

<b>Gaetano Dev. Corp. v Lee</b>
2012 NY Slip Op 33705(U)
October 3, 2012
Supreme Court, Westchester County
Docket Number: 25722/2007
Judge: William J. Giacomo
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o commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON 10-3-2012 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF WESTCHESTER PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

-----X GAETANO DEVELOPMENT CORP.,

Plaintiffs,

-against-

FRANCIS A. LEE, Individually and d/b/a as Francis A. Lee Company, FRANCIS A. LEE COMPANY, A CORPORATION,

Defendants.

-----X GAETANO DEVELOPMENT CORP.,

Plaintiffs,

-against-

FRANCIS A. LEE, Individually and d/b/a as Francis A. Lee Company, FRANCIS A. LEE COMPANY, A CORPORATION, FRANCIS A. LEE EXTERIOR RESTORATION CORP., FRANCES A. LEE, INC. FAL INC., INTEGRATED STRUCTURES NEW YORK, LLC, MATT-CON SERVICES CORP.,

Defendants.

-----X

The following documents numbered 1 to 33 were read in connection with the Defendant's motion to dismiss the complaint in Action #2 and plaintiff's motion to restore Action #1 and consolidate that action with Action #2.

Defendant's Notice of Motion, Affirmation, Exhibits 1-8

Action # 1 Index No. 25722/2007 DECISION & ORDER

FILED OCT 03 2012 TIMOTHY C. IDONI COUNTY CLERK COUNTY OF WESTCHESTER

Action # 2 Index No. 54747/2011 DECISION & ORDER

Memorandum of Law.....	1-11
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### **Factual and Procedural Background:**

On September 16, 2006, plaintiff entered into a subcontract with Francis A. Lee Company for the sum of \$2,679,000 whereby Lee agreed to furnish and erect steel and related materials as per a construction project's drawings. On November 3, 2006, plaintiff paid Lee a deposit of \$241,111 against the subcontract. By letter dated February 13, 2007, plaintiff terminated the subcontract and demanded the return of the deposit.

Plaintiff commenced Action # 1 on December 20, 2007 seeking damages for breach of contract, unjust enrichment, conversion and for a constructive trust to be placed on defendants' funds to be refunded to plaintiff in the amount of \$241,111.00. Issue was joined on January 28, 2008.

On March 11, 2008, defendant Lee Corporation filed a Chapter 11 proceeding. The action against defendant Lee individually proceeded in Westchester County Supreme Court. Discovery continued in this action.

On August 29, 2008, Lee individually and Lee Corporation moved to remove Action # 1 to the Bankruptcy proceeding. On November 3, 2008, a notice of removal was filed in Westchester Supreme Court and the case was marked disposed.

On June 16, 2010, Lee Corporation's motion to dismiss the bankruptcy proceeding was granted.

On August 24, 2011, plaintiff commenced Action #2 which is nearly identical to Action #1.

Defendants now move to dismiss Action #2 on the ground that pursuant to the the contract between plaintiff and Lee Corporation this action is barred by a mediation and arbitration clause. Further, they argue that the breach of contract action must be dismissed against all defendants other than Lee Corporation and Francis A. Lee Exterior Restoration Corp. because all other defendants lack privity of contract with plaintiff. Defendants also argue that the causes of action for conversion, unjust enrichment, impressing a constructive trust and misappropriation of trust funds under Article 3 of the Lien Law should be dismissed because they are barred by the statute of limitations. Further, the causes of actions based on Article 3A of the Lien Law should be dismissed because plaintiff is not a beneficiary under the Lien Law. Finally, defendants argue that the cause of action seeking to pierce the corporate veil should be dismissed for failure to state a cause of action.

Plaintiff cross moves to restore Action # 1 on the ground that it was marked off the calendar due to no fault of its own. Plaintiff notes that it never abandoned these claims, but rather the matter was removed due to Lee Corporation's bankruptcy proceeding. Plaintiff also seeks consolidation of Action #1 with Action #2 since they are nearly identical.

Plaintiff also opposes defendants' motion to dismiss arguing that due to defendants' extensive participation in Action #1 defendants have waived their right to mediation and arbitration. Further, the breach of contract claims should not be dismissed because they are properly plead and the contract plaintiff entered into was signed by Francis A. Lee, Owner of Francis A. Lee Company. Plaintiff claims that there is no indication that Francis

A. Lee was Francis A. Lee Company, **A Corporation**, as alleged by defendants. Further, Francis A. Lee Company, A Corporation is the parent company of defendants Integrated Structures, Inc. and Matt-Com Services, Corp. With respect to defendants statute of limitations arguments, plaintiff argues that its claim for unjust enrichment was made within the 6 year statute of limitations and its conversion claim relates back to Action #1 and is, therefore, timely. Finally, plaintiff argues that it has properly plead a claim for piercing the corporate veil.

Defendants oppose plaintiff's cross motion, arguing that the bankruptcy proceeding was dismissed in June of 2010, yet plaintiff waited until August 24, 2011 to commence Action #2. Defendants argue that plaintiff abandoned its claims by waiting one year to commence Action #2 and almost 19 months to attempt to restore Action #1 after the dismissal of the bankruptcy proceedings. Defendants also argue that the cross motion should be denied because Action #1 lacks merit since plaintiff failed to seek mediation and arbitration, pursuant to their contract, before commencing Action #2.

**Discussion:**

The Court will address the motions in the order it deems most logical.

"A party seeking to restore a case to the trial calendar after it has been dismissed pursuant to CPLR 3404 must demonstrate the merits of the case, a reasonable excuse for the delay, the absence of an intent to abandon the matter, and the lack of prejudice to the nonmoving party in the event that the case is restored to the trial calendar" (*Jeffs v. Janessa, Inc.*, 226 A.D.2d 504, 641 N.Y.S.2d 75, quoting *Civello v. Grossman*, 192 A.D.2d 636, 596 N.Y.S.2d 464).

Plaintiff has demonstrated a clear intent not to abandon its claims against defendant. Notably, Action #1 was discontinued due to Lee Corporation's bankruptcy; not because of any inaction of plaintiff. Notably, plaintiff has demonstrated meritorious claims against all defendant at this stage of the litigation. Further, while it did wait more than one year to commence Action #2, defendants have not suffered any prejudice as they have not had to repay the \$241,111 deposit for almost 6 years. Finally, in view of the fact that both Action #1 and Action #2 involve the same transaction, they will be consolidated (see CPLR 602).

Accordingly, plaintiff's motion to restore Action #1 and consolidate it with Action #2 is GRANTED.

With respect to defendant's motion to dismiss, the Court notes at the outset that since defendants have litigated these claims extensively in this Court, they have waived their right to enforce the mediation and arbitration clause of the subcontract (see *LZG Realty, LLC v. HDW 2005 Forest, LLC*, 71 AD3d 328 [2<sup>nd</sup> Dept 1989][ A defendant in an action who has the right to arbitrate a claim may forfeit or waive that right by acts inconsistent with the intention to arbitrate.]). Accordingly, defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(5) is DENIED.

With respect to plaintiff's individual causes of actions on a motion for dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "[the Court's] well-settled task is to determine whether, 'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated'" (*Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307,318 [1995] [internal citations and quotation marks omitted]). In performing that task, the Court "[is] required to accord plaintiff[] the benefit of

all favorable inferences which may be drawn from [its] pleading, without expressing [any] opinion as to whether [it] can ultimately establish the truth of [its] allegations before the trier of fact" (*ibid.*).


Here, plaintiff has adequately plead each cause of action set forth in its complaint.

Accordingly, defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is DENIED.

To the extent defendants seek to dismiss the conversion action as time barred, in view of the restoration of Action #1 that application is DENIED.

The parties are to appear in the Compliance Part on October 29, 2012 at 9:30 a.m. room 800 for further proceedings.

Dated: White Plains, New York  
October 3, 2012

  
WILLIAM J. GIACOMO, J.S.C.

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