Detection Control Sys. Inc. v Colliers Tri-State Mgt. LLC
2019 NY Slip Op 33637(U)
December 9, 2019
Supreme Court, New York County
Docket Number: 654129/2018
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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DETECTION CONTROL SYSTEMS INC.,

Plaintiff,

- v -

COLLIERS TRI-STATE MANAGEMENT LLC D/B/A COLLIERS INTERNATIONAL,

Defendant.

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INDEX NO. 654129/2018

MOTION DATE 08/22/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30

were read on this motion to/for DISMISS.

Platzer, Swergold, Levine, Goldberg, Katz & Jaslow, LLP, New York, NY (Clifford Katz and Michael Giannini of counsel), for plaintiff.
Mohen Cooper LLC, Woodbury, NY (Thomas Mohen and Kenneth Kast of counsel), for defendant.

Gerald Lebovits, J.:

This action arises out of contracts to install and maintain fire-safety equipment at 492 First Avenue in New York County, a property owned by the City of New York. This property is used by the City Administration for Children's Services and is managed by defendant, Colliers Tri-State Management LLC. (*See* Compl., NYSCEF No. 1, at ¶ 9.) Non-party Firequench Inc. contracted with Colliers to provide fire-safety services for the property.

Firequench has assigned certain claims for payment under the contracts to plaintiff, Detection Control Systems Inc. DCS sued Colliers for payment; Colliers now moves to dismiss under CPLR 3211 (a) (1), (3), (5), (7), and (10).

Background

In 2007, Colliers, the City, and ACS entered into a contract for defendant to "manage, operate, and maintain the Property [492 First Avenue] . . . to the satisfaction of ACS" and to "comply with ACS' written requests and instructions related to the management, operation and maintenance of the Property." (NYSCEF No. 10, at 1.) In addition to a management fee paid by ACS to Colliers, ACS agreed to reimburse Colliers for the "actual expenses incurred by [Colliers] to provide the Building Management Services." (*Id.* at 2.)

In 2010, Firequench and Colliers entered into a contract to inspect, service, and certify fire-safety equipment at the property. (*See* NYSCEF No. 21.) The contract does not mention the City, ACS, or any relationship between them and Colliers. However, Colliers expressly told Firequench on multiple occasions by email that proposed work on the property required approval from the City and ACS. (*See* NYSCEF No. 7, at ¶ 17.) Those emails were sent by Irene Dunne of Colliers, property manager for the site; her email signature described her as "Property Manager, ACS/Colliers International." (*Id.* at ¶ 16.)

Firequench alleges that on March 2, 2016, Colliers wrote and sent Firequench a check for $7172.69, as partial payment for services rendered. (*See* NYSCEF No. 18, at ¶ 9.) On March 21, 2016, though, Colliers received a binder of approximately 200 invoices from Firequench for work performed on 492 First Avenue from 2008 to 2015. The binder's cover page is addressed to "NYC Administration for Children's Services c/o Colliers International." (*Id.* at ¶ 18.)

On March 22, 2016, Colliers disputed by email that the invoices represented valid outstanding amounts. The email also stated that as to invoices dated after July 1, 2015, Colliers would not pay the invoiced amounts regardless, because Colliers's contract with the City and ACS had expired. The email suggested that as to those invoices, Firequench's proper course was to seek reimbursement directly from ACS. (*See* NYSCEF No. 11, at 16.) On March 24, 2016, a Firequench employee replied to this email, suggesting that Irene Dunne had reviewed the invoices and stated that she would submit them to ACS for payment (and that ACS had no issue with the invoices). (*Id.* at 15.) Colliers immediately replied, again questioning the validity of the invoices, asking why Firequench had sent Colliers eight years worth of invoices at one time, and indicating that Colliers believed Firequench to have been paid in full. (*Id.* at 14.)

Firequench later assigned its claims to payment under those invoices to DCS. DCS sued Colliers, alleging that it is liable for the invoiced-but-unpaid services as 492 First Avenue's building manager. DCS has brought claims for breach of contract, account stated, and quantum meruit, seeking $435,468.47 plus interest. Collier now moves to dismiss.

Discussion

I. The Branch of Colliers's Motion to Dismiss Seeking Dismissal as Untimely All Claims that Accrued before August 18, 2012.

Colliers moves under CPLR 3211 (a) (5) to dismiss all of DCS's claims to the extent that those claims are premised on services rendered before August 18, 2012. In evaluating a motion to dismiss under this rule, this court must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Faison v Lewis*, 25 NY3d 220, 224 [2015] [quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [alteration in *Faison*].)

Here, DCS's contractual claims are governed by CPLR 213 (2), which imposes a six-year limitations period for "action[s] upon a contractual obligation or liability." DCS filed its complaint on August 17, 2018. DCS does not dispute that absent tolling, its action is time-barred as to all claims for services rendered before August 17, 2012.

Instead, DCS argues that Colliers's alleged March 2, 2016, payment for services rendered tolled the running of the statute of limitations. (*See* NYSCEF No. 26.) A partial payment of a debt, though, is not alone enough to toll the statute of limitations. Rather, the creditor must also provide evidence that the partial payment was for an admitted debt, that the creditor accepted it as such, and that surrounding circumstances constituted an "absolute and unqualified acknowledgment by the debtor of more being due." (*Flynn v. Flynn*, 175 AD2d 51, 51 [1st Dept. 1991] [internal quotation marks omitted].)

DCS asserts that an *undated* certification by Irene Dunne, property manager for Colliers, constitutes the requisite acknowledgment. (*See* NYSCEF No. 26, at 8.) But the certification says at most that Dunne "duly acknowledge[s] that Firequench . . . provided additional services and repairs" related to the fire alarm system "above and beyond their contractual agreement," that Dunne had received invoices for these services, and that she "submitted [the invoices] to the appropriate persons for payment." (NYSCEF No. 25.) The certification does not mention the alleged March 2, 2016, payment, or otherwise indicate on its face that the alleged payment was made in partial satisfaction of an obligation to pay for the "additional services" referenced in the certification. (*See id.*)

The certification also is not an "absolute and unqualified acknowledgment" that Colliers owed the additional sum that DCS now pursues: it does not describe the number, date, scope, or aggregate amount of the invoices that Firequench apparently provided to Dunne. (*Compare Banco do Brasil S.A. v State of Antigua & Barbuda*, 268 AD2d 75, 77 [1st Dept. 2000] [holding that a debtor had acknowledged that more was due by a letter that referred to a loan agreement and "'confirm[ed] four balances, namely, the original loan amount, accrued interest, past-due interest, and, adding up the first three balances, the total amount"] [internal quotation marks omitted].) And Dunne's statement that she submitted Firequench's invoices "to the appropriate persons for payment" does not on its face necessarily commit Colliers to paying those invoices, much less commit Colliers necessarily to paying the invoices that Dunne submitted "to the appropriate persons" within the company.

DCS has not met its burden to establish that its assignor Firequench received partial payment of an admitted debt so as to toll the statute of limitations. Any claims arising from services performed before August 18, 2012, are time-barred.

II. The Branch of Colliers's Motion to Dismiss Seeking Dismissal of DCS's Unjust Enrichment Claim

Colliers asserts that DCS's cause of action for unjust enrichment, to the extent it arises from services rendered on or after August 18, 2012, is subject to dismissal under CPLR 3211 (a) (7) as duplicative of DCS's contract claim. (*See* NYSCEF No. 6, at 20.) This court disagrees. Colliers's only argument on this point is that the two claims seek the same relief based on the same circumstances. (*See* NYSCEF No. 6, at 16-17.) As DCS contends, however, contract and unjust-enrichment claims may be pleaded in the alternative if there is a bona fide dispute about the existence of a contract. (*See Foster v Kovner*, 44 AD3d 23, 29 [1st Dept 2007].) Here, Colliers's March 24, 2016, email to Firequench hotly disputed whether many of the invoices

even related to additional services performed by Firequench at all. (*See* NYSCEF No. 11, at 14.) Nor does the court understand Colliers to have since conceded that a valid contract existed between the parties for the provision of the invoiced services. On this record, and at this stage of the action, DCS's alternative claim for unjust enrichment (to the extent it is timely) is not subject to dismissal as duplicative.

III. The Branch of Colliers's Motion to Dismiss Seeking Dismissal of All Claims for Failure to Serve a Necessary Party

Colliers also argues that all of DCS's timely claims should be dismissed for the independent reason that DCS has failed to join a necessary party, namely the City of New York. Under CPLR 1001, "a person should be joined in an action or proceeding where necessary 'if complete relief is to be accorded between the persons who are parties' thereto or where the person to be joined 'might be inequitably affected by a judgment' therein." (*Mahinda v Bd. of Collective Bargaining*, 91 AD3d 564, 565 [1st Dept. 2012] [quoting CPLR 1001 (a)].)

In the circumstances of this case, the City is a necessary party. Colliers is entitled to reimbursement from the City for expenses incurred in the performance of Colliers's work under the contract between Colliers, ACS, and the City. If DCS succeeds on some or all its remaining claims in this case, Colliers could be entitled to additional reimbursements from the City under the contract. Since resolution of this case may affect the City's substantial rights, it should be joined as a party. Joinder of the City would have the additional benefit of ensuring that any potential dispute between Colliers and the City over the reimbursement of additional payments by Colliers to DCS could go forward as a cross-claim in this action, rather than requiring commencement of a new plenary action. (*See City of New York v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979] [noting that the necessary-party rule "serves judicial economy by preventing a multiplicity of suits, and ensures "fairness to third parties who ought not to be prejudiced or embarrassed by judgments purporting to bind their rights or interest where they have had no opportunity to be heard"] [internal quotation marks omitted].) And indeed, at oral argument DCS conceded that the City is a necessary party to this case.

Under CPLR 1001 (b), "[w]hen a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned." DCS does not suggest that the City of New York is not amenable to this court's jurisdiction. DCS must serve and file an amended complaint naming the City as a party defendant within 30 days from service of notice of entry. (*See Williams v Somers*, 91 AD2d 545, 546 [1st Dept 1982] [imposing this remedy].)

Accordingly, it is hereby

ORDERED that the branch of Colliers's motion to dismiss as time-barred DCS's claims arising from services provided before August 18, 2012, is granted, and those claims are dismissed; and it is further

ORDERED that the branch of Colliers's motion to dismiss as duplicative DCS's cause of action for unjust enrichment is denied to the extent that the cause of action is premised on services alleged to have been provided on or after August 18, 2012; and it is further

ORDERED that the branch of Colliers's motion to dismiss DCS's action for failure to join a necessary party is denied; and it is further

ORDERED that DCS shall serve an amended complaint joining the City of New York as a party defendant within 30 days of service of a copy of this order with notice of its entry.

12/9/19
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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