

Extech Bldg. Materials, Inc. v The J Cos., LLC

2021 NY Slip Op 30194(U)

January 15, 2021

Supreme Court, Kings County

Docket Number: 504829/2018

Judge: Richard Velasquez

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of January 2021.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

-----X

EXTECH BUILDING MATERIALS, INC.,

Plaintiff,

-against-

Index No.: 504829/2018
Decision and Order
Mot. Seq. No. 4-6

THE J COMPANIES, LLC, SENATOR CONSRTUCTION GROUP, INC., AND WESTCHESTER FIRE INSURANCE COMPANY,

Defendants,

-----X

The following papers NYSCEF Doc #'s 276 to 315 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	58-68; 84-92; 95-98
Opposing Affidavits (Affirmations)_____	71-76; 85-92; 109-120
Reply Affidavits_____	99-108; 109-120

Upon the foregoing papers, defendant The J Companies LLC (J Companies) moves, pursuant to CPLR 3211 (a) (1) and (7), in motion (mot.) sequence (seq.) number (no.) four for an order dismissing the action and all cross claims asserted by defendant Senator Construction Group, Inc. (Senator) and awarding all attorney's fees and costs associated with preparing and filing the instant motion. Senator cross-moves, pursuant to CPLR 3025, in mot. seq. no. five, for an order granting leave to amend its verified answer with cross claims. Plaintiff Extech Building Materials, Inc. (Extech) moves,

pursuant to CPLR 2004, in mot. seq. no. six, for an order extending the time to file its note of issue.

Background

Extech commenced this action with the filing of a summons and complaint on March 9, 2018. The complaint alleges that Extech retained J Companies as a general contractor for certain construction work to be performed at 531 Myrtle Avenue in Brooklyn (premises); that J Companies later subcontracted with Senator for certain construction work at the premises; that Extech furnished various building materials to Senator for the construction project; and that J Companies and Senator subsequently failed to pay Extech \$62,379.06 due for these materials. Thereafter, Extech, on October 10, 2017, within eight months of the final work performance and the furnishing of building materials, filed a notice under the mechanic's lien law in the Kings County Clerk's Office. Extech now seeks to enforce the lien and obtain a judgment against J Companies and Senator for the amount due with interest; with a decree that the notice of lien was good and valid and that defendant Westchester Fire Insurance Company (Westchester Fire) pay it the amount of its lien with interest and expenses; and with Senator and J Companies being held liable for any deficiency.

J Companies subsequently filed an answer with various affirmative defenses. Westchester Fire moved, pre-answer, for an order dismissing the complaint, and after oral argument, Westchester Fire's motion was denied. Shortly thereafter, Westchester Fire filed an answer asserting various affirmative defenses and cross claims, sounding in indemnification and contribution, against Senator. Senator likewise appeared by filing an answer with various affirmative defenses and cross claims against J Companies for lien foreclosure, breach of contract and unjust enrichment.

J Companies now moves for an order dismissing the complaint and cross claims that Senator asserted; Senator moves for an order amending its answer; and Extech moves for an order extending the time to file its note of issue.

Cross Motion To Amend

Parties' Positions

Senator seeks to amend its answer to add three nonparties, The J1616 Construction Co., LLC (J1616), Clinton Hill Development I LLC and Clinton Hill Development II LLC, as additional defendants. Also, Senator seeks to assert various cross claims as against J1616 for lien foreclosure and breach of contract and to assert various cross claims for breach of contract and unjust enrichment as against Clinton Hill Development I LLC and Clinton Hill Development II LLC.¹

Discussion

“Leave to amend pleadings ‘shall be freely given’ absent prejudice or surprise resulting directly from the delay” (*Katz v Castlepoint Ins. Co.*, 121 AD3d 948, 950 [2d Dept 2014], quoting *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]; CPLR 3025 [b]). “No evidentiary showing of merit is required under CPLR 3025 (b). The court need only determine whether the proposed amendment is ‘palpably insufficient’ to state a cause of action or defense, or is patently devoid of merit” (*Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Further, “[a] court shall not examine the legal sufficiency or merits of [the proposed amended] pleading unless such insufficiency or lack of merit is clear and free from doubt” (see *Favia v Harley-Davidson Motor Co., Inc.*, 119 AD3d 836, 836 [2d Dept 2014] [internal citation omitted] [emphasis added]). “The party opposing the application has the burden of establishing prejudice, which requires a showing that the party has been hindered in the preparation of its case

¹ J Companies and nonparties Clinton Hill Development I LLC and Clinton Hill Development II LLC submit opposition to Senator’s motion to amend.

or has been prevented from taking some measure in support of [its] position” (*Lomeli v Falkirk Mgt. Corp.*, 179 AD3d 660, 664 [2d Dept 2020], . . . quoting *Loomis v Civetta Corinoro Constr. Corp.*, 54 NY2d 18, 23 [1981] [internal citation and quotation marks omitted]). “A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed” (*McIntosh v Ronit Reality, LLC*, 181 AD3d 579, 579 [2d Dept 2020] [internal citation and quotation marks omitted]).

Here, Senator’s relief, in its present form, is palpably improper and thus is denied. The proper procedural vehicle for a defendant to assert claims against nonparties is a third-party action commenced pursuant to CPLR 1007. CPLR 1007 specifically provides:

After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant, by filing pursuant to section three hundred four of this chapter a third-party summons and complaint with the clerk of the court in the county in which the main action is pending, for which a separate index number shall not be issued but a separate index number fee shall be collected. The third-party summons and complaint and all prior pleadings served in the action shall be served upon such person within one hundred twenty days of the filing. A defendant serving a third-party complaint shall be styled a third-party plaintiff and the person so served shall be styled a third-party defendant. The defendant shall also serve a copy of such third-party complaint upon the plaintiff's attorney simultaneously upon issuance for service of the third-party complaint on the third-party defendant.

The court has routinely held this is the proper mechanism to use for a defendant to seek relief from nonparties that may be liable to it for all or part of the plaintiff's claims (see generally *George Cohen Agency v Donald S. Perlman Agency*, 51 NY2d 358, 365-366 [1980]; *Qosina Corp. v C & N Packaging, Inc.*, 96 AD3d 1032, 1034-1035 [2d Dept 2012]; *Zurich Ins. Co. v White*, 129 AD2d 388, 390-391 [2d Dept 1987]). The procedures delineated in CPLR 1007 must be strictly followed as the court does not possess

jurisdiction over the nonparties before service of the summons. Hence, due process requirements must be met (*see generally* CPLR 1007; Siegel & Connors, NY Prac §§ 155 & 156 [6th ed 2018]) [Note: online treatise]. Accordingly, Senator's cross motion is denied as it is impermissibly brought as a cross motion to amend its answer.

Motion to Dismiss²

The Parties' Positions

J Companies, in support of its motion, presents the affidavit of David Brot, its managing member, and two contracts. Mr. Brot attests to the veracity and authenticity of the two proffered contracts related to the construction work occurring at the premises. The first contract is between Clinton Hill Development I LLC, the owner of the premises, and J1616, wherein Clinton Hill Development I LLC retained J1616 services as construction manager for various construction work to be performed at the premises (General Contract). The second contract is between Senator and J1616, wherein J1616 retained Senator as a subcontractor for roofing, water proofing, and vapor barrier work as part of the construction work being performed at the premises (Subcontract).

J Companies argues that the two fully executed contracts unequivocally prove that neither Extech's claims relating to its mechanic's lien or Senator's claims for lien foreclosure, breach of contract, and unjust enrichment can remain as the contracts clearly demonstrate that it was not involved in the construction project at the premises and has no legal relationship with either party. J Companies maintains that each contract unmistakably is executed by J1616, not J Companies, and that a cursory review of the appropriate documentation by Senator and Extech would have revealed this fact. J Companies contends that its inclusion in the present action is improper as it did not

² While J Companies' notice of motion and supporting paper make reference and include statements as to the standards for dismissal pursuant to CPLR 3211 (a) (7), the substance of J Companies' argument is exclusively related to the presentation of documentary evidence pursuant to CPLR 3211 (a) (1). Accordingly, the court shall only address J Companies' motion to dismiss pursuant to CPLR 3211 (a) (1).

contract to perform any work at the premises. Therefore, J Companies submits that all claims and cross claims against it must be dismissed pursuant to CPLR 3211 (a) (1).

In opposition, Extech argues that dismissal must be denied as J1616 held itself out as J Companies and that J1616 and J Companies, for all intents and purposes, are the same entity. Extech asserts that the two purported contracts fail to conclusively resolve either its claim or Senator's cross claims as both contracts make multiple references to J Companies. In addition, Extech asserts that Senator engaged in transactions with J Companies, not J1616, and proffers various documents to support its arguments including a document entitled "Change Order Request" on J Companies' letterhead. Extech thus maintains that J Companies is a proper party to the action as J1616, at a minimum, held itself out as J Companies. Accordingly, Extech contends that J Companies' proffered documentary evidence fails to utterly refute the allegations asserted in the complaint and in Senator's cross claims.

Senator likewise opposes J Companies' motion, arguing that J Companies acted as the general contractor for the construction project and none of the proffered contracts J Companies presented conclusively rebuts its allegations in its cross claims. Further, notwithstanding the documentary evidence, Senator asserts its unjust enrichment cross claim can exist even if its other cross claims as against J Companies are dismissed. Senator argues that it sufficiently alleges having provided services to J Companies and that J Companies received value for those services but never paid for those services. Senator thus asserts its unjust enrichment claim must survive regardless of the sufficiency of J Companies' documentary evidence.³

³ Senator, like Extech, proffers certain documentary evidence in opposition to J Companies and that documentary evidence was reviewed and considered.

J Companies, in reply, reiterates that Extech lacks privity with it and thus the action as pertaining to it must be dismissed. Similarly, J Companies again refers to the proffered documentary evidence, and asserts that the contracts relating to the construction project at the premises are clearly and unambiguously between J1616 and the respective entities, not J Companies. It argues that each contract is composed of hundreds of pages and, while there are references to J Companies in the contracts, J1616 unmistakably executed each contract. Further, J Companies contend that both the General Contract and Subcontract clearly identify J1616 as the construction manager. It further argues that it may not be brought into an action merely by virtue of being J1616's parent company. Thus, J Companies principally resubmits its initial arguments in its reply and asserts that none of the issues presented in Extech's or Senator's opposition warrants denying dismissal.

Discussion⁴

Where a defendant moves pursuant to CPLR 3211 "the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996 [2d Dept 2010] [internal citations omitted]). "To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019], quoting *Gould v Decolator*, 121 AD3d 845, 847 [2d Dept 2014]). To qualify as "documentary," the evidence must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn.*, 78 AD3d at

⁴ Both Extech's complaint and Senator's verified answer with cross claims lack any allegations that could be deemed sufficient to find claims for piercing the corporate veil (*see generally Pebble Cove Homeowners' Assn. v Fidelity N.Y. FSB*, 153 AD2d 843 [2d Dept 1989]).

996-997). “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010] [internal citations omitted]). “Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence” (*25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015]).

Senator’s Cross Claim for Breach of Contract

“The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach” (*Magee-Boyle*, 173 AD3d at 1159 [internal quotation marks and citations omitted]). Critically, to maintain an action for breach of contract against a defendant, that defendant must be party to the contract and bound by its terms (*Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965 [2d Dept 2019] [“[o]ne cannot be held liable under a contract to which he or she is not a party”]).

Here, the proffered Subcontract presented by J Companies clearly and unambiguously identifies the parties to the Subcontract as J1616 and Senator, not J Companies and Senator (NYSCEF Doc No. 67). Senator’s opposition fails to rebut the proffered Subcontract. Further, Senator’s proffered affidavit of Usman Ghumman, its president, affirmatively states that “Senator signed contracts . . . with an entity known as [J1616]” (NYSCEF Doc No. 86, aff of Ghumman at 1, ¶ 4). Further, the operative documents presented by Senator, even though some of which appears on J Companies’ letterhead, clearly are either executed by J1616 or identifies J1616 as the Construction Manager (*see generally* NY St Cts Elec Filing [NYSCEF] Doc Nos. 66, 67, 74, 75, 87, 88,

91).⁵ Accordingly, J Companies motion to dismiss Senator's breach of contract cross claim is granted.

Senator's Cross Claim for Unjust Enrichment

"The theory of unjust enrichment lies as a 'quasi-contract claim' (*Goldman v. Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005] [and contemplates] an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], *rearg denied* 12 NY3d 889 [2009]). "The elements of unjust enrichment are that the defendants were enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendants to retain what is sought to be recovered" (*County of Nassau v Expedia, Inc.*, 120 AD3d 1178, 1180 [2d Dept 2014], citing *Old Republic Natl. Tit. Ins. Co. v. Luft*, 52 AD3d 491 [2d Dept 2008]). "The essence of unjust enrichment is that one party has received money or a benefit at the expense of another" (*id.*, quoting *Goldman v. Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2d Dept 2008]). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered . . . Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice" (*Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013] [internal quotation marks and citation omitted]).

The proffered Subcontract fails to utterly refute Senator's cross claim for unjust enrichment. Accepting all allegations in the cross claims as true, the broad considerations

⁵ Senator does present a document it entitled "Change Orders and Requests" (NYSCEF Doc No. 89) which includes a single piece of correspondence with an electronic signature from a representative of J Companies. Such evidence constitutes parol evidence and does not defeat J Companies' showing of entitlement to dismissal pursuant to CPLR 3211 (a) (1) as there are no allegations of fraud or misrepresentation (*see generally Agai v Liberty Mut. Agency Corp.*, 118 AD3d 830, 832 [2d Dept 2014], *lv denied* 24 NY3d 906 [2014]; *cf. Midorimatsu, Inc. v Hui Fat Co.*, 99 AD3d 680, 681-683 [2d Dept 2012], *lv dismissed* 22 NY3d 1036 [2013]).

of equity and justice do not preclude the possibility that Senator may be able to ultimately recover against J Companies based upon a theory of unjust enrichment. To warrant dismissal pursuant to CPLR 3211 (a) (1), the proffered documentary evidence “must definitively dispose” of the claims asserted (*Juliano v McEntee*, 150 AD2d 524, 525 [2d Dept 1989]). In this case, though J Companies is not a party to the Subcontract between Senator and J1616, there are numerous references to J Companies in the Subcontract. Certainly not every instance of a parent company being referred to in a contract would warrant the survival of an unjust enrichment claim against the parent company, but here, based upon the proffered Subcontract, the court cannot determine conclusively that J Companies did not gain some form of value and enrichment at Senator’s expense. Specifically, the Subcontract allowed J Companies to assert a demand for certificates for certain types of construction work relating to the construction project (see NYSCEF Doc No. 67 at 140, ¶ 14 and 145 ¶ Q 2).⁶ Such availability to provide some oversight weighs against J Companies’ assertions that the documentary evidence conclusively demonstrates it did not receive any benefit from Senator. Though such rights conferred to J Companies in the contract do not warrant a finding that it was a party to the contract, the conferring does indicate that J Companies may have received some form of enrichment from Senator, and equity and good conscience thus permits Senator to recover. Accordingly, to the extent J Companies seeks dismissal of Senator’s cross claim for unjust enrichment, such relief is denied.

Extech Claim and Senator’s Cross Claim for Foreclosure of a Mechanic’s Lien

A mechanic's liens “may be enforced against the property specified in the notice of lien and which is subject thereto and against any person liable for the debt upon which

⁶ Specifically, J Companies may request certificates/licenses for operating cranes and all powder-actuated tools.

the lien is founded” (Lien Law § 24). “A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, mortgage, judgment or other claim against such property not recorded, docketed or filed at the time of the filing of the notice of such lien” (Lien Law § 13). “There exists authority to the effect that a general contractor is also a proper party defendant in an action to enforce a mechanic's lien” (*Martirano Constr. Corp. v Briar Contr. Corp.*, 104 AD2d 1028, 1030 [2d Dept 1984] [internal citations omitted]).⁷

The proffered contracts demonstrate J Companies’ entitlement to dismiss Extech’s claim and Senator’s cross claim for enforcement of a mechanic’s lien as against it. Lien Law § 24 expressly states that an action may be brought to enforce a lien “against any person liable for the debt upon which the lien is founded . . .” Here, the proffered contracts demonstrably and utterly refute the allegations that J Companies incurred debts relating to the construction work at the premises. Further, the proffered documents submitted in opposition to J Companies’ dismissal motion, contrary to Extech’s and Senator’s positions, further J Companies’ assertion that Extech’s claim and Senator’s cross claim should be dismissed. Though certain documents refer to J Companies and/or are on J Companies’ letterhead, each operative document is unmistakably executed on behalf of J1616, not J Companies (see NYSCEF Doc Nos. 66, 67, 74, 75, 87, 88, 91). Accordingly, Extech’s claim and Senator’s cross claim seeking enforcement of a mechanic’s lien as against J Companies are hereby dismissed.

Attorney’s Fees and Costs

⁷ The court notes that Lien Law § 9 (7) expressly states that “[a] failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien.” Further, a court, pursuant to Lien Law § 12-a, may, in the absence of prejudice and in compliance with proper procedures may issue “an order amending a notice of lien upon a public or private improvement, nunc pro tunc.”

“Under the general rule, attorney’s fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule” (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989] [internal citations omitted]). Here, J Companies presents no basis either contractual or statutory for awarding it attorney’s fees or costs. Accordingly, that branch of J Companies’ motion is denied.

Extech’s Motion To Extend Time To File the Note of Issue

Pursuant to the Kings County Supreme Court Uniform Civil Term Rules, Part E Extech’s motion seeking an extension of time to file the note of issue is respectively referred to the Kings County Supreme Court, Compliance Conference Part.

To the extent not specifically addressed herein, the parties’ remaining contentions have been considered and found either meritless and/or moot. Accordingly, it is;

ORDERED that J Companies’ motion to dismiss, mot. seq. four, is granted to the extent the complaint as against it and Senator’s cross claims for breach of contract and lien foreclosure are hereby dismissed, and is otherwise denied; and it is further

ORDERED that Senator’s motion to amend, mot. seq. five, is hereby denied, and it is further

ORDERED that Extech’s motion to extend the time to file its note of issue, mot. seq. six, is respectively referred to the Compliance Conference Part.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
January 15, 2021

ENTERFORTHWITH:



HON. RICHARD VELASQUEZ