G&Y Maintenance Corp. v 540 W. 48th St. Corp.
2021 NY Slip Op 31206(U)
April 12, 2021
Supreme Court, New York County
Docket Number: 652108/2020
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA ANNE CRANE **PART** IAS MOTION 15EFM

Justice

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G&Y MAINTENANCE CORP.

Plaintiff,

- v -

540 WEST 48TH ST. CORP.

Defendant.

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INDEX NO. 652108/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 64

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendants GLSC 48 Special LLC ("GLSC") and 540 West 48th Corp. ("540 West") (collectively, the "Owner Defendants") move to dismiss the complaint as against them pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7). For the following reasons, defendants' motion is granted.

I. BACKGROUND

As this is a motion to dismiss, the following background is from the complaint. Plaintiff G&Y Maintenance ("G&Y") is a subcontractor who entered an oral contract with defendant Core Continental Construction LLC ("Core"), a general contractor, to provide heating and air conditioning work at 538 West 48th Street (Block: 01076, Lot: 0051) (the "Property") (Compl. ¶¶ 3, 6, 13-14). From 2012 to June 4, 2014, G&Y performed the contract, including a Change Order that, upon information and belief, defendant and owner of the Property 540 West requested ("Change Order 1") (*id.* ¶¶ 16, 18, 29). No written contract defined the relationship between the parties or detailed the applicable terms and conditions with regards to Change Order 1 (*id.* ¶ 19). Core breached its agreement with G&Y, failing to pay plaintiff a remaining balance of $126,559 (*id.* ¶ 17). Further, G&Y rendered services totaling $147,941 on Change Order 1 (*id.* ¶ 26). In October 2014, 540 West recorded a deed to GLSC for the subject Property with G&Y's improvements which included a provision obligating 540 West to pay subcontractors who improved the Property (*id.* ¶ 29, 31, 44-45). As against the Owner defendants, plaintiff alleges

two causes of action, unjust enrichment and quantum meruit, for failure to pay for G&Y's services under Change Order 1.

II. ARGUMENTS

A. Defendants' Affirmation in Support

In support of their motion, defendants begin by arguing that plaintiff's claims against them are time-barred (Def. Aff. ¶¶ 29-30; *Demian v Calmenson*, 156 AD3d 422, 423 [1st Dept 2017] ["claims sounding in quasi-contract, for unjust enrichment and quantum meruit . . . are subject to a six-year statute of limitations"]; *see also Behrman v Red Flower, Inc.*, 2018 WL 5831141, at *5 [Sup Ct NY County 2018] [limitations period on unjust enrichment and quantum meruit begin running from the date on which plaintiff provided the services at issue]). Defendants argue that the limitations period on plaintiff's claims have tolled as the invoices that plaintiff demanded payment from Core for Change Order 1 are dated March 1, 2014 and this action began over six years later, on May 29, 2020 (Def. Aff. ¶¶ 31-32; Compl., Ex. D [Doc. No. 6]). Defendants argue plaintiff would have no right to demand payment on March 1, 2014 if the work described in the invoices was unfinished (Def. Aff. ¶ 32; *see e.g. Consolidated Energy Design Inc. v Princeton Club of New York*, 590 Fed Appx 115, 116 [2d Cir 2015]). Further, defendants note the last invoice expressly states "All work is complete" [Def. Aff. ¶ 32; Compl., Ex. D at 3]). Defendants further argue that plaintiff cannot maintain an account stated claim against Core based on Core's alleged retention of the invoices without objection, because an account stated claim cannot create liability where none otherwise exists (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 251 [1st Dept 2007]). Defendants argue that, even if plaintiff completed the last of its work on Change Order 1 just prior to issuing the invoices on March 1, 2014, its claims would still have expired on March 2, 2020, weeks before statutes of limitation were tolled in New York state due to the pandemic (Def. Aff. ¶ 34).

Defendants next argue that plaintiff's claims against them are meritless as, in New York, courts have established that "a property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi-contract theory unless it expressly consents to pay for the subcontractor's performance" (Def. Aff., ¶ 40; *Perma Pave Constr. Corp. v Paerdegat Boat & Racquet Club, Inc.*, 156 AD2d 550, 551 [2d Dept 1989]; *see e.g. Sears Ready Mix, Ltd. v Lighthouse Marina, Inc.*, 127 AD3d 845, 846 [2d Dept 2015]). Defendants argue that plaintiff has not alleged, nor could it prove, that it performed the work described in Change Order 1 at the

specific request of the Property's then-owner 540 West, much less GLSC, or that either of the Owner defendants expressly consented to pay for plaintiff's performance (Def. Aff., ¶ 42). Defendants argue that plaintiff has admitted under oath that it performed Change Order 1 at Core's request and that Core promised payment, referencing the Verified Complaint in the previous GLSC Action (*id.* ¶ 43; *id.*, Ex. 4 ¶ 2). Defendants further argue that plaintiff's invoices with Core demonstrate that plaintiff and Core dealt exclusively with each other (*id.* ¶ 46; Compl., Ex. D). Defendants argue that plaintiff, in its complaint, admits that 540 West already paid Core for all work performed at the Property, including Change Order 1 (Def. Aff., ¶ 47; Compl. ¶ 44 ["Core was paid in full for improvements G&Y installed at the Property for Change Order No. 1"]). Defendants argue that GLSC did not purchase the Property until after plaintiff completed its work on Change Order 1 (Def. Aff., ¶ 48-49; *J.P. Plumbing Corp. v Born to Build Const. Corp.*, 137 AD3d 976, 977 [2d Dept 2016] ["There can be no enrichment that is unjust where there is no relationship that causes reliance or inducement"]).

Finally, defendants argue that plaintiff's claims against them are barred by collateral estoppel as, in a prior action with the same parties and claims under a mechanic's lien, Judge Hagler dismissed unjust enrichment claims against the Owner defendants because plaintiff could not show that defendants has specifically requested the Change Order be performed by plaintiff (Def. Aff., ¶¶ 51-52; *id.*, Ex. 6, Ex. A at 9:18; *Allen v Hoffinger, Friedland, Dobrish & Stern, P.C.*, 283 AD2d 346, 349 [1st Dept 2001]).

B. Plaintiff's Affirmation in Opposition

Plaintiff begins by arguing that defendants cannot dismiss its claims as time-barred because the "Lau Affidavit," which the Supreme Court has previously cited approvingly, states that G&Y continued working and delivering materials until June 2014 (Pl. Aff. ¶¶ 17-18 [Doc. No. 37]). Plaintiff argues that defendants' attorney affirmation "demonstrates no personal knowledge of the days G&Y worked" (*id.* ¶ 19). Plaintiff next argues that it has properly pleaded the requisite elements to sustain its unjust enrichment and quantum meruit claims (*id.* ¶¶ 22-26; Compl. ¶¶ 19-26, 40-48). Plaintiff argues that the defendants admit no contract exists for Change Order 1 and notes that defendants have failed to produce a "mount of evidence" showing that the Owner defendants did not consent to pay for plaintiff's performance (*id.* ¶¶27-30). Plaintiff further argues the defendants only cite inapposite cases where written contracts existed between the general and subcontractors (*id.* ¶¶ 31-32). Plaintiff argues that, in the prior actions before

Judge Hagler, the court did not address its breach of contract claim and, consequently, plaintiff's claims here are not barred by claim preclusion (*id.* ¶¶ 36-39). Plaintiff further argues that the prior action did not address the Change Order at issue here but, instead, a mechanic's lien on the property (*id.* ¶¶ 40-42). Plaintiff argues defendants' motion to dismiss pursuant to the claims' statute of limitations must fail because defendants do not provide evidence of the dates G&Y worked (*id.* ¶ 43; *Zuckerman v City of NY*, 49 NY2d 557, 563 [1980]). Plaintiff reiterates it has successfully stated a claim for unjust enrichment because the "contract" does not cover the dispute in issue (Pl. Aff. ¶¶ 44-45; *Joseph Sternberg, Inc. v Walber 36th St. Assocs.*, 187 AD2d 225, 228 [1st Dept 1993]). Finally, plaintiff argues claim preclusion cannot apply, because the facts of this action have not before been litigated (Pl. Aff. ¶ 47).

C. Defendants' Reply Affirmation

Defendants begin their reply arguing that the date plaintiff completed work related to Change Order 1 has not been decided by the prior actions (Def. Reply ¶ 10 [Doc. No. 50]; *see 540 West 48th St. Corp. v G&Y Maintenance Corp.*, Index No. 161388/2014 [Sup Ct New York] [the "Slander Actions"]). Defendants argue the issues in the Slander Action were not identical to the issues in this matter and, although the Owner defendants alleged in the Slander Action that plaintiff completed its work on the project no later than October 2013, the question here is whether plaintiff completed the Change order prior to March 20, 2014 (Def. Reply ¶ 11). Defendants argue that when plaintiff completed work at the property was not litigated or decided in the Slander Action (*id.* ¶ 12). Defendants next reiterate plaintiff's own documents show that the claims here are untimely, relying once more on the invoices annexed to the complaint (*id.* ¶¶ 13-15). Defendants next argue that plaintiff's claims against them fail regardless of whether plaintiff had a valid contract with Core as the existence of an express contract between a general contractor and a subcontractor is only one reason to dismiss quasi-contract claims against a property owner, not the only reason (*id.* ¶¶ 16-17; *see e.g. Metropolitan Elec. Mfg. Co. v Herbert Constr. Co., Inc.*, 183 AD2d 758 [1st Dept 1992]). Defendants argue that, just as in *Metropolitan*, no privity exists between plaintiff and defendants, and plaintiff fails to allege that the owner defendants assumed an obligation to pay plaintiff (Def. Reply ¶ 18). Finally, defendants reiterate that plaintiff's claims against them are barred by collateral estoppel as Justice Hagler rejected the same claims in the Prior Actions, arguing now that plaintiff cannot

avoid the prior ruling on these claims by reversing its position that Change Order 1 was part of its contract with Core (*id.* ¶¶ 20-21).

III. DISCUSSION

The Owner defendants' motion to dismiss is granted pursuant to CPLR 3211(a)(5). "Collateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same'" (*Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 349 [1999], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d at 349). Collateral estoppel will only be applied "to matters actually litigated and determined in a prior action" (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 456 [1985] [internal quotation marks omitted] citing Restatement [Second] of Judgements §27). Here, plaintiff's quasi-contract claims against the Owner defendants has been previously litigated and denied. In the matter *G&Y Maintenance Corp. v GLSC 48 Special LLC*, Index Number 162458/2014, Justice Hagler addressed plaintiff's quasi-contract claims against the owners of 540 West 48th Street, a premises bearing the same Block and Lot numbers as the subject Property here (Def. Aff., Ex. 6; Compl. ¶ 7). Justice Hagler denied plaintiff's unjust enrichment claims against the owners of the Property, finding that a contract existed between Core and plaintiff, no privity existed between plaintiff and the owners, and the no "direct specific request" for work was made of plaintiff by the owners (Def. Aff., Ex. 6, Ex. A). Consequently, plaintiff's claims against defendants here are dismissed.

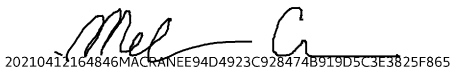
Defendants' motion to dismiss is further granted pursuant to CPLR 3211(a)(7). On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman,*

Sachs & Co., 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]). Here, defendants correctly note that they are not liable for quasi-contract claims just because an express contract may not have existed between plaintiff and Core. Similarly to *Metropolitan Electrical Manufacturing Co. v Herbert Construction Co., Inc.*, plaintiff's failure here to plead privity of contract between itself and the owners or to plead defendants' assumption of an obligation to pay for plaintiff's services is fatal to its claims against the Owner defendants (*Metropolitan*, 183 AD2d 758, 759 [2d Dept 1992] ["That . . . the owners consented to the improvements provided by the plaintiff and accepted the benefits does not render them liable to the plaintiff"]). Consequently, plaintiff's unjust enrichment and quantum meruit claims as against defendants GLSC and 540 West are dismissed.

Accordingly, it is

ORDERED that the Owner defendants' motion to dismiss is granted and plaintiff's claims against GLSC and 540 West are dismissed; and it is further

ORDERED THAT the remaining claims against the remaining defendants are severed and shall continue.



4/12/2021
DATE

MELISSA ANNE CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE