

New York Geomatics, Inc. v JTJ Contr.
2019 NY Slip Op 31119(U)
April 22, 2019
Supreme Court, New York County
Docket Number: 150709/2016
Judge: Louis L. Nock
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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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INDEX NO. 150709/2016

NEW YORK GEOMATICS, INC.,
Plaintiff,

MOTION DATE 3/14/2019

- v -

MOTION SEQ. NO. 001

JTJ CONTRACTING, NYC TRANSIT AUTHORITY, JOHN DOES

DECISION AND ORDER

Defendants.

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LOUIS L. NOCK, J.

Upon e-filed documents numbered 7 through 25, it is ordered that plaintiff's motion to amend the summons and complaint to add Travelers Casualty Insurance and Surety Company of America as a party defendant is granted, in accord with the following memorandum.

This is an action by a subcontractor for foreclosure of a mechanic's lien. The notice of lien in this particular case was filed September 3, 2014, and extended July 24, 2015. On July 18, 2016, that notice was continued by court order through July 18, 2017. Plaintiff timely commenced this action on January 28, 2016, naming JTJ Contracting (the general contractor) and New York City Transit Authority (the property owner) as the defendants. Proposed additional defendant Travelers Casualty Insurance and Surety Company ("Travelers") is the surety on the lien by virtue of a bond posted September 17, 2014. The instant motion, seeking to add Travelers as a party defendant, was made December 28, 2018. The motion is properly accompanied by submission of the proposed summons and complaint (CPLR 3025 [b]), in redlined form.

By statutory decree, leave to amend pleadings "shall be freely given upon such terms as may be just including the granting of costs and continuances" (*id.*). Opposition to the motion is

based on the argument that any claim now asserted against Travelers would be futile, as time-barred under the Lien Law's one-year statute of limitations, calculated from the date of filing or extended filing of the notice of lien (Lien Law § 18).¹ In that vein, the opposition urges this court not to apply relation-back theory that might bring Travelers (the secondary obligor) within the parameter of the timely suit against the present defendants (the primary obligors), that occurred on January 28, 2016. In so doing, the opposition posits that Travelers cannot be considered a party that is united in interest with the present defendants, as it can possess a right of subrogation to pursue a claim against those defendants. However, the Appellate Division has openly found, within the context of limitations and relation-back analysis, that a surety on a mechanic's lien is most certainly a party that is united in interest with the primary obligor because "the plaintiff's claim against Travelers . . . arises from the assumption of the obligations that are otherwise at issue in this action" (*Pansini Stone Setting, Inc. v Crow & Sutton Assocs., Inc.*, 46 AD3d 784, 786-87 [2d Dept 2007]).

As expounded on by the Appellate Division (*id.*, at 786):

Where the claim against the new party would otherwise be barred by the applicable statute of limitations, the claim may nonetheless be asserted upon demonstrating that "(1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well."

(Citations omitted.)

¹ The instant action involves a public improvement project. Although the opposition cites Lien Law § 17, which is unrelated to public improvement projects, that is of no consequence to its argument because Lien Law § 18, which does relate to such projects, contains the same limitations period.

As the Appellate Division concluded in the referenced appeal, which also involved Travelers: here, too, Travelers, as surety for the obligation borne by the present defendants, falls into all the foregoing categories. That is why, as in the referenced appeal, it cannot be said here that the claim of the obligee (here, plaintiff subcontractor) against the secondary obligor (here, proposed defendant surety) somehow does not relate back to its very same claim against the primary obligors (here, defendants contractor and property owner).

Therefore, in accord with this state's legislative policy of liberal pleading amendment, and absent any compelling factors or showing of undue prejudice favoring a contrary determination, plaintiff's motion to amend the summons and complaint is granted.

Accordingly, it is

ORDERED that plaintiff's motion to serve and file an amended summons and complaint in the fashion submitted to the court in exhibit form is granted; and it is further

ORDERED that a clean copy of said summons and complaint – not in redlined form – shall be served on the present defendants, and on additional defendant Travelers by proper service of process, no later than 20 days from the date hereof; and it is further

ORDERED that all papers henceforth served and filed in this action shall indicate the parties defendant as “JTJ Contracting, New York City Transit Authority, Travelers Casualty Insurance and Surety Company, and John Does ‘1’ through ‘10’ being and intended to be those unknown individuals or entities with an interest against the public improvement known as the construction of ‘Montague Tunnel Rehab, Montague Tunnel, NY, Contract # P-36435’”.

This shall constitute the decision and order of the court.

ENTER:

Louis L. Nock

4/22/2019

DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE