Island Founds. Corp. v Turner/STV
2019 NY Slip Op 31280(U)
May 6, 2019
Supreme Court, New York County
Docket Number: 155754/2016
Judge: Robert D. Kalish
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

---X

ISLAND FOUNDATIONS CORP.,

Plaintiff,

- against -

Index No. 155754/2016

TURNER/STV, A JOINT VENTURE, TUNRER CONSTRUCTION COMPANY, STV CONSTRUCTION, INC., LIBERTY MUTUAL INSURANCE COMPANY, WESTERN SURETY COMPANY, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, and NEW YORK CITY DEPARTMENT OF FINANCE

Decision and Order

Defendants.

---X

HON. ROBERT D. KALISH, J.:

Defendants Turner /STV, a Joint Venture, Turner Construction Company, and STV Construction, Inc. (collectively, the Joint Venture) and defendants Liberty Mutual Insurance Company and Western Surety Company (collectively, the Sureties) move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). Plaintiff opposes the motion.

BACKGROUND

Plaintiff subcontracted with the Joint Venture to supply and install concrete and rebar (the Subcontract) for the construction of the New Police Academy being built on 125-05 31st Street, Flushing, New York (the project) (*see* Murray aff, ¶ 3). The City of New York (City) via the New York City Department of Design and Construction (the DDC) is the owner / developer of the project (*see id.*, ¶ 9). The Joint Venture entered into a contract with the City to provide construction and construction management services for the project, which includes the General Contract, the General Conditions, and the addenda to the General Conditions (Prime Contract) (*see id.*, ¶ 9).

On August 25, 2014, plaintiff filed a public improvement mechanic's lien (the lien) in the amount of $3,271,436 for work it performed on the project (*see id.*, exhibit E). On or about August 12, 2015, plaintiff extended the lien (*see id.*, exhibit F). The Sureties issued bonds that cover the public improvement lien (*see id.*, ¶ 28, exhibit H).

Plaintiff provided an itemization of the lien in response to a demand by the Joint Venture that specified $1,095,476 is due on account of base contract work with approved change orders and $2,175,960, is due on account of pending unapproved change orders (*see id.*, ¶ 26, exhibit G). The lien covered claims for additional work represented by change order requests that had not been approved by the DDC (*see id.*, ¶ 27, exhibits E, G). The Prime Contract requires plaintiff to obtain written change orders before performing any work (*see id.*, ¶¶ 13, 23). Plaintiff issued requests for change orders for extra work that plaintiff considered not to be included in the original Subcontract (*see id.*, ¶ 26). The Joint Venture processed plaintiff's requests for change orders, many of which were denied by the DDC (*see id.*, ¶ 27).

Plaintiff provided multiple mechanic's lien waivers to the Joint Venture in exchange for payment of invoices accepted (*see id.*, ¶ 29). On July 11, 2016, plaintiff provided its last lien waiver to the Joint Venture (*see id.*, ¶ 30). Defendants assert that the last lien waiver waived all lien rights for work performed prior to June 2016 (*see id.*, ¶ 29).

On July 12, 2016, plaintiff commenced this action (*see* Seiden affirmation, exhibit A). In its complaint, plaintiff seeks to foreclose on the public improvement lien bond, recover damages against the Joint Venture for breach of contract, and recover against the Sureties for the payment bond (*see id.*). Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). Plaintiff opposes the motion.

DISCUSSION

The standard of review on a motion to dismiss pursuant to CPLR 3211 is well established. The court must assume the truth of the allegations in the pleading and "resolve all inferences which reasonably flow therefrom in favor of the pleading" (*Sanders v Winship*, 57 NY2d 391, 394 [1982]). In assessing a complaint, the court must "determine simply whether the facts alleged fit within any cognizable legal theory" (*Morone v Morone*, 50 NY2d 481, 484 [1980]). "[T]he allegations of a complaint, supplemented by a plaintiff's additional submissions, if any, must be given their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). If the facts stated are sufficient to support any cognizable legal theory, the motion to dismiss should be denied (*Campaign for Fiscal Equity v State of New York,* 86 NY2d 307, 318 [1995]). "On a motion to dismiss pursuant to CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Morgenthow & Latham v Bank of New York Co.*, 305 AD2d 74, 78 [2003] [internal quotations and citations omitted]). Pursuant to CPLR 3211 (a) (7), a dismissal is warranted when "the pleading fails to state a cause of action" (*see also Leon v Martinez*, 84 NY2d 83, 88, [1994]).

I. First Cause of Action: Foreclosure of Public Improvement Lien Bond

Defendants move to dismiss plaintiff's first cause of action for foreclosure of the lien bond. Defendants argue that plaintiff waived its right to lien the project for work performed prior to the issuance of the waivers and may not lien the amounts it claims are due. During oral argument before this court on November 13, 2018, defendants' counsel stated, "[plaintiff] issued lien waivers in exchange for payment that basically says all work up to date is waived for the lien," and that "it's not a general release. It does not prohibit [plaintiff] from pursuing through

other causes of action the right to recover" (Oral Argument tr at 4-5). Plaintiff argues that it did not waive its right because the pattern of the course of conduct between plaintiff and the Joint Venture was to treat the lien waivers as receipts for payments actually made. During oral argument, plaintiff's counsel emphasized that "waivers are merely receipts of payments received," and thus plaintiff did not waive its lien rights (Oral Argument tr at 23).

Under section 34 of New York Lien Law, waivers of liens in exchange for payment are enforceable (*see* Lien Law § 34; *Atlantic Line Constr., LLC v Marstan Dev. Corp.*, 90 AD3d 456, 456 [1st Dept 2011]). On July 11, 2016, plaintiff issued a release of lien in consideration of payments for all work performed through the month of June 2016. The July 2016 release of lien states:

> "The undersigned, for and in consideration of payments of $15,462,231.74, received for all work performed thru the month of June 2016... hereby waive and release any and all lien of claim, or right of lien under the Statutes . . . on the above described premises and on improvements thereon, and on the monies or other considerations due or to become due from the owner, on account of labor or services, material, fixtures or apparatus heretofore furnished to this date by the undersigned . . ."

(Murray aff, exhibit I). On its face, the language of the lien release is clear and unambiguous – all rights to lien claims for work performed through June 2016 were waived and released. Plaintiff's reliance on *Leonard E. Riedl Constr., Inc. v. Homeyer* (105 AD3d 1391 [4th Dept 2013], is inapposite as in that case the Fourth Department found that the plaintiff had not waived its right to pursue a claim for breach of contract. Critically, however, the plaintiff in *Leonard* did not pursue a lien foreclosure action. Furthermore, Fourth Department held that a lien waiver will not be deemed a general release of all contractual liability where a waiver form purports to acknowledge that no payments are owed, but subsequent payments are made (*see id.*). Unlike in *Leonard*, the lien waiver in the instant action does not purport to acknowledge that no further payment is due, only that plaintiff waived its right to lien the project. Thus, payments plaintiff

received after the date of the lien waiver is not conduct in contravention of the lien waiver. Therefore, the branch of defendants' motion to dismiss the first cause of action is granted.

II. Second Cause of Action: Damages Against Sureties

Defendants move to dismiss plaintiff's second cause of action for damages against the Sureties alleging that "[p]laintiff duly provided notice of claim to [the Sureties] pursuant to the payment bond(s)", "[the Sureties] and /or the [the Joint Venture] are jointly and severally liable to plaintiff", "and [the Sureties] have failed to make payment, although demand for payment has been duly made by plaintiff." (Seiden affirmation, exhibit A [Complaint]). Defendants argue that the Subcontract provides that plaintiff must litigate its lien foreclosure action to finality before it can commence a suit against the Joint Venture or the Sureties. During oral argument, defendants' counsel noted that, "the [Subcontract] says if you pursue your lien, you have to completely and get a judgment under that lien in order to – before you can proceed on any causes of action . . ." (Oral Argument tr at 7). Plaintiff argues that according to the Subcontract itself, nothing within the Subcontract waives or abrogates plaintiff's rights to file claims against the Joint Venture or the Sureties. During oral argument, plaintiff's counsel noted that "[the] [s]econd cause of action is a payment bond claim. . . . [T]he [Subcontract language specifically addresses the resolution of a mechanic's lien issue. That's a separate cause of action . . . [u]nrelated to a mechanic's lien" (Oral Argument tr at 25). During oral argument, defendants' counsel conceded that the Court's dismissal of the first cause of action would effectively bring the resolution of the mechanic's lien to finality and require denial of the branch of this motion seeking dismissal of the second cause of action (Oral Argument at 45-46).

Article IV of the Subcontract states, "[i]n the event that Subcontractor files a claim against any or all of Turner/STVs sureties, **Subcontractor agrees to stay any proceedings**

against Turner/STVs sureties pending the resolution of its mechanic's lien action to finality in the courts, including collection therefrom." (Seiden affirmation, exhibit A at 2 [emphasis added]). In light of dismissal of plaintiff's lien foreclosure cause of action, defendants' motion to dismiss the claim against the Sureties is denied as finality has been reached in the prosecution of the mechanic's lien.

III. Third Cause of Action: Breach of Contract as against Joint Venture

Defendants move to dismiss plaintiff's third cause of action for breach of contract against the Joint Venture for "failing to pay the balance of $3,271,436.08 for work, labor, services, and materials provided by plaintiff for the [] [p]roject" (Complaint, ¶ 43). Defendants argue that because plaintiff failed to follow contractually required alternate dispute resolution (ADR) procedures in the Subcontract and Prime Contract, plaintiff's claims for breach of contract as well as lien foreclosure are premature and should be dismissed. During oral argument, defendants' counsel stated that, "[defendant] was required to put that incorporated language into its contract by the City. The [G]eneral [C]onditions were created by the city as part of the contract package that went out with the bids" (Oral Argument tr at 12). Defendants' counsel's position was that in order for plaintiff to recover, plaintiff needed to go through the ADR procedure set forth in the contract documents (*see id.*). Plaintiff argues that it did not fail to comply with ADR procedures and that ADR provisions are not expressly incorporated in the Subcontract. During oral argument plaintiff noted that the ADR provisions and the intent "must be clear," and "all of these references in this agreement between plaintiff and defendant to the city's contract has no relevance here" because the clause was incorporated by reference (*id.* at 27).

An agreement to participate in ADR may be incorporated by reference into a subcontract, provided the reference clearly shows the parties' intention (*see Navillus Tile, Inc. v Bovis Lend Lease LMB, Inc.*, 74 AD3d 1299, 1302, [2d Dept 2010]; *Matter of Aerotech World Trade Ltd. v Excalibur Sys.*, 236 AD2d 609, 611 [2d Dept 1997]). A plaintiff's failure to comply with ADR provisions within a contract provides grounds for dismissal of a complaint (*see Laquila Construction Inc. v New York City Tr. Auth.*, 282 AD2d 331, 331 [1st Dept 2001]; *see also JCH Delta Contr., Inc. v City of New York*, 44 AD3d 403, 404 [1st Dept 2007] [upholding "[d]ismissal of plaintiff's causes of action seeking damages for extra and disputed work . . . since the claims were not timely submitted for review pursuant to the exclusive, alternative resolution procedures set forth in the parties' contract"]; *Excel Group, Inc. v New York City Tr. Auth.*, 28 AD3d 708, 710 [2d Dept 2006] [finding plaintiff could not pursue other remedy as "plaintiff was required to pursue the [alternative dispute] resolution procedure" in the contract]).

Article II of the Subcontract provides the following:

> "The parties recognize that problems and disputes between them may occur and that it is preferable for them to reach an amicable resolution of same without the need to resort to formal dispute resolution procedures. In that regard, they each pledge to participate in good faith in voluntary and non-binding Alternate Dispute Resolution (ADR) procedures. However, in the event that such disputes are not resolved by mediation or another non-binding ADR procedure as Turner/STV and the Subcontractor may agree then such disputes shall be resolved, where applicable, as provided in Article 2 of the General Conditions or according to law. Furthermore, the Subcontractor agrees that Turner/STV shall have the exclusive right to join the Subcontractor as a party in any dispute resolution procedure (including without limitation ADR procedures, binding arbitration or other judicial or non-judicial proceeding) between the Owner and Turner/STV, together with such other subcontractors or parties as may be appropriate, where in the judgment of Turner/STV the issues in dispute are related to the work or performance of the Subcontractor. Furthermore, the Subcontractor expressly agrees to waive its right to trial by jury in case the dispute is to be resolved in litigation"

(Seiden affirmation, exhibit A at 1). The Subcontract expressly incorporates the Prime Contract, and article II specifically incorporates Article 2 of the General Conditions (*see id.*). The General

Contract "is subject to the Rules of the Procurement Policy Board of the City of New York" (PPB) (Seiden affirmation, exhibit B at 4). The General Conditions require plaintiff to (1) submit claims by Notice of Dispute; (2) submit denied claims for review by the Commissioner of the DDC; (3) obtain review of the Commissioner's decision by the Comptroller of the City of New York; and (4) obtain review of the Comptroller's decision by submission to the Contract Dispute Resolution Board (CDRB) for final review and determination (Seiden affirmation, exhibit D at 22-25). The CDRB decision will be final and binding on all parties and is only subject to challenge through an Article 78 proceeding in a court of competent jurisdiction in the State of New York (*see id*).

Plaintiff commenced this proceeding prior to submitting to ADR as delineated in the Subcontract. Thus, plaintiff's claims have not reached final determination, and to date plaintiff has not commenced an Article 78 proceeding challenging denial of any of its claims. Plaintiff "freely and knowingly accepted an ADR solution for its disputes with [defendants] by contract . . . . It cannot accept the whole contract, except for a part it later chooses not to accept. . . . That is part of the calculated business risk [plaintiff] undertook" (*Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47, 55 [1993]). In *Beys Specialty Inc. v STV Inc.* (Sup Ct, NY County, May 2, 2016, Kornreich J, index no. 652827/14), which plaintiff cited during oral argument, the court found that the plaintiff "was aware of [the] article [that designated arbitration of claims] and understood its implications and risks before entering into the [s]ubcontract" and saw "no reason why it should relieve plaintiff of the [ADR] provision now." Therefore, plaintiff's third cause of action for breach of contract is dismissed as premature because of plaintiff's failure to comply with the ADR provisions of the Subcontract.

Navillus Tile, Inc. is inapposite. In that case, the Appellate Division held that the subcontractor was not required to submit to ADR under the PPB Rules because the contract at issue did not expressly incorporate the PPB Rules (*see Navillus Tile, Inc.,* 74 AD3d at 1302). In the instant action, the Subcontract expressly incorporates the PPB Rules through the General Conditions (*see* Seiden affirmation, exhibit A at 1).

Plaintiff's reliance on *Matter of C/S Window Installers v New York City Dept. of Design Constr.* (304 AD2d 380, 380 [1st Dept 2003]) is misplaced. In that case, the First Department found that the PPB rules did not apply to the subcontractors in that action, but in the instant action the City required the Joint Venture to include ADR provisions of the PPB rules into the Joint Venture's subcontracts. The Subcontract expressly incorporates the PPB rules; thus, plaintiff must comply with them. Additionally, nothing prevents the incorporation of PPB rules into a subcontract (*see Navillus Tile, Inc.,* 74 AD3d at 1302).

Plaintiff further argues that obligating plaintiff to follow the ADR provisions would result in the loss of plaintiff's lien law rights, which are procedures and requirements not found in the Lien Law. A contract clause requiring exhaustion of ADR remedies is enforceable as it does not indefinitely suspend a contractor's right to enforce its mechanic's lien (*see Inter Metal Fabricator, Inc. v HRH Constr. LLC*, 44 AD3d 488, 488 [1st Dept 2007] [finding that "[a]lthough plaintiff contends that the clause requiring exhaustion of Lien Law remedies is unenforceable, the provision . . . does not offend the prohibition against indefinitely suspending a contractor's right to enforce its mechanics' liens"]). Therefore, the ADR provisions do not restrict plaintiff's right to lien the project and, as previously discussed, plaintiff waived its right to lien the project.

Accordingly, the third cause of action as against Joint Venture for breach of contract is dismissed.

CONCLUSION

Accordingly, it is hereby

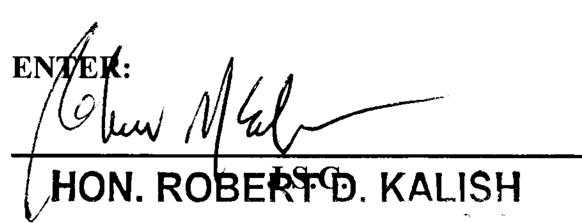
ORDERED that defendants' motion to dismiss is granted only to the extent of dismissing the first cause of action for lien foreclosure and the third cause of action for breach of contract; and it is further

ORDERED that defendants shall serve a copy of the instant order with notice of entry upon plaintiff within five (5) days of the date of filing of the instant order; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of the order with notice of entry.

Dated: May 6, 2019

ENTER:



HON. ROBERT D. KALISH
J.S.C.