

**American Spray-On Corp. v Austin Helle Company,
Inc.**

2004 NY Slip Op 30209(U)

July 20, 2004

Supreme Court, New York County

Docket Number: 0602595/2003

Judge: Charles E. Ramos

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

Charles Edward Ramos

53

PRESENT: _____

PART _____

0602595/2003

AMERICAN SPRAY-ON CORP.

vs
AUSTIN HELLE CO, INC

SEQ 1

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

is decided in accordance with accompanying memorandum decision and order.

FILED

JUL 22 2004

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/20/04

Check one: FINAL DISPOSITION

CHARLES E. RAMOS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X

AMERICAN SPRAY-ON CORP.,

Plaintiff,

Index No. 602595/03

-against-

AUSTIN HELLE COMPANY, INC.,

Defendants.
-----X

Charles Edward Ramos, J.S.C.:

In this action, plaintiff American Spray-On Corp. (Spray-On) seeks to recover money allegedly due for construction work performed pursuant to a **subcontract**. Spray-On seeks damages in the amount of \$40,000 for payment on a dishonored check, and \$165,000 on its unjust enrichment **and** quantum meruit causes of action. Defendant Austin **Helle** Company, Inc. (AHC) now moves to dismiss the complaint **based** upon documentary evidence and for failure to state a cause of action. AHC also requests **costa**, disbursements and attorney's fees.

Background

AHC, a New Jersey construction company, entered into an agreement with the Port Authority of New York and New Jersey (Port Authority) to perform fireproofing construction on a parking garage **at** Newark Airport in Newark, **New** Jersey. AHC then entered into a subcontract with non-party Condor Associates, Ltd. (Condor), whereby Condor was to perform asbestos abatement and apply fire retardant materials on steel beams in connection with AHC's fireproofing construction at Newark Airport (AHC-Condor Agreement). Under the AHC-Condor Agreement, Condor agreed to

keep the Port Authority's property "free and clear of any Construction Lien Claim, or other claim of lien"

Kianovsky Aff., Ex. B, ¶ 15.

Condor, in turn, entered into a subcontract with Spray-On to perform some of Condor's obligations under the AHC-Condor Agreement (Condor-Spray-On Agreement). Spray-On claims that its work was to be performed for \$165,000 "for the ultimate benefit of [AHC], the general contractor." Azrin Aff., ¶ 6. According to **Spray-On**, the Condor-Spray-On Agreement, like the AHC-Condor Agreement, barred Spray-On from filing a mechanic's lien to protect its **rights**.¹ Azrin Aff., ¶ 22; Spray-On Opp. Mem. of Law, at 5. Spray-On **avers** that the majority of the work under the Condor-Spray-On Agreement was completed by May 31, 2002.

On June 6, 2002, AHC made a **progress** payment to Condor in the amount of \$169,582. However, on June 11, 2002, Condor requested that AHC withdraw that payment, and make the same payment in two separate checks: one for \$40,000 payable to Condor and Spray-On jointly, and one for \$129,582 payable solely to Condor. AHC complied with this request and drafted the two checks, both dated June 11, 2002.

On July 2, 2002, Condor allegedly notified AHC that Condor did not forward the \$40,000 payment to Spray-On, and that Condor was having financial difficulties. Consequently, AHC placed a stop-payment on the \$40,000 check, and, shortly thereafter,

¹ Neither party submits a copy of the Condor-Spray-On Agreement.

terminated the AHC-Condor Agreement.²

According to AHC, on July 10, 2002, **AHC** proposed terms for a new agreement with Spray-On, whereby Spray-On would complete work under the Condor-Spray-On Agreement. According to the affidavit of Richard McCann, AHC's president, Spray-On rejected the terms of that agreement. Subsequently, on July 17, 2002, AHC and Spray-On entered into an agreement, whereby Spray-On agreed to complete uncompleted work under the Condor-Spray-On Agreement for \$36,300 (AHC-Spray-On Agreement). According to AHC, the AHC-Spray-On Agreement was prospective in nature.

Though it is not clear when, Condor indorsed and delivered the \$40,000 check to Spray-On. Spray-On deposited the check on July 31, 2002. Spray-On claims that the check was returned unpaid on August 2, 2002, and that it never received payment for the work performed for AHC's alleged benefit under the Condor-Spray-On Agreement. Spray-On now seeks payment on the dishonored \$40,000 check, and payment for the full value **of** the work it performed under the Condor-Spray-On Agreement.

Discussion

Choice of Law

The parties do not dispute that the agreements relating to this action contain choice **of** law provisions, providing for the

² AHC claims that it terminated the **AHC-Condor** Agreement due to numerous defaults by Condor, involving Condor's bankruptcy filing, expiration of its workmen's compensation insurance, and failure to pay field labor. Spray-On claims that Condor was liquidated in chapter 7 bankruptcy, and that none of Condor's unsecured creditors, including Spray-On, were paid.

application of New Jersey law. Moreover, the parties do not dispute that their agreements were entered into, **and** performed, in New Jersey. Therefore, New Jersey law applies. *Finucane v Interior Constr. Corp.*, 264 AD2d 618 (1st Dept 1999).

Payment On the Dishonored Check

AHC argues that it had no obligation to pay Spray-On, and that the issuance of the \$40,000 joint check did not create such an obligation. In opposition, Spray-On argues that the check is a negotiable instrument, which Spray-On, as a **payee**, is entitled to cash. Spray-On also **argues** that **it** is entitled to maintain an action on the dishonored check because it is a holder in due course.

A "negotiable instrument" is

an unconditional promise to order to pay a fixed amount of money . . . if it: (1) is payable . . . to order at the time it is issued or first comes into possession of a **holder**; (2) **is** payable on demand **or** at a definite time; **and** (3) **does** not state any other undertaking or instruction **by** the person promising **or** ordering payment to do any act in addition to the payment of money .

. . .

NJSA § 12A:3-104 (a). The holder of a negotiable instrument is entitled to enforce that instrument. NJSA § 12A:3-301.

Here, **the** \$40,000 check is an unconditional promise, because it does not state a condition to payment, or that payment is subject to, or governed by, another writing. NJSA § 12A:3-106 (a). The check is an order, because **it** is "a written instruction to pay money signed **by** the person giving the instruction." NJSA § 12A:3-103 (6). The check **is for** \$40,000, "a fixed amount of

money." **NJSA 12A:3-104** (a). The check is payable to order (**NJSA** § 12A:3-109 [b]), because it states: "pay to the order of [Spray-On] and [Condor]" (Kianovsky **Aff.**, **Ex. E**). The check is "**payable on demand**," because it is payable on demand, at the will of Spray-On and Condor, and does not state any time of payment. **NJSA** § 12A:3-108 (a). The check "does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money" **NJSA** § 12A:3-104 (3). Thus, the \$40,000 check is a negotiable instrument.

Spray-On is the "holder" of the negotiable instrument, because it is payable to Spray-On, and Spray-On is in possession of it. **NJSA** § 12A:1-201 (20). **AHC** fails to show why **Spray-On**, as the holder of the instrument, and as a co-payee, **is** not entitled to enforce it. **NJSA** § 12A:3-301. Therefore, Spray-On has stated a **cause of** action for payment on the dishonored check.

AHC has not shown that it has no obligation to honor the check. **AHC's** argument, that it "was not under an obligation to make good on [the] check" because it had no obligation to Spray-On (**AHC** Opp. Mem. of Law, at 8), fails to explain why the check cannot be enforced by Spray-On as a negotiable instrument. Nor **does** **AHC** cite any law in support of this argument.

AHC also **argues** that Condor, because of its alleged breach of the **AHC-Condor** Agreement, had no authority to indorse the \$40,000 check to Spray-On, and, therefore, that Condor's indorsement is a nullity. However, even assuming that Condor

breached the AHC-Condor Agreement, AHC fails to explain how that breach renders Condor's indorsement of the check to **Spray-On** unauthorized. Moreover, even if Spray-On were "in wrongful possession of the instrument," it **may** still be entitled to enforce the instrument. **NJSA § 12A:3-301.**

"**If** an instrument is not payable alternatively to two or more persons, it is payable **to** all of them and may be negotiated, discharged, or enforced **only** by **all** of them," NJSA § 12A:3-110 (d). The check was indorsed, because it **was** signed, and, therefore, negotiated by Condor. NJSA § 12A:3-204 (a). That indorsement transferred Condor's rights in **the** negotiable instrument to **Spray-On**. **NJSA § 12A:3-203 (a).** For the foregoing reasons, AHC has not stated a **sufficient basis** to warrant dismissal of Spray-On's cause **of** action for payment on the dishonored check. Accordingly, AHC's motion to dismiss Spray-On's first cause of action for payment on the dishonored check is denied.

The court notes Spray-On's argument that it is a "holder in due course," pursuant to NJSA § 12A:3-302, which would entitle Spray-On to enforce the negotiable instrument against AHC with limited defenses available **to AHC**. "In the typical case the holder in due course is not the payee of the instrument. Rather, the holder in due course **is an** immediate or remote transferee of the payee." *Id.* **at** Uniform Commercial Code Comment (4). Thus, "the holder-in-due-course doctrine **is irrelevant** in determining rights between [the drawer of the check] and [the payee] **with**

respect to the instrument," where the drawer of the check is the only drawer. *Id.*

Quantum Meruit and Unjust Enrichment

AHC next moves to dismiss Spray-On's quantum meruit **and** unjust enrichment causes of action, arguing that AHC paid a new subcontractor to complete Condor's work, that Spray-On has a remedy at law, and that Spray-On's right to payment arises solely under the Condor-Spray-On Agreement. In opposition, Spray-On **argues** that AHC received a benefit from Spray-On, that retention of that benefit without payment **would** be unjust, and that it has no adequate remedy at **law**.

Generally, a sub-subcontractor who **has** a dispute with the party with whom it contracted "must resolve this problem without looking to those parties further up the chain" *F. Bender, Inc. v Jos. L. Muscarelle, Inc.*, 304 NJ Super 282, 287, 700 A2d 374 (1997). However, some cases justify equitable exceptions to the general rule, permitting the sub-subcontractor to assert a **cause** of action against the general contractor for quantum meruit. *Id.*; *Oronato Constr., Inc. v Eastman Constr. Co.*, 312 NJ Super 565, 711 A2d 1363 (1998).

In order to state a cause **of** action for quantum meruit, Spray-On must show that AHC was unjustly enriched, that is, that **AHC** "received a benefit, and that retention **of** the benefit without payment therefor would be unjust," and that Spray-On has no adequate **remedy** at law. *Callano v Oakwood Park Homes Corp.*, 91 NJ Super 105, 109, 219 A2d 332, 334 (1966); *F. Bender, Inc.*,

304 NJ Super at 285; *National Amusements, Inc. v New Jersey Turnpike Auth.*, 261 NJ Super 468, 619 A2d 262 (1992), *affd* 275 NJ Super 134, 645 A2d 1194 (AD 1994). "Unjust enrichment is not an independent theory of liability, but is **the** basis for a claim of quasi-contractual liability." *National Amusements, Inc.*, 261 NJ Super at 478.

AHC claims that it has not retained the benefit of Spray-On's **work** without paying for it, arguing that "Condor **has** received all [it] was entitled to receive under the [AHC-Condor Agreement]." AHC Mem. of Law, at 6. However, AHC fails to show that the \$129,582 check, payable to Condor, was actually cashed by Condor. Moreover, while AHC claims that it was required to hire new contractors to complete Condor's uncompleted **work** (McCann **Aff.**, ¶ 17), AHC fails to show that it **paid** for the portion of the work that was, in fact, completed **by** Condor. Thus, AHC has not shown that it did not retain the benefit of **Spray-On's** work without paying for it. Therefore, AHC fails to refute Spray-On's allegations that AHC received the benefit of the work and materials provided by Spray-On without paying **for** them.

Citing *National Amusement, Inc.* (261 NJ Super 468, *supra*), AHC argues that Spray-On has an adequate remedy at law **by** virtue of its breach of contract claim against Condor, thereby precluding Spray-On's equity action for unjust enrichment. In *National Amusement, Inc.*, the court determined that the plaintiff's unjust enrichment claim was improper because the

legal remedy of inverse condemnation was available to the plaintiff. Similarly, in *Callano* (91 NJ Super 105, *supra*), the plaintiff had a legal remedy against the estate of the individual with whom the plaintiff contracted.

Here, conversely, the parties do not dispute that Condor was liquidated in bankruptcy and no longer exists. Moreover, AHC does not refute Spray-On's contention that it was barred from filing a mechanic's lien to protect its rights. Thus, Spray-On cannot maintain an action for breach of contract against Condor, or enforce a lien. AHC does not suggest **any** other manner in which Spray-On could seek legal redress, and, therefore, AHC has not shown that **Spray-On has** an adequate remedy **at** law against Condor.

AHC argues that Spray-On's right to payment arises solely out of the Condor-Spray-On Agreement, and, therefore, that Spray-On is not entitled to maintain its quasi contract claims against AHC. In support of this argument, AHC cites *F. Bender, Inc.* (304 NJ Super 282, *supra*), *Callano* (91 NJ Super 105, *supra*), *National Amusement, Inc.* (261 NJ Super 468, *supra*) and *Insulation Contr. and Supply v Kravco, Inc.* (209 NJ Super 367, 507 A2d 754 [1986]). These cases are distinguishable on their facts.

In *F. Bender, Inc.* (304 NJ Super at 285-86), *Callano* (91 NJ Super at 109-10), and *National Amusement, Inc.* (261 NJ Super at 478), the plaintiff had an adequate remedy at law; whereas, here, as discussed *supra*, AHC has not shown that Spray-On has an adequate remedy at law. In *National Amusement, Inc.*, the court

determined that the defendants **did** not receive a benefit from the plaintiff (261 NJ Super at 478); whereas, here, **AHC** does not show that it received no benefit from Spray-On. In *Insulation Contr. and Supply*, the defendant **paid** the full amount due under the subcontract. 209 NJ Super at 374. Conversely, here, as discussed *supra*, AHC has not shown that **it** paid the full amount due under the AHC-Condor Agreement. Thus, AHC has not shown that it paid for the benefit that it received.

For the foregoing reasons, AHC's motion **to** dismiss Spray-On's second and third **causes** of action for quantum meruit and unjust enrichment is denied.

AHC states no basis for **its** request for attorney's fees, costs or disbursements. Therefore, that request is also denied.

Accordingly, it is hereby

ORDERED that the motion to dismiss is denied; and it **is** further

ORDERED that defendant **is** directed to serve an answer to the complaint within **10 daye** after service of a copy of this order with notice of entry.

Dated: July 20, 2004



J.S.C.

CHARLES E. RAMOS

FILED
JUL 22 2004
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10