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

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MAINE SERVICE CORP.,

Plaintiff,

Index No. 450196/16
Mot. Seq. 002

-against-

K.D. HERCULES INC., UNIVERSAL CONSTRUCTION RESOURCES, INC., GENERAL CASUALTY COMPANY OF WISCONSIN, INTERCONTINENTAL CONSTRUCTION CONTRACTING, INC., HUDSON INSURANCE COMPANY NEW YORK CITY HOUSING AUTHORITY, and JOHN DOES "1" through "10",

Defendants.

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OSTRAGER, J.:

Before the Court is a post-Note of Issue motion for summary judgment by defendants Universal Construction Resources, Inc. ("Universal") and its surety defendant General Casualty Company of Wisconsin ("General Casualty") dismissing all claims against them. The action was previously resolved as against all other defendants, but for K.D. Hercules Inc. ("K.D."). For the reasons stated below, the motion is granted, all claims against the movants are dismissed with prejudice, and K.D. Hercules is the sole remaining defendant for the June 8, 2017 trial.

The undisputed facts are as follows. Plaintiff Maine Service Corp. ("Maine") commenced this action to recover monies allegedly due to Maine for materials it provided to defendant K.D. Hercules in connection with various public improvement projects on properties owned by defendant New York City Housing Authority ("NYCHA"). Defendant Universal was the general contractor for the NYCHA projects at Mariner's Harbor Houses and South Beach Houses. As required by State Finance Law § 137, Universal obtained payment bonds from General Casualty.

On or about August 31, 2014, Universal, as contractor, entered into two contracts with K.D., as subcontractor, for the performance of asbestos abatement work at the two projects for the sum certain of $320,760.00 for the Mariner's project and $228,531.00 for the South Beach project (copies of the contracts are attached to the Affidavit of Muhammad Mansoor, President of Universal, in support of the motion as Exhibits I and J). The specific sum K.D. was entitled to receive for each project was set forth in Article 10 of each contract. The "General Scope" of work for each project was spelled out in the broadest possible terms in the section of each contract entitled Supplementary Conditions for Asbestos Abatement, which stated as follows:

> The work of this agreement shall include, but is not limited to, all material, labor, equipment, engineering, shop drawing, samples, layout, mockups, supplies, paints, tools, hoisting, freight, transportation, superintendent, insurance, taxes, permits, temporary protections, temporary shoring/pinning, compliances with all agencies, all other services and other items necessary to perform, Asbestos Abatement work in accordance with the contract documents specifications and additional information stated herein.

Plaintiff Maine was one of the vendors that supplied materials to K.D. for use on the two projects. As Universal's President attested in his affidavit, Universal had no contract nor other direct relationship with Maine, did not place any orders for materials with Maine, and did not approve nor even review the orders K.D. placed with Maine. The only time Universal had anything to do with Plaintiff Maine was when, toward the end of the project, Maine requested that Universal issue 2-party checks payable to K.D. and Maine in payment of monies Universal owed K.D. because K.D. allegedly was not paying Plaintiff Maine." (Mansoor Aff at ¶8). Maine's counsel expressly acknowledged in its Memorandum of Law (at p 4) that is does not dispute any of these facts. Nor does

K.D. or Maine dispute that Universal paid K.D. in full for all work K.D. performed pursuant to its contract with Universal.

In its Complaint, Maine asserted four causes of action against the moving defendants. In the Fourth Cause of Action Maine seeks to recover $43,710.86 against Universal and its surety for sums K.D. failed to pay Maine in connection with the Mariner's project. In the Fifth Cause of Action, Maine seeks to confirm the validity of the Mechanic's Lien served on NYCHA related to those monies (Exh U to moving papers). In the Sixth Cause of Action, Maine seeks to recover $35,393.83 against Universal and its surety for sums K.D. failed to pay Maine in connection with the Mariner's project. In the Seventh Cause of Action, Maine seeks to confirm the validity of the Mechanic's Lien served on NYCHA related to those monies (Exh V to moving papers). The lien claims name Universal and other defendants, but not General.

The moving defendants seek dismissal of the Fourth and Sixth Causes of Action on the ground that the claims for monies under the payment bonds are barred by Maine's failure to serve the notice required by State Finance Law § 137(3). That provision states in relevant part (with emphasis added) that:

> Every person who has furnished ... material [here Maine], to the ... subcontractor [K.D.] of the contractor [Universal], in the prosecution of the work provided for in the contract and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the ... material was furnished by him for which the claim is made [December 5, 2014], shall have the right to sue on such payment bond in his own name for the amount ...; ***provided, however, that a person*** [Maine] ***having a direct contractual relationship with a subcontractor*** [K.D.] ***of the contractor furnishing the payment bond but no contractual relationship express or implied with such contractor*** [Universal] ***shall not have a right of action upon the bond unless he shall have given written notice to such contractor*** [Universal] ***within one hundred twenty days from the date on which ... the last of the***

> ***material was furnished*** [April 4, 2015], for which his claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or for whom the labor was performed. The notice shall be served by delivering the same personally to the contractor or by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place where he maintains an office or conducts his business or at his residence; provided, however, that where such notice is actually received by the contractor by other means, such notice shall be deemed sufficient.

Plaintiff's counsel explicitly acknowledges in its Memorandum of Law (at p 4) that "it did not provide written notice of is claim, including the amount of the claim" by April 4, 2015, the time provided by the statute. However, counsel argues that the statutory notice requirements were satisfied, albeit somewhat late, when Maine requested, and Universal issued, two-party checks payable to Maine and K.D.[1] To support the argument, counsel points to the final phrase in the statute, quoted above, and argues that the checks constitute notice "actually received."

Plaintiff's argument is wholly without merit. First, the argument finds no support in the language of the statute. The phrase notice "actually received" must be read in the context of the entire sentence. When done so, the meaning is clear; service of the notice is valid even if not served personally or by registered mail if the notice is actually received. The phrase does not in any way modify the dictates stated earliest in the statute that the notice must state "with substantial accuracy the amount claimed and the

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[1] Counsel states the checks were issued on May 8, 2015, but the only two-party check payable to those parties is one $10,000.00 check dated June 8, 2016, more than a year later (Exh N to moving affidavit). For the reasons indicated, the Court need not reach the timeliness issue but nevertheless notes that the Court of Appeals held in *Windsor Metal Fabrications v General Acc. Ins. Co. of Am.*, 94 NY2d 124, 134-35 (1999) that the limitations set forth in the statute must be strictly applied, despite "the ironic result of a subcontractor being shut out from a timely lawsuit by the very statute meant generally to protect the rights of subcontractors."

name of the party to whom the material was furnished or for whom the labor was performed." The $10,000.00 two-party check cannot be deemed to constitute notice "stating with substantial accuracy the amount claimed" when the amounts at issue are $43,710.86 and $35,393.83 allegedly due after credit was given for the two-party check.

Nor does the case law support Maine's position. On the contrary, the statutory notice requirement is viewed as a "condition precedent" to suit on a payment bond. *Conesco Indus. v St. Paul Fire & Mar. Ins. Co.*, 184 AD2d 956, 959 (3d Dep't 1992). As such, the courts have repeatedly upheld the dismissal of actions to collect on payment bonds when the plaintiff has failed to serve the statutory notice. *See, e.g., Brer-Four Transp. Corp. v Zurich Am. Ins. Co., 78 AD3d 875 (2d Dep't 2010), lv denied* 17 NY3d 707; *Willets Point Asphalt Corp. V R.L.I. Insurance Company,* 294 AD2d 356 (2d Dep't 2002). Maine has not cited a single case to the contrary; wholly misplaced is Maine's reliance on *American Bldg. Constrs. Assoc., Inc. v Mica & Wood Creations, LLC*, 23 AD3d 322 (2d Dep't 2005), as the primary issue there was whether the timeliness of the notice had been established as a matter of law, and the case is otherwise distinguishable on the facts.

For these reasons, the Fourth and Sixth Causes of Action must be dismissed for noncompliance with State Finance Law § 137(3).

The Court also finds that the Fifth and Seventh Causes of Action should be dismissed. It is undisputed that General is not named in those causes of action. To the extent Universal is named, the causes of action merely seek to confirm the validity and priority of the liens that were served on NYCHA. As previously noted, all claims and cross-claims involving NYCHA were discontinued (see NYSCEF Doc. No. 37). In any

event, since Universal owes no funds to either KD or Maine, there appears to be no basis for seeking any type of declaration regarding the liens in connection with Universal. *See Graham Architectural Products Corp. v St. Paul Mercury Insurance Company*, 303 F.Supp.2d 274 (EDNY 2004).

Accordingly, it is hereby

ORDERED that the motion is granted in its entirety, and the Clerk is directed to enter judgment dismissing all claims against defendants Universal Construction Resources, Inc. and General Casualty Company of Wisconsin and particularly the Fourth, Fifth, Sixth and Seventh Causes of Action. The claims against K.D. Hercules are severed and shall proceed to trial as scheduled on June 8, 2017 at 9:30 a.m.

Dated: June 2, 2017

J.S.C.
BARRY R. OSTRAGER
JSC