

**BDG Constr. Corp. v Abeles**

2009 NY Slip Op 30840(U)

April 10, 2009

Supreme Court, Nassau County

Docket Number: 22428/07

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA  
Justice

BDG CONSTRUCTION CORP., FARAD  
CONSTRUCTION, INC., ISLAND STEEL  
& DETAILING CORP., and JUST PLUMBING  
CORP.

Motion Sequence #1  
Submitted January 15, 2009  
XXX

Plaintiffs,

-against-

INDEX NO: 22428/07

RICHARD ABELES,

Defendant.

The following papers were read on this petition:

Plaintiffs' Notice of Motion for Summary Judgment .....	1
Plaintiffs' Memorandum of Law In Support of Motion .....	2
Defendant's Affidavit in Opposition to Plaintiff's Motion .....	3
Affidavit of David Barroca in Opposition to Plaintiffs' Motion.....	4
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Requested Relief

Plaintiffs, BDG CONSTRUCTION CORP. (hereinafter referred to as "BDG"), FARAD  
CONSTRUCTION CORP. INC. (hereinafter referred to as "FARAD"), ISLAND STEEL &  
DETAIL CORP. (hereinafter referred to as "ISLAND STEEL") and JUST PLUMBING  
CORP. (hereinafter referred to as "JPC"), moves for an order, pursuant to CPLR § 3212,

1) granting plaintiffs summary judgment against the defendant, RICHARD ABELES (hereinafter referred to as "ABELES"), based upon his default in payment upon four (4) separate promissory notes that he executed in favor of plaintiffs for construction related work performed by the plaintiffs on behalf of Milton Abeles, Inc. (hereinafter referred to as "MAI"), a corporation of which he is the President, and 2) dismissing defendant's counterclaim and affirmative defenses. Defendant opposes the motion, which is determined as follows:

### **Background**

This litigation arises from the construction project connected with the relocation of MAI, a meat processing firm that was previously located in Mineola, New York, adjacent to the Long Island Railroad tracks, which land was taken by the State of New York and the Metropolitan Transportation Authority through eminent domain for the purpose of making room to divert Roslyn Road under the railroad tracks. According to ABELES, BDG was the construction manager and FARAD, ISLAND STEEL and JPC were some of the sub-contractors on the project, which consisted of constructing a new facility for MAI in Port Washington, New York, under extreme time constraints, to avoid being put out of business by the government taking of MAI's original facility. ABELES states that Edward Blumenthal (hereinafter referred to as "Blumenthal"), a principal of BDG, obtained the management opportunity for BDG by oral agreement on the strength of his friendship with ABELES father, Julius Abeles, who became terminally ill at the beginning of the project and has since died, and that Blumenthal and BDG were entrusted with the details of the construction and the hiring of the sub-contractors. On the record before the Court, it appears that, because of cost overruns, ABELES was unable to make timely payments on

the project and the plaintiffs agreed to accept promissory notes as a accommodation to ABELES to provide the corporation additional time for him to pay the amounts due for the work already completed on the project. The notes, signed by RICHARD ABELES, are as follows:

1. To BDG, dated June 7, 2006, in the sum of \$229,057.87, "for value received", with interest of 12% per annum to be paid monthly, and all principal and unpaid interest due and payable on June 1, 2007;
2. To JPC, dated June 7, 2006, in the sum of \$16,575.54, "for value received", with interest of 12% per annum to be paid monthly, and all principal and unpaid interest due and payable on June 1, 2007;
3. To ISLAND STEEL, dated June 7, 2006, in the sum of \$ 26, 978.00, "for value received", with interest of 12% per annum to be paid monthly, and all principal and unpaid interest due and payable on June 1, 2007;
4. To FARAD, dated September 12, 2006, in the sum of \$35,185.72, "for value received", with interest of 12% per annum and monthly payments of \$3,126.21, and a maturity date of September 1, 2007 when all sums due under the note are due.

On the instant motion, Blumenthal asserts that, with respect to BDG, ABELES made payments toward the principal and interest in the total amount of \$209,057.37, leaving a balance in the amount of \$20,000.00. With accrued interest, he claims that, as of October 31, 2008, the sum of \$29,609.05 remains due and owing. As to JPC, by affidavit of its President Pete Miglionico, Sr., it appears that ABLES made eleven (11) payments under the note, between June 29, 2006 and May 1, 2007, totaling \$3,072.85, and no further payments. He asserts that, as of October 31, 2008, the sum of \$17, 979.85 remains due and owing. As to ISLAND STEEL, by affidavit of its Secretary and Treasurer, Jeanne Forster, it appears that ABELES made eleven (11) payments under the note, between July 1, 2006 and May 1, 2007, totaling \$5,001.41, and no further payments. She asserts that,

as of October 31, 2008, the sum of \$29,008.09 remains due and owing. As to FARAD, by affidavit of its Secretary and Treasurer, Antonio Ferreira, it appears that none of the required payments were made under the note. He asserts that, as of October 31, 2008, the sum of \$45,471.74 remains due and owing.

Its is the plaintiffs' position that ABELES defaults under the four (4) promissory notes entitles plaintiffs to summary judgment as there is no legitimate dispute regarding ABELES liability on the notes executed by him in June and September 2006. Moreover, it is alleged by plaintiffs that ABELES various affirmative defenses and counterclaim are based upon a fabricated and false claim that the notes were executed in consideration for work "to be performed" by plaintiffs in the future. Counsel argues that said claim is clearly contradicted by the clear and unequivocal language of the notes which reflect that the notes relate to an antecedent obligation and, even assuming *arguendo* that the plaintiffs breached their underlying construction agreement (which the plaintiffs emphasize they did not), the notes did not require any additional performance by plaintiffs under those agreements, or otherwise. See, *Mlcoch v Smith*, 173 AD2d 443, 570 NYS2d 70 (2<sup>nd</sup> Dept. 1991), holding that "the general rule is that the breach of a related contract cannot defeat a motion for summary judgment on an instrument for money only unless it can be shown that the contract and the instrument are 'intertwined' and that the defenses alleged to exist create material issues of triable fact". Plaintiffs assert that, if as defendant claims, the work was not completed, there would be no logical reason for defendant to execute the notes and continue making payments, including principal and interest, due under the notes. Counsel urges that defendant's counterclaim and affirmative defenses be dismissed, as a matter of law.

In opposition to the motion, defendant's counsel claims that the notes do not stand alone but were conditioned upon a contemporaneous oral agreement which conditioned the execution of the notes upon subsequent performance by the plaintiffs herein. In his affidavit, ABELES asserts that, because of cost overruns, the notes were executed in order to facilitate payment to BDG and the subcontractors of the work already performed, but also in recognition of the need on plaintiffs part to correct deficiencies in the work that had been completed. ABELES claims that he had communicated to Blumenthal his concerns about the quality of the construction work performed up to that point, and that he and Blumenthal, acting on behalf of the plaintiffs herein, executed the notes based upon Blumenthal's representations that the deficiencies would be addressed. ABELES contends that the notes do not reflect acceptance of the quality of the work performed and that it was understood that he reserved his rights to seek damages in the event that the deficiencies in the construction were not corrected. ABELES claims that the services rendered by the plaintiffs herein was particularly defective and unacceptable because of the stringent and continuous standards imposed upon MAI by the United States Department of Agriculture, which monitors the meat and chicken processed at the plant for human consumption. ABELES annexes a "punch list" addressed to BDGs on site construction manager, dated January 4, 2006, which he claims reflects the substantial issues remaining with the quality of construction which existed even after the new MAI facility opened. The Court notes that a review of the punch list reveals typical end of project follow-up items, such as, *inter alia*, labeling of circuit breakers, a light in the freezer, a LIPA refund, the need for a C of O, a leak in the men's and women's bathroom, adjustments to the dry age coolers and removal of all marks on the walls, and not the major construction deficiencies in the concrete slab,

steel piping and plumbing facilities that ABELES now claims in the instant litigation. Indeed, in reply, Blumenthal points out that said punch list was issued six (6) months prior to execution of the subject notes herein, and that ABELES made payments on all but one of the notes for at least a year, without objection, until this action was commenced. Moreover, Blumenthal asserts that, even assuming arguendo that there were deficiencies in plaintiffs work (which he claims is untrue), any claim that MAI may have for alleged damages must be brought in a separate action and cannot serve as a defense to payment on the notes or as a basis to defeat plaintiffs' motion for summary judgment.

### The Law

In order to make a *prima facie* showing for summary judgment on a promissory note, a plaintiff need only establish proof of the promissory note and the defendant's failure to make payments thereunder according to its terms. *Quest Commercial L.L.C. v Rovner*, 35 AD3d 576, 825 NYS2d 766 (2<sup>nd</sup> Dept. 2006); *Davis v Lanteri*, 307 AD2d 947, 763 NYS2d 470 (2<sup>nd</sup> Dept. 2003); *Neuhaus v McGovern*, 293 AD2d 727, 741 NYS2d 436 (2<sup>nd</sup> Dept. 2002); and *Hestnar v Schetter*, 248 AD2d 499, 728 NYS2d 479 (2<sup>nd</sup> Dept. 2001). While a failure of consideration may be alleged in opposition to a motion for summary judgment on a promissory note and parol evidence may be introduced to rebut the recitation "for value received" (*Ehrlich v American Mononger Greenhouse Manufacturing Corp.*, 26 NY2d 255, 309 NYS2d 341, 257 NE2d 890 [C.A. 1970]); the evidence presented cannot be conclusory or speculative and must raise legitimate questions of fact about the genuineness of the consideration. *Torelli v Esposito*, 63 NY2d, 903, 483 NYS2d 204, 472 NE2d 1032 (C.A. 1984). Assertions of a failure of consideration can be contradicted by

proof of receipt of the goods or services claimed to have been provided and partial payment thereon. See, *Northside Savings Bank v Sokol*, 183 AD2d 816, 584 NYS2d 77 (2nd Dept. 1992); *Friends Lumber Inc. v Cornell Development Corp.*, 243 AD2d 886, 663 NYS2d 327 [3<sup>rd</sup> Dept. 1997].

The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2<sup>nd</sup> Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2<sup>nd</sup> Dept. 1988]).

After a careful reading of the submissions herein, it is the judgment of the Court that plaintiffs have met their burden of demonstrating their entitlement to summary judgment by producing the promissory notes executed by defendant and by establishing the defendant's default thereon. However, the Court finds that, after making payments for eleven (11) months, without objection until this action was commenced, and after sending

the January 4, 2006 "punch list", without claiming any major deficiencies in the plaintiffs' work until his answer was interposed in February 2008, more than two (2) years later, the defendant's conclusory and belated allegations of wrongdoing are insufficient to establish a genuine issue of fact or to defeat plaintiffs motion for summary judgment. *Mlcoch v Smith, supra*. Moreover, any purported claim by MAI based upon alleged deficiencies in the construction work performed by plaintiffs cannot defeat the summary judgment motion to recover against the defendant personally on the notes. Defendant ABELES has no standing to assert a counterclaim in his individual capacity on behalf of MAI and MAI is not a party to the action. Accordingly, it is hereby

**ORDERED**, that plaintiffs' motion for summary judgment on the four (4) promissory notes is granted; and it is further

**ORDERED**, that defendant's affirmative defenses and counterclaim are dismissed. All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court. Submit judgment with notice of settlement.

Dated: April 10, 2009



WILLIAM R. LaMARCA, J.S.C.

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**ENTERED**  
APR 15 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE