SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 15EFM

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JOHNNY PEREZ, ARCADIO FRIAS, NESTOR RAMIREZ,

Plaintiffs,

- v -

LONG ISLAND CONCRETE INC.,THOMAS PERNO, TJM CONSTRUCTION CORP., ZHL GROUP INC.,LANMARK GROUP, INC.,THE GUARANTEE COMPANY OF NORTH AMERICA USA, VIGILANT INSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, JOHN DOE BONDING COMPANIES 1-10, REGULATOR CONSTRUCTION CORP.,

Defendants.

INDEX NO. 654227/2018

MOTION DATE

MOTION SEQ. NO. 005, 006

DECISION + ORDER ON MOTION

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HON. MELISSA ANNE CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 156, 157, 158, 159, 160, 161, 162, 163

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 123, 124, 125, 126, 148, 149, 150, 151, 155, 164, 165, 166, 167

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

The court consolidates motion sequence 005 and 006 for disposition.

Background

This is a prevailing wage class action on behalf of all nonunion workers who performed construction trade work for defendants, concrete construction corporations. Specifically, the named plaintiffs, Johnny Perez ("Perez"), Arcadio Frias ("Frias"), and Nestor Ramirez ("Ramirez"), individually and on behalf of the putative class (collectively, "Plaintiffs") seek to

recover under Public Work Contracts ("PWC")[1] (First Amended Complaint [FAC ¶ 1]). Defendants Long Island Concrete Inc ("LIC"), Thomas K. Perno ("Perno"), TJM Construction Corp ("TJM"), ZHL Group Inc. ("ZHL"), the Guarantee Company of North America USA ("TGCNAU"), Vigilant Insurance Company ("Vigilant"), and The Ohio Casualty Insurance Company ("TOCIC") (collectively, the "LIC Defendants") employed the named plaintiffs to work on these various Public Works Projects. Of note, defendant Perno is a New York State resident and Chief Executive Officer ("CEO") and President of LIC Defendants (FAC ¶ 12).

The Public Works Projects ("PWCs") at issue include, *inter alia,* work performed at the Park Avenue Armory, 424 Wythe Avenue, FDNY Rescue Company Firehouse 2, Zerega EMS, 501 Zerega Avenue, Bryant Park Train Station, Middle College High School at LaGaurdia Queens, Ferry Point Park, Seaside Coney Island Amphitheatre, Brooklyn Navy Yard, LaGuardia Apriport, Polonsky Theatre for a New Audience, and Brooklyn Academy of Music (FAC ¶ 2).

Defendants LIC, Perno, and Regulator allegedly employed plaintiff Perez from May 2012 to September 2016 (FAC ¶ 5). Defendants LIC, Perno, and Regulator allegedly employed plaintiff Frias from May 2011 to May 2013 - and then again for one week in May 2014 (FAC ¶ 6). Defendants LIC, Perno, and Regulator allegedly employed plaintiff Ramirez from April 2013 to May 2016 (FAC ¶ 7).

Under the FAC, Plaintiffs seek to hold defendant Regulator Construction Corp. ("Regulator") liable to the putative class through an alter ego/piercing the corporate veil theory (FAC - third cause of action). First, Plaintiffs allege that Defendants LIC, Regulator, and Perno currently employ Brent Walker as a Concrete Construction Superintendent (FAC ¶ 29). Plaintiffs also allege that Regulator utilized the same equipment and shared the same customers

[1] Named plaintiffs also seek to recover under various "Private Projects," that are not at issue in motion sequence 5 or 6.

as the LIC Defendants and Perno (FAC ¶ 108). Further, the LIC Defendants, Perno, and Regulator maintained an office, payroll operations, and provided paychecks to their employees from Defendant LIC's office (FAC ¶ 109). LIC Defendants, Perno, and Regulator, from 2011 to February 2015, allegedly used Regulator Paychecks to pay their non-union workers lower hourly rates than their union workers. LIC Defendants, Perno, and Regulator allegedly used the Regulator paychecks to avoid paying Plaintiffs lawful union and the prevailing wages rate, in addition to Defendants failure to pay overtime rates (FAC ¶ 52, 110). The Regulator paychecks did not include payroll taxes and other deductions, nor did the Regulator paychecks state the number of hours worked or rate of pay (FAC ¶ 50, 51).

Allegedly, the named plaintiffs worked five to six days a week, and more than forty hours per week (FAC ¶ 48). They approached Perno several times to discuss joining the union (FAC ¶ 53). Allegedly, in early 2015, Perno told Perez that to join the union, Perno had to start paying Perez with official checks from LIC that included payroll taxes (FAC ¶ 54). After Perno and Perez's conversation, in March 2015, Regulator and Perno began paying Perez and Ramirez with "Long Island Concrete" checks, that included payroll taxes and deductions (FAC ¶ 55). Yet soon after, in October 2015, Regulator and Perno allegedly paid Perez and Ramirez with "Regulator Construction Corp" paychecks (FAC ¶ 56). When Perez and Ramirez asked why they stopped receiving LIC paychecks, Jennifer Reyes, an office worker from Defendant LIC's headquarters allegedly "told Perez and Ramirez that non-union workers got Regulator checks" (FAC ¶ 64, 65). Throughout their employment, Defendants Perno or LIC foreman provided Regulator with the number of hours that named plaintiffs worked each week, and the hourly rates for each of the named plaintiffs, allegedly to enable Regulator to prepare paychecks for the named Plaintiffs (FAC ¶ 80).

Now, in the FAC, Plaintiffs seek to recover under a theory of, *inter alia*, breach of contract against LIC Defendants, Regulator, and Perno; violation of the New York Labor Law - unpaid overtime against LIC Defendants, Regulator, and Perno; or in the alternative, alter-ego liability against defendant regulator.

In Motion Sequence 005, the LIC Defendants move to partially dismiss the amended complaint. LIC Defendants argue: (1) that the Public Labor Agreements ("PLAs") prevents Plaintiffs from seeking relief under the Public Works Contracts ("PWCs"). Instead, LIC Defendants argue that the PLAs compel Plaintiffs to arbitration; (2) to dismiss the breach of contract claims because those claims are time-barred. Specifically, that the addition of Regulator to the amended complaint alters the original complaint so drastically, that it cannot "relate-back" to the original complaint; and (3) dismiss the alter ego claim.

In Motion Sequence 006, defendant Regulator moves to dismiss (1) Plaintiffs' breach of contract claim because Regulator was not a signatory; and (2) Regulator acted as an alter ego of defendant Long Island Concrete, Inc, or alternatively, Plaintiffs are barred from bringing claims against Regulator pursuant to the "single employer" doctrine.

Discussion

A court must deny a motion to dismiss under CPLR 3211 (a)(1), unless the contract constitutes documentary evidence sufficient to grant a motion to dismiss, or under (a)(2) "if from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003] [internal quotation marks omitted], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp*., 98 NY2d 144, 151-152 [2002]). The court must afford the pleading a "liberal construction," and "the benefit of every possible favorable inference" (*Leon v Martinez*,

84 NY2d 83, 87 [1994]). However, the court may disregard "bare legal conclusions" and "inherently incredible" facts (*Matter of Sud v Sud,* 211 AD2d 423, 424 [1st Dept 1995]). Moreover, "[w]hen the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one" (*Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2000]).

Motion Sequence 005

PROJECT LABOR AGREEMENT / PUBLIC WORK CONTRACTS

The first issue is whether the Project Labor Agreements contained in the Public Work Contracts expressly bar Plaintiffs' claims. Plaintiffs argue that LIC Defendants have provided PLAs for three projects that named plaintiffs worked on, but the amended complaint names at least twelve specific public works projects. The LIC Defendants submit the same 3 PLAs as before, when it moved to dismiss Plaintiffs original complaint.

The "Park Avenue Armory" PLA from 2009:

> Any question, dispute or claim arising out of, or involving the interpretation or application of this Agreement (other than jurisdictional disputes or alleged violations of Article VII, Section 1) including schedule B Agreements shall be considered a grievance and shall be resolved pursuant to the exclusive procedure of the steps described below, provided in all cases that the question, dispute or claim arose during the term of this Agreement.
>
> Failure of the grieving party to adhere to the time limits set forth in this Article shall render the grievance null and void. These time limits may be extended only by written consent of the Construction Manager (or designee), involved Contractor and involved Affiliated Union at the particular step where the extension is agreed upon. The Arbitrator shall have authority to make decisions only on the issues presented to him and shall not have the authority to change, add to, delete or modify any provision of this Agreement. (Cemele Aff, dated 10/21/20, p.6)

The 424 Wythe Avenue PLA:

> Any question, dispute or claim arising out of, or involving the interpretation or application of this Agreement (other than jurisdictional disputes or alleged violations of Article 7, Section 1) shall be considered a grievance and shall be resolved pursuant to the

> exclusive procedure of the steps described below, provided, in all cases, that the question, dispute or claim arose during the term of this Agreement. (Cemele Aff, dated 10/21/20, p.7-8)

The FDNY Rescue Company Firehouse 2 PLA:

> Any question, dispute or claim arising out of, or involving the interpretation or application of this Agreement (other than jurisdictional disputes or alleged violations of Article 7, Section 1) shall be considered a grievance and shall be resolved pursuant to the exclusive procedure of the steps described below, provided, in all cases, that the question, dispute or claim arose during the term of this Agreement. Grievances shall include the City contract number and the Program Work address; such information is posted at the Program Work Site if already commenced, and is available in the City Record and Notice to Proceed for projects not already commenced. (Cemele Aff, dated 10/21/20, p.9)

NY Lab Law § 220 gives both union and nonunion workers a statutory right to receive prevailing wage and supplemental benefits, and also mandates that contracts include, in writing, those rights for Public Works Projects. Yet this statutory right under § 220 does not "override" a Public Works Project that includes a PLA.

However, that the remaining 9 Public Work Contracts have binding PLAs is unclear. In *Ansah v AWI Security & Investigation, Inc*. 129 AD3d 538 [1st Dept 2015]), the lower court, on summary judgment, held that the court had insufficient documentary evidence, i.e., the relevant contracts, to determine whether plaintiffs' could recover prevailing wages. The appellate court affirmed, and noted in its decision that plaintiffs never agreed to arbitrate ["nonsignatories are generally not subject to arbitration agreements"] [129 AD3d 539]).

In this case, the named plaintiffs are also nonsignatories to the Project Labor Agreements. Plaintiffs do not even know if all Public Work Projects that the named plaintiffs worked on even had PLAs. The LIC Defendants have the information necessary to compile a complete list of the Public Work Projects. At this pleading stage, not enough is known about the actual contracts to grant a motion to dismiss.

Further, the plaintiffs here are not part of the union and therefore did not agree to arbitrate (*cf. Lorentti-Herrera v Alliance for Health, Inc.,* 172 AD3d 596 [arbitration agreement in CBA not binding on plaintiff where provision limits mandatory arbitration to employee / employer disputes over a "specific term"]). Accordingly, the PLAs do not bar Plaintiffs from recovering under Public Works Contracts.

Motion Sequence 006

ALTER EGO / BREACH OF CONTRACT

To state an alter ego claim under New York Law, courts require misuse of the corporate form (an act that harms), domination, and control (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405 [1st Dept, 2014]). In this case, Plaintiffs' complaint describes a situation where the LIC Defendants, Perno, and Regulator purposefully confused and deceived the named plaintiffs as to which corporation hired them. The named plaintiffs wanted to join the union. In early 2015, Perno told Perez that to join the union, Perno had to start paying Perez with official checks from LIC that included payroll taxes (FAC ¶ 54). For years, named plaintiffs had received paychecks that Regulator issued. Now, suddenly in March 2015, Regulator and Perno began paying Perez and Ramirez with "Long Island Concrete" checks, that included payroll taxes and deductions (FAC ¶ 55). Merely months later, in October 2015, Regulator and Perno paid named plaintiffs again with paychecks issued from "Regulator Construction Corp" (FAC ¶ 56). When Perez and Ramirez asked why they stopped receiving LIC paychecks, allegedly Jennifer Reyes, an office worker from Defendant LIC's headquarters "told Perez and Ramirez that non-union workers got Regulator checks."

Essentially, plaintiffs allege that LIC Defendants, Perno, and Regulator acted with domination and control, and engaged in a shell game to prevent Plaintiffs from naming the

proper party to collect prevailing wages, and overtime monies owed (*see* Tr. dated 1/7/21, p.14, 2-5). Even where plaintiffs worked on Projects where the foreman wore LIC badges, and Plaintiffs believed that they interacted with the LIC president, and LIC acted as the contractor or subcontractor, they still received paychecks from Regulator.

From the pleadings, and without any further discovery, the three defendants, Regulator, LIC Defendants, and Perno, could be one in the same. If Plaintiffs actually worked for LIC Defendants, why did the paychecks provide Regulator's information, like its phone number. Plaintiffs' also allege that Regulator vehicles and LIC vehicles appeared together, and defendants' equipment for the public work projects appeared together. This all raises questions about the relationship between the defendants and whether they were hiding the eight ball to avoid liability. Accordingly, the court finds that Plaintiffs have stated a breach of contract claim against Defendant Regulator, based upon an alter-ego theory.

TIME-BAR ISSUE

Given that plaintiff has sufficiently stated facts to support piercing the corporate veil, plaintiffs' claims in the amended complaint all relate back to 2018, when plaintiffs filed their original complaint. However, plaintiffs do not dispute that there is a six-year statute of limitations. Accordingly, claims based on jobs that ended more than six years prior to August 24, 2018 are time barred.

Accordingly, it is

ORDERED that the court denies defendants' motion to dismiss as to motion sequence 005 and 006, except that Named Plaintiff Frias's 2011 claims are time-barred; and it is further

ORDERED that defendant Regulator shall file an answer within 20 days of the e-filing date of this decision; and it is further

ORDERED that there shall be no further motion practice without advance notice to the court; and it is further

ORDERED that the parties are directed to appear for a compliance conference on **June 16, 2021 at 10:30AM**. The court will schedule the conference via Microsoft Teams.

Dated: June 2, 2021

ENTER:

HON. MELISSA A. CRANE, J.S.C.