A. Russo Wrecking, Inc. v Bullard Purch. & Sales, Inc.
2013 NY Slip Op 32626(U)
October 15, 2013
Supreme Court, New York County
Docket Number: 106225/11
Judge: Kathryn E. Freed
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 3

Index Number : 106225/2011
A. RUSSO WRECKING, INC.
vs.
BULLARD PURCHASING & SALES
SEQUENCE NUMBER : 003
DISMISS CALL # 1

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

OCT 24 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10-15-13

OCT 15 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

A. RUSSO WRECKING, INC.,

Plaintiff,

-against-

BULLARD PURCHASING & SALES, INC, KANSAS FRIED CHICKEN, INC., HORACE BULLARD as an Individual, THE CITY OF NEW YORK, et al.,

Defendants.

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DECISION AND ORDER
Index No. 106225/11
Seq. No. 003

HON. KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR§2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED.....	....1-2 (Exhs. 11-20)
ORDER TO SHOW CAUSE AND AFFIDAVITS ATTACHED.....	.....
ANSWERING AFFIDAVITS.....	.....5 (Exhs. 2-5)
REPLYING AFFIDAVITS.....	.....6.....
OTHER.....(X-Motion & Defendants' memo of law).....	.....3-4(Exhs.B-F)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This action was brought by plaintiff A. Russo Wrecking, Inc. (Russo) for monetary relief, and to foreclose on a mechanic's lien filed against defendants Bullard Purchasing and Sales, Inc. and Horace Bullard (collectively, Bullard) by Russo, dated September 23, 2010, and for damages (the Lien). The Lien recites that Russo was employed by the New York City Department of Housing Preservation and Development (HPD), Greenwich Insurance Co. (Greenwich), and Public Insurance Adjusters of N.Y., Ltd. (Public), as contract vendee of Bullard to perform work from February 28, 2010 through March 1, 2010. The total amount of the Lien is $63,945.28.

Russo now moves to dismiss pursuant to CPLR§ 3211 [a] [1] & [7], §3013, and §3016 [b], the first counterclaim and sixteenth affirmative defense (fraudulent filing of a mechanic's lien and encumbrance of title), and second counterclaim and seventeenth affirmative defense (deprivation of property rights, and civil rights under the 5th and 14th Amendments [US Constitution], and money damages under 42 USC §§ 1983, 1985, 1986, and 1988) of Bullard.

Bullard cross-moves for summary judgment pursuant to CPLR §3212 on its counterclaims, or, if not granted, an order dismissing the complaint pursuant to CPLR§3211 [a] [1] & [7], §3013, and §3016 [b]).

Factual and procedural background:

The complaint and the contentions therein arise from the performance of demolition work performed by Russo in connection with the collapse of the second floor of a two-story structure at the premises known as both as 685-689 Lenox Ave, and as 107 West 144th Street, New York, New York (collectively, the Premises). The demolition work was allegedly performed between February 28, 2010 and March 1, 2010, pursuant to an immediate declaration of emergency (IDE) by the New York City Department of Buildings (DOB), following an inspection on February 26, 2010 which revealed a dangerous condition.

More specifically, the IDE, with reference to the Premises, noted on February 26, 2010, that the "2 Story Commercial Building had entire roof collapse and the roof trusses pushed out the north and south exterior walls causing partial collapse of walls and remainder in danger of collapse. Recommend full demolition." (Notice of motion, exh. 11). On that same day, Russo provided Public with an estimate stating that "our price to demolish and remove the collapsed area of the second floor of [the Premises] including the supplying of equipment, labor, and insurance is for the

lump sum of [$135,000.] Price excludes asbestos testing/removal if any . . ." (*id.*,12).

On February 26, 2010, Russo allegedly provided an initial proposal to Bullard via defendants Public and Craig Spiegel, who Russo claims, are Bullard's duly authorized representatives, for partial demolition at the Premises. Reportedly, on February 27, 2010, Bullard's carrier, Greenwich, was provided with a contract for partial demolition and removal of the second floor of Premises (the Demolition Contract). Despite presentation on February 27, 2010, and a request for signature, the Demolition Contract was never signed, but, according to Russo, it was approved orally by Public, Spiegel, and Greenwich, and Russo commenced work on the Premises.

As of February 28, 2010, Glenn Lewis of HPD indicated that they were told to leave the Premises "as per Sammy," and that "A. Russo [was] working for owner and [the insurance] company" (*id.*, exh.14). Some months later, by letter of October 27, 2010, the claims specialist of the City of New York Comptroller indicated, by letter, that according to HPD, DOB had issued the IDE, that Russo worked for the owner on the Premises, and that as of March 1, 2010, HPD had been informed that the owner had "backed out of his arrangement with Russo and HPD was required to mobilize and finish remediating the emergency condition ... Any work performed prior to that time is not the responsibility of HPD or the City of New York" (*id.*, exh. 15).

Although there is no indication as to exactly how the information was transmitted, Russo maintains that as of March 1, 2010, while working on the Premises it learned that Greenwich was refusing to make payment on account of the asbestos monitoring work required to complete the demolition work because asbestos abatement work is excluded under the terms of the insurance policy for the Premises, and, thus, payment for this aspect of the work would have to be covered by Bullard. Bullard has refused to do so.

Russo has commenced this action, which "arises essentially from a breach of contract or arguably a liability based on a quasi contract claim for non-payment for work, labor and services performed by [Russo] at the [Premises]." (Salman Affirmation, ¶ 8).

Russo moves to dismiss the first counterclaim and sixteenth affirmative defense (fraudulent filing of a mechanic's lien and encumbrance of title), and the second counterclaim and seventeenth affirmative defense (deprivation of property rights, and civil rights under the 5th and 14th Amendments [US Constitution], and money damages under 42 USC §§ 1983, 1985, 1986, and 1988), pursuant to CPLR§ 3211 (a) (1) & (7), upon documentary evidence, and for failure to state a claim upon which relief can be granted, pursuant to CPLR§ 3013, because the statements of the counterclaims are too general on a normal basis, and certainly too general pursuant to the heightened pleading requirements of CPLR§ 3016 (b), which necessitate additional detail for causes of action based upon allegations of fraud or mistake.

Conclusions of law:

Panoptically, on a motion to dismiss pursuant to CPLR§ 3211, the pleading is to be afforded a liberal construction (*see* CPLR§ 3026). As such, the court accepts the facts as alleged by Bullard in the counterclaims as true, and accords Bullard the benefit of every favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory *(* see *Morone v. Morone*, 50 N.Y.2d 481, 484 [1980]; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 [1976]). Likewise, on Bullard's motion for summary judgment dismissing the complaint, the court accepts the allegations of the complaint as true, and affords Russo the benefit of every favorable inference. Despite any such inferences, however, unsupported or idle speculation is insufficient to defeat a motion to dismiss (see *Mark Hampton Inc. v. Bergreen*, 173 A.D.2d 220, 220 [1st Dept. 1991]).

(inherently incredible, unsupported, or flatly contradicted facts, and conclusory allegations are not entitled to the presumption of truth or the benefit of every favorable inference).

More specifically, under CPLR §3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to Bullard's counterclaims as a matter of law (see e.g. *Heaney v. Purdy*, 29 N.Y.2d 157 [1971]). In addition, in assessing the motion under CPLR §3211 (a) (7), the court may freely consider affidavits submitted by Bullard to remedy any defects in the counterclaims (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d at 635) and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275 [1977]; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d at 636; *see gen. Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]).

Finally, while the sufficiency of pleadings generally depends upon compliance with CPLR §3013, the special provisions in Rule 3016 (b) require that the counterclaims of Bullard, which are based upon transactions and occurrences sounding in fraud, be pleaded in sufficient detail to give adequate notice to Russo, and the court, of their basis (see *Sargiss v. Magarelli*, 12 N.Y.3d 527, 530-31 [2009]) ("[w]hat is critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action, and although under CPLR 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud" [internal quotation marks omitted]); *see also Foley v. D'Agostino*, 21 A.D.2d 60, 64 [1st Dept. 1964]).

Fraudulent Filing of Mechanic's Lien:

It is undisputed that work was undertaken by Russo at the Premises between February 28 and March 1, 2010. Moreover, it is undisputed that Bullard owns the Premises upon which the work was

performed. This establishes a basic right for Russo to file a mechanic's lien. More particularly, "[a] contractor . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . ." Lien Law § 3.

Here, however, several issues arise with regard to that basic right. First, Bullard maintains, with the benefit of every favorable inference, that it "never hired [Russo] . . . never asked [Russo] to perform work . . . never requested that [Russo] perform the demolition . . . never consented that [Russo] perform the demolition and [its] consent was never sought by [Russo] or the [DOB, and it] was not given the opportunity to hire a demolition contractor of [its] choosing." So there is an alleged lack of consent. Indeed, Russo never claims to have had direct consent from Bullard. *Compare C. Wilson's Plumbing Shop on Wheels v. Trustees of Dartmouth Coll.*, 168 Misc. 376, 378 (Sup Ct, Erie County 1938) (owner's consent should not be inferred from passive acquiescence, but where "owner is an affirmative factor in procuring specific improvements to be made which benefit his property or, when being in possession and control, the owner assents to improvements expecting to reap benefits from them"); see also 16 Carmody-Wait 2d § 97:56 ("[c]onsent . . . be found where the landlord is an affirmative factor in procuring specific improvements . . . or where, being in possession and control of the premises, the landlord assents to improvements in the expectation of reaping benefits from them").

Second, Russo nonetheless claims to have had the consent of Bullard via Public, acting as the agent of Bullard. Bullard first argues that the relationship of Public, as an adjuster, to Greenwich, as the entity against which a claim was made, is adverse, and, as such, it is incomprehensible that Russo would actually deem Public the agent of Bullard. In addition, Bullard

offers the actual terms of its relationship with Public in an effort to demonstrate that Public's role was only as an adjuster, not as an agent that could direct demolition on behalf of Bullard. *See* notice of cross motion, exhibit G ("Kansas Fried Chicken Inc. hereby retains [Public] to aid in the preparation, presentation, adjustment, and negotiation of or effecting settlement of the claim for the loss or damage by collapse sustained at [the Premises]"); *see also* Insurance Law § 2101 (g) (2) ("'[p]ublic adjuster' means any . . . corporation [that] acts . . . on behalf of an insured in negotiating . . . the settlement of a claim . . .").

Russo points out that in order to sustain a viable claim for fraud under New York law, Bullard must allege and prove representation of material fact, the falsity of that representation, knowledge by Russo that it was false when made, justifiable reliance, and resulting injury (see *e.g. Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 [2009]). In this regard, Russo identifies inconsistencies in the allegations of Bullard. Essentially, Russo first notes that Bullard categorically denies any privity of contract with Russo, hiring Russo to perform demolition work at the Premises, or that Public or Greenwich served as Bullard's agent.

Russo then goes on to argue that Bullard cannot, on the one hand, claim that they did not know of the contract, and the misrepresentations therein, and at the same time claim reliance on those same alleged misrepresentations. This is a cogent point. To the extent that the counterclaim of Bullard sounds in simple fraud it is not viable (see *e.g. Circle Assoc., L.P. v. Starlight Props.*, 98 A.D.3d 596, 598 [2nd Dept 2012]) (absence of a material misrepresentation mandates dismissal of fraud claim).

Notwithstanding, while Bullard's counterclaim may suffer somewhat from ungainly pleading, this is not the same as the absence of a cause of action (see *Stendig v. Thom Rock Realty Co.*, 163

A.D.2d 46, 48 [1st Dept 1990] "[t]he test on a motion to dismiss for insufficiency of the pleadings is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained."). Bullard's counterclaim states that

> "[b]y reason of filing of the aforesaid spurious mechanics lien based upon alleged work for which plaintiff has already been paid by the CITY and by reason of assigning a value to the alleged work described in such lien far in excess of the proportionate amount assignable pursuant to the proposed contract presented by plaintiff to the Insurer, plaintiff has filed a fraudulent and willfully exaggerated mechanics lien, which has wrongfully encumbered and disparaged the Owner's title."

Answer, ¶ 83.

Bullard then requests that the mechanic's lien be declared void, and that Bullard be found to be entitled to recover the amount of willful exaggeration, along with damages for disparagement of their title, attorneys' fees, and exemplary damages.

Bullard's cause of action may be a valid one:

> "[i]n any action or proceeding to enforce a mechanic's lien . . . in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon."

Lien Law § 39; *see also Frederick J. Fox Constr. Corp. v. Halikman*, 88 N.Y.S2d 156 (Sup Ct, Queens County 1949).

That being established, as even an actual exaggeration may not be a willful exaggeration (*Goodman v. Del-Sa-Co Foods*, 21 A.D.2d 641, 642 [1st Dept 1964], *mod* 15 N.Y.2d 191 [1965]), this motion to dismiss raises a fact-laden inquiry as to intent (*Shisgal v Brown*, 21 AD3d 845, 847 [1st Dept 2005]). Given these circumstances, "[t]he right to urge that the lien is void for [willful exaggeration], is always reserved for the trial" (*Matter of Upstate Bldrs. Supply Corp. (Maple Knoll*

Apts.), 37 A.D.2d 901, 902 [4th Dept. 1971]; see also *Durand Realty Co. v. Stolman*, 197 Misc. 208, 211 (Sup Ct, NY County 1949), *affd* 280 App Div 758 [1st Dept. 1952]; *Washington 1993 v. Reles*, 255 A.D.2d 745, 747 [3rd Dept 1998] (whether there is deliberate or intentional exaggeration of a lien amount is a question of fact to be resolved at trial). As such, both the motion to dismiss, and the cross motion for summary judgment, with regard to the cause of action related to willful exaggeration of the mechanic's lien, are denied.

Deprivation of Property Rights:

Russo also moves to dismiss the seventeenth affirmative defense and counterclaim of Bullard, which claims that Russo deprived Bullard of: (i) property rights without due process of law, as required by the New York State Constitution and the fourteenth amendment to the United States Constitution; and (ii) rights, privileges and immunities as secured by the fifth and fourteenth amendments to the United States Constitution. In addition, Bullard complains that the actions taken to deprive them of their rights were taken under the color of law, to wit, Administrative Code of the City of New York § 26-236, also known as the Unsafe Building Procedure, which allegedly subjects Russo to damages as a matter of law under 42 USC § 1983.[1]

This whole claim, however, relies on the veracity of three allegations: (i) that Bullard never gave consent to the demolition of the Premises either directly or through an agents; (ii) that the DOB

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[1]42 USC § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

somehow conspired with Russo to deprive Bullard of its rights; and (iii) that the mechanic's lien filed as a result of the work on the Premises was improper, illicit, and/or over-exaggerated. With regard to the last of these assertions, the counterclaim states, in conclusory fashion, that there was an "unlawful, wrongful, unwarranted, and intentional assertion of a frivolous and extortionate mechanics lien and notice of pendency, as part of a corrupt conspiracy and scheme to deprive Owner of its right and opportunity consistent with due process, to engage a demolition contractor of its choosing." (Answer ¶ 90). Meanwhile, the former two of these assertions are classic issues of fact which cannot be resolved upon summary adjudication where the court's role is of issue finding, not issue determination (see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]; *Wiener v. Ga-Ro Die Cutting*, 104 A.D.2d 331, 333 [1st Dept. 1984], *affd* 65 N.Y.2d 732 [1985]).

Russo's suggestion that the property rights asserted by Bullard are not protectable on the basis of procedural due process is slightly off base. While, there may be few palpable *substantive* due-process protections for property subject to state law, there is no suggestion in the cases brought to the attention of the court that this limitation is extensible to a violation of *procedural* due process, which is the theory that undergirds Bullard's counterclaims (see e.g. *Local 342, Long Is. Pub. Serv. Empls., UMD, ILA, AFL-CIO v. Town Bd. of Town of Huntington*, 31 F.3d 1191,1196 (2nd Cir 1994), citing *Regents of Univ. of Michigan v. Ewing*, 474 US 214, 229 (1985, Powell, J., concurring) (while "not every such right is entitled to the protection of substantive due process . . . property interests are protected by procedural due process") (citation omitted).

To dismiss, or grant, a motion for summary judgment based upon violation of procedural due process would be either premature or an unseasonable finding of fact. As such, both the motion to dismiss, and the motion for summary judgment with regard to the second counterclaim and

seventeenth affirmative defense of Bullard sounding in deprivation of property and civil rights are denied.

Upon these motions relating to recovery on a mechanic's lien, there is no definitive evidence that Bullard consented to the demolition of the Premises, or that the demolition work was undertaken at the behest of Bullard's agent. Indeed, even Russo claims Bullard consented by agency only. Whether such alleged agency can be ascribed to Bullard is an issue of fact precluding determination of the matter before trial (see e.g. *Dark Bay Intl., Ltd. v. Acquavella Galleries*, 12 A.D.3d 211, 212 [1st Dept. 2004]; *Deep Blue Ventures v. Manfra, Tordella & Brookes*, 6 Misc. 3d 727, 732 (Sup Ct, NY County 2004)).

Thus, the motion to dismiss the counterclaims of Bullard alleging that Russo filed a fraudulent mechanic's lien and encumbrance of title, and improperly deprived Bullard of their property rights must also be denied. Likewise, the conclusory allegation that the mechanic's lien is excessive, or filed in bad faith, is insufficient to demonstrate entitlement to judgment as a matter of law as required to be granted a cross motion for summary judgment. Finally, any determination that such actions became the basis of a deprivation of property rights is clearly premature or an improper finding of fact.

The court notes, however, that to the extent that the fees for the demolition of the Premises can be shown to be fair and reasonable, recovery for the services would normally remain viable (see e.g. *Paul F. Vitale v. Parker's Grille*, 23 A.D.3d 1147 [4th Dept. 2005] (finding that where the court determines that fees for demolition are fair and reasonable, "[e]quity requires that plaintiff recover for its services in quantum meruit in order to avoid the unjust enrichment of defendants at its expense" [citation omitted]).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the motion of plaintiff A. Russo Wrecking, Inc., pursuant to CPLR§3211 (a) (1) & (7), 3013, and 3016 (b), to dismiss the first counterclaim and sixteenth affirmative defense and second counterclaim and seventeenth affirmative defense of defendants Bullard Purchasing and Sales, Inc. and Horace Bullard is denied; and it is further

ORDERED that the motions, pled in the alternative, of defendants, Bullard Purchasing and Sales, Inc. and Horace Bullard, pursuant to CPLR §3212, or, alternatively, CPLR§3211 (a) (1) & (7), 3013, and 3016 (b), to dismiss the complaint of A. Russo Wrecking, Inc. are both denied; and it is further

ORDERED that counsel are directed to appear for a compliance conference on December 3, 2013 at 80 Centre Street, Room 103 at 2:00 pm; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: October 15, 2013

OCT 15 2013

FILED

OCT 24 2013

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT