

**B&J Servs., Inc. v Brunswick Constr. Co., Inc.**

2007 NY Slip Op 32746(U)

August 30, 2007

Supreme Court, Queens County

Docket Number: 0024899/2004

Judge: Lawrence Vincent Cullen

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN  
Justice

IAS PART 6

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B&J SERVICES, INC.,

Index No.: 24899/04

Plaintiff(s),

Motion Date: 3/27/07  
(From Part 7 Motion Calendar  
of Hon. Brathwaite-Nelson)

-against-

BRUNSWICK CONSTRUCTION COMPANY, INC.,

Motion Cal. No.: 2

Defendant(s).

Motion Seq. No.: 2

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The following papers numbered 1 to 5 read on this motion, pursuant to CPLR § 3212, granting the defendant, Arthur Cody, summary judgment, dismissing him, individually, as a party to this action and dismissing the plaintiff’s second cause of action for punitive damages; and on this cross motion, pursuant to CPLR § 3212, granting summary judgment in favor of the plaintiff, B&J, in the amount of \$232,950.00 with interest thereon from May 5, 2003 and awarding costs of this action.

PAPERS  
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1
Memorandum of Law .....	2
Notice of Cross Motion-Affidavits-Exhibits.....	3
Replying Affidavit.....	4
Replying Affidavit.....	5

Upon the foregoing papers it is ordered that this motion and cross motion are decided as follows:

This action arose on November 3, 2004 when the plaintiff, B&J Services, Inc. (hereinafter “B&J”) filed a Summons and Complaint in Queens County, New York against the defendants, Brunswick Construction Company, Inc. (hereinafter “Brunswick”) and Art Cody (hereinafter “Cody”) alleging a breach of contract against each defendant along with a second separate cause of action to collect punitive damages. The plaintiff within the complaint cites a material breach of agreement occurring on six separate occasions. Brunswick being a construction company often sub-contracted with other companies to work on various aspects of each project. B&J Services’ role was to provide labor to Brunswick Construction for the various asbestos removal projects that Brunswick had

contracts for. Mr. Cody, the president of Brunswick, would contact B&J Services and depending on the size of the current project would request a certain number of laborers; this occurred six times during 2003 and 2004. B&J within the complaint and for their first cause of action allege:

(1) In May of 2003 in East Fishkill, NY the defendants, Cody and Brunswick, each individually materially breached the agreement by failing and/or refusing to pay sixteen thousand two hundred dollars (\$16,200.00) for goods and services provided.

(2) In June of 2003 to September 2003 in Pittsfield, Massachusetts the defendants, Cody and Brunswick, each individually materially breached the agreement by failing and/or refusing to pay forty-nine thousand two hundred and fifty dollars (\$49,250.00) for goods and services provided.

(3) In November of 2003 to December 2003 in Pittsfield, Massachusetts the defendants, Cody and Brunswick, each individually materially breached the agreement by failing and/or refusing to pay thirty-five thousand dollars (\$35,000.00) for goods and services provided.

(4) In April of 2004 to May 2004 in Pittsfield, Massachusetts the defendants, Cody and Brunswick, each individually materially breached the agreement by failing and/or refusing to pay fifty thousand dollars (\$50,000.00) for goods and services provided.

(5) In April of 2004 to June 2004 in Pittsfield, Massachusetts the defendants, Cody and Brunswick, each individually materially breached the agreement by failing and/or refusing to pay fifty thousand dollars (\$50,000.00) for goods and services provided.

(6) In April of 2004 to July 2004 in Pittsfield, Massachusetts the defendants, Cody and Brunswick, each individually materially breached the agreement by failing and/or refusing to pay fifty thousand dollars (\$50,000.00) for goods and services provided.

The plaintiff further alleges, in a second separate cause of action, that each individual defendants' failure and/or refusal to pay for the goods and services provided was a reckless and willful failure, and as such the plaintiff has suffered punitive damages in the amount of one million dollars (\$1,000,000.00).

Following service of the complaint, the defendants filed a counter-claim, stating that on or about August 13, 2004 the plaintiff lost their workers compensation insurance coverage, unemployment insurance coverage and payroll tax liability causing the plaintiff to be unable to secure a labor force. Due to the plaintiff's inability to secure a labor force, Brunswick was forced to secure their own labor force causing the defendant Brunswick to suffer damages in the amount of one hundred fifty five thousand one hundred ninety-four dollars (\$155,194.00).

In his motion to dismiss, Cody asserts that at all times he acted as an officer of Brunswick and that B&J Contracted with Brunswick, so the action interposed against Cody individually must be dismissed. Defendants urge that the cause of action seeking punitive damages must be dismissed, in its entirety as improperly pleaded, as only a private contractual dispute is at issue, and the complained of conduct was not directed at the public generally.

B&J opposes the motion asserting that Cody is personally liable because he completely dominated Brunswick and used that domination to commit a fraud or wrong against B&J. B&J asserts further that defendants' deliberate, willful, wrongful and unjust acts towards plaintiff should result in the recovery of punitive damages for the resultant harm.

In its cross motion, B&J asserts that it is owed the amount of compensatory damages claimed in its complaint (\$250,450.00) based on the unpaid invoices, less \$17,500.00 for inability to complete their performance. In opposition, defendants assert that plaintiff's failure to supply the labor it had agreed to for the entire project caused them to incur additional costs and suffer damages in the amount of \$155,194.00.

The purpose of a summary judgment motion is "issue-finding, not issue determination" (Assaf v Ropog Cab Corp., 153 AD2d 520, 521, [1989]). Thus, summary judgment is to be granted only when there are no genuine issues of material fact (Alvarez v Prospect Hosp., 68 NY2d 320, [1986]). In determining whether summary judgment is appropriate, the "Court should draw all reasonable inferences in favor of the nonmoving party" (Asaf v Ropog Cab Corp., 153 AD2d at 521). Where, however, documentary evidence utterly refutes a plaintiff's factual allegations, and conclusively establishes a defense as a matter of law, the cause of action may be dismissed (see, Leon v Martinez, 84 NY2d 83,88).

In the matter at hand, defendants' motion was previously denied so that further disclosure may be had. Upon renewal of their motion, however, defendants were unable to produce certain documentary, i.e. corporate stock certificates along with numerous corporate records, to show that Cody did not exercise complete control of the corporate defendant. Furthermore, plaintiff submitted evidence to support its claim that Cody used that control to commit the wrong complained of which resulted in plaintiff's injury (see, Matter of Morris v New York State Dept. of Taxation and Finance, 82 NY2d 135 [1993]; Brooke Realty-Dupont Inc. v SBC Equipment Leasing Co., Incorporated, 248 AD2d 347 [1997]). Hence, at this stage of the proceeding defendant Cody has failed to demonstrate conclusively and at a matter of law that he cannot be individually liable on the contract.

As a result, the branch of the motion for summary judgment dismissing the action against defendant Cody individually is denied.

The second cause of action alleges that, in light of the deliberate, willful, wrongful and unjust act by the defendants, which ultimately resulted in plaintiff's dissolution, punitive damages should be made available in order to achieve equity. There is no allegation that defendants' conduct was directed at or impacted the public generally (Rocanova v Equitable Life Assur. Society, 83 NY2d 203 [1994]). Accordingly, the branch of the motion for summary judgment dismissing the second cause of action seeking punitive damages is granted.

Finally, plaintiff's cross motion for summary judgment in the amount of \$232,950.00 with interest thereon from May 5, 2003 and awarding costs of this action, is denied. The evidence considered on this cross motion demonstrates the existence of a triable issue of fact as to the amount owed.

Accordingly, based upon the papers submitted to this Court for consideration and the determinations set forth above, it is

ORDERED that the defendants' motion for summary judgment is granted to the extent of dismissing the second cause of action, and otherwise is denied; and it is further

ORDERED that the plaintiff's cross motion seeking summary judgment is denied.

Dated: August 30, 2007

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LAWRENCE V. CULLEN, J.S.C.