

**Seiko Iron Works, Inc. v Triton Bldrs. Inc.**

2018 NY Slip Op 30051(U)

January 10, 2018

Supreme Court, New York County

Docket Number: 654220/2015

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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SEIKO IRON WORKS, INC.,

Plaintiff,

INDEX NO. 654220/2015

MOTION SEQ. NO. 001

- v -

**DECISION AND ORDER**

TRITON BUILDERS INC., AEGIS SECURITY INSURANCE  
COMPANY, STACY GUERCIA, JOHN DOE #1-5,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER)

HON. SALIANN SCARPULLA:

In this action for breach of contract, plaintiff Seiko Iron Works, Inc. (“Seiko”) moves, pursuant to CPLR § 3212, for summary judgment in its favor, seeking \$665,975.00 plus interest. Defendant Triton Builders Inc. (“Triton”) and defendant Aegis Security Insurance Company (“Aegis”) oppose summary judgment.

**Background**

Seiko is a New York corporation that manufactures construction materials. Triton is a New York corporation that provided services as a subcontractor for a construction project related to the World Trade Center (“Subcontract”). The Subcontract required

Triton to obtain surety bonding, and Triton obtained a labor and material payment bond from Aegis in the amount of \$1,649,016.60 ("Payment Bond").

Triton entered into a purchase order with Seiko, dated February 2, 2015, for the purchase of materials to fulfill its obligations under the Subcontract ("Purchase Order"). The Purchase Order provided that in exchange for materials as specified, Triton would pay Seiko \$751,000.00.<sup>1</sup> Subsequently, on February 19, 2015, Seiko entered into a subcontract with Newport Industrial Fabrication, Inc. ("Newport"), in which Newport agreed to manufacture the Purchase Order materials for \$513,023.76.

Seiko alleges that it delivered all Purchase Order materials, except one set, and that Triton accepted the Purchase Order materials that were delivered. Seiko submits the following invoices as accepted deliveries: (1) an invoice dated February 20, 2015 for \$33,425.000; (2) an invoice dated March 31, 2015 for \$19,950.00; (3) an invoice dated April 6, 2015 for \$19,950.00; (4) an invoice dated April 15, 2015 for \$19,500.00; (5) an invoice dated May 29, 2015 for \$208,500.00; (6) an invoice dated June 11, 2015 for \$39,900.00; (7) an invoice dated June 30, 2015 for \$89,775.00; (8) an invoice dated July 7, 2015 for \$39,900.00; and (9) an invoice dated July 28, 2015 for \$293,650.00 (collectively, the "Invoices").

On September 30, 2015, Seiko sent Triton a statement accounting for all Invoices, including the Change Order, and all payments made. The statement indicates that Triton paid Seiko \$33,425.00, on May 14, 2015 and that Triton made additional payments of

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<sup>1</sup> On May 31, 2015, Seiko submitted an invoice of \$4,400.00 for materials supplied in addition to the Purchase Order ("Change Order").

\$20,000.00 to non-party Kodiak Steel Company and \$50,000.00 to non-party Newport on September 29, 2015. It further provides that \$665,975.00 remains due (“Disputed Amount Due”).

In February 2016, Triton submitted two letters to its contractor seeking payment under the Subcontract, specifically addressing the unpaid Invoices. The request for payment included the last Invoice dated July 28, 2015. Triton disputes that it has been paid under the Subcontract, and asserts that a litigation regarding the Subcontract is currently pending.

Meanwhile, Seiko sought payment from Aegis pursuant to the Payment Bond, and Aegis denied Seiko’s claim for the Disputed Amount Due because the claim presented incomplete information. Although Seiko later provided Aegis with the additional requested information, Seiko alleges that Aegis never responded to its claim. Instead, Seiko alleges that Aegis improperly settled portions of the unpaid Invoices with non-party Newport in contravention of the Payment Bond. Triton and Aegis submit documentary evidence demonstrating that, in fact, it settled Newport’s bond claim of \$427,423.76 for \$385,000.00 on December 16, 2016 (“Newport Settlement”).

Triton argues that the Disputed Amount Due is incorrect because of the Newport Settlement and because Seiko itself breached the Purchase Order. Triton alleges that it incurred \$362,992.58 in backcharges for Seiko’s alleged breaches, and argues that the backcharges together with the Newport Settlement satisfies the Disputed Amount Due.

On March 31, 2016, Seiko filed an amended complaint seeking payment for the Disputed Amount Due against Triton and Aegis, and Triton and Aegis filed respective

answers and affirmative defenses. Seiko now moves for summary judgment on five of the amended complaint's eight causes of action, specifically (1) breach of contract against Triton, or in the alternative; (2) account stated against Triton, or in the alternative; (3) breach of the implied covenant of good faith against Triton; (4) payment bond claim against Aegis; and (5) breach of the implied covenant of good faith against Aegis.

### Discussion

A party moving for summary judgment is required to make a *prima facie* showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Grob v Kings Realty Assoc.*, 4 A.D.3d 394, 395 (2d Dep't 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

#### **I. Breach of Contract against Triton**

"The elements of [a breach of contract] claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages[.]" *See Harris v Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Here, it is undisputed that Seiko and Triton were parties to the Purchase Order. Seiko additionally submits sufficient proof demonstrating that it performed by delivering materials that Triton accepted; that Triton breached by failing to pay all Invoices; and that damages exist to the extent any of the Invoices remain unpaid.

Triton opposes summary judgment, arguing that Seiko itself breached by failing to perform the administration of the Purchase Order and the oversight of Newport's performance. In support of this argument, Triton submits an affidavit from its president, Stacy Guercia-Baldea. Guercia-Baldea simply asserts that Seiko failed to perform its administrative duties, without indicating which provision of the Purchase Order Seiko breached or what obligations Seiko contractually failed to fulfill. Guercia-Baldea's affidavit is therefore inadequate to raise an issue of fact necessitating a trial on the breach of contract claim. *See Banco Popular N. Am. v Victory Taxi Mgt., Inc.*, 1 N.Y.3d 381, 383 (2004) (“[A]verments merely stating conclusions, of fact or of law, are insufficient to ‘defeat summary judgment’”).<sup>2</sup>

Further, Triton's conclusory argument that this motion is premature and that it is unable to present evidence in support of its affirmative defense is also insufficient, because Triton has failed to specifically show that evidence exists that would support its affirmative defense. *See Capital Funding Services, Inc. v Focus Real Estate Mgt., Inc.*, 259 A.D.2d 510, 511 (2d Dep't 1999) (stating that “summary judgment [should not] be denied on the ‘mere hope’ that evidence sufficient to defeat the motion may be uncovered

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<sup>2</sup> Triton's calculation of backcharges for Seiko's alleged breach is unsupported by sufficient competent evidence. Triton calculates nearly \$200,000.00 for its employees' time due to Seiko's administrative non-performance, without submitting proof of how hours were calculated or which rates applied. Triton's claim of \$150,000.00 for unspecified delays or defamation is similarly conclusory, without evidentiary support and therefore insufficient to warrant denial of summary judgment. *See Lacoparra v Bellino*, 296 A.D.2d 480, 481 (2d Dep't 2002) (finding that the trial court properly granted summary judgment where the opposing party “failed to come forward with clear and convincing evidence sufficient to raise a triable issue of fact”).

during the discovery process”). Accordingly, I find that Seiko has made out its *prima facie* cases for summary judgment on the issue of liability on its breach of contract claim, and that Triton has failed to raise a sufficient issue of fact warranting a trial on the claim.

As to damages, however, I cannot determine the total amount of damages to which Seiko is entitled based on the papers submitted. I note that the parties do not dispute that the Newport Settlement satisfies a portion of the Dispute Amount Due. Accordingly, I order a hearing on the amount of damages owed Seiko, pursuant to CPLR § 3212(c).<sup>3</sup>

## II. Causes of Action against Aegis

Seiko seeks summary judgment against Aegis for failure to pay under the Payment Bond and breach of the implied covenant of good faith and fair dealing.

Regarding Seiko’s Payment Bond claim, Seiko alleges that it made due demand on the Payment Bond, and that Aegis failed to pay the amounts due and owing. Aegis does not dispute that Seiko is a claimant as provided in the Payment Bond, or otherwise dispute that Seiko satisfied the Payment Bond’s requirements to sue on it. As discussed above, Triton is liable to Seiko for breach of the Purchase Order, and Seiko may sue on the Payment Bond for such sums as determined at the hearing on damages. *See Am. Bldg. Supply Corp. v Avalon Properties, Inc.*, 8 A.D.3d 515, 516 (2d Dep’t 2004) (“The liability of . . . the surety is measured by the liability of the [] contractor, its principal”).

I therefore grant summary judgment in Seiko’s favor and against Aegis on the issue of liability under the Payment Bond, because Seiko has established a *prima facie*

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<sup>3</sup> As I am granting Seiko summary judgment on its breach of contract claim, Seiko’s other causes of action for the same damages based on alternative legal theories are moot.

cause of action against Aegis, and Aegis failed to raise an issue of fact or otherwise demonstrate a valid defense to this claim. *See Clayton B. Obersheimer, Inc. v Travelers Cas. & Sur. Co. of Am.*, 96 A.D.3d 1284, 1285–86 (3d Dep’t 2012) (affirming trial court’s grant of summary judgment to plaintiff on the issue of surety’s liability where plaintiff demonstrated compliance with the terms of the subcontract and surety’s opposition only created a question of fact as to the amount due).

Regarding Seiko’s breach of the covenant of good faith and fair dealing claim, Seiko argues that Newport is an improper claimant under the Payment Bond and that by proceeding with the Newport Settlement, Aegis acted in bad faith and delayed Seiko’s relief. The Payment Bond provides that “[a] claimant is defined as one having a direct contract with Principal [, *i.e.*, Triton] or with a Subcontractor of the Principal [, *i.e.*, Seiko] . . . .” Because Newport had a direct contract with Seiko, a subcontractor of Triton, Newport is a claimant as defined in the Payment Bond. Accordingly, Seiko has failed to demonstrate entitlement to judgment as a matter of law on this claim, and, upon a search of the record, I dismiss this claim against Aegis. *See* CPLR 3212(b). I also deny Seiko’s request for sanctions and other relief.

As neither party has addressed Seiko’s eighth cause of action, that claim shall continue.

In accordance with the foregoing, it is

ORDERED that that the motion of plaintiff Seiko Iron Works, Inc. for summary judgment is granted as to liability on its first cause of action for breach of contract against



defendant Triton Builders Inc., and granted as to liability on the sixth cause of action on the Payment Bond against defendant Aegis Security Insurance Company, and it is further

ORDERED that Seiko Iron Works, Inc.'s second through sixth causes of action against defendant Triton Builders, Inc. are dismissed as moot, and its seventh cause of action against defendant Aegis Security Insurance Company for breach of the covenant of good faith and fair dealing is dismissed; and it is further

ORDERED that, the pursuant to CPLR § 3212(c), the amount of damages owed plaintiff Seiko Iron Works, Inc. on its first and sixth causes of action is referred to a Special Referee to hear and report. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the damages issue; and it is further

ORDERED that counsel for plaintiff Seiko Iron Works, Inc. shall, within 30 days from the date of this order, serve a copy of the order, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report, this motion shall be disposed of in accordance with the results of the Special Referee's report and this decision; and it is further

ORDERED that plaintiff Seiko Iron Works, Inc.'s eighth cause of action is severed and shall continue.

This constitutes the decision and order of the Court.

1/10/2018  
DATE

Saliann Scarpulla  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE