

Everlast Drywall Constr., Inc. v Safeco Ins. Co. of Am.

2020 NY Slip Op 31172(U)

January 28, 2020

Supreme Court, Albany County

Docket Number: Index No. A00455/2014

Judge: Roger D. McDonough

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ALBANY

EVERLAST DRYWALL CONSTRUCTION, INC.,

Plaintiff,

AMENDED¹

DECISION AND ORDER

Index No.: A00455/2014

RJI No.: 01-17-124854

-against-

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant.

(Supreme Court, Albany County All Purpose Term)

Appearances:

LAW OFFICE OF CARL J. DEPALMA
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Auburn, New York 13021

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Breidenbach, Esq., of Counsel)
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Jericho, New York 11753-2702

Roger D. McDonough, J.:

Defendant seeks dismissal of the complaint based on the statute of limitations and/or plaintiff's failure to state a cause of action. Alternatively, defendant seeks summary judgment in this matter. Plaintiff opposes defendant's motion in its entirety.

Background

¹ The amendment was necessary to correct a scrivener's error in the decretal paragraph of the Original Decision and Order.

Plaintiff had a contract with an entity known as DooleyMack Constructors of New York, LLC (“DooleyMack”). The contract called for plaintiff to be a subcontractor to DooleyMack on a project known as the “Westmere Fire District Project, Westmere Fire House Phase II”, (“the Project”). Plaintiff entered into the contract in April of 2011. DooleyMack was terminated from the Project on January 28, 2012. The record reveals that the latest that plaintiff could have performed work on the Project was January 28, 2012. Plaintiff filed a Mechanic’s Lien in February/March of 2012, wherein it indicated that payment under the contract with DooleyMack was already due. The plaintiff maintains that defendants were obligated to promptly pay all undisputed amounts due plaintiff under plaintiff’s contract with DooleyMack. Defendant, Safeco Insurance Company of America (“Safeco”) as surety, issued payment and performance bonds on behalf of DooleyMack.

Safeco entered into a Takeover Agreement with the Westmere Fire District wherein Safeco was to complete DooleyMack’s contract work. While Safeco hired certain of DooleyMack’s subcontractors back, plaintiff was not one of them. The instant action was commenced on June 25, 2014.

In prior motion practice, the Court dismissed the case as to three prior defendants and dismissed plaintiff’s initial sole cause of action. The Court also granted plaintiff’s motion to serve an amended complaint which set forth a new cause of action. This cause of action is the subject of the instant motion for dismissal/summary judgment.

Discussion

Plaintiff’s New Cause of Action

The cause of action is a claim by plaintiff on a payment bond issued on or about March 24, 2011 (“Bond”), pursuant to New York State Finance Law § 137. Defendant maintains that the cause of action is untimely and that the potentially applicable amendment to § 137 was not meant to be given retroactive application. Alternatively, defendant argues that summary judgment is warranted because plaintiff’s December 2012 bond claim: (1) is not in compliance with the Bond’s preconditions; and (2) the instant action was filed several months after the contractual statute of limitations.

Plaintiff argues that the defendant should be estopped from utilizing the statute of limitations defense. Additionally, plaintiff asks the Court to relate back to its prior decision and

strike defendant's answer based on their dilatory tactics regarding discovery in this matter. Finally, plaintiff argues that the amendment to § 137 should govern in this matter.

Statute of Limitations

Plaintiff stopped working on the Project no later than January 18, 2012. Further, plaintiff's Mechanic's Lien was filed on March 12, 2012. At that time, plaintiff had clearly demanded payment for all labor and materials provided during their work on the Project. Controlling case law from the Second Department indicates that the prior § 137 applies to this matter (*see, Clean Earth of North Jersey, Inc. v Northcoast Maintenance Corp.*, 142 AD3d 1032, 1036 [2nd Dept. 2016]). Specifically, the Court must consider the date when the Bond was issued in determining which version of the statute applies (*see, Id.*). The record reflects that the Bond was issued on or about March 24, 2011. This is obviously prior to the amended version of § 137. As such, plaintiff was obligated to commence this action no later than March 13, 2013. Because the action was not commenced until 2014, it must be dismissed on statute of limitations grounds.

Further, the Court again notes that plaintiff's estoppel theory is wholly without merit as there has not even been an allegation that defendants took any action to induce plaintiff to refrain from filing a timely action (*see, Kotecki's Grandview Grove Corp. v Acadia Insurance Company*, 158 AD3d 1306, 1307-1308 [4th Dept. 2018]). Finally, the Court finds no basis to reconsider its earlier decision related to plaintiff's request to strike defendant's answer.

The parties' remaining arguments and requests for relief have been considered and found to be lacking in merit and/or unnecessary to reach in light of the Court's findings.

Based upon the foregoing it is hereby


ORDERED that defendant's motion to dismiss is hereby granted in its entirety; and it is further

ORDERED that the parties are directed to appear for a Court conference on February 14, 2020 at 11:15 a.m. for the purpose of setting a final discovery scheduled and/or trial date on defendant's counterclaim.

This shall constitute the Decision and Order of the Court. The original decision and order is being returned to the counsel for defendant who is directed to enter this Decision and Order without notice and to serve plaintiff's counsel with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of the Decision and Order to the County Clerk. As this is an E-file matter, the Court will not provide the County Clerk with any hard copies of the motion papers. The signing of the Decision and Order and delivery of a copy of the Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER.

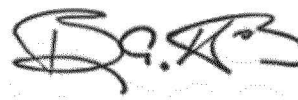
Dated: Albany, New York
January 28, 2020



Roger D. McDonough
Supreme Court Justice

01/29/2020

Papers Considered²:



1. Defendant's Notice of Motion, dated June 4, 2019;
2. Affirmation of Patricia A. Wager, Esq., dated June 4, 2019, with annexed exhibits;
3. Affirmation of Carl J. DePalma, Esq., dated August 2, 2019, with annexed exhibit;
4. Reply Affirmation of Patricia A. Wager, Esq., dated August 12, 2019.³

² Both parties submitted memoranda of law in support of their respective positions. Defendant submitted a reply memorandum as well.

³ Plaintiff's challenge to the timeliness of defendant's reply affirmation is wholly without merit.