

**Padilla Constr. Servs., Inc. v DeMicco Bros., Inc.**

2012 NY Slip Op 30150(U)

January 9, 2012

Supreme Court, Nassau County

Docket Number: 004391/11

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
PADILLA CONSTRUCTION SERVICES, INC.  
On Behalf of Themselves and Others  
Similarly Situated,

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 004391/11

MOTION DATE: Nov. 30, 2011  
Motion Sequence # 001, 002

Plaintiff,

-against-

DeMICCO BROTHERS, INC., FRANK  
DeMICCO, FIDELITY & DEPOSIT  
COMPANY OF MARYLAND, ZURICH  
AMERICAN INSURANCE COMPANY,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation/Affidavit..... XX
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

Motion by plaintiff Padilla Construction Services, Inc. ("PCS") for an order pursuant to CPLR 3212 granting it summary judgment against defendant DeMicco Brothers, Inc. ("DeMicco") is **denied** without prejudice to renewal upon completion of disclosure. Cross-motion by DeMicco for an order pursuant to CPLR 3025 (b) granting it leave to amend its answer is **granted**.

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Plaintiff commenced this action to recover money damages for the outstanding balances on three construction projects in the City of New York: the Ely Avenue Project, the Paulding Subcontract, and the Flushing Avenue project.

Plaintiff PCS is a contractor which performs general construction work and also negotiates with utility companies to avoid their interference with construction projects. Defendant DeMicco Brothers is a general contractor which works on public improvement projects. Defendants Zurich American Insurance Company and Fidelity & Deposit Company of Maryland issued surety bonds covering the projects.

PCS moves for summary judgment against DeMicco in the amount of \$260,711.79 plus interest from February 6, 2009 for unpaid contract balance on the Ely Avenue Project; in the amount of \$17,426,01 plus interest from February 6, 2009 for unpaid contract balance on the Paulding Subcontract; in the amount of \$33,753.18 plus interest from February 6, 2009 for unpaid contract balance on the Flushing Avenue Project. PCS asserts that there are no issues of material fact as to the amounts owed and that DeMicco has failed and refused to make payments to PCS.

PCS alleges that it performed “utility interference work” on each of the projects and has not been paid for that work. PCS submits, *inter alia*, an affidavit of James Jacobi, the Utility Operations Consultant for PCS; an e-mail dated February 26, 2009 (Exhibit 13 to Motion) sent to DeMicco regarding the aged receivables for the Ely, Paulding and Flushing projects; and DeMicco’s response stating that it would make weekly payments on the monies owed by DeMicco to PCS but DeMicco was “struggling with its vendors.” *Id.*

In opposition to the motion, DeMicco asserts that the motion should be denied because

No discovery has been conducted in this litigation and there exists numerous material issues of fact which should preclude summary judgment;

Padilla’s complaint itself fails to state a cause of action, in that it fails to set forth the elements for either breach of an express written contract or for an account stated;

Padilla’s motion failed to include any evidence of a written subcontract for the Ely Avenue Project and the Flushing Avenue Project;

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Padilla's motion failed to offer any evidence that Padilla performed any work on any of the projects, such as certified payroll records or time sheets, which is essential to its case;

Padilla's motion failed to offer any evidence that DeMicco breached any of the alleged subcontracts;

Padilla's motion failed to offer any evidence, other than conclusory statements, of any damages; and

Padilla's motion failed to offer any evidence of an account stated.

In addition, DeMicco cross-moves for leave to amend its answer to assert an affirmative defense based on statute of frauds. Specifically, DeMicco asserts that Padilla does not have written executed agreements for either the Ely Avenue Project or the Flushing Avenue Project. See Spitz v Klein, 33 AD3d 988, 989 [2<sup>nd</sup> Dept 2006], citing General Obligations Law § 5-701(a)(1).

Zurich claims that, as surety for DeMicco, it is entitled to assert those positions and defenses available to DeMicco. Thus, Zurich joins in the arguments presented by DeMicco in opposition to the motion.

Zurich joins in contesting plaintiff's allegation that it was a "subcontractor" that performed "work" on any of DeMicco Brothers' projects with the City. Zurich also asserts that there are multiple issues of fact which preclude summary judgment.

Zurich served discovery demands upon the plaintiff aimed at many of these factual issues, including the following: (i) Demand for Written Interrogatories dated August 10, 2011, (ii) First Notice for Discovery and Inspection dated August 10, 2011, and (iii) Notice to Take Deposition Upon Oral Examination dated July 6, 2011. Said discovery demands are currently outstanding.

Specifically, Zurich requests discovery with respect to: (i) the terms of the parties' alleged agreements (Padilla's percentage – if any– of the monies paid on the utility interference work); (ii) whether Padilla performed its obligations owed to DeMicco; (iii) Padilla's certified payroll records; (iv) what monies, if any, DeMicco actually received from

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the utility companies; (v) how Padilla calculated its damages; (vi) how much money DeMicco paid to Padilla; and (vii) any setoffs DeMicco had against the monies Padilla claims are owed.”

DeMicco argues that discovery is needed as to its affirmative defenses that (i) DeMicco made payments which were not credited by Padilla; (ii) Padilla’s claims are barred by release, payment and/or waiver; (iii) the monies due and owing to Padilla are improperly calculated; (iv) some of the claims are not covered by State Finance Law § 137; (v) Padilla’s claims are barred by the doctrine of equitable estoppel; (vi) Padilla’s claims are barred by the doctrine of unclean hands and (vii) Padilla’s claims are barred for failure to comply with Labor Law § 220 *et seq.* (*Id.* at pg. 14.)

It is well established that “a party should be permitted a reasonable opportunity to obtain discovery prior to the determination of a motion for summary judgment.” *See e.g., General Electric Capital Auto-Leasing Inc. v Stephens*, 248 AD2d 668, 669 [2<sup>nd</sup> Dept 1998]; *see also Baron v Inc. Village of Freeport*, 143 AD2d 792, 792-93 [2<sup>nd</sup> Dept 1998]. Further, “where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.” *Id.* at 792-93.

CPLR 3212(f) permits a party opposing a motion for summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated (*Lettieri v Cushing*, 80 AD3d 574 [2<sup>nd</sup> Dept 2011]; *Botros v Flamm*, 77 AD3d 602 [2<sup>nd</sup> Dept 2010]; *see Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738 [2<sup>nd</sup> Dept 2010]; *Aurora Loan Servs., LLC v LaMattina & Assoc., Inc.*, 59 AD3d 578 [2<sup>nd</sup> Dept 2009]; *Juseinoski v New York Hosp. Med. Ctr., of Queens*, 29 AD3d 636, 637 [2<sup>nd</sup> Dept 2006]).

Although determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent (see CPLR 3212[f]), “[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence (*Anne Koplick Designs, Inc. v Lite*, 76 AD3d 535, 536 [2<sup>nd</sup> Dept 2010]; *Williams v D&J School Bus, Inc.*, 69 AD3d 617 [2<sup>nd</sup> Dept 2010]; *see also Nascimento v Bridgehampton Construction Corp.*, 86 AD3d 189 [1<sup>st</sup> Dept 2011]; *Lambert v Bracco*, 18 AD3d 619 [2<sup>nd</sup> Dept 2005]).

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Based upon the documents submitted, DeMicco and Zurich have established that further discovery may lead to relevant evidence (*Lettieri v Cushing, supra; Botros v Flamm, supra*). Plaintiff's motion for summary judgment is **denied** without prejudice to renewal upon completion of discovery.

This Court will now address DeMicco's cross motion. It is well settled that leave to amend should be freely granted (*see* CPLR 3025[b]); *Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 [1989]) in the absence of prejudice or surprise resulting from the delay. *Schwartz v Sayah*, 83 AD3d 926 [2<sup>nd</sup> Dept 2011]. However, leave to amend should not be granted when the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit. (*Id.*, *see* *Jenal v Brown*, 80 AD3d 727 [2<sup>nd</sup> Dept 2011]; *Morton v Brookhaven Mem. Hosp.*, 32 AD3d 381 [2<sup>nd</sup> Dept 2006]). Further, leave to amend a pleading should be granted "where the documentary evidence submitted in support of the motion indicates that the proposed amendment may have merit" *Zito v County of Suffolk*, 81 AD3d 722 [2<sup>nd</sup> Dept 2011], quoting *Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1047 [2<sup>nd</sup> Dept 2010]; *see* *Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983].

In this case, plaintiff will not be prejudiced or surprised by allowing DeMicco to interpose the affirmative defense of Statute of Frauds and the proposed defense is potentially meritorious. *See* *Zito v County of Suffolk, supra*; General Obligations Law § 5-703(3). Accordingly, defendant Demicco's cross-motion for leave to amend is **granted**. Defendant Demicco's amended answer is deemed served in the form annexed as exhibit 1 to defendant's motion.

A Preliminary Conference has been scheduled for March 8, 2012 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

This constitutes the order and judgment of this Court.

Dated JAN 09 2012

  
J.S.C.

**ENTERED**

JAN 12 2012

NASSAU COUNTY  
COUNTY CLERK'S OFFICE