H. Sherman
J.S.C.

 FILED Aug 13 2012 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

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STRONGBACK CORPORATION

Plaintiff,

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DECISION

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Facts and Procedural Background

This action seeking to foreclose upon mechanic's liens recorded against real property located in Bronx County was commenced in April 2004. [1]

Issue was joined with the service of the answer of defendant N.E.D. Cambridge Avenue Development Corp.("N.E.D."). Among the seven counterclaims there were two [Fifth , Sixth] asserted as against defendant Christopher Georgoulis for willful exaggeration of the amounts of the liens [Lien Law § 39-a].

By order entered July 26, 2004, this court (Hunter, J.) *inter alia,* conditionally granted N.E.D.'s motion seeking cancellation of the lien if plaintiff failed to provide an itemized statement of labor and materials furnished with respect thereto within sixty days

[1] Plaintiff also asserted causes of action for breach of contract, wrongful termination , damages for contractual termination for convenience, and quantum merit.

of entry of the order. NED's motion for summary judgment on the counterclaims asserted pursuant to Lien Law § 39 were also denied.

Upon appeal as limited by the briefs, the Appellate Division, First Department reversed the order and discharged the lien remanding the matter to this court for an assessment of damages.

In pertinent part, the court made the following findings with respect to the motion for dispositive relief on the § 39-a counterclaims.

> The record establishes that this is not a case involving a mere inaccuracy or honest mistake in setting the amount of the lien (see Goodman v Del-Sa-Co Foods, 15 NY2d 191, 196, 205 NE2d 288, 257 NYS2d 142 [1965]). Plaintiff concedes that it received $ 238,000 from NED. The primary evidence of the value of plaintiff's work is NED's concession that $ 85,081 in labor and materials was supplied to the project. Even plaintiff's own invoice reflects a value of only $ 122,395 in completed work ($ 9,500 for tree clearing, $ 44,007 for excavation and backfill and $ 68,888 for foundation work). Thus, overlooking the question of whether the sum sought for overhead is lienable (cf. Matter of P.T. & L. Constr. Co. v Winnick, 59 AD2d 368, 369, 399 NYS2d 712 [1977]), at the time the mechanic's lien was filed, plaintiff had been overpaid in the amount of at least $ 115,605, and its filing of the lien was altogether without justification. These facts conclusively establish that the lien was wilfully exaggerated, leaving only the issue of damages to be determined (Westbury S & S Concrete v Manshul Constr. Corp., 212 AD2d 596, 597-598, 622 NYS2d 584 [1995]).
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> 25 A.D.3d 392, 393-394 [1st Dept. 2006]

By decision/order of this court (Hunter, J.) entered September 23, 2005,N.E.D's motion to disqualify members of the Georgoulis & Associates ("G & A ") from representing plaintiff and its Vice-President John Munoz was denied , as was the plaintiff's cross-motion for summary judgment dismissing the fifth and sixth counterclaims.

Upon appeal, the First Department affirmed this court's order, stating in pertinent part, the following:

Before our order was entered on the prior appeal, NED filed a summons and answer. In those pleadings, it added Strongback's attorneys as additional defendants, and it asserted two counterclaims specifically alleging that Strongback's counsel, Christopher Georgoulis and Georgoulis & Associates, PLLC, were responsible for the exaggerated lien. NED subsequently moved to have plaintiff's counsel disqualified, based upon the "advocate witness rule," and an alleged conflict with their client. The IAS court denied this motion. We affirm.

The advocate witness disqualification rules in the Code of Professional Responsibility provide guidance as to situations where a party's attorneys, at its adversary's insistence, should be disqualified during the course of litigation (S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 440, 508 NE2d 647, 515 NYS2d 735 [1987]). However, disqualification decisions cannot be made without consideration of the principle that a civil litigant has a fundamental right to counsel of its choice (see Lightning Park v Wise Lerman & Katz, 197 AD2d 52, 609 NYS2d 904 [1994]).

NED's counterclaims baldly allege that Strongback's attorneys were liable for the exaggeration of the lien because they "signed, verified and filed" it. However, NED, the party bearing the burden on the motion, has not presented facts which would support the allegation of a conflict, that counsel was involved in the underlying transactions, or calculation of the amount of the lien (see 212 E. 10 N.Y. Bar v Samel & Assoc., 249 AD2d 220, 671 NYS2d 751 [1998]). As the IAS court noted, the record in this case is rife with motion practice, and it shows that there has been little or no substantive discovery. Courts adjudicating disqualification motions must be mindful of the possibility that the motion is made for improper reasons, to "stall and derail the proceedings, redounding to the strategic advantage of one party over another" (S & S Hotel Ventures, 69 NY2d at 443; see generally Talvy v American Red Crossin Greater N.Y., 205 AD2d 143, 149, 618 NYS2d 25 [1994], affd 87 NY2d 826, 661 NE2d 159, 637 NYS2d 687 [1995]). It appears from the record that counsel's knowledge was limited to the facts given to them by their client.

Contrary to NED's current position, this Court's prior order did not resolve against Strongback's attorneys the issue of their

> liability for the exaggerated lien. NED has not demonstrated that testimony from Strongback's attorneys will be necessary at any joint trial (see S & S Hotel Ventures, 69 NY2d at 445-446).
>
> Accordingly, it was a proper exercise of the court's discretion to deny defendant's motion. In addition, to the extent NED's motion is based on its ostensible solicitude for potential [*3] conflict between his adversaries, the IAS court did not err in denying the motion on this ground Pearl v 305 E. 92nd St. Corp., 156 AD2d 122, 123, 548 NYS2d 25 [1989]).
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> 32 A.D.3d 793, 793-795 [1st Dept. 2006]

The Note of Issue was filed on May 10, 2010.

Motion /Cross-Motion and Contentions of the Parties

1) Upon the completion of discovery, N.E.D. moves again for an order disqualifying the G&A law firm, and any attorney associated with the firm, including George Marco, Esq. From representing Strongback and its principal , Munoz, and for a stay of discovery[2] pending substitution of counsel contending that the depositions conducted of Munoz, and Georgoulis and that of non-party witness, Marco, demonstrate that "G & A cannot meet the disinterested objective lawyer under any set of circumstances due to the inherent conflict of interest between co-defendants and plaintiff." [Affirmation in Support ¶ 16]

Plaintiff opposes the motion contending that the discovery conducted confirms that the calculation of the lien amount was based upon information provided by plaintiff , and as such, "does not give rise to an inherent conflict between plaintiff and its attorneys necessitating disqualification." [Affirmation in Support ¶ 22]

2) Plaintiff again cross-moves for summary judgment dismissing the fifth and sixth

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[2] It is unclear what post-note discovery would be sought or would remain outstanding,

counterclaims asserted as against Georgoulis and G & A.

In opposition , N.E.D. maintains that there are material issues of fact precluding such relief with respect to the individual attorney and the firm's calculation, verification and filing of the now judicially determined willfully exaggerated lien.

Discussion and Conclusions

Motion for Summary Judgment

A motion for summary judgment may be made by any party to an action after the joinder of issue (CPLR 3212(a)). The court may set a date after which no such motion may be made, provided that the date is no earlier than thirty days after the filing of the note of issue.

A set forth in the Rules of this Part, as then applicable, all motions for summary judgment are required to be made within sixty days of the filing of the note of issue. As such, this cross-motion dated nearly nine months after the filing of the note of issue is untimely.

The motion may only be entertained by the court upon a showing of "good cause" for the delay in making the motion (i.e., a satisfactory explanation for the untimeliness (Brill v. City of New York, 2 N.Y.3d 648, 814 N.E. 2d 431, 781 N.Y.S.2d 261 [2004]). No explanation is proffered and absent the requisite good cause, the motion must be denied as untimely. The issues raised herein may be reasserted at trial upon a motion to dismiss after the completion of defendant's case on the counterclaim , or upon an application for a directed verdict .

As the Appellate Division, First Department recently observed " [w]e note Brill's express prohibition against consideration of unexcused, untimely motions no matter how

meritorious or nonprejudicial (id. at 653, especially n 4; see Perini Corp. v City of New York, 16 AD3d 37, 39-40, 789 N.Y.S.2d 29 [2005])." Rivera v. City of New York, 73 A.D.3d 413 [1st Dept. 2010].

Motion for Disqualification

For purposes of clarification of the record, and in light of the fact that only selected excerpts of the testimony of the sole corporate witness were provided for the court's determination of the ultimate issue raised, the motion is set down for oral argument/conference to be held on **Monday, October 31, 2011 at 10:00 a.m.**

This constitutes the decision and order of this court.

Dated: October 4, 2011
Bronx, New York

Howard H. Sherman
J.S.C.