

Dantes v Megalopoli, LLC

2018 NY Slip Op 32524(U)

September 11, 2018

Supreme Court, Kings County

Docket Number: 509990/15

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of September, 2018.

PRESENT:

HON. LARRY D. MARTIN,
Justice

-----X

AUSTIN DANTES, REGIS EDWARD AND HENRY LLOYD,

Plaintiffs,

- against -

Index No. 509990/15

MEGALOPOLI, LLC, George Vasilakis, Vasileios Paganos, and VOLMAR CONSTRUCTION, INC.,

Respondents,

-----X

The following papers numbered 1 to 9 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1,2, 3,4, 5
Opposing Affidavits (Affirmations) _____	6,7, 8
Reply Affidavits (Affirmations) _____	9

Upon the foregoing papers, plaintiffs move by two separate motions (motion sequences 8 and 10)¹ seeking permission to add a party, serve an amended/supplemental summons and third amended complaint (motion sequence 8), and receive costs and attorneys' fees for a deposition that was not held (motion sequence 10). These two motions are both decided in this decision and order.

¹ The Hon. Francois Rivera decided motion sequence 9, seeking costs and sanctions, by an April 20, 2018 short form order which denied that motion without prejudice and with leave to renew.

Plaintiffs bring this suit to recover damages from defendants for allegedly receiving less than the prevailing wages and supplemental/fringe benefits to which they were entitled as carpenters working under government contracts from March 2013 to September 2014. Plaintiffs allege they performed the work at the Queens Museum, the Mid-Island US Post Office, and the Fort Dix Army Base.

Motion Sequence 8

After completion of all answering defendants' depositions² plaintiffs seek permission to serve a third amended complaint adding Tectonic Services Inc. (Tectonic) as a defendant. At his deposition, Peter J. Volandes ("Volandes") testified, on behalf of defendant Volmar Construction Inc. (Volmar), that Volmar subcontracted with Tectonic, at the Mid-Island US Post Office and the Fort Dix Army Base. Volandes also testified that George Vasilakis (Vasilakis) and/or Vasileios Paganos owned, operated or controlled Tectonic (*see* Volandes tr at 83-84).³

In opposition, defendants Vasilakis and Megalopoli, LLC urge denying the motion to serve a third amended complaint because they have filed a cross motion to dismiss plaintiffs' causes of action against them for unpaid (underpaid) wages and benefits for work performed at the Mid-Island US Post Office, and the Fort Dix Army Base. That cross motion is returnable September 25, 2018. Defendants Vasilakis and Megalopoli, LLC argue in the cross motion that plaintiffs' claims for unpaid or underpaid wages and benefits, based on violations of the Davis-Bacon Act, 40 USC § 3141 et seq (DBA), must be dismissed because there is no federal cause of action for workers if employers violate the wage provisions of the DBA. However, New York common law and the New York Labor Law allow plaintiffs to bring an action for unpaid or underpaid wages and benefits on government contracts as third-party beneficiaries, even if the DBA does not contain an enforcement provision (*see Cos v NAP Constr Co., Inc.*, 10 NY3d 592, 601-608 [2008]). Moreover, defendants

² It is unclear from the record if defendant Megalopoli, LLP has been deposed. Nathalie Paganos and George Vasilakis have both been deposed. Vasileios Paganos is in default.

³ The deposition of Volmar Construction, Inc. is annexed as exhibit 1 to plaintiff's reply affirmation.

Vasilakis and Vasileios Paganos control, operate, or own Tectonic, and they are already parties in this case. The court sees no prejudice to defendants Vasilakis and Vasileios Paganos stemming from the proposed third amended complaint. Therefore, amendment of the pleadings is allowed as there will be no prejudice to defendants (*see* CPLR 3025). In the event that Vasilakis and Megalopoli, LLC are successful in their pending cross motion, then Tectonic can make an appropriate motion to advance its rights.

Motion Sequence 10

Plaintiffs seek an award of legal fees and costs for attending a deposition at which defendant Volmar did not appear. Defendant Volmar, pursuant to a February 13, 2018 court order, was to be deposed on March 5, 2018, but, apparently there was miscommunication between Volmar and Ms. Gayle Rosen Esq., a member of Rabinowitz, Galina & Rosen, attorneys for defendant Volmar. Despite efforts to hold the deposition on March 5, 2018, it became apparent that Volmar's deposition would have to occur another day. On March 5, 2018, at 8:26 a.m., Ms. Rosen Esq. emailed all attorneys who were going to attend the deposition, that the deposition would need to be rescheduled (*see* exhibit 4 annexed to plaintiffs's sequence 10 notice of motion).

From the record it does not appear that Volmar was willfully trying to avoid its deposition. The deposition was, in fact, held on March 19, 2018. It would be an abuse of discretion to order Volmar to pay the deposition fee under all the circumstances mentioned above. Moreover, plaintiffs failed to attach proof of the deposition fee with its motion. Therefore, motion sequence 10 warrants denial. Accordingly, it is

ORDERED that plaintiffs' motion to amend (motion sequence 8) to add a party and serve an amended/supplemental summons and their proposed third amended verified complaint is granted, the amended/supplemental summons and third amended verified complaint are deemed served, and the caption is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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Plaintiffs,

- against -

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MEGALOPOLI, LLC, GEORGE VASILAKIS, VASILEIOS
PAGANOS, VOLMAR CONSTRUCTION, INC., AND
TECTONIC SERVICES, INC.

Respondents,

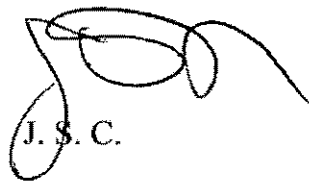
----- X; and it is further

ORDERED defendants shall serve their respective answers to the third amended verified complaint within 20 days after service of this decision and order with notice of entry; and it is further

ORDERED that plaintiffs' motion for sanctions, monetary penalties and attorneys' fees (motion sequence 10) is denied.

The foregoing constitutes the decision and order of the court.

ENTER,



J. S. C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

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KINGS COUNTY CLERK
FILED