

551 West 161st St. Lender LLC v Skygate 010 LLC
2019 NY Slip Op 32172(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 850191/2017
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 850191/2017

551 WEST 161ST STREET LENDER LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 003 004

- v -

SKYGATE 010 LLC, HEZI TORATI, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, NEW YORK
CITY DEPARTMENT OF FINANCE, AC PENGUIN
PRESTIGE CORP., ADMIRAL AIR CONDITIONING CORP.,
MARJAM SUPPLY CO. INC., NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, JOHN DOE #1
THROUGH JOHN DOE #12,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 159, 160, 161

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 162, 163, 164, 165, 166, 167, 169, 170, 171, 172, 173

were read on this motion to/for SEVER ACTION

Motion Sequence Numbers 003 and 004 are consolidated for disposition.

The motion (MS 003) by defendant Skygate 010 LLC (“Skygate”) to dismiss co-defendant AC Penguin Prestige Corp.’s (“Penguin”) cross-claims and discharging its purported mechanic’s lien is granted in part and denied in part. The motion (MS 004) by Penguin to sever its causes of action is granted in part and denied in part.

Background

In this commercial foreclosure case, plaintiff seeks to foreclose on a property owned by Skygate located at 551 West 161st Street in Manhattan. Penguin brought cross-claims against Skygate related to its work as a contractor on the side—Penguin claims it was hired to supply

labor and materials. Penguin brought claims for foreclosure of its mechanic's lien, breach of contract, quantum meruit, unjust enrichment and fraud.

Skygate moves to dismiss Penguin's cross-claims on the ground that Penguin did not comply with a Court order. Penguin previously moved for leave to compel acceptance of its late answer and cross-claims. In its decision granting that cross-motion, the Court directed Penguin to file an answer within 20 days. Skygate claims that Penguin never did that. Skygate also claims that the mechanic's lien claim should be dismissed because Penguin did not comply with the Court's order and did not allow Penguin to file cross-claims.

In opposition, Penguin points out that it filed an answer in November 2017 and the Court granted Penguin the right to serve that late answer in July 2018. Penguin claims that Skygate is embracing form over substance because Skygate is seeking to dismiss on the ground that Penguin "should have pointlessly re-filed the [answer]" after the Court's decision. Penguin insists that its cross-claims were included in its initial answer and that the Court did not prohibit Penguin from raising cross-claims. Penguin contends it performed air conditioning work at the job site and it was not paid in full.

Discussion

On a motion to dismiss, a Court must "accept as true the facts as alleged in the complaint and accord plaintiff [] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Epiphany Community Nursery School v Levey*, 171 AD3d 1, 4, 94 NYS3d 1 [1st Dept 2019] [internal quotations and citations omitted]).

As an initial matter, the Court rejects Skygate's claim that Penguin's answer should be dismissed because Penguin failed to re-upload its answer. The fact is that this is an e-filed case and Penguin uploaded an answer with cross-claims in November 2017 (NYSCEF Doc. No. 52). After notices of rejection were filed, Penguin cross-moved to compel late acceptance of the answer and attached the proposed answer with cross-claims as an exhibit (NYSCEF Doc. No. 63). This Court is not going to dismiss Penguin's case because it failed to re-upload a document that was previously filed multiple times.

The Court also denies Skygate's claim that Penguin was only permitted to answer and not allowed to pursue cross-claims. That is not supported in the Court's decision. And it is not a surprise that Penguin wanted to pursue cross-claims against Skygate given that Penguin's initial answer included those cross-claims. Simply put, there is no prejudice to considering Penguin's claims against Skygate on the merits.

Skygate also moves to dismiss Penguin's cross-claims on the merits. Accordingly, the Court must consider whether Penguin has stated causes of action to foreclose on a mechanic's lien, breach of contract, quantum meruit, unjust enrichment and fraud.

Mechanic's Lien

This cause of action is severed and dismissed because it constitutes a junior lien against the property. In this foreclosure action, the first mortgage (plaintiff's interest) takes priority and when a judgment is entered, it will foreclose all junior liens against the property (including Penguin's mechanic's lien). Plaintiff has already submitted an unopposed motion for a judgment of foreclosure and sale (*see* NYSCEF Doc. Nos. 98-122 [Motion Sequence 002]). There is no point in permitting Penguin to pursue this cause of action.

However, that does not prevent Penguin from seeking to recover surplus monies if the property is sold for more than the amount due to plaintiff. The precise amount Penguin would receive (if any) is to be determined at a surplus monies proceeding before a referee, assuming that Skygate continues to object to Penguin's claim.

Breach of Contract

Skygate moves to dismiss the breach of contract action. That branch of the motion is denied. Penguin claims it had an agreement with Skygate for labor, work, materials, equipment and services and Skygate refused to pay. That states a cause of action for breach of contract.

Quantum Meruit/ Unjust Enrichment

These claims also remain. Skygate claims that there was no contract. Therefore, Penguin is permitted to plead quasi-contract theories of recovery in the event that there is a finding that there was no contract. Penguin claims it provided services to Skygate and was not paid in full.

Fraud

Penguin alleges in its cross-claim for fraud that Torati (principal of Skygate) represented himself as an attorney and that Penguin paid Torati \$4,000 as a retainer for legal work. Penguin alleges that it later found out that Torati was not an attorney and demanded the money back, but Torati refused. This states a cause of action for fraud against Torati. If, as Penguin alleges, he misrepresented his status as an attorney in order to induce Penguin to pay him a retainer, then Penguin has a valid fraud claim.

Claims Against Torati

The Court observes that Penguin alleged the breach of contract, quantum meruit and unjust enrichment cross-claims against *both* Skygate and Torati. The Court declines to dismiss these causes of action against Torati because Penguin alleges that both Skygate and Torati were

involved. Penguin argues that Torati personally benefitted and that it is not seeking recovery through a *veil piercing* theory at this stage of the litigation. Penguin contends that Torati made the deal, failed to make payments and used different corporate entities to try and shield himself from liability.

At this stage of the case, the Court must accept Penguin's allegations as true and, therefore, these claims must proceed to discovery. That process may reveal that Torati was only acting through Skygate and that he is not personally liable for the purported agreement with Penguin. Alternatively, it might also show that Torati made the deals personally or that he used different corporate entities to hide from liability.

Motion to Sever

The motion to sever is granted to the extent that the causes of action for breach of contract, quantum meruit, unjust enrichment and fraud shall continue under a separate index number. As stated above, once plaintiff is awarded a judgment of foreclosure and sale, this case will be marked disposed. Therefore, severance is appropriate so that Penguin can pursue its claims against Skygate.

Accordingly, it is hereby

ORDERED that the motion (MS 003) to dismiss by defendant Skygate 010 LLC is granted only to the extent that AC Penguin Prestige Corp.'s cross-claim to foreclose a mechanic's lien is severed and dismissed and denied as to the remaining branches of the motion; and it is further

ORDERED that the motion (MS 004) by AC Penguin Prestige Corp. to sever its cross-claims is denied to the extent that it may not pursue its mechanic's lien cross-claim and granted to the extent that it may pursue its breach of contract, quantum meruit, unjust enrichment and

fraud claims in a separate plenary action and AC Penguin Prestige Corp. is directed to purchase a new index number, file an RJI and commence a new action in accordance with the instant decision on or before August 30, 2019.

7/8/19

DATE

HON. ARLENE P. BLUTH

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