Buffalo Drilling Co., Inc. v Hotel Ithaca, LLC
2017 NY Slip Op 33181(U)
November 22, 2017
Supreme Court, Broome County
Docket Number: EFCA2017001646
Judge: Molly Reynolds Fitzgerald

At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, Binghamton, New York on the 20th day of October, 2017.

PRESENT: HON. MOLLY REYNOLDS FITZGERALD
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

BUFFALO DRILLING COMPANY, INC.,

Plaintiff,

v.

HOTEL ITHACA, LLC, WILLIAM H. LANE INCORPORATED, and LIBERTY MUTUAL INSURANCE CO.,

Defendants.

DECISION AND ORDER

Index No.: EFCA2017001646
RJI No.: 2017-1231-M

Plaintiff and Defendant, William H. Lane Incorporated (hereinafter Lane), entered into a subcontract agreement dated December 19, 2014. Buffalo Drilling Company, Inc. (the subcontractor) agreed to provide all labor, materials and equipment necessary to complete the drilled concrete piers (caissons) work at the Hotel Ithaca located at 120 South Aurora Street, Ithaca, NY. Lane (the general contractor) agreed to pay Buffalo Drilling Company, Inc. (hereinafter Buffalo) the sum of $465,750. Plaintiff alleges it is owed the sum of $185,043. Buffalo filed a mechanic's lien on February 8, 2016. Liberty Mutual Insurance Co. filed an undertaking in the sum of $203,547.30 to discharge the lien. An action to foreclose the lien was commenced on May 27, 2016. Buffalo now moves to amend the complaint.

PROCEDURAL HISTORY

The action was commenced on May 27, 2016. Defendants served an answer and counterclaim on July 1, 2016. An answer to counterclaim was filed on July 14, 2016. On July 15, 2016 defendants moved to change venue to Broome County, to dismiss the action against Hotel Ithaca, LLC and to amend the complaint to substitute Liberty Mutual Insurance Company in place of Liberty Mutual Group, Inc. The Hon. Timothy J. Walker, Erie County Acting Supreme Court Justice, granted the motion in its entirety.

In support of its motion to amend, plaintiff submitted a Notice of Motion for Leave to Amend Complaint dated September 12, 2017, Affirmation in Support of Motion by Samuel A. Alba, Esq., dated September 12, 2017, with attached exhibits, including the proposed amended complaint.

An Affirmation by Albert J. Millus, Jr., Esq., dated October 13, 2017 was submitted in opposition to the motion.

A Reply Affirmation by Samuel A. Alba, Esq., dated October 19, 2017 was filed in further support of the motion.

Both parties filed memorandum of law in support of its position. Oral argument was heard on October 20, 2017.

LEGAL DISCUSSION

Plaintiff proposes to add six new causes of action and name 8 additional defendants[1]. As a general rule, leave to amend a pleading should be freely granted in the

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[1] All proposed new causes of action are based on the following facts: a settlement conference was held on June 13, 2017, wherein defendant advised plaintiff it hired a consultant to allocate the delay in the project to the various subcontractors. Defendant further advised plaintiff that it owed it money for its delay in completing its work. Plaintiff was under the impression that this conference was the contract required mediation. Negotiations were fruitless given the above facts and the meeting ended

absence of prejudice to the non-moving party where the amendment is not patently lacking in merit, *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 (2015); *Ferguson v Hart,* 151 AD3d 1242, 1243 (2017). There has been no alleged prejudice to defendants, however, defendants' contend the proposed amendments lack merit. This Court will address the merit of each proposed amendment.

First cause of action-to foreclose the mechanic's lien

Defendants do not object to the first cause of action. This is a restatement of the action in the origin complaint to foreclose a mechanic's lien. This is a valid cause of action.

Second cause of action-implied covenant of good faith and fair dealing for failure to negotiate in good faith

Initially, plaintiff proposed to add this cause of action against defendant Lane and two other newly named defendants, Cooper Carry, Inc. and Hotel Ithaca, LLC . In its reply, plaintiff stated this was a clerical error and agreed to limit the cause of action to defendant Lane only.

Plaintiff asserts that Lane breached the implied covenant of good faith and fair dealing for its contumacious failure to negotiate in good faith, or at all. Specifically, plaintiff charges: Lane threatened to move to dismiss the complaint if plaintiff failed to engage in non-binding mediation; it took 9 months to schedule what plaintiff's counsel believed was mediation[2]; once at this conference/mediation, Lane did not negotiate but instead asserted

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abruptly.

[2] There is a dispute as to whether this was a meeting or a mediation.

that plaintiff owed it money for delaying the project (Lane's counterclaim).

In appropriate circumstances, an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced. In such instances the implied obligation is in aid and furtherance of other terms of the contractual relationship, *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 (1983). However, plaintiff has not specified any contractual provision in the December 19, 2014 subcontract agreement requiring the parties to negotiate. Paragraphs 2.9.1-2.9.6 of the agreement reference the subcontractor's legal right to file a lien and prosecute a foreclosure action on its mechanic's lien. Article 12 refers to disputes, whether they be judicial, administrative, arbitration or other. Article 17.1 states that jurisdiction shall be in the Courts of the State of New York, Broome County. The agreement does not contain a term requiring the parties to negotiate. As such, this cause of action lacks merit.

Third cause of action-breach of contract for failure to negotiate in good faith

Plaintiff alleges that Lane breached its contractual duty to negotiate in good faith. Parties may require one another to negotiate in good faith as a condition precedent to initiating litigation, *Board of Mgrs. of Paradise Harbor at Piermont Landing Condominium v Dutch Hill Realty Corp.*, 68 AD3d 696, 697 (2009). A contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition, *Mullany v Munchkin Enters., Ltd.*, 69 AD3d 1271, 1274 (2010). The December 19, 2014 subcontract agreement does not contain a clause to negotiate in good faith. This cause of action lacks merit.

Fourth cause of action-quantum meruit and Fifth cause of action-unjust

enrichment

Plaintiff has withdrawn these causes of action.

Sixth cause of action-tortious interference with business relationship

This cause of action is alleged against Hotel Ithaca, LLC and Cooper Carry, Inc., for shifting a major portion of the liability for liquidated damages to the plaintiff. In order to state a cause of action of this type, the plaintiff must allege that the owner and architect intentionally and unjustifiably interfered with the work to be done by the subcontractor, *Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 281 (1978) . Plaintiff fails to allege a solely malicious act by the owner or architect. More importantly, the actions alleged by plaintiff against Hotel Ithaca and Cooper Carry (shifting the liability for liquidated damages to plaintiff) occurred after the completion of the project and commencement of this lawsuit and did not interfere with plaintiff's work.

This cause of action lacks merit.

Seventh cause of action-indemnification/contribution against all other subcontractors, architect and engineer

Plaintiff proposes to add a cause of action against C&C Welding Co., Inc., Lamp Lighters & Sons, LLC, Whitacre Engineering Company, Ceco Concrete Construction, LLC, Cooper Carry, Inc., Woodcokc (sic) & Armani, Eagle Mechanical and General Construction, LLC and John/Jane Does 1-10, for indemnification and/or apportionment of joint and several liability.

To permit apportionment of liability arising solely from breach of contract would do

violence to settled principles of contract law which limit a contracting party's liability to those damages that are reasonably foreseeable at the time the contract is formed, *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley,* 71 NY2d 21, 28 (1987). A complaint couched upon a pure breach of contract complaint which alleges economic loss only, fundamentally seeks contribution and therefore fails to state a cause of action, *Tempforce, Inc. v Municipal Hous. Auth. of City of Schenectady,* 222 AD2d 778, 780 (1995).

A request to amend a complaint will be freely given. However, denial is appropriate if the moving party fails to make a evidentiary showing that the proposed amendments have merit, *Trump on the Ocean, LLC v State of New York*, 79 AD3d 1325, 1327 (2010). Plaintiff failed to make an evidentiary showing that the amendments have merit.

The motion to amend the complaint is denied, in its entirety. This constitutes the Decision and Order of this Court.

Dated: November 22 2017

HON. MOLLY REYNOLDS FITZGERALD
SUPREME COURT JUSTICE

cc: Samuel A. Alba, Esq.
Albert J. Millus, Jr., Esq.
Judith E. Osburn, Broome County Chief Court Clerk