

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

986

CA 09-00255

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

CNP MECHANICAL, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ALLIED BUILDERS, INC., HARTFORD FIRE INSURANCE
COMPANY, HARTFORD CASUALTY COMPANY AND HARTFORD
ACCIDENT AND INDEMNITY COMPANY,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(Kenneth R. Fisher, J.), entered September 15, 2008 in a breach of
contract action. The judgment was entered upon the order in appeal
No. 1 and awarded plaintiff the sum of \$70,347.09 against defendant
Allied Builders, Inc.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs and the motion is
denied.

Memorandum: Plaintiff commenced this action seeking, inter alia,
\$429,332.46 in damages resulting from the alleged breach by defendant
Allied Builders, Inc., the general contractor, of its subcontract with
plaintiff. We agree with defendants that Supreme Court erred in
granting plaintiff's motion seeking partial summary judgment in the
amount of \$62,077.48. In support of its motion, plaintiff submitted a
"Subcontract Summary" (Summary) prepared by defendants' counsel, which
allegedly constituted an admission by defendants that plaintiff was
owed a minimum of \$62,077.48. In opposition to the motion, defendants
submitted evidence that the Summary was prepared for the purpose of
settlement negotiations and was therefore inadmissible as proof of the
amount of damages (see CPLR 4547). We conclude that the court erred
in determining that the Summary was admissible because it contained
readily verifiable facts with respect to the amount owed to plaintiff
pursuant to the subcontract and thus erred in granting plaintiff's
motion based on the Summary. Even assuming, arguendo, that the
Summary was admissible, we further conclude that plaintiff itself
raised an issue of fact with respect to the amount set forth in the

Summary by submitting documents in its reply papers, including its responses to defendants' interrogatories, that conflict with the individual amounts listed in the Summary (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court