

Santana v San Mateo Constr. Corp.

2023 NY Slip Op 32086(U)

June 21, 2023

Supreme Court, New York County

Docket Number: Index No. 650029/2022

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

WILLIAM SANTANA,

Plaintiff,

- v -

SAN MATEO CONSTRUCTION CORP., CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,

Defendant.

-----X

INDEX NO. 650029/2022

05/27/2022,

05/27/2022,

04/07/2023

MOTION DATE

MOTION SEQ. NO. 004 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 45, 46, 47, 48, 49, 50, 51, 63, 64, 65, 66, 67, 68, 69, 70, 71, 88, 89

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 52, 53, 54, 55, 56, 57, 58, 59, 60, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 006) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 104, 105

were read on this motion to/for MISCELLANEOUS

Plaintiff is a traffic control flagger employed by San Mateo Construction Corporation, one of several of Consolidated Edison Company Of New York, Inc.'s ("Con Ed") traffic control flagging service vendors.

Plaintiff brings the instant action to recover the difference between the wage plaintiff was paid and the hourly rate of prevailing wages and benefits set by the New York City Office of the Comptroller, pursuant to New York Labor Law §220, that he contends he should have been paid by defendant San Mateo ("San Mateo"). Defendants now move to dismiss the complaint; plaintiff opposes the motion and moves by Order to Show Cause for a stay of this action pending the appeal of a related matter. The Court will discuss each motion in turn.

Motion Sequence 006

Plaintiff seeks a stay of this action, pursuant to CPLR § 2201, pending the decision by the Appellate Division, First Department in the appeal of the March 17, 2023 Decision and Order in the matter of *Graham Ross v No Parking Today, Inc., et al.*, NYSCEF Index. No. 151700/2022, Doc. No. 20 (Sup. Ct. N.Y. Cnty.). Defendants oppose that application.

CPLR § 2201 provides in pertinent part that the court may grant a stay of the proceedings “upon such terms as may be just”. In support of his application for a stay in this action, plaintiff asserts that the appeal will “dispose of or limit” relevant issues and that a stay of this action pending that determination would serve the goals of “judicial economy, orderly procedure, and the prevention of inequitable results.”

With respect to defendant Con Ed, the Court agrees, as there is no dispute that claims asserted against it and the basis for its motion are the same as in the *Ross* matter. San Mateo, however, is not a party in the related matter. Moreover, it is undisputed that the claims asserted against it and the basis for its motion to dismiss are not addressed in the related matter or in the appeal. Further, should the plaintiff be aggrieved in a similar manner here, there is no reason that he could not seek a consolidated appeal. The Court does not find that judicial economy is served by granting the instant application for a stay. Accordingly, plaintiff’s motion is denied.

Defendants’ Motions to Dismiss

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the Court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83 [1994]).

With respect to CPLR § 3211(a)(1), a motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes a plaintiff's factual allegations, and conclusively establishes a defense as a matter of law. *See Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 327 [2002]. Furthermore, judicial 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 Doe*, 73 AD3d 78 [2d Dept 2010].

Motion Sequence 004

Con Ed moves to dismiss the complaint, based on the same arguments in support of its dismissal motion in the related *Ross* matter. Specifically, Con Ed contends that the permit issued by the City of New York Department of Transportation ("DOT") is not a contract, nor does it confer upon plaintiff any rights as third party beneficiary.

Plaintiff concedes that the first amended complaint contains the same cause of action based on the same allegations as the related matter, specifically that the permit between Con Ed and the DOT constitutes a contract. Accordingly, the Court finds, for the same reasoning and legal analysis provide by Justice Billings in the decision and order dated March 17, 2023, that Con Ed has established its prima facie entitlement to dismissal as a matter of law.

Con Ed has established, and the applicable case law supports the finding that the DOT permits are not contracts, thus there can be no viable breach of contract claim asserted by plaintiff as an alleged third-party beneficiary.

Motion Sequence 005

Plaintiff alleges two causes of action as against San Mateo, both are an alleged breach of contract. The first cause of action alleging breach of contract arise out of allegations of breach of the flagging contracts between San Mateo and Con Ed. The second cause of action arises out of allegations that both defendants violated the terms of the permit to which plaintiffs contend they are third-party beneficiaries.

Defendant San Mateo moves for dismissal on the grounds that the permit is not a contract and that plaintiffs are not third-party beneficiaries to the contract between it and Con Ed, as the contract relates to private work and not public works. Further, San Mateo contends that its contract contains a disclaimer that prohibits third-party beneficiary claims.

In opposition to this motion plaintiff cites to a multitude of cases that are not analogous to the instant action. For instance, plaintiff relies on *Lewis v Hallen Constr. Co., Inc.*, 193 AD3d 511 [1st Dept 2020], to support the proposition that he is entitled to prevailing wages even when the work is private is misplaced. In *Lewis*, the First Department found that the contract, rather than any permit, promised prevailing wages in compliance with New York City Administrative Code § 19-142. *Id.* *Lewis* is distinguishable from the instant matter.

Preliminarily, the Court finds that the permits are not contracts and thus there can be no viable breach of contract claims as to San Mateo, as such plaintiff's second cause of action is dismissed in its entirety.

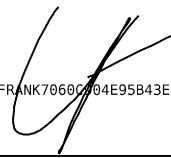
As to plaintiff's allegations that he is a third-party beneficiary of the contract between Con Ed and San Mateo, the Court finds that San Mateo has established that plaintiff's cause of action is not viable based upon the documentary evidence submitted. Here, San Mateo has established that its contract contains a disclaimer denying any third-party beneficiaries. Plaintiff's attempt to invalidate this provision is not supported by the cases cited.

Plaintiff does not substantively oppose the validity of the third-party beneficiary disclaimer, rather he contends that such a disclaimer violates public policy. However, in support of that argument plaintiff cites a case that specifically involves public works when prevailing wages are required by statute and there the Court held that third-party beneficiary claims are viable. As stated above, plaintiff's reliance on *Lewis*, is misplaced because here there is no contractual language entitling plaintiff to the prevailing wage to overcome the applicability of the statute to public works only. Plaintiff has simply failed to rebut San Mateo's showing that prevailing wages apply to non-public works, and that the third-party disclaimer is not applicable.

The Court has reviewed the plaintiff's remaining contentions and finds them unavailing. Accordingly, it is hereby

ORDERED that plaintiff's complaint is dismissed in its entirety.

6/21/2023
DATE


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LYLE E. FRANK, J.S.C.

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: