New Era Mech. Corp. v Seneca Ins. Co., Inc.
2020 NY Slip Op 31760(U)
June 3, 2020
Supreme Court, Kings County
Docket Number: 520840/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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NEW ERA MECHANICAL CORP., ELECTRIC FIXX INC.,
on behalf of themselves and on behalf of all
persons entitled to trust funds received by
defendants in connection with project located
at 679 Van Sinderen Avenue, Brooklyn,
New York, Block 3850, Lot No. 5,
Plaintiffs, Decision and order

- against - Index No. 520840/19

SENECA INSURANCE COMPANY, INC.,
MACQUESTEN CONSTRUCTION MANAGMENT, LLC,
NEW VAN SINDEREN LOTS LLC, RELLA FOGLIANO,
"JOHN DOE No. 1" through "JOHN DOE No. 10",
defendants being fictitious and unknown to
plaintiffs but intended to be those parties
having or claiming an interest in or lien
upon the improvements known as 679 Van Sinderen
Avenue, Brooklyn, New York, Block 3850, Lot No.
5, and JANE DOE No. 1" though "JANE DOE No. 10",
defendants being fictitious and unknown to plaintiff
but intended to be parties liable for diversion
of trust assets pursuant to Article 3-A of the Lien Law,
Defendants, June 3, 2020
--x
PRESENT: HON. LEON RUCHELSMAN

MCM and Seneca have moved pursuant to CPLR §3211 seeking to dismiss the complaint on various grounds including the fact New Era is not a proper party and that Electric Fixx cannot maintain the action. New Era has moved pursuant to CPLR §3025 seeking to add Masterfund as a party and to remove Electric Fixx as a plaintiff or alternatively to dismiss the case without prejudice pursuant to CPLR §3217(b). The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the

following determination.

This lawsuit concerns a construction site located at 697 Van Sideren Avenue/180 New Lots Avenue in Kings County. MacQuesten Construction Management, LLC (hereinafter" MCM") a contractor entered into two contract with plaintiff New Era Mechanical Corp., a mechanical subcontractor on April 5, 2016. One was a plumbing contract and the other an HVAC contract. During June and July 2017 New Era executed twenty eight separate releases which released MCM from any claims. Two years later during July 2019 MCM fired New Era for the failure to adequately perform pursuant to the contracts. On July 24, 2019 New Era filed a Mechanic's Lien in the amount of $1.093,760.90 for work performed concerning the plumbing contract and two days later on July 26, 2019 filed a Mechanic's Lien for the the HVAC contract in an amount of $665,592. Moreover, on the same day New Era assigned both liens to an entity called Masterfund LLC. On October 7, 2019 MCM and defendant Seneca Insurance Company Inc., discharged both liens.

In addition, on March 10, 2017 MCM entered into a contract with Electric Fixx an electric subcontractor. Electric Fixx likewise executed releases which released MCM from any claims. MCM alleged Electric Fixx was not performing adequately and on June 29, 2019 served Electric Fixx with a notice to complete the work. A week later MCM served Electric Fixx with another notice

to complete the work. Upon Electric Fixx's inadequate response, Electric Fixx was terminated from the job site on July 10, 2019. On July 18, 2019 Electrix Fixx filed a Mechanic's Lien in the amount of $1,146,557.57. On August 6, 2019 MCM and Seneca filed a petition to discharge the lien upon the filing of a discharge bond pursuant to Lien Law §19(4). On September 25, 2019 Electric Fixx filed an additional lien in the amount of $980,757.92. On October 9, 2019 MCM and Seneca filed a discharge bond concerning the second lien.

New Era and Electric Fixx commenced this action alleging breach of contract, unjust enrichment, Foreclosure of Mechanic's Lien bonds, an Accounting of Trust Assets pursuant to Lien Law §77, unlawful diversion of Trust Assets pursuant to Lien Law §77. The above noted motions were filed.

Conclusions of Law

It is well settled that the court maintains discretion whether to grant a voluntary discontinuance of a litigation pursuant to CPLR §3217(b) (Tucker v. Tucker, 55 NY2d 378, 449 NYS2d 683 [1982]). That discretion includes the determination whether such discontinuance is granted 'without prejudice' (Valladares v. Valladares, 80 AD2d 244, 438 NYS2d 810 [2d Dept., 1981]). Generally, such discontinuance should be granted unless valid reasons, such as prejudice to the defendant, warrant denial

(id). Prejudice means the discontinuance would prejudice a substantial right of a party, circumvent an order of the court, avoid the consequences of a potentially adverse determination or produce some other improper result (Marinelli v. Wimmer, 139 AD3d 914, 30 NYS3d 571 [2d Dept., 2016]). Thus, in Catherine Commons LLC v. Town of Orangetown, 157 AD3d 785, 69 NYS3d 662 [2d Dept., 2018] the court denied the request for voluntary discontinuance since such discontinuance would prejudice a party's ability to challenge an assessment. Again in Baez v. Parkway Mobile Homes Inc., 125 AD3d 905, 5 NYS3d 154 [2d Dept., 2015] the court held discontinuance was improper where it was only pursued to avoid the consequences of failing to respond to a 90 notice and an adverse determination of a summary judgement motion filed.

The defendants assert they will suffer prejudice if the discontinuance is granted. Specifically, they assert the plaintiffs will delay the motion to dismiss and might indeed file two separate lawsuits. However, that is not a valid demonstration of prejudice. It is true that an inordinate delay seeking discontinuance can constitute prejudice (Brenhouse v. Anthony Industries Inc., 156 AD2d 411, 548 NYS2d 533 [2d Dept., 1989]) however, no such improper delay exists in this case. Nor is there any evidence the discontinuance is being sought to frivolously delay the litigation. Thus, the true prejudice presented by the defendants is simply one of delay. However,

"delay, frustration and expense in preparation of a contemplated defense do not constitute prejudice warranting denial of a motion for a voluntary discontinuance under CPLR 3217(b)" (Eugenia VI Venture Holdings Ltd., v. Maplewood Equity Partners L.P., 38 AD3d 264, 832 NYS2d 155 [1st Dept., 2007]).

The basis for the discontinuance is the acknowledgment that New Era is not a proper party and that Electric Fixx cannot, at this juncture, proceed with litigation. These are not substantive impediments which discontinuance could not remedy. Further, concerning the releases, New Era has presented facts which raise questions concerning the precise date of their applicability. Whether New Era or Masterfund LLC will be able to prevail upon those challenges does not mean there is prejudice in granting the voluntary discontinuance. Indeed, the same motion seeking to dismiss can likewise be filed against the proper parties to the action (see, Green Tree Servicing LLC v. Shiow Fei Ju, 182 AD3d 840, _NYS3d_, [3rd Dept., 2020]).

Therefore, based on the foregoing the motion seeking voluntary discontinuance without prejudice is granted. The motion of defendants seeking to dismiss is denied without prejudice.

So ordered. ENTER:

DATED: June 3, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC