Superior Quality Craftsman, Corp. v City of New York
2017 NY Slip Op 30520(U)
March 20, 2017
Supreme Court, New York County
Docket Number: 652183/2015
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 33

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SUPERIOR QUALITY CRAFTSMAN, CORP.,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, STV BRADFORD/JV

Defendants.

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DECISION/ORDER
Index No. 652183/2015

MARGARET A. CHAN, J.:

In this action, plaintiff's complaint asserts breach of implied contract and unjust enrichment, inter alia, stemming from a construction project for defendant New York City School Construction Authority (SCA). Plaintiff, a subcontractor, alleges that it performed work for Ortega Group, LLC, (Ortega), a non-party general contractor for the project, but was not paid. In motion sequence 001, City of New York (the City) and the SCA jointly move to dismiss plaintiff's complaint pursuant to CPLR § 3211, which plaintiff opposed. In motion sequence 002, plaintiff moves for a default judgment against STV Bradford/JV (STV). STV submitted opposition and cross-moved to dismiss for failure to effectuate proper service. The decisions and orders on both motion sequences are as follows:

In 2009, SCA and defendant STV Bradford/JV (STV) entered into a contract that designated STV as construction manager for certain projects under SCA's Mentor Program[1]. STV contracted with the Ortega Group, LLC, (Ortega) as general contractor for work of a public improvement project known as "PS050M, Paved Areas- Blacktop, Contract No. MC0042" (the project) (Mot Seq 001, City's mot, exh A, ¶10). Ortega contracted with plaintiff as subcontractor for certain work on the project. Prior to completion of the project, on October 10, 2010, Ortega terminated plaintiff and hired a different subcontractor to complete the project (Mot Seq 001, City Mot, Wilcox Aff).

In a separate action commenced in 2011, plaintiff brought suit against SCA and Ortega. The claim against SCA was to foreclose on a mechanic's lien and as against Ortega the claim was for breach of contract. Another justice of this court determined that the mechanic's lien against SCA expired and thus, the action against SCA was dismissed (*Superior Quality Craftsmen Corp. v Ortega Group. LLC*, index No. 650527/11 [Sup Ct, NY Cty, August 2, 2012, Engoron, J.]). As to Ortega, the court ordered further discovery (*id.*). Litigation continued against Ortega and after an inquest, a different justice of this court granted plaintiff a judgment against Ortega in the amount of $89,988.00 (*Superior Quality Craftsmen Corp. v Ortega Group. LLC*, index No. 650527/11 [Sup Ct, NY Cty, June 3, 2014, Rackower, J.]). Plaintiff asserts that its efforts for collection of the judgment against Ortega have been unsuccessful.

[1] The Mentor Program is an incentives program to facilitate growth and development of minority-owned, women-owned and locally based enterprise contractors by pairing them with larger companies on SCA contracts (Mot Seq 001, City's mot, Wilcox Aff). Plaintiff is a minority-owned business that participated in the Mentor Program.

Plaintiff theorizes that the SCA did not properly disperse payments for the project and that the SCA retains funds that rightfully belong to plaintiff for work it completed. Plaintiff learned that Ortega was suspended from doing business with the SCA around December 2012 (Mot Seq 001, Pltf's Opp, exh 8). To further investigate how monies were distributed to subcontractors on the project, on September 12, 2014, plaintiff submitted a FOIL request for documents, which was responded to on October 21, 2014 (Mot Seq 001, Pltf's Opp, exh 9-A). Plaintiff interprets the FOIL records to show that the SCA[2] paid all the subcontractors directly (*id.*; Pltf's Aff in Opp, pp 7-11). Ortega was paid only for its work as general contractor, and Ortega assigned its rights to collect payments for all of the subcontractors back to the SCA, except in plaintiff's case (*id.*).

Motion Sequence 001

Addressing the City and SCA's joint motion to dismiss, plaintiff asserts causes of action against SCA and the City for: (1) breach of implied contract; (2) unjust enrichment; (3) conversion: (4) breach of fiduciary duty; (5) breach of constructive trust; (6) misappropriation of assets;[3] (8) breach of implied covenant of good faith and fair dealing; and (9) quantum meruit. The City argues that it is not a proper party to the action because it is a separate legal entity from the SCA and the City was not in privity with plaintiff. As against SCA, it claims that plaintiff failed to file a timely notice of claim against it and the one-year statute of limitations pursuant to Public Authorities Law §1744(2)(ii) has run requiring dismissal of the action.

Plaintiff opposes the motion on procedural grounds by arguing that it was improperly accompanied by an affidavit of a law school student who is not an attorney. As affirmed in the student's moving papers, her appearance is made pursuant to a Practice Order approved by the Appellate Division, First Department, concerning work performed by law school students and graduates under the supervision of an attorney from the Corporation Counsel's office (City's reply, exh B; *see In re Collie W.*, 309 AD2d 611, 612 [1st Dept 2003]). Plaintiff's arguments on this point are obviated by the Practice Order that specifically authorizes such practice.[4]

Plaintiff also procedurally argues that the motion was improperly made pursuant to CPLR § 3211, where it actually seeks summary judgment pursuant to CPLR §3212. This argument is misplaced because the municipal defendants' arguments in favor of dismissal are premised on: a lack of jurisdiction as they claim plaintiff failed to file the statutorily required notice of claim in a timely manner (*see* CPLR § 3211(a)(2)); statute of limitations grounds (*see* CPLR § 3211(a)(5)); and an argument that the complaint is not actionable as a matter of law (*see* CPLR § 3211(a)(7)). Therefore, this court can correctly scrutinize the motion as one to dismiss pursuant to CPLR § 3211.

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[2] Plaintiff clarifies that STV made the payments as an agent of SCA, and that on some records STV holds itself out as the general contractor on the project.

[3] Plaintiff does not assert a seventh cause of action.

[4] Plaintiff's attorney also alleged that the corporation counsel's office was unethically participating in the "unauthorized practice of law" (Pltf's Aff in Opp, ¶ 76). Ethical complaints are not taken lightly by this court nor should they lightly made. Such a claim should not be made without first performing a diligent inquiry, which in this case would have revealed that the allegation was meritless.

In a motion to dismiss pursuant to CPLR § 3211 the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Thomas v Thomas*, 70 AD3d 588 [1st Dept 2010]). The court need only determine whether the alleged facts fit within any cognizable legal theory (*id.*).

The municipal defendants argue that the City and the SCA are distinct legal entities and the City is not a proper party here. Plaintiff counters that the City should not be dismissed because both the City and its agencies may be defendants in a given litigation. While that may be true, this case solely concerns a construction project authorized and carried out by the SCA. No facts were asserted that involve the City as a party. The City Charter and Public Authorities Law §1727 establish that the SCA is a separate public benefit corporation distinct from the City. As such, the City is dismissed from this action (*see Westchester Cr. Corp. v New York City School Const. Auth.*, 286 AD2d 154, 159 [1st Dept 2001] affd 98 NY2d 298 [2002][discussing the creation and purpose of the SCA]).

As to the SCA's statute of limitations argument, it is undisputed that plaintiff was terminated from the project in 2010. The SCA deemed the project substantially complete in January 2011 (Mot Seq 001, City's Mot, Wilcox Aff). Several years later, plaintiff filed the relevant Notice of Claim on January 5, 2015. Plaintiff claims that its damages were not ascertainable until it received the responses to its FOIL demands on October 21, 2014 and it thereafter timely filed a Notice of Claim within three months.

"A timely notice of claim is a condition precedent to maintaining an action against [the] SCA, and the plaintiff has the obligation to plead and prove that its notice of claim was served within three months after the accrual of its claim" (*C.S.A. Contr. Corp. v New York City School Const. Auth.*, 5 NY3d 189, 192 [2005]). "It is well settled that a contractor's claim accrues when its damages are ascertainable" (*id.*). While the date of accrual of damages requires a case by case analysis, in matters concerning construction work, it is generally upheld that damages are ascertainable when the work is substantially complete (*id.*). In matters involving work for the SCA, the date of execution of a Certificate of Substantial Completion fixes the date on which damages are ascertainable (*see D & L Assoc., Inc. v New York City School Const. Auth.*, 69 AD3d 435, 435 [1st Dept 2010]).

Here, there is no dispute that the SCA deemed the project substantially complete in January 2011 (Mot Seq 001, City's Mot, Wilcox Aff, exh C). Plaintiff's argument that its damages were not discernable until its receipt of the FOIL responses are belied by the fact that plaintiff commenced litigation against other entities based on the same construction work. Indeed, that litigation, in essence, ended in June 2014 with a judgment in plaintiff's favor. Plaintiff's failed collection efforts on that judgment have no bearing on the date from which its damages are ascertainable. Moreover, the law is clear, Public Authorities Law § 1744(2) mandates that an action against the SCA must be commenced within one year of the accrual of the cause of action and this action was commenced several years later in July 2015. Therefore, this action is time-barred against the SCA.

Accordingly, the City and the SCA's joint motion to dismiss (mot sequence 001) is granted in its entirety.

Motion sequence 002

Plaintiff moved for a default judgment against STV. STV, represented by Corporation Counsel, submitted opposition to the motion claiming that it was not properly served. STV also cross-moved to dismiss the action against it pursuant to CPLR § 3211. Plaintiff submitted opposition claiming that the motion to dismiss is untimely.

STV is a joint venture between STV Group, Inc. and Bradford Construction Corporation (Mot Seq 002, STV's Cross-mot, Held Aff). On July 8, 2015, plaintiff served "STV BRADFORD, JV C/O NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY" at what it claimed was the recipient's "actual place of business," 30-30 Thompson Avenue, 4th Floor, Long Island City, NY (Mot Seq 002, Pltf's mot, exh 6).

Pursuant to CPLR § 310, service upon a Joint Venture, like a partnership, may be made by personally serving the summons upon either entity, the managing or general agent of the Joint Venture, or the person in charge of the office of the Joint Venture. Plaintiff contends that it was not able to locate the Joint Venture via the New York State Division of Corporations website after a diligent search and that STV held itself out as doing business at the same address as SCA (Mot Seq 002, Pltf's Aff in Opp, exh 4). Plaintiff's service here on the SCA's address does not fulfill the service requirements of CPLR § 310. As STV has since supplied plaintiff with a complete New York State Division of Corporations website printout with its corporate information there should be no question now about the address for proper service (Mot Seq 002, STV's Aff in Reply, exh B). As such, plaintiff's motion for a default judgment is denied and STV's cross-motion to dismiss is denied as moot.

Accordingly, it is hereby

ORDERED, the City of New York and the School Construction Authority's joint motion to dismiss (mot sequence 001) is granted in its entirety and the action is dismissed as against the City of New York and the New York City School Construction Authority. The clerk of the court is directed to enter judgment as written, it is further

ORDERED, plaintiff's motion for a default judgment against STV Bradford/JV is denied, and STV Bradford/JV's cross-motion to dismiss is denied as moot. Plaintiff is granted leave to serve STV Bradford/JV within 30 days of entry of this order.

This constitutes the decision and order of the court.

DATE : 3/20/2017

MARGARET A. CHAN, JSC