A.A.D. Constr. Corp. v Apex Bldg. Group Inc.
2020 NY Slip Op 34041(U)
December 8, 2020
Supreme Court, Kings County
Docket Number: 523562/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
--x
A.A.D. CONSTRUCTION CORP.,
Plaintiff, Decision and order

- against - Index No. 523562/19

APEX BUILDING GROUP INC., APEX BUILDING COMPANY INC., & LIBERTY MUTUAL INSURANCE COMPANY
Defendants, December 8, 2020
--x
PRESENT: HON. LEON RUCHELSMAN

The defendant Apex Building Company has moved pursuant to CPLR §3211 seeking to dismiss the plaintiff's complaint on the grounds essentially there was no contract between the plaintiff and that entity. Apex Building Group has also moved seeking to dismiss the complaint on various grounds. The plaintiff opposes the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On July 22, 2015 Apex Building Group, a general contractor, entered into a contract with 306 West 148th LLC the owner of premises located at 306 West 148th Street in New York county to engage in construction work. On March 1, 2016 Apex Building Group entered into a contract with the plaintiff, a subcontractor, to perform certain work at the location. The plaintiff claims they performed work and were not paid $438,684.47 and filed a Mechanic's Lien against Apex Building Corp. for that amount. The plaintiff instituted this lawsuit and have alleged four causes of action, namely, breach of contract, quantum meruit, an account stated and

a discharge of the Mechanic's Lien bond. The defendants have filed the instant motion to dismiss arguing the causes of action fail to state any legitimate claim. The plaintiffs oppose the motion and have cross-moved seeking to amend the Mechanic's Lien filed.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

First, there has been no evidence presented that Apex Building Corp. is any way connected with this lawsuit. That entity did not enter into any contract with the plaintiff. The plaintiff concedes this but does note that both Apex Building Corp. and Apex Building Group operate from the same office and maintain the same officers. Notably, Lee Braithwaite is the chief executive officer of both entities. Thus, to the extent the plaintiff is arguing that the

two entities are really one and that obligations flowing from one are incumbent upon the other, a "heavy burden" of evidence must be presented (Etex Apparel Inc., v. Tractor International Corp., 83 AD3d 587, 922 NYS2d 315 [1st Dept., 2011]). The Second Department in explaining the definition of an 'alter ego entity' held that a party must demonstrate that one entity controls the "day to day" activities of the other (Constantine v. Premier Cab Corp., 295 AD2d 303, 743 NYS2d 516 [2d Dept., 2002]). The plaintiff has failed to present any evidence supporting the theory the two companies are really the same and therefore, the motion seeking to dismiss the complaint against Apex Building Corp. is granted in all respects.

It is well settled that a condition precedent is an "act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (Oppenheimer & Company Inc., v. Oppenheim, Appel, Dixon and Co., 86 NY2d 685, 636 NYS2d 734 [1995]). Thus, a condition precedent is an act or an event that must occur before the obligations of the parties become operative. If such condition is not fulfilled then the parties are excused from performing under the contract. For example where a broker maintains a contract for the commission of a fee upon closing of title a condition precedent to the contract requires the title actually close (Levy v. Lacey, 22 NY2d 271, 292 NYS2d 455 [1968]). Generally, it is for the court to decide whether a term of a contract is in fact a condition

precedent (Rooney v. Slomowitz, 11 AD3d 864, 784 NYS2d 189 [3rd Dept., 2004]). It must be clear from the contract itself the parties intended a provision to operate as a condition precedent (Kass v. Kass, 235 AD2d 150, 663 NYS2d 581 [2d Dept., 1997]). Therefore, if there ambiguity in the language such language will not be treated as a condition precedent (id).

Article §6.1 of the contract between Apex Building Group and the plaintiff states that "as a condition precedent to Subcontractor asserting a claim of any nature whatsoever" the subcontractor must first notify the defendant of the claim and provide all documentation in support of such claim. Article §6.3 of the contract states that "any claim or dispute arising out of or related to this Subcontract...shall be subject to non-binding mediation as a condition precedent to either party utilizing a binding dispute resolution method" which the next article defines as the Supreme Court of New York County or the County where the project is located.

Black's Law Dictionary defines a 'claim' as "a statement that something yet to be proved is true" and secondly "the assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional" (id). The conventional definition is not materially different. Webster's New Collegiate Dictionary (9th edition) defines 'claim' as "to ask for esp. as a right...to assert in the face of possible contradiction...a demand

for something due or believed to be due" (see, In re Interstate Stores Inc., 830 F2d 16 [2d Cir. 1987]). Clearly, the parties unmistakably agreed to present all claims, of whatever nature, before non-binding mediation prior to engaging in litigation. There can be no dispute that allegations of non-payment of fees owed surely was contemplated by the parties and is encompassed by the broad scope of the agreement. There is also no dispute that the parties did not so engage in such mediation prior to this litigation. Therefore, the condition precedent outlined in the contract must be satisfied. Consequently, the causes of action must be dismissed.

To secure the plaintiff's right to any potential bond or mechanic's lien the dismissal is without prejudice and the plaintiff may commence a new action if the non binding mediation proves fruitless. It should be noted that since the project was located in New York County it appears that only New York County is the proper venue of any future lawsuit, notwithstanding the plaintiff's corporate address in Kings County.

The cross-motion seeking to amend the Mechanic's Lien is denied as premature.

So ordered.

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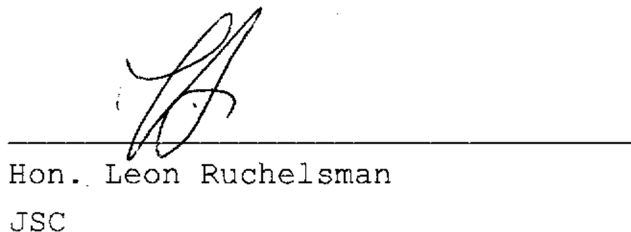

DATED: December 8, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC