MCM Prods. USA, Inc. v Aliusta Design
2015 NY Slip Op 32187(U)
November 16, 2015
Supreme Court, New York County
Docket Number: 651475/2015
Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MCM PRODUCTS USA, INC.,

Plaintiff,

- v -

ALIUSTA DESIGN, A&M ELECTRIC, ARCH MILL SPECIALTIES INC., CHINATOWN PLUMBING & HEATING INC., CERTIFIED CUSTOM INTEGRATORS, LLC, FIVE STAR FINISHES CORP., GRYPHON CONTRACTING CORP., HUDSON CONCRETE POLISHING, INC., JUST RIGHT AIR CONDITIONING SERVICES, LITE BRITE NEON STUDIO, LLC, NEWCO IRON WORKS, ROCKLAND FLOORING, INC., SKYLINE GROUP CORP., SKYLINE SCAFFOLDING GROUP, INC., TOPCOAT ART, INC., TRI STATE EXQUISITE ROOFING LLC, ULTRA CARPET, INC., VANQUISH CONTRACTING CORP., WARNER CONCEPT CONSULTING INC., AND WILLIS AVE CONSTRUCTION CORP.,

Defendants.

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DECISION and ORDER

Mot. Seq. #003

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, MCM Products USA, Inc. ("Plaintiff"), brings this action for a declaratory judgement, discharge of lien and release of bond, and wrongful filing of a mechanic's lien placed on the property located at 100 Greene Street, New York, NY 10012 (the "Property"). Plaintiff claims to have leased the Property from non-party VCW Associates, pursuant to a lease agreement dated February 27, 2014, and to have hired non-party A.J.S. Project Management Inc. ("A.J.S.") as general contractor on a renovation project (the "Project") for the Property, pursuant to a contract dated June 10, 2014. Plaintiff claims that A.J.S. hired various subcontractors, with whom Plaintiff has no contractual relationship, to assist with

the Project on the Property. Plaintiff claims that certain of these subcontractors, namely, defendants Aliusta Designs ("Aliusta"), Newco Iron Works ("Newco"), and Skyline Scaffolding, Inc. ("Skyline Scaffolding"), filed Mechanic's Liens on the Property, that such Liens were not properly filed, and that any monies due and owing to defendants Aliusta, Newco, or Skyline Scaffolding in connection with the Project are due and owing from A.J.S only. As against the other defendants/subcontractors who performed work on behalf of A.J.S., including defendant, Hudson Concrete Publishing Inc. ("Hudson"), Plaintiff seeks a declaratory judgment declaring that Plaintiff is not liable to Defendants for any money due and owing between Defendants and A.J.S. regarding the Project.

Plaintiff commenced this action on May 1, 2015, by Summons and Complaint. Hudson interposed a Verified Answer with Cross-claims to Plaintiff's Complaint on June 25, 2015. Hudson alleges three counterclaims in its Verified Answer with Counterclaims: unjust enrichment, accounting and pro rata distribution of trust funds, and diversion of trust funds.

Plaintiff now moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing Hudson's counterclaims for failure to state a cause of action. No opposition is submitted.

CPLR § 3211 provides, in relevant part:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (7) the pleading fails to state a cause of action;

(CPLR §§ 3211[a][7]). In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]).

To prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]).

An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. (*Id.*). Thus, it is the general rule that, "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]). This general rule extends to claims against non-signatories, "there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim." (*Randall's Is. Aquatic Leisure, LLC v. City of New York*, 92 A.D.3d 463, 464 [1st Dep't 2012]; *Melcher v. Apollo Med. Fund Mgt. L.L.C.*, 105 A.D.3d 15, 27-28 [1st Dep't 2013] [rejecting argument that, because plaintiff had no breach of contract claim against non-party to written agreement covering subject matter of plaintiff's complaint, plaintiff could properly assert quasi-contract claim against such non-signatory, "*Clark-Fitzpatrick* did not draw that distinction"] [listing cases]).

To recover under a theory of quasi contract, "[i]t is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery." (*Kagan v. K-Tel Entm't*, 172 A.D.2d 375, 376 [1st Dep't 1991]). "Where there is an express contract . . . between the general contractor and the subcontractor, the owner of the subject premises may not be held directly liable to the subcontractor on a theory of implied or quasi-contract, unless he has in fact assented to such an obligation; the mere fact that he has consented to the improvements provided by the subcontractor and accepted their benefit does not render him liable to the subcontractor, whose sole remedy lies against the general contractor." (*Contelmo's Sand & Gravel, Inc. v. J & J Milano, Inc.*, 96 A.D.2d 1090, 1091 [2d Dep't 1983]).

Here, Hudson's first counterclaim alleges that, "Hudson Concrete provided services and materials to MCM Products for the Project," "performed its work for the Project in a proper and workmanlike manner," "benefited from the provision of work by Hudson Concrete on the project," and "[u]nder the principles of equity and good conscience, MCM Products should be required to pay for the services and materials received by it from Hudson Concrete." Hudson does not assert any allegations linking Plaintiff to the services it alleges to have performed and admits that it was hired by A.J.S., the general contractor on the project.

Even accepting all allegations as true and drawing all inferences in favor of the non-moving party, Hudson's first counterclaim seeks payment for services performed under Hudson's agreement with A.J.S. Such claims, as alleged, are

governed by Hudson and A.J.S.'s agreement. Accordingly, even viewing Hudson's Verified Answer in the light most favorable to Hudson, Hudson's first counterclaim fails to plead a cause of action for unjust enrichment against Plaintiff. (*Clark-Fitzpatrick, Inc.*, 70 N.Y. 2d at 399).

Hudson's second counterclaim seeks an accounting and pro rata distribution of trust funds for the Project pursuant to Section 77 of the Lien Law as a representative of all beneficiaries of the trust. Hudson's third counterclaim seeks a judgment against Plaintiff adjudging that Plaintiff is a trustee of all Trust Funds received by Plaintiff in connection with the Project, and that Plaintiff is liable to Hudson and "the other Trust Fund beneficiaries" for all trust assets received. Hudson's counterclaims fail to allege facts to substantiate the existence of the alleged trust, Plaintiff's alleged diversion of assets of such a trust or Hudson's right to an accounting and pro rata distribution of such a trust.

Wherefore, it is hereby

ORDERED that Plaintiff's motion to dismiss Hudson's counterclaims against Plaintiff is granted without opposition; and it is further

ORDERED that Hudson's counterclaims as against Plaintiff are dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: NOVEMBER 16, 2015

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EILEEN A. RAKOWER, J.S.C.