

**J.P. Fendt Contr. & Dev., Inc. v Gaetano Diplacidi & Assoc., Inc.**

2009 NY Slip Op 33028(U)

December 18, 2009

Supreme Court, New York County

Docket Number: 101128/07

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**  
J.S.C.

PART 1

Index Number : 101128/2007  
J.P. FENDI CONTRACTING  
vs.  
DIPLACIDI, GAETANO  
SEQUENCE NUMBER : 003  
DISMISS

INDEX NO. 101128/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1, 2  
3  
4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
DEC 30 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: Dec. 18, 2009

**MARTIN SHULMAN**  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X  
J.P. FENDT CONTRACTING AND DEVELOPMENT,  
INC. n/k/a RIVER CONSTRUCTION CORP.,

Index No: 101128/07

**Decision and Order**

Plaintiff,

-against-

GAETANO DIPLACIDI AND ASSOCIATES, INC.,  
THE COMMUNITY PRESERVATION CORPORATION  
and 2515 LLC,

Defendants.  
-----X

**Hon. Martin Shulman:**

Defendant Gaetano DiPlacidi and Associates, Inc. ("GDA" or "defendant") moves *inter alia* for summary judgment dismissing the complaint herein. Plaintiff J.P. Fendt Contracting and Development, Inc. n/k/a River Construction Corp. ("Plaintiff" or "Fendt") opposes the motion and brings a separate motion to strike defendant's answer based upon defendant's failure to appear for a deposition. Both motions are consolidated for disposition.

**FILED**  
DEC 30 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

**Background**

On or about June 26, 2000, Fendt and GDA entered into a contract whereby Fendt, a sub-contractor, agreed to perform certain rehabilitation and reconstruction work (the "project") for GDA, the general contractor, at 2513/2515 Adam Clayton Powell, Jr. Blvd., New York, New York (the "premises").<sup>1</sup> The June 26, 2000 contract

<sup>1</sup> On the same date, the parties entered into two other agreements with respect to construction projects at other locations. The parties' contract for the performance of work at 164 West 146<sup>th</sup> Street, New York, New York (the "146<sup>th</sup> St. project") is the subject of a separate action and virtually identical motion also pending before this court under N.Y. County Index No. 101129/07 (the "related action"). Unlike the project

required plaintiff to provide a letter of credit in the sum of \$129,000.00 as security for its performance. It is undisputed that Fendt never commenced work on the project or provided the letter of credit.

Each of the parties contends the other breached one or more of the June 26, 2000 contracts pertaining to the project and the 146<sup>th</sup> St. Project. GDA alleges that plaintiff defaulted thereunder by *inter alia*: 1) failing to provide the letters of credit for both projects; 2) failing to commence work on the project; and 3) stopping work on the 146<sup>th</sup> St. project. For its part, plaintiff contends defendant did not make payments to Fendt in accordance with the terms of the contract for the 146<sup>th</sup> St. project.

The parties attempted to settle the various disputes among themselves throughout December 2000. In response to plaintiff's demands for payment, GDA sent Fendt a proposed letter agreement dated December 27, 2000 (the "letter agreement") with respect to the project, which provides *inter alia* that in lieu of the letter of credit, plaintiff was to deposit \$129,000.00 cash with GDA, who in turn was to post this amount with the Community Preservation Corporation ("CPC") pursuant to GDA's contract with the owner of the premises.<sup>2</sup> Upon CPC's release of this amount to GDA on completion of the project, plaintiff claims the letter agreement required GDA to release same to plaintiff. Simultaneously, GDA sent Fendt a separate letter agreement pertaining to the 146<sup>th</sup> St. project and containing substantially similar terms. Both letter agreements were

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herein, plaintiff commenced work on the 146<sup>th</sup> St. project.

<sup>2</sup> 2515 LLC, the owner of the premises, obtained construction financing from CPC. Although both the owner and CPC initially were named as defendants in this action, it was ultimately discontinued against them.

signed by defendant but plaintiff did not sign them until 16 months later.<sup>3</sup> See Exhs. D and E to Gaetano Aff. in Supp. of Motion.

Fendt commenced this action alleging one cause of action for declaratory relief declaring that plaintiff is entitled to the \$129,000 deposited with CPC based upon the purported letter agreement. This claim is based upon the letter agreement.

### Discussion

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943 (1<sup>st</sup> Dept., 1984), *aff'd* 62 N.Y.2d 938 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Frøedman v. Chemical*

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<sup>3</sup> Plaintiff included additional hand written terms on the letter agreement for the 146<sup>th</sup> St. project. Defendant did not agree to these additional terms.

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*Const. Corp.*, 43 N.Y.2d 260 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979). Further, "[w]here the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action . . ." *Id.*, 49 N.Y.2d at 560.

GDA seeks summary judgment in its favor dismissing the first cause of action based on res judicata, collateral estoppel and/or the doctrine of "law of the case". By prior decision and order dated May 25, 2007, this court denied plaintiff's order to show cause to enjoin CPC from releasing the deposited funds to defendant, finding that the first cause of action for declaratory relief essentially alleges breach of contract and requests damages for money allegedly owed to plaintiff. However, as Fendt admittedly never posted a letter of credit or cash in lieu thereof, this court found that the deposited funds did not belong to plaintiff. Plaintiff's opposition does not address this argument and the court agrees that its prior determination necessitates the dismissal of the sole cause of action for declaratory relief.

The court rejects Fendt's claim that summary judgment is premature because plaintiff has not deposed defendant. Plaintiff fails to explain how a deposition of defendant's representative regarding his intent with respect to the letter agreement would change the outcome herein.

Finally, the court is compelled to address plaintiff's validly raised point regarding defendant's failure to bring its summary judgment motion within the time frame set forth in the November 13, 2007 compliance conference order which required defendant to serve dispositive motions on or before December 17, 2007. Here, the within motion

6] was not served until May 2009. GDA responds that after agreeing to the terms of this court order, it ascertained that it was unable to move for summary judgment without first deposing plaintiff.<sup>4</sup> Certainly, the admissions contained in Fendt's deposition testimony bolstered defendant's motion, but no explanation is given for the approximately one year delay between plaintiff's deposition and service of GDA's motion. However, while not condoning defendant's dilatory conduct, the court concludes that the matter should be decided on the merits and without further waste of the parties' and the court's resources. No purpose would be served by permitting this case and the related action, both of which clearly warrant summary disposition, to proceed to trial. Accordingly, plaintiff's motion to strike is denied.

Having determined that this court's prior decision and order dated May 25, 2007 precludes plaintiff's sole cause of action for declaratory relief, the court does not address the parties' remaining arguments. For the foregoing reasons, it is hereby

ORDERED that defendant Gaetano DiPlacidi and Associates, Inc.'s motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff's motion is denied.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this court. Courtesy copies of the decision and order have been sent to counsel for the parties.

DATED: New York, New York  
December 18, 2009

**FILED**  
DEC 23 2009  
HON. MARTIN SHULMAN, J.S.C.  
NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>4</sup> Plaintiff was deposed on May 6, 2008.