SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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APA GROUP, INC.,

Plaintiff, Decision and order

- against - Index No. 518556/18

mS # 3

HARWAY TERRACE, INC.,

Defendant, May 22, 2019

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement on the grounds there are no questions of fact it is owed payment under two contracts. The defendant opposes the motion arguing significant questions of fact exist. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff and the defendant executed two contracts wherein the plaintiff contracted to perform construction work at two locations. The plaintiff has sued arguing they are owed significant sums and the plaintiff has now moved seeking summary judgement.

Conclusions of Law

Summary Judgment may be granted where the movant establishes sufficient evidence which would compel the court to grant judgment in his or her favor as a matter of law (Zuckerman v.

City of New York, 49 NY2d 997, 427 NYS2d 998, [1980]). Summary Judgment would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

It is well settled that a motion for summary judgement should generally not be granted before any discovery has taken place (Fazio v. Brandywine Realty Trust, 29 AD3d 939, 815 NYS2d 470 [2d Dept., 2006]). This is especially true where discovery is necessary to ascertain whether the plaintiff can establish the allegations contained in the complaint and whether the defendant can establish any valid defenses (see, generally, Manufacturer's and Trader's Trust Company v. Norfolk Bank, 16 AD3d 467, 791 NYS2d 599 [2d Dept., 2005]). Thus, a summary judgement motion filed prior to any discovery should be denied as premature (Amico v. Meliville Volunteer Fire Company Inc., 39 AD3d 784, 832 NYS2d 813 [2d Dept., 2007]), with leave to renew following the completion of all discovery (Zafarani v. Salton/Maxim Housewares, Inc., 18 AD3d 651, 795 NYS2d 633 [2d Dept., 2005]). The plaintiff argues the motion is not premature because the unambiguous terms of the contract demand summary judgement.

First, there is no merit to the argument "there is an issue of fact as to which contract applies and/or exists" (see, Affirmation in Opposition, ¶7). The parties executed two contracts, one dated March 21, 2017 concerning property located

at 2475 West 16th Street in Kings County and the other dated February 23, 2017 concerning property located at 2483 West 16th Street in Kings County. Both contracts state on the very first page that "AIA Document A201-2007, General Conditions of the Contract for Construction, is adopted in this document by reference" (id). Further, reference is made to AIA Document A201-2007 in Section 5.1.6(1) and (4), Section 5.1.7(1), Section 5.2.1, Section 6.1, Section 6.2, Section 7.1, Section 7.2, Section 8.1, Section 9.1.2, Section 9.1.7 and Section 10 of the executed contracts. Thus, clearly, both parties understood and contracted that AIA Document A201-2007 would be incorporated within the contracts executed. Therefore, there can be no question of fact regarding the governing provisions of the two contracts. They are undisputably the provisions of the actual contracts signed as well as the provision of AIA Document A201-2007.

The defendant further argues there are questions of fact whether the plaintiff also breached their agreements excusing performance by the defendant. The plaintiff counters that even if true that any breaches occurred "there is no exception under the AIA contracts nor New York law permitting Harway to evade its payment obligations without formal nullification" (see, Reply Affirmation, ¶55).

The AIA Document A201-2007 in Section 9.4.1 states that when a request for payment is presented to the architect then the architect will make payment "or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Section 9.5.1" (id). Section 9.5.1 provides two distinct reasons for withholding payment. First, the section states the architect may withhold a certificate of payment if in the architect's opinion the representations required cannot be made. Section 9.5.1 then provides for a reconciliation mechanism where the amount owed can be agreed upon and if an agreement cannot be reached the architect may issue payment based upon the amount in which the architect may make such representations to the owner. Section 9.5.1 then states "the Architect may also withhold a Certificate of Payment...to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible" (id). The section then lists seven acts or omissions which could permit such withholding of payment. While it is true that no evidence of a formal writing mandated by Section 9.4.1 has been presented, that does not mean the plaintiff is entitled to payment if plaintiff also breached the contracts.

Thus, there are factual questions whether the plaintiff likewise breached the contracts by failing to conduct the work in a timely and efficient manner. The plaintiff asserts that "there is no exception under AIA contracts nor New York law permitting Harway to evade its payment obligations without formal nullification" (Affirmation in Reply, ¶ 55). As noted, the contracts did require written notice, however, that failure does not mean the plaintiff is entitled to summary judgement. On the contrary, that failure could possibly have resulted in damages since the very next section of the agreement, Section 9.5.2 states that "when the above reasons for withholding certification are removed, certification will be made for amounts previously withheld" and such notification could have helped to resolve any disputes between the parties. Of course, that issue as well as many other factual issues require the denial of summary judgement so that the parties can engage in discovery and narrow the scope of the fault of the parties, if any.

Therefore, based on the foregoing, the motion seeking summary judgement is denied.

So Ordered.

ENTER:

DATED: May 22, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC