

Eastside Floor Serv., Ltd. v Ibex Constr., LLC

2012 NY Slip Op 33416(U)

August 15, 2012

Sup Ct, New York County

Docket Number: 108977/09

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. ANIL C. SINGH

PRESENT: SUPREME COURT JUSTICE
Justice

PART 61

East Side Floor Services LLC

INDEX NO. 108977/2009

MOTION DATE _____

- v -

Idea Construction LLC

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 8/15/12

[Signature]
HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDGE

SETTLE ORDER/ JUDGE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

-----X
EASTSIDE FLOOR SERVICES, LTD,

Plaintiff,

Index No. 108977/09

-against-

IBEX CONSTRUCTION, LLC and
WESTCHESTER FIRE INSURANCE
COMPANY,

Defendants.

-----X
IBEX CONSTRUCTION, LLC,

Third-Party Plaintiff,

Index No. 590313/11

-against-

ECLIPSE DEVELOPMENT, INC. and
EQUINOX HOLDINGS, INC.,

Third-Party Defendants.

-----X
SINGH, J.:

In this action for breach of contract and an account stated, third-party plaintiff, Ibex Construction, LLC (Ibex) seeks dismissal of third-party defendants Eclipse Development, Inc. (Eclipse) and Equinox Holdings, Inc.'s (Equinox) first, second, third, fourth, sixth, and seventh counterclaims, pursuant to CPLR 3211 (a) (1), (3) and (7), on the grounds of a defense founded upon documentary evidence, the party asserting the action does not have the legal capacity to sue, and the pleading fails to state a cause of action.

Ibex is a construction company authorized to do business in the state of New York.

Eclipse is a wholly owned subsidiary of Equinox and serves as the construction manager

and Equinox's representative for the development of Equinox Fitness Clubs. Equinox is a Delaware corporation. It owns and operates fitness centers across the country. It has several locations in New York City, one of which is located at 208 West 76th Street (Premises).

The underlying action involves a claim by Eastside Floor Services, Ltd. (Eastside) based on Ibex's failure to remit payment for materials and labor provided in the installation of wood flooring at the Premises, as per a subcontracting agreement. It is seeking damages in the amount of \$132,777. Ibex subsequently commenced a third-party action against Eclipse and Equinox for breach of contract and an account stated.

Ibex alleges that on July 30, 2008, Eclipse hired it as the general contractor for a construction project at the Premises. The parties signed an agreement (Contract) and Ibex subsequently entered into a subcontract agreement with Eastside. Ibex further alleges that it timely commenced performance under the Contract and completed the renovations at the Premises. However, Eclipse has failed to pay Ibex for the work completed, despite Ibex's repeated demand for payment.

In the answer to the third-party complaint, Eclipse and Equinox assert that Ibex had a December 26, 2008 deadline to complete work at the Premises prior to its January 2009 opening. The parties agreed to a guaranteed maximum price of \$7.35 million dollars for the work. Eclipse and Equinox devoted a substantial amount of human and financial resources to develop, market, and promote the event. Despite Ibex's assurances, Ibex failed to complete the project prior to the deadline. The Premises opened to the public on February 12, 2009, and much of the contracted work remained incomplete following Ibex's cessation of the work. After Ibex discontinued its work at the Premises, Eclipse and Equinox were forced to compensate subcontractors for their

work at the Premises because Ibex failed to pay them from the designated trust account. They also incurred additional costs after several subcontractors filed a mechanic's lien on the Premises.

As a result, Eclipse and Equinox commenced a third-party counterclaim against Ibex alleging causes of action for fraud, negligence, promissory estoppel, unjust enrichment, breach of contract and violations of trust provisions of the New York Lien Law. They are seeking damages in excess of \$3,000,000, together with interest, costs, disbursements, and reasonable attorney's fees.

Ibex argues that it is entitled to dismissal of Eclipse and Equinox's counterclaims for: (1) fraud, (2) negligence, (3) promissory estoppel, and (4) unjust enrichment because those claims are duplicative of the breach of contract claim. Ibex also argues that Eclipse and Equinox lack standing to assert claims based upon alleged violations of the New York Lien Law because: (1) as owners of the project, the third-party defendants are not beneficiaries within the meaning of Article 3-A of the Lien Law, and (2) pursuant to Lien Law § 77 (2), the action is time-barred. Ibex also argues that Equinox has no standing to bring a counterclaim for breach of contract because it is not a signatory to the Contract.

Pursuant to CPLR 3211 (a) (1), Ibex is entitled to dismissal of Eclipse's first, second, third and fourth counterclaims for fraud, negligence, promissory estoppel and unjust enrichment. The parties' transactions are controlled by an express agreement, and thus their rights and liabilities are to be determined solely on theories of breach of contract.

In order to prevail on a motion to dismiss based on documentary evidence, the documents relied upon must definitely dispose of plaintiff's claim (*Blonder & Co. Inc. v Citibank, N.A.*, 28

AD3d 180, 182 [1st Dept 2006]). Section 4.3 of the Contract¹ provides: “The Contractor shall achieve Substantial Completion of the entire Work not later than December 26, 2008” (Exhibit A to Affirmation of Eric P. Blaha, dated October 12, 2011) (Blaha Aff.). Section 5.2.1 of the Contract further provides:

“The sum of the Cost of the Work and the Contractor’s Fee is guaranteed by the Contractor not to exceed Seven Million Three Hundred Fifty Thousand Dollars and Zero Cents (\$7,350,000.00), subject to additions and deductions by Change Order as provided in the Contract Documents. Such maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Contractor without reimbursement by the Owner”

(Exhibit A to Blaha Aff.).

Eclipse’s first counterclaim is for fraud. Eclipse alleges that IbeX committed fraud when it entered into an agreement with Eclipse and Equinox to make improvements to the Premises by December 2008, for the guaranteed price of \$7.35 million dollars, and then failed to adhere to those terms.

“A fraud claim may coexist with a breach of contract cause of action only where the alleged fraud constitutes the breach of a duty separate and apart from the duty to abide by the terms of the contract” (*Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d 176, 179-180 [1st Dept 2011]). However, as in this case, “[a] cause of action alleging fraud does not

¹ The Contract consists of: AIA Document A111-1997 titled “Standard Form of Agreement Between Owner and Contractor where the basis for payment is COST OF THE WORK PLUS A FEE with a negotiated Guaranteed Maximum Price,” dated October 21, 2008 (including attachments therein), and accompanying AIA Document A201-1997 titled “General Conditions of the Contract for Construction.” See Exhibit C to Affidavit of Jeffrey M. Weinhaus, dated October 14, 2011.

lie where the only fraud claim relates to a breach of contract . . . A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud” (*Ross v DeLorenzo*, 28 AD3d 631, 636 [2d Dept 2006] [internal quotation marks and citation omitted]).

Eclipse and Equinox do not allege that they were induced to enter the agreement by a misrepresentation of any material fact collateral to the Contract. The allegations for fraud arise out of the identical facts and circumstances as their fifth counterclaim alleging breach of contract. Any allegation that there was a misrepresentation of an intention to perform under the contract is insufficient to sustain a counterclaim alleging fraud in the case at bar (*id.*).

Ibex is entitled to dismissal of Eclipse’s second counterclaim for negligence. “[M]erely alleging that a party breached a contract because it failed to act with due care will not transform a strict breach of contract claim into a negligence claim” (*Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d at 180). In this context, the harm alleged is merely economic and the Court of Appeals has declined to extend a legal duty beyond a contractual obligation in cases involving only economic harm (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]). Thus, “a tort cause of action that is based upon the same facts underlying a contract claim will be dismissed as a mere duplication of the contract cause of action,” particularly where, as here, both seek identical damages (*Duane Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 190 [1st Dept 2006]).

Ibex is also entitled to dismissal of Eclipse’s third counterclaim based on promissory estoppel. A claim for promissory estoppel cannot stand when there is an existing contract between the parties (*see Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st

Dept 2012]).

Ibex is entitled to dismissal of Eclipse's fourth counterclaim for unjust enrichment. The parties' transactions are controlled by an express agreement, and thus "their rights and liabilities are to be determined solely on theories of breach of contract" (*Apfel v Prudential-Bache Sec.*, 81 NY2d 470, 479 [1993]).

Ibex is entitled to dismissal of Equinox's fifth counterclaim for breach of contract because it lacks legal capacity to sue. In a motion to dismiss, pursuant to CPLR 3211 (a) (3), dismissal will be granted when the movant establishes that the party asserting the claim lacks legal capacity to sue (*see Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006]). The doctrine of legal capacity "concerns a litigant's power to appear and bring its grievance before the court" (*id.*). Here, it appears that the issue involves Equinox's standing. Equinox is not a signatory to the Contract alleged to have been breached. Accordingly, Equinox lacks standing to recover damages for said counterclaim.

Although Eclipse and Equinox have established that they have the legal capacity to sue in the sixth and seventh counterclaims, Ibex has demonstrated its entitlement to dismissal of those claims because they are time-barred under section 77 (2) of the Lien Law.

As stated above, in a motion to dismiss, pursuant to CPLR 3211 (a) (3), dismissal will be granted when the movant establishes that the party asserting the claim lacks legal capacity to sue (*see Security Pac. Natl. Bank v Evans*, 31 AD3d 278, *supra*).

"Article 3-A of the Lien Law creates trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction" (*Ippolito v TJC Dev., LLC*, 83 AD3d 57, 64 [2d

Dept 2011] [citation omitted]). Section 70 defines trusts created thereunder. It provides, in part:

“The funds described in this section . . . received by a contractor under or in connection with a contract for an improvement of real property, or home improvement, or a contract for a public improvement in this state, or received by a subcontractor under or in connection with a subcontract made with the contractor for such improvement of real property including a home improvement contract or public improvement or made with any subcontractor under any such contract, and any right of action for any such funds due or earned or to become due or earned, shall constitute assets of a trust for the purposes provided in section seventy-one of this chapter.”

(Lien Law § 70 [1]). Lien Law § 77 (1) provides:

“A trust arising under this article may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding a trust claim.”

Eclipse and Equinox argue that Ibex neglected to remit payment to its subcontractors, including Eastside, for their completed work. They also allege that in order to save their own property they were forced to pay a mechanic’s lien due to Ibex’s failure to pay or arrange for direct payment to said subcontractors, and thus, they have subrogated rights and, consequently, standing to enforce the trust. The equitable doctrine of subrogation “is ‘applicable to cases, [like here], where a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property’” (*Broadway Houston Mack Dev., LLC, v Kohl*, 71 AD3d 937, 937 [2d Dept 2010]). Thus, Eclipse and Equinox have demonstrated their legal right to assert the sixth and seventh counterclaims in this action.

However, the sixth and seventh counterclaims are time-barred under section 77 (2) of the Lien Law. It provides in part:

“Such action may be maintained at any time during the improvement of real property. . . . No such action shall be maintainable if commenced more than one year after the completion of such improvement, or in the case of subcontractors or materialman, after the expiration of one year from the date on which final payment under the claimant’s contract became due, whichever is later, except an action by the trustee for final settlement of his accounts and for his discharge”

(Lien Law § 77 [2]). Herein, the work at the Premises was completed in February 2009.

Equinox and Eclipse filed an answer to the third-party complaint along with its counterclaims on June 16, 2011, a date that was commenced more than one year after the completion of said improvements (Exhibit K to Blaha Aff.).

Eclipse and Equinox argue that their sixth and seventh counterclaims are timely under CPLR 203 because they relate back to virtually identical issues brought by Eastside in the underlying action. Contrary to Eclipse and Equinox’s contentions, the sixth and seventh counterclaims are not saved by CPLR 203. “[C]ounterclaims relate back only to the interposition of the third-party complaint” (*Benedict v Whitman Breed Abbott & Morgan*, 77 AD3d 867, 869 [2d Dept 2010]). Here, the third-party complaint was interposed in April 2011. As mentioned above, Ibex ceased its work in January of 2009, and, thus, CPLR 203 does not prevent the sixth and seventh counterclaims from being time-barred.


Accordingly, it is

ORDERED Ibex Construction, LLC's motion to dismiss is granted as follows: the first, second, third, fourth, sixth, and seventh counterclaims of the third-party complaint are dismissed against Eclipse Development, Inc., and the first, fifth, sixth and seventh counterclaims of the third-party complaint are dismissed against Equinox Holdings, Inc.; and it is further

ORDERED that the action in all other respects continues.

Dated: 8/15/12

ENTER:



J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE