

Isacowitz v Halpern Constr., Inc.

2009 NY Slip Op 30180(U)

January 14, 2009

Supreme Court, New York County

Docket Number: 604119/00

Judge: Eileen Bransten

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

PRESENT: JON. EILEEN BRANSTEN

PART 3

Justice

ISACOWITZ

- v -

HALPERN

INDEX NO.

604119/00

MOTION DATE

7-3-08

MOTION SEQ. NO.

006

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for Summary Judgment

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits

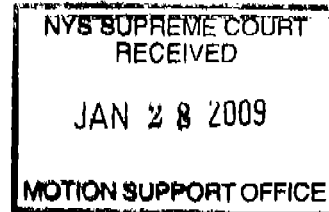
2

Replying Affidavits

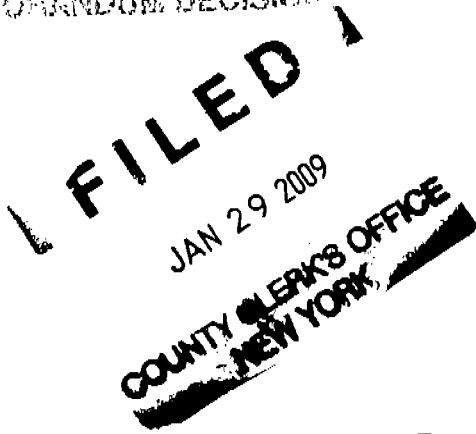
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion



MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION



Handwritten initials: JTBW

Dated: 1-14-09

Signature of Eileen Bransten

JON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
ALVIN ISACOWITZ d/b/a EXCELLENCE IN
PLUMBING,

Plaintiff,

Index No. 604119/00
Motion Date: 7/3/08
Motion Sequence No.:
006

-against-

HALPERN CONSTRUCTION, INC., GENERAL
ACCIDENT INSURANCE COMPANY OF AMERICA,
SAVOY LITTLE NECK ASSOCIATES LIMITED
PARTNERSHIP, a New York Limited Partnership and
SAVOY BORO PARK ASSOCIATES LIMITED
PARTNERSHIP, a New York Limited Partnership,
Defendants.

-----X
BRANSTEN, J.:

This is a motion by plaintiff Alvin Isacowitz d/b/a Excellence in Plumbing (“Excellence”) for an order, pursuant to CPLR 3212, granting summary judgment in its favor and granting it the relief sought in its complaint (“Complaint”), and dismissing the counterclaims and affirmative defenses asserted by defendants Halpern Construction, Inc. (“Halpern”) and General Accident Insurance Company of America (“GAIC”) on the ground that no genuine triable issues of fact exist.

For the reasons set forth below, the motion is denied.

DISCUSSION

In 1999, Halpern was hired to act as construction manager for the renovation and reconstruction of two assisted-living facilities located in Little Neck, Queens and Boro Park, Brooklyn. Halpern hired Excellence, as subcontractor, to do the plumbing work on both projects. Halpern and Excellence entered into two separate contracts for each project, one to cover plumbing work and the second to cover sprinkler work.

Excellence commenced this action for money allegedly due for work it performed, as subcontractor, for Halpern, as general contractor, in conjunction with the construction of two assisted-living facilities on properties owned by defendants Savoy Little Neck Associates Limited Partnership, a New York Limited Partnership (“Savoy Little Neck”) and Savoy Boro Park Associates Limited Partnership, a New York Limited Partnership (“Savoy Boro Park”) (together, “Savoy”).

Excellence claims that: (a) with respect to the Little Neck project, in addition to the approximate \$950,000 it was paid, it is owed \$311,255 from Halpern, which represents contract work that was completed, retainage amounts due, and extra work performed that was unpaid; and (b) with respect to the Boro Park project, in addition to the approximate \$348,731 it was paid, Excellence is owed \$79,769 from Halpern, which represents contract work that was completed and retainage amounts due.

Excellence submits that the evidence supports its claims, and that Halpern's affirmative defenses and counterclaims, including its counterclaim for backcharges, are without basis, and, as such, Excellence should be granted summary judgment against Halpern for the relief requested herein, and Halpern's affirmative defenses should be stricken and its counterclaims dismissed. In support, Excellence contends that the notice by Halpern, which purported to terminate Excellence's service on the projects, was defective because: (a) it provided only 48 hours to cure the alleged problems on the site in contravention to the pertinent contractual provisions that required Halpern to give its subcontractors a 3-day cure period; and (b) it did not set forth a valid basis for termination.

In opposition, Halpern claims that Excellence is not owed any money, and that Excellence actually owes Halpern money for sums paid to Excellence's suppliers for materials that Excellence was obligated, but failed, to provide. According to Halpern, Excellence cannot establish a right to summary judgment because: (a) Halpern acted solely as a construction manager, and not as a general contractor; (b) Excellence did not provide sufficient manpower to timely complete the work on one of the projects and it abandoned the other project, forcing Halpern to retain a substitute contractor to complete the work on both projects at substantial cost; (c) Excellence's calculation of damages is unsupported by any evidence; (d) Excellence's claim to retainage is without merit since, under the terms of the contract, the retainage shall be withheld by the owner pending completion of the work, and

the work was never completed; and (e) Excellence's claim for \$150,000 for extra or change order work is unsupported by any documentation. Halpern further submits that the record demonstrates that Excellence was terminated because it did not have sufficient manpower to handle the work, and that it violated its agreements by misappropriating trust funds.

Halpern also maintains that the issues raised by Excellence on this motion for summary judgment were previously addressed and rejected by the court in a prior decision and order, dated September 7, 2006, denying summary judgment. While Excellence concedes that the prior summary judgment motion was denied, it contends that this motion is appropriate since the Note of Issue was previously vacated, and additional discovery, resulting in the production of evidence and supporting a grant of summary judgment in Excellence's favor was produced.

ANALYSIS

"To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable (*Glick & Dolleck v Tri-Pac*, 22 NY2d 439, 441 [1968]).

The parties dispute the material facts, including, among other things, whether Excellence was in breach of the parties' agreements, whether Halpern was entitled to terminate the Little Neck project, and, if so, whether the termination was properly done, and whether or not Excellence abandoned the Boro Park project. Also at issue is the nature of Halpern's responsibilities as general contractor, on the one hand, or construction manager, on the other, under the operative agreements and whether the terms of the agreements were modified by the parties' course of conduct.

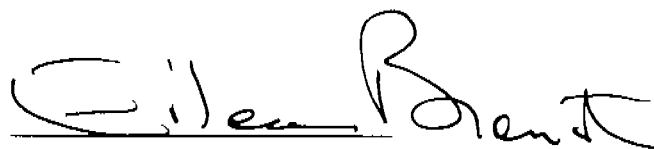
Although Excellence was not the moving party with respect to the prior summary judgment motion, the court's prior determination regarding the existence of material issues of fact apply equally to many of the issues raised in Excellence's current motion. Indeed, contrary to Excellence's claim, no new evidence has been submitted that supports Excellence's contentions and/or contradict the court's prior determination with respect to, among other things, the change order issues. In any event, even if law of the case based on the prior denial of summary judgment were inapplicable here, a review of the facts and contentions confirms that this case is fraught with material factual issues not capable of resolution on this motion.

CONCLUSION

It is ORDERED that the motion by plaintiff Alvin Isacowitz d/b/a Excellence in Plumbing for summary judgment is denied in all respects. This constitutes the decision and the order of the Court.

Dated: January 14, 2008

ENTER:



J.S.C.

FILED

JAN 29 2009

**COUNTY CLERK'S OFFICE
NEW YORK**