STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

---

DiMARCO CONSTRUCTORS, LLC,

Plaintiff, DECISION and ORDER

v. INDEX No. 2007-02537

MDR ELECTRIC, INC.,

Defendant.

---

This is a motion for summary judgment by plaintiff based in large part on answers to a Notice to Admit. Defendant cross-moves for summary judgment seeking $31,575.20 in damages.

The matter began in 2005 when plaintiff and Home Depot USA entered into a construction contract to perform certain work on a Home Depot in Westfield, Ma. On or about 8/12/05, plaintiff entered into a subcontract with defendant for defendant to perform some work on the project (Ex. 1 is the subcontract). Defendant then subcontracted with CLP Resources, Inc., whereby CLP furnished labor, etc., for the project. Subsequently, CLP created a mechanic's lien against the project in the amount of $88,741.08, for unpaid labor and materials (Ex.2), and CLP later filed suit against defendant and Home Depot in Massachusetts (Ex. 3). Plaintiff commenced this lawsuit in Monroe County on or about 2/26/07 (Ex. 9). Plaintiff has made a series of demands against defendant for defendant to indemnify plaintiff pursuant

to the terms of the subcontract, and to discharge the mechanic's lien.(Ex. 12). The demands have gone unanswered.

The terms of the subcontract require defendant to pay for material and labor, etc. at ¶9. Further, under ¶10, defendant is required to discharge the mechanic's lien within 10 days of a demand and defendant must pay attorneys fees and associated costs in the event that a demand is needed. Plaintiff contends that defendant has failed to pay for the materials etc., has not discharged the lien, has failed to pay CLP, and has failed to indemnify plaintiff all in violation of the terms of the subcontract.

In support of plaintiff's motion for summary judgment, plaintiff submits the contents of the 4/6/07 Response to DiMarco's First Notice to Admit, executed by Mary Whalen in which Ms. Whalen purportedly admits to all of the foregoing assertions lodged by plaintiff. As such, plaintiff submits, defendant has made admissions which serve to entitle plaintiff to judgement as a matter of law and plaintiff asks for summary judgment in the amount of $88,741.08 as principal, plus associated costs for a total judgment in the amount of $101,036.17. Plaintiff details the associated costs and avers that attorney's fees in the amount of $7,720.00 is appropriate because she avers that she has worked 35.20 hours at $225.00 per hour.

Defendant's cross-motion for summary judgment consists of a

memorandum of law and an attached affidavit by David Bolduc, who avers as the VP and Treasurer of defendant. Bolduc's affidavit is short and begins with the assertion that defendant is a Massachusetts corporation which does not transact business in New York, and that it entered into an agreement with plaintiff on 8/12/2005, to do certain construction work and supply materials to plaintiff for the construction of a Home Dept store in Westfield Mass. He asserts that all of the negotiations regarding the contract occurred in Massachusetts, that it was executed in Massachusetts, and that all the work was performed in Massachusetts. Defendant asserts that it performed all of the conditions of the agreement, but plaintiff failed to pay what remains on the contract, a balance due of $31,575.20. Defendant asserts that, as the direct result of defendant not getting paid this balance, defendant was unable to pay one of its subcontractors, CLP Resources. Defendant contends that the issues in the Massachusetts lawsuit with CLP are the same as the ones herein. As revealed in defendant's memorandum of law, defendant filed a third-party action against plaintiff in Massachusetts on 2/20/07, which predated the filing of this action by 7 days. Defendant contends that the complaint should dismissed "in the interest of substantial justice" because New York is an inconvenient forum, that all of the significant events occurred in Massachusetts, and that the issues raised in the

Massachusetts lawsuit are the same. Defendant also suggests in its memorandum that the action should be dismissed because the court lacks personal jurisdiction over defendants in that defendant has not conducted business of any kind in New York and thus does not have the minimum contacts necessary to confer jurisdiction. Defendant claims entitlement to judgement because it has fully performed on the terms of the contract and deserves judgment. Finally, defendant contends that, even if plaintiff prevails in this action, plaintiff is not entitled to attorneys' fees and costs because the contract is not clear as to the responsibility of costs in the event that plaintiff is the source of the breach of the contract.

Analysis

Generally, admissions made in response to a CPLR §3123 notice to admit are binding for purposes of motion practice and, thus, a response to a notice to admit may be used in support of summary judgement. Beneficial Finance Co., v.. Youngman, 57 A.D.2d 727 (4th Dept. 1977). However, a notice to admit is to be used for the disposal of uncontroverted questions of fact or those that are easily provable, and not for compelling admissions of fundamental and material issues or ultimate facts that can only be resolved at trial. The Hawthorne Group, LLC v. RRE Ventures, 7 A.D.3d 320 (1st Dept. 2004). It is usually used for admissions that an adverse party owned a car, or that a

photograph accurately depicts the intersection of an accident or that a person's signature appears on a contract; it is not used to compel a party to admit that he or she was driving negligently or that the party breached a contract. Siegel, N.Y. Practice §364 (4th Ed.)

Although the cases arise usually in the context of unanswered notices to admit, which are claimed to be "deemed admitted" under the statute, at least one case has refused to permit consideration of an "executed" notice to admit on the ground that the questions posed in the notice do not involve clear cut matters, but were used to establish material facts or ultimate issues of fact. Eddyvill Corp. v. Reylea, 35 A.D.3d 1063, 1066 (3rd Dept. 2006). See Nanco Env. Serv. Inc. v. Camo Lab. Inc., 245 A.D.2d 601 (3d Dept. 1997)(motion for summary judgment "premised upon what we find to be an inappropriate use of CPLR 3123(a)); Miller v. Hilman Kelly Co., 177 A.D.2d 1036 (4th Dept. 1991); Howlan v. Rosol, 139 A.D.2d 799, 802 (1st Dept. 1988). Accordingly, plaintiff fails to meet its initial burden on summary judgment, the affidavit of its principal being conclusory only, and plaintiff's motion is denied.

In connection with defendant's cross-motion for summary judgment, the only substantive proof offered for this relief is the self-serving conclusory and bare statement by Bolduc that defendant fulfilled the terms of the contract and is therefore

entitled to relief. Conclusory assertions by a party are insufficient on their face to qualify for the granting of summary judgment. Therefore, defendant failed in its initial burden and the cross-motion should be denied regardless of the sufficiency of the response.

The other arguments of defendant, only suggested by the affidavit but contained in its brief, is that the matter should be dismissed under the doctrine of forum non conveniens grounds and for lack of personal jurisdiction. The parties' agreement, ¶24, in pertinent part, reads, "Any litigation or other dispute resolution proceeding arising out of or pertaining to this Agreement *shall* be venued in Monroe County, New York." (emphasis supplied). With respect to that portion of defendant's motion which seeks dismissal based upon the lack of jurisdiction, that must be denied. It is well settled that parties to a contract may consent to the jurisdiction of a court that would otherwise not have jurisdiction. Dine-A-Mate v. J.B. Noble's Restaurant, 240 A.D.2d 802 (2d Dept. 1997). It has also been held that, absent a showing of fraud, overreaching, unreasonableness or injustice, a party consents to personal jurisdiction when the term "venue" is used in a contract clause conferring jurisdiction. CV Holdings, LLC v. Bernard Technologies, Inc., 14 A.D.3d 854 (3rd Dept. 2005). Therefore, here, defendant expressly agreed that venue and thus personal jurisdiction, may

be found in New York. Since defendant makes no claim of overreaching or the other disclaiming factors listed above, jurisdiction is found in Monroe County.

This, however, does not end the discussion. Defendant has also moved for dismissal under forum non conveniens grounds. It is well settled that pursuant to CPLR §327(a), a court may dismiss an action if it finds in the interest of substantial justice that the action should be heard in another forum. Phat Tan Nguyen v. Banque Indosuez, 19 A.D.3d 292 (1st Dept. 2005); Bodea v. Trans Nat Express, Inc., 286 A.D.2d 5 (4th Dept. 2001). The burden of proving that an alternative forum is more appropriate is borne by the moving party. Banco Amrosiano v. Artco Bank & Trust, 62 N.Y.2d 65 (1984). But that burden cannot be met here, inasmuch as ¶24 is not merely a service of suit clause, cf., Price v. Brown Group, Inc., 206 A.D.2d 195 (4th Dept. 1994), but is an exclusive forum selection clause. Chiarizia v. Xtreme RYDZ Custom Cycles, ___ A.D.3d ___ (4th Dept. Sept. 28, 2007); SterLing Nat. Bank as Assignee of Norvergence, Inc. V. Eastern Shipping Worldwide, Inc., 35 A.D.3d 222, 223 (1st Dept. 2006)("where a party to a contract has agreed to submit to the jurisdiction of a court, that party is precluded from attacking the court's jurisdiction on forum non conveniens grounds"); Bell Constructors, Inc. V. Evergreen Caissons, Inc., 236 A.D.2d 859 (4th Dept. 1997); Arthur Young & Co. V. Leong, 53

A.D.2d 515, 516 (1st Dept. 1976).

Defendant is correct that a similar case in Massachusetts is being adjudicated. Indeed, the third-party action there was commenced prior to the present action. Plaintiff filed an answer in that case on or about March 1, 2007 (Ex. 7) in which he asserted three affirmative defenses which are identical to the three causes of action asserted in the subject action. Although it was verified earlier, the subject action was filed on 2/26/97 (Ex. 9), so the answer and the subject complaint were prepared almost simultaneously. Under the circumstances, and especially because there is no discrete mention of either waiver of the forum selection clause or the so-called first-in-time doctrine, defendant's motion is denied.

The parties must submit proposed scheduling deadlines by the end of next week.

SO ORDERED.

_____
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: October 12, 2007
Rochester, New York