Supreme Court of the State of New York
County of Kings

Part 91

ASAP BUILDERS, INC.,

Plaintiff,

against

PARK RESIDENCE CONDOS, LLC, THE PARK TOWNHOMES, LLC, ROGERS & DAWSON BUILDING COMPANY LLC, AMERICAN DEVELOPMENT GROUP LLC, PERRY FINKELMAN, BANK LEUMI USA, JOHN DOES 1 THRU 10, JOHN DOES, INC. 1 THRU 10,

Defendants.

Index Number 504815/2018
SEQ #002

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Upon the foregoing papers, defendants' motion for summary judgment is decided as follows:

Factual and Procedural Background

Plaintiff commenced this action for damages arising from a contract to perform masonry and carpentry work for defendant Rogers & Dawson Building Co, LLC ("Rogers & Dawson") at property located at 333 14th Street a/k/a 346 13th Street Brooklyn, New York. Plaintiff also filed a notice of pendency against the subject property.

In the complaint, plaintiff alleges that defendant Finkelman, the managing member of Rogers & Dawson, hired plaintiff to "erect framing, install brick, flooring, beams, drywall, windows, moulding, doors, insulation as well as to perform masonry work, install blocks, etc., at the [subject property]" (complaint at ¶¶ 13 and 17). Defendants Park Residence Condos, LLC and The Park Townhomes, LLC (collectively, the "Park Defendants") own the subject property (*id.* at ¶ 10).

The work was governed by two contracts, dated March 25, 2015 and August 5, 2016, respectively, which described plaintiff's compensation (*id.* at ¶ 19). Plaintiff contends that Mr. Finkelman caused Rogers & Dawson to breach these contracts by "requiring [plaintiff] to perform substantial extra-contractual [w]ork" to the subject property before plaintiff had been paid for the work it previously performed (*id.* at ¶ 29). Plaintiff claims that, at the direction of other defendants, Rogers & Dawson did not pay plaintiff for certain work plaintiff performed and ultimately fired plaintiff (*id.* ¶¶ at 31 and 34). Plaintiff further claims that Mr. Finkelman paid it directly (*id.* at ¶ 22). Plaintiff contends that Mr. Finkelman "owns, controls and/or operates" Rogers & Dawson through defendant American Development Group LLC ("ADG"), of which Mr. Finkelman is also the CEO and managing member (id. ¶¶ at 13 and 27).

Plaintiff asserts causes of action for: (1) breach of contract against Rogers & Dawson (id. at 40-46); (2) tortious interference with contract against Mr. Finkelman and the Park Defendants (*id.* at ¶¶ 47-55); (3) foreclosure of a mechanic's lien against the Park Defendants (*id.* at ¶¶ 56-67); and (4) unjust enrichment against the Park Defendants (*id.* at ¶¶ 68-76).

On April 13, 2018, defendants moved to dismiss the complaint and to vacate the mechanic's lien. By order, dated October 10, 2019, the court (Wooten, J.) denied the motion without prejudice and with leave to move for summary judgment after discovery.

Analysis

Defendants move for summary judgment to dismiss plaintiff's claims for breach of contract, tortious interference with contract, foreclosure of mechanic's lien, and unjust enrichment. The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the

burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Breach of Contract

"The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach, and resulting damages" (*Detringo v South Is. Family Med., LLC*, 158 AD3d 609, 609 [2d Dept 2018]). Rogers & Dawson argues that its contract with plaintiff requires that any modifications or changes to the work must be in writing and approved, and contends that there is no such written modification or approval. In the absence of such a written agreement, Rogers & Dawson argues there can be no breach.

Rogers & Dawson is correct that Articles 5.2 and 5.3 of the contract, and Section 4 of the rider to the contract, read together, require written approval of any changes or modification to the scope of work. Such prohibitions against oral modifications are enforced by GOL § 15–301(1) (*Vizel v Vitale*, 184 AD3d 602, 605 [2d Dept 2020]). However, like other protections of the Statute of Frauds, oral modifications are enforced if there is partial performance that is "unequivocally referable to the modification" (*id.*).

In his affidavit, Mr. Finkelman states that defendants never requested the work, and that plaintiff never submitted invoices or other request for payments for the "extra work" it claims it performed (Finkelman affidavit at ¶¶ 24-25 and 27-29). Mr. Finkelman further disputes that plaintiff actually performed the work (*id.* at ¶¶ 26 and 33). Conversely, in his opposing affidavit, Louie Selamaj, plaintiff's president, states that Rogers & Dawson's foreman "required" plaintiff to perform the extra work before plaintiff would be paid for the work it had already performed

(Selamaj affidavit at ¶ 10). Mr. Selamaj also describes the extra work performed, who performed it, and when it was performed (*id.*). These conflicting statements show that there are triable issues of fact concerning the existence of a contract and the breach of that contract.

There is also a dispute about plaintiff's work described in invoices numbered 10 and 11. Plaintiff alleges in the complaint that Invoice #10 sought payment of $10,642.90 and Invoice #11 sought payment of $5,734.74, but that Rogers & Dawson refused to pay the invoices (complaint at 31). Mr. Finkelman states in his affidavit that "at no point in time did [plaintiff] perform any masonry work pursuant to Invoice #11, dated April 27, 2017 in the amount of $10,642.90" (Finkelman affidavit at ¶ 35). As the invoices are both dated the same, Mr. Finkelman confused either the invoice number or the amount. In either case, Roger & Dawson have not disproven plaintiff's allegation of breach by failure to pay these invoices.

Tortious Interference with Contract

Plaintiff alleges that Mr. Finkelman and the Park Defendants acted to cause Rogers & Dawson to breach its contract with plaintiff (complaint at ¶¶ 47-55). A claim for tortious interference with contract must establish: "(1) the existence of a contract between plaintiff and a third party; (2) defendants' knowledge of the contract; (3) defendants' intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). The defendants must also have intentionally procured the breach of contract "without justification" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Additionally, defendants' conduct must have been the "but for" cause of the breach (*Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 1036 [2d Dept 2011]).

Defendants first argue that there was no enforceable contract, and thus there was nothing to interfere with. As explained above, defendants have not disproven the existence of a contract underlying the extra work or Invoices ## 10 and 11.

Defendants next argue that Mr. Finkelman did not, and could not, have acted as a third party to interfere with Roger & Dawson's contract with plaintiff, because he was always acting in his corporate capacity as the managing member of Roger & Dawson. As an initial matter, defendants are correct that, even assuming Mr. Finkelman acted to prevent performance of the contract, any such action taken within his corporate capacity as managing member would amount to breach of contract, not tortious interference. Plaintiffs must ultimately prove that Mr. Finkelman acted somehow outside his duties as managing member, or that he and his corporate entities did not respect their separate corporate identities.

Because defendants are moving for summary judgment, they have the initial prima facie burden to disprove these allegations. To that end, Defendants contend that Mr. Finkelman and ADG respected the corporate integrity of the various entities that Mr. Finkelman owns and/or controls, and thus neither he nor ADG interfered with the contract between Rogers & Dawson and plaintiff.[1]

Mr. Finkelman states in his affidavit that, although he is the managing member of the Park Defendants, Rogers & Dawson, and ADG, "these companies are separate and distinct and independent from one another. The above entities have separate operating accounts, have separate checking accounts, have separate SEC accounts and filings, file their own taxes, have

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[1] The cause of action is actually against Mr. Finkelman and the Park Defendants, not ADG (complaint at ¶¶ 47-55).

their own independent EIN numbers, and were created for their own purposes, independent from one another" (Finkelman affidavit at ¶ 6). He further states that these entities were created for separate and different purposes and that they do not have a relationship with each other (*id.* at ¶¶ 8 - 13). He also states that none of them control the other (*id.*).

Regarding the work at issue, Mr. Finkelman states that he negotiated the contract on behalf of Rogers & Dawson (*id.* at ¶ 16). He further claims the Rogers & Dawson, and not he, the Park Defendants, or ADG, hired and paid plaintiff (*id.* at ¶¶ 17-19 and 32).

In contrast, Mr. Selamaj states in his affidavit that Mr. Finkelman acted to prevent Rogers & Dawson from paying plaintiff and from otherwise honoring the terms of the contract. However, plaintiff offers no proof, other than Mr. Selamaj's conclusory allegations, that Mr. Finkelman was somehow acting outside his corporate capacity to cause Roger & Dawson to breach. While plaintiff is correct that it does not need "conclusive" proof that defendants violated their corporate forms, it does need some proof to rebut defendants' prima facie showing. Because plaintiff has not submitted any such evidence, its claim for tortious interference against Mr. Finkelman is dismissed. The same claim against the Park Defendants is not dismissed because defendants did not move as to them.

Foreclosure of Mechanic's Lien

Lien Law § 3 provides that a contractor who performs labor or furnishes materials for the improvement of real property with the consent of the owner "shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien" (*see also DHE Homes, Ltd. v Jamnik*, 121 AD3d 744, 745 [2d Dept 2014]).

Proof of the debt may be established by "either the price of [the] contract or the value of the labor and materials supplied" (*id.*).

Defendants argue that plaintiff did not perform the work and there was no consent to the work. As explained above, these issues are disputed and must be tried. Defendants further argue that plaintiff did not perform all of the alleged work, but rather hired others to perform some of it. However, there is no evidence to suggest that plaintiff did not pay those it hired to perform the work, and that it is still owed money for the price or value of the work it performed.

Defendants also argue that the liens are not valid because plaintiff did not provide invoices for the work. Defendants offer no legal support for this contention. In any event, the amount of the lien may be established by the value of the services performed. This court will not pre-determine how plaintiff will attempt to prove this value. To the extent that plaintiff seeks to prove the value using evidence previously requested in discovery but not disclosed, defendants may address that matter at trial.

In addition, defendants contend that, in accordance with Lien Law § 39, the lien should be declared void because plaintiff willfully exaggerated the amount of the lien. To prevail on this issue, defendant must establish that the amount was purposefully exaggerated; simply showing that the amount is incorrect is not sufficient (*Park Place Carpentry & Builders, Inc. v DiVito*, 74 AD3d 928, 929 [2d Dept 2010]). In its motion, defendants dispute the amount actually due, but they do not submit any evidence that plaintiff willfully exaggerated the amount. Accordingly, plaintiff's claim to foreclose on its mechanic's lien is not dismissed.[2]

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[2] As part of its argument that the lien amount is exaggerated, defendants refer to certain lien waivers plaintiff purportedly executed. In its moving papers, defendants do not argue that the lien waivers are valid or otherwise seek enforcement of the waivers. If defendants seek

Unjust Enrichment

A claim for unjust enrichment must show that: (1) defendants were enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendants to retain the enrichment (*Main Omni Realty Corp. v Matus*, 124 AD3d 604, 605 [2d Dept 2015]). Defendants' receipt of some benefit, standing alone, is not sufficient to support an unjust enrichment claim (*Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013]). There must have been a transaction between the parties that the court determines is unjust (*id.*).

The Park Defendants, against whom this claim is asserted, argue that plaintiff has no such claim because there is a contract for the work and because the Park Defendants did not consent to the work. As to the first point, defendants do not submit a contract between the Park Defendants and plaintiff. As to the second point, consent here is disputed. In any event, there appears to be no dispute that the Park Defendants hired Rogers & Dawson, who then hired plaintiff, who performed work that may have benefitted the Park Defendants. Accordingly, the claim is not dismissed.

Plaintiff's Notice of Pendency

Lien Law § 17 provides that a mechanic's lien expires one year after filing unless the lienor files an extension or commences an action to foreclose the lien within that time and a notice of pendency is filed together with an action (*see also Thompson Bros. Pile Corp. v*

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enforcement of those lien waivers, defendants must establish their validity in their moving papers, regardless of what plaintiff argues in opposition. Unfortunately, defendants do not make such arguments until their reply. The court will not consider such arguments made for their first time in reply papers (*Immaculada Lopez v Bell Sports, Inc.*, 175 AD3d 1524, 1526 [2d Dept 2019]).

Rosenblum, 134 AD3d 1020, 1021-22 [2d Dept 2015]). Accordingly, although this action may not affect title or possession of property, the notice of pendency is properly filed.

Defendants' Request for Sanctions

Defendants appear to request sanctions against plaintiff for, they contend, asserting frivolous claims in this action and in a related action. The related action was a special proceeding that the Park Defendants commenced against plaintiff to vacate the mechanic's lien. By order, dated February 22, 2018, the court (Toussaint, J.) denied the Park Defendant's request for vacatur, denied defendants' request for fees, and dismissed the action. Likewise, there is no basis to award defendants fees in this action.

Conclusion

For the reasons stated above, defendants' motion is granted only to the extent that plaintiff's claim for tortious interference with contract against defendant Finkelman is dismissed. The motion is in all other respects, denied.

This constitutes the decision and order of the court.

January 29, 2021
DATE

DEVIN P. COHEN
Justice of the Supreme Court