

Bay Crane Serv., Inc. v Continental Ironworks, Inc.
2007 NY Slip Op 32575(U)
August 8, 2007
Supreme Court, New York County
Docket Number: 0604391/2006
Judge: Eileen A. Rakower
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: RAKOWER
Justice

PART 5

Bay Crane
- v -
Con't Inmate's

INDEX NO. 604391/06
MOTION DATE _____
MOTION SEQ. NO. 001
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
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
AUG 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/8/07

[Signature]

EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
BAY CRANE SERVICE, INC.,

Plaintiff,

Index No.
604391/06

- against -

CONTINENTAL IRONWORKS, INC., NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION and
THE CITY OF NEW YORK,

Defendants.

HON. EILEEN A. RAKOWER

Decision and Order

FILED
AUG 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Bay Crane Service, Inc. ("Bay") is the owner and provider of hydraulic cranes. The New York City Department of Environmental Protection ("DEP") and The City of New York ("City") contracted with Continental Ironworks, Inc. ("Continental") to be the prime contractor on a project known as the Reconstruction of Sludge Storage Tank # 1, Coney Island Water Pollution Control Plant, D.E.P. Contract # CI-100 ("Project"). Bay provided to Continental a 300 ton hydraulic crane and a 265 ton hydraulic crane along with counterweights, rigging, crane mats and trucking, for the Project in August of 2005, at the agreed upon price of \$25, 270.63. Bay, after its last day on the job site on August 23, 2005, provided Continental with invoices for the rental of both cranes. These went unpaid. Bay reiterated its demands for payment to Continental through December 2005, when it filed a Notice of Public Improvement Mechanic's Lien ("Lien").

Continental executed an assignment under the Lien Law to Bay. Bay served the DEP and the NYC Dept. of Finance ("City"), and the assignment was approved and consented to by DEP. Despite the direction of DEP to disburse the funds, City failed to do so.

Plaintiff brings this action to enforce its Lien, and makes this motion for summary judgment. City, through a DEP affidavit, opposes the instant motion, explaining that the assignment, while valid, only assigns what Continental itself was entitled to receive. Because Continental failed to abide by a documentation provision of its contract with City, Continental remains ineligible to receive funds. Continental

failed to answer or appear in this action. Plaintiff moves also for a default judgment as against Continental.

Plaintiff, in support of its motion, provides the affidavit of Joseph Bernardo, Secretary of Bay, a copy of the summons and complaint and answer by City, a Notice of Pendency filed December 22, 2005, a Mechanics Lien with proof of certified mailing to City, correspondence from plaintiff's attorney to DEP, the Notice of Assignment under Mechanics Lien Law and the assignment from Continental to Bay for the \$25, 270.63 dated April 7, 2006 with proof of certified mailing to DEP, a proposed satisfaction of lien provided at the request of DEP in order to facilitate payment by City, communication from DEP to City consenting to the assignment and payment to Bay, and proof of service of additional notice of the action upon Continental pursuant to CPLR §3215(g)(4).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

Uncontested is the fact that Bay provided cranes for the project, that the cranes were provided for an agreed upon price (\$25, 270.63), and that Bay has not been paid for the services it rendered and equipment it furnished and from which City benefitted. Additionally, it is uncontested that Continental executed an assignment in the amount of the above sum, and that DEP consented to the assignment. There is no evidence to rebut plaintiff's claim that funds remain designated that are due and owing to Continental from which this claim can and should be paid.

City provides the affidavit of DEP project engineer Igor Yagudayev. It also attaches portions of a DEP City of New York Standard Construction Contract, but fails to include Articles 17 and 18 regarding subcontracts and assignments. Finally, it appends a copy of an envelope it sent to Continental at 877 Hart Street, Brooklyn, New York, stamped "No Such Number" and undeliverable.

City's dispute is with Continental for failure its to provide certain documentation that it owes to City which City does not claim is related to Bay's services. Rather, it asserts that "[a]lthough Continental initially complied with some of the documentation requirements, Continental has failed to supply originals of payroll reports and employee sign-in logs despite numerous requests from DEP to do so which Continental has not answered." Nevertheless, City concedes it is prepared to release the assigned funds to Bay from what it holds as potentially due Continental (\$104,000) once Continental provides the requested documentation. Peripherally, DEP acknowledges that Continental may no longer be operating and that its principals may have left the Country.

Plaintiff has made a prima facie showing of its entitlement to judgment pursuant to the Lien Law. Defendant has failed to raise a material issue of fact requiring a trial of the issues.

Wherefore it is hereby

ORDERED that plaintiff's motion for summary judgment as against New York City Department of Environmental Protection and The City of New York foreclosing the mechanic's lien filed and served upon DEP on December 27, 2005 is granted; and it is further

ORDERED that City is directed to pay the full amount set forth in the Notice of Lien in the sum of \$25, 270.63; and it is further

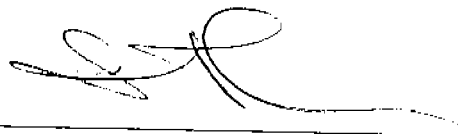
ORDERED that plaintiff's motion for a default judgment as against Continental Ironworks, Inc. is granted; and it is further

ORDERED that judgment shall be entered in favor of Bay Crane Service, Inc. against Continental Ironworks, Inc. in the sum of \$25,270.63, jointly and severally, with interest thereon from the 7th day of April, 2006 until the entry of judgment as

calculated by the Clerk of the Court, and thereafter at the statutory rate.

This constitutes the Decision and Order of the Court.

DATED: August 7, 2007



EILEEN A. RAKOWER, J.S.C

FILED
AUG 20 2007
NEW YORK
COUNTY CLERK'S OFFICE