

Doka USA Ltd. v IA Constr. Mgt., Inc.

2021 NY Slip Op 32323(U)

November 15, 2021

Supreme Court, Kings County

Docket Number: Index No. 506122/21

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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DOKA USA LTD.,

Plaintiff,

Decision and order

- against -

Index No. 506122/21

IA CONSTRUCTION MANAGEMENT, INC.,
AMANT PROPERTIES, LLC, AMANT
FOUNDATION PROPERTIES, LLC, METRO
ELECTRIC CONTRACTORS INC., PARK
PLUMBING & MECHANICAL, INC., and
EUROCRAFT CONTRACTING LLC,

Defendants,

November 15, 2021

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IA CONSTRUCTION MANAGEMENT INC.,
Third-Party Plaintiff,

- against -

JOHN O'HARA, INC., and PARATUS GROUP
II, INC.,

Third-Party Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The third party defendant Paratus Group II Inc., has moved seeking to dismiss the third party complaint pursuant to CPLR §3211. The third party plaintiff IA Construction Management Inc., [hereinafter 'IACM'] opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The defendant/third party plaintiff IACM, the general contractor at a construction site located at 306 Maujer Street in Kings County, entered into a subcontract with plaintiff Doka USA Ltd., to provide concrete formwork. Doka instituted this lawsuit

alleged they have not been paid and is owed \$361,142.75. IACM initiated a third party action against Paratus, the owner's representative at the construction site. The third party complaint alleges that Paratus in fact owes the money to Doka and seeks indemnification and subrogation in the amount of any judgement Doka obtains. The third party complaint asserts three causes of action, namely unjust enrichment, breach of a covenant of good faith and fair dealing and tortious interference. Paratus has moved seeking to dismiss the third party complaint on the grounds the third party complaint fails to allege any valid causes of action. The motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaim as true, whether the party can succeed upon any reasonable view of those facts (Dauids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, the allegations of the counterclaim are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]). Whether the counterclaim will later survive a motion for summary judgment, or whether the party 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]).

Turning to the cause of action for a breach of implied covenant of good faith and fair dealing, it is well settled that cause of action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). IACM argues that "clearly there was a contract and IACM was obligated, as well as Paratus, to perform the construction, the oversight, as well as payment for work and materials (see, Memorandum in Opposition, pages 13,14). While that is certainly true in a general sense, there was no contract entered between IACM and Paratus to permit a cause of action for a breach of duties that are contractual in nature. Indeed, the entire covenant is implied within every contract (P.T. & L. Contracting Corp., v. Trataros Construction Inc., 29 AD3d 763, 816 NYS2d 508 [2d Dept., 2006]). Thus, without the existence of a contract there can be no implied covenant (Lakeville Pace Mechanical Inc., v. Elmar Realty Corp., 276 AD2d 673, 714 NYS2d 338 [2d Dept., 2000]). Therefore, the language of the third party complaint that there was an "implied covenant of good faith and fair dealing" that "governed the work and services provided

to Paratus for the project" (see, Third Party Complaint, ¶ 23) fails to allege any contract between IAMC and Paratus sufficient to encompass and breach of any such covenant. Therefore, the motion seeking to dismiss this cause of action is granted.

Next, it is well settled that the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Anethsia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009]).

In this case the third party complaint does not allege that Paratus induced Doka to breach the contract at all. Rather, the complaint alleges that Paratus "purposely and intentionally interfered with the contract between IACM and Doka, by routinely denying or failing even to process payments owed to Doka" (see, Third Party Complaint, ¶ 28). That allegation might be true, however, if does not allege any tortious interference on the part of Paratus. That allegation asserts, perhaps, wrongdoing on the part of Paratus, however, fails to allege that Paratus induced Doka to breach the contract, a necessary component of tortious interference.

Therefore, the motion seeking to dismiss the tortious interference claim is granted.

Lastly, to prevail on a claim of unjust enrichment the party must prove the other party was enriched at that party's expense and that it is against equity and good conscience to allow the other party to retain what is sought to be recovered (Alpha/Omega Concrete Corp., v. Ovation Risk Planners Inc., 197 AD3d 1274, NYS3d [2d Dept., 2021]). It is well settled that failure to pay a bill due can constitute unjust enrichment (Wigging v. Garden City Golf Club, 2017 WL 4898285 [EDNY 2017], Streit v. Bushnell, 424 F.Supp2d 633 [SDNY 2006]). However, even if true that Paratus promised to pay Doka's bill or gave the appearance such bills would be paid Paratus did not retain a benefit to which they are not entitled. Specifically, Paratus is not the owner of the property and was merely acting as an agent of the owner. Thus, any benefit improperly retained accrues to the owner, not Paratus. IACM argues that since Paratus was the agent of the owner then Paratus somehow was unjustly enriched by failing to pay Doka. However, merely being the agent of the owner does not mean Paratus maintained any benefit at all. To assert otherwise, would essentially equate agency with ownership and the third party complaint fails to allege any such relationship. Consequently, to the extent IACM has any claims

they should be directed toward the owner and not Paratus.
Therefore, there can be no question that no such improper conduct
can be attributed to Paratus. Consequently, the motion seeking
to dismiss the unjust enrichment cause of action is granted.

Thus, the entire third party complaint is hereby dismissed.

So ordered.

ENTER:



DATED: November 15, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC