

**Harding Steel, Inc. v BDM Solutions LLC**

2020 NY Slip Op 33344(U)

October 8, 2020

Supreme Court, New York County

Docket Number: 656026/2019

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY**

**PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

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HARDING STEEL, INC.,	<table border="1"> <tr><td>INDEX NO.</td><td>656026/2019</td></tr> <tr><td>MOTION DATE</td><td></td></tr> <tr><td>MOTION SEQ. NO.</td><td>002</td></tr> </table>	INDEX NO.	656026/2019	MOTION DATE		MOTION SEQ. NO.	002
INDEX NO.		656026/2019					
MOTION DATE							
MOTION SEQ. NO.	002						
Plaintiff,							
- v -	<p><b>DECISION + ORDER ON MOTION</b></p>						
BDM SOLUTIONS LLC, DIONYSSIOS MAROULIS, 2269 FIRST AVENUE OWNER LLC, JOHN and JANE DOES 1-10 and others similarly situated,							
Defendants.							
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HON. BARRY R. OSTRAGER

Before the Court is a pre-note of issue motion by plaintiff Harding Steel, Inc. (“Harding”) for summary judgment in its favor on the majority of claims it has asserted against defendant BDM Solutions LLC (“BDM”) and its principal defendant Dionyssios Maroulis (“Maroulis”) (together “BDM”). For the reasons stated below, the motion is denied.

The underlying facts are detailed in the Court’s March 17, 2020 decision granting the pre-Answer motion by defendant First Avenue Owner LLC, the owner of the subject premises, to dismiss the claims in this action against the Owner. The facts will be summarized here.

Pursuant to a standard form AIA contract dated May 2014, the Owner retained BDM to complete a major construction project at the Property (NYSCEF Doc. No. 26). BDM in turn entered into an AIA contract with Harding in September of 2017 to install parking lifts at the Property as part of the project (NYSCEF Doc. No. 3). Defendant Maroulis signed the contract with Harding as principal of BDM.

Harding commenced this action on October 17, 2019, claiming it had fully performed its obligations under its contract with BDM and that the sum of \$108,650.00 remained due and

owing to Harding, along with attorney's fees pursuant to its contract based on the nonpayment. In its Complaint (NYSCEF Doc. No. 2), Harding asserted ten causes of action sounding in breach of contract, promissory estoppel, breach of the covenant of good faith and fair dealing, and account stated against BDM (the 1<sup>st</sup>, 2<sup>nd</sup>, 8<sup>th</sup> and 10<sup>th</sup> causes of action), breach of constructive trust, breach of fiduciary duty, and fraud against BDM and its principal Maroulis (the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> causes of action), and tortious interference with contractual relations against Maroulis (9<sup>th</sup> cause of action). Harding seeks summary judgment in its favor on all but the tort-related causes of action (the 5<sup>th</sup> and the 9<sup>th</sup>) and also seeks the dismissal of most of BDM's affirmative defenses.

In support of its motion, Harding submits an affidavit from Phil Harding, Chairman and Chief Executive Officer of plaintiff Harding Steel, authenticating its contract with BDM, asserting that Harding fully performed its obligations under the contract, and alleging that BDM breached the contract by failing to pay Harding \$108,650.00 still due, based on which Harding filed a mechanic's lien (NYSCEF Doc. No. 44). Harding also asserts that the Final Waiver of Lien provided to it by the Owner is invalid as it was neither prepared by, nor executed by, anyone on behalf of Harding, and the signature appears to be false. Counsel also submits a memorandum of law asserting that the elements of all of the contract-related claims have been established and that no triable issues of fact exist.

BDM disagrees and identifies various issues of fact both in the Maroulis Affidavit and counsel's Affirmation (NYSCEF Doc. Nos. 63 and 73). Maroulis does not dispute that Harding may be entitled to money, but he insists the facts demonstrate that the Owner assumed responsibility for the payments. Specifically, Maroulis states: "The reason this money was not paid by BDM to plaintiff Harding Steel is that this money was not paid to BDM by the 2269

First Avenue Owner. In fact, the 2269 First Avenue Owner had agreed to make payment directly to Harding Steel, as evidenced by the fact that the only prior payment made to Harding Steel was made directly by the 2269 First Avenue Owner.” Maroulis provides a copy of an email he claims proves his point that the Owner, not BDM, was paying Harding (NYSCEF Doc. No. 67).

BDM’s counsel in his affirmation reiterates that issues of fact mandate the denial of summary judgment. He notes a related case before this Court scheduled for trial on January 20, 2021 wherein BDM is seeking to recover over \$2M from the Owner (Index No. 655824/18).<sup>1</sup> On the merits, counsel argues that Harding cannot be granted relief on the Trust Fund claim when BDM never received from the Owner, and is not holding, any monies due to Harding. Nor is there a claim for unjust enrichment where it is the Owner, and not BDM, who received the services provided by Harding. And the evidence from Maroulis that the Owner had, at least on one occasion, paid Harding directly defeats summary judgment on both the breach of contract and the account stated claims. Further, claims such as promissory estoppel, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing not only do not merit judgment in plaintiff’s favor but are typically dismissed as barred by the existence of a written contract. *See, e.g., Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987) (“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter”).

In reply, Harding’s counsel complains of BDM’s alleged noncompliance with discovery obligations and the failure of defense counsel to submit a memorandum of law and not merely an affirmation (NYSCEF Doc. No. 75). On the merits, counsel contends Harding has admitted its

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<sup>1</sup> A third related action by another subcontractor against BDM was recently filed and is pending before this Court under Index No. 150985/2020.

breach of contract and has failed to refute Harding’s other causes of action, and the possibility that the Owner may owe BDM or Harding money should not defeat Harding’s claims here.

The Court finds that Harding has failed to establish its right to the drastic remedy of summary judgment. As discussed above, Harding has not met its burden of establishing a prima facie case as to several of the causes of action, and defendants have successfully raised triable issues of fact as to the others. Therefore, plaintiff’s motion for summary judgment is denied, and the action shall proceed to trial unless resolved by the parties. In light of the relatively small amount of money at issue, which may soon be outpaced by the cost of this litigation, the Court urges counsel to seek a consensual resolution of the dispute.

In that regard, the Court notes that a conference has been scheduled for October 13, 2020 at 11:00 a.m. in this case and the two related cases pending before the Court. During that conference, the Court will not only resolve outstanding discovery disputes but will work with counsel to limit the triable issues. All counsel are directed to appear with full settlement authority. Counsel for BDM, which is a party in all three cases, shall promptly forward a copy of this decision to all counsel in the related cases who may not counsel here.

Accordingly, it is hereby ORDERED that the motion by plaintiff Harding Steel, Inc. for summary judgment is denied.

Dated: October 8, 2020

*Barry R. Ostrager*  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: