

**L.A. Wenger Contr. Co., Inc. v Florman**

2007 NY Slip Op 31236(U)

May 9, 2007

Supreme Court, New York County

Docket Number: 0402859/2005

Judge: Judith J. Gische

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SCANNED ON 5/16/2007  
[\* 1]  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE  
Justice

PART 10

L.A. WENGER CONTRACTING Co, Inc. INDEX NO.

402859/05

- v -

KREISLER BORG FLOMAN

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for turnover funds

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
MAY 16 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: MAY 09 2007

[Signature]  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

L.A. Wenger Contracting Co., Inc.,

Plaintiff

-against-

Kreisler Borg Florman,

Defendant.

DECISION/ORDER

Index No.: 402859/05

Seq. No.: 003

Present:

Hon. Judith J. Gische

J.S.C.

-----x

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

**Papers**

Pitff OSC [release funds] w/EFB affirm, exhs .....

Def's opp w/EP affid, exhs .....

**FILED**  
Numbered  
MAY 1 21 6 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers the court's decision is as follows:

**GISCHE, J.**

This is an action for breach of contract. The court has before it plaintiff's motion for an order directing defendant to immediately release certain money presently being held by its attorney in escrow. The motion is opposed<sup>1</sup>.

**Background**

Plaintiff is the subcontractor on a project and defendant is the construction manager. The construction manager has an overarching agreement with the City of

<sup>1</sup>This motion was scheduled for oral argument on May 3, 2007, but the parties later agreed that it would be considered on the papers, without being argued.

New York to do a project for the Administration of Children's Services. The dispute between the subcontractor/plaintiff and defendant/construction manager is over whether defendant timely submitted requests for payment to the Comptroller of the City of New York.

Although neither side has provided the court with a complete copy of either of the applicable agreements, each refers to and relies upon an agreement between them dated May 7, 1999 (the "subcontract"). They also agree that the overarching or "prime" agreement between defendant and the City of New York is dated January 14, 1999.

The subcontractor/plaintiff argues that as per article 42.1.3 of the subcontract, it's right to get paid is "parallel to Construction Manager's entitlement to payment from Owner, except where Contractor's entitlement or disentitlement arises from the fault of the Construction Manager . . .". Plaintiff contends that defendant made an untimely application to the City to get paid and that it suffered monetary damages. Plaintiff was able to negotiate a partial settlement with the City, and the City made payment of that settlement money to the defendant.

Article 42.1.3. does not prevent a contractor from directly settling a claim for payment with the City, but in fact encourages it: "Contractor agrees to defer collection of payment from the Construction Manager of any Parallel Entitlement that is due and payable hereunder until all reasonable efforts to collect from the Owner or by way of enforcement of Construction Manager's mechanic's liens have been exhausted."

Defendant first contends that it timely submitted all the payments it received from plaintiff timely, and that damages plaintiff claims to have sustained were as a result of

plaintiff submitting untimely claims for payment in the first place. In opposition to this motion, defendant contends that it properly retained the money the City sent to it. Article 42.9 of the subcontract provides that “[t]he Construction Manager or the Owner may withhold from the Contractor any part of any payment as may, in the judgment of the Construction Manager or City, be necessary: (a) [ . . . ], (b) to protect the Construction Manager due to any breach or default of the Contractor's obligations thereunder; . . .” Defendant also relies upon articles 10.1.3 (“hold harmless”) and 10.3.1. (“liquidated damages”) to support its argument, that it has properly retained the money.

#### **Discussion**

This motion is simply styled as being for the release of money held by the defendant. However, stripping plaintiff's arguments to their bare essentials, plaintiff is actually seeking summary judgment on its claim that it is defendant's fault that plaintiff's claim for payment was not timely submitted to the City. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Alternatively, plaintiff is actually seeking injunctive relief in advance of trial, ordering the defendant to surrender the money it received based upon plaintiff's argument that it has a greater right to the money, it has a likelihood of success on the merits, and it will suffer irreparable harm if the money is not immediately made available to it. Paine v. Chriscott v. Blair House Associates, 70 AD2d 571 (1<sup>st</sup> dept. 1979); Aetna Insur. Co. v. Capasso, 75 NY2d 860 (1990). Either way, plaintiff's motion must be denied.

Not only is this motion improperly noticed for such extreme relief, plaintiff has not set forth any basis for the court to order (at this time) the release of the money being held by defendant. As per the express terms of the subcontract, the defendant has the right to retain money it may receive for the benefit of its subcontractor to protect itself against any breach of contract claims it may have. This is in contrast to the relief sought by plaintiff, which is based upon the allegations and claims in the complaint. Consequently, what plaintiff is asking for is the ultimate relief in the case.

Although defendant presents the further argument, that it is entitled to retain the money pending the trial because it may prevail on its counterclaims, and the money may then be applied as an offset under the doctrine of recoupment, this is not the basis for the court's denial of plaintiff's motion at this juncture of the case.

### **Conclusion**

Plaintiff's motion, for an order directing defendant to turn over the funds in its possession is denied at this time.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
May 9, 2007

So Ordered:

Hon. Judith J. Gische, J.S.C.

**FILED**  
MAY 16 2007  
NEW YORK  
COUNTY CLERK'S OFFICE