

**277 Mott St., LLC v Fountainhead Constr., LLC**

2010 NY Slip Op 33678(U)

December 17, 2010

Sup Ct, New York County

Docket Number: 603168/08

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PART 10

Index Number : 603168/2008 J.S.C.

277 MOTT LLC

vs

INDEX NO. \_\_\_\_\_

FOUNTAINHEAD CONSTRUCTION LLC

MOTION DATE \_\_\_\_\_

Sequence Number : 002

MOTION SEQ. NO. 002

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion


**FILED**

DEC 21 2010

NEW YORK COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s) decided in accordance with the attached decision/order of even date.**

Dated: 12/17/10

  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
277 Mott Street LLC,

Plaintiff (s),

**DECISION/ ORDER**  
Index No.:603168/08  
Seq. No.: 002

**-against-**

**PRESENT:**  
Hon. Judith J. Gische, JSC

Fountainhead Construction, LLC,  
Steven Abrams and John Doe 1-10,

**FILED**

Defendant (s).  
-----X

DEC 21 2010

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

NEW YORK  
COUNTY CLERK'S OFFICE

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, SRM affirm., DTF affd., exhibits.....	1
SA affd. , exhibits.....	2
SRM Reply.....	3

Upon the aforementioned papers the decision and order of the court is as follows:

Plaintiff moves for summary judgment on the second and third causes of action, which are the only causes of action that remain in this cases. The remaining causes of action are asserted only against, Fountainhead Construction, LLC, which is the sole remaining defendant. The other plead causes of action were dismissed by the court in the decision and order dated 6/30/09. Defendant opposes the motion, but only in part. Issue has been joined and the motion has been timely made after the filing of the Note of Issue. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004). The motion is, therefore, properly before the court for consideration on its merits.

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact, also through admissible evidence Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 (1<sup>st</sup> Dept 2003). On a motion for summary judgment, it is for the court to decide any issues of law that are raised Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> Dept 2003).

The second cause of action is for diversion of trust funds and the third cause of action is for breach of contract. The claims arise out of the same set facts, which have been established, as follows, in this motion:

Plaintiff is the owner of a certain piece of undeveloped real estate located at 277 Mott Street, New York, New York ("property"). It embarked on a project to develop the property and build a 6 ½ story, 7500 square foot, structure, with both residential and commercial space. Prior to November 2007, the site had been excavated, and a foundation and concrete slab had been erected.

In November 2007 Plaintiff, through its representatives, first met with defendant, through its representatives. Shortly thereafter plaintiff decided that it would retain defendant to perform the construction needed for the project. The parties never entered into a formal contract, but on February 22, 2008, defendant sent plaintiff a letter of

intent to enter into a contract for a total construction budget of \$10,888,292.00. The letter of intent contemplated that a formal agreement would be subsequently signed. At or about the same time, defendant sent plaintiff a requisition for a deposit to be paid in the amount of \$1,533,839.00. On February 25, 2008, plaintiff wired the sum of \$1,533,839 to defendant as and for the requested deposit to do the work.

No work was ever done by defendant on the property. Plaintiff claims that when it tried to get a satisfactory explanation from defendant of what had been done with the deposit monies, none was forthcoming. On or about July 13, 2008 plaintiff received a communication from James Grundivg, one of defendant's employees, indicating that he was resigning from defendant and that the monies plaintiff had given defendant were missing.

During discovery, plaintiff deposed Steven Abrams, defendant's Sole Managing Member, Daren Macchio, defendant's Chief Financial Officer, and Joseph DiPalermo, defendant's Director of Operations. Although each witness was asked direct questions about what had been done with the money, none of them could give any specific information.

Plaintiff now seeks a judgment in the amount of \$1,533,839 plus interest representing the deposit monies, that were received, but never used, by defendant for the project at the property.

Defendant concedes that plaintiff should have a judgment for at least \$749,491.00. As to the balance, it claims that there is at least an issue of fact about whether the monies were used for plaintiff because it has copies checks it made payable to vendors for the relevant time period. The checks alone are not sufficient to

raise any issue of fact about whether the deposit monies were used for any part of the project on the property. Mr. Abrams, in his affidavit, does not explain what the check payments actually reflect. In any event, as plaintiff points out, many of the payments are on their fact, irrelevant to the project. Thus, for example, there is a payment to defendant's attorney; there is a payment to an elevator company even though there is no elevator at the property, there is a payment for plumbing even though there is no plumbing at the project, there is a payment for steel, even though there is no steel at the project. The payments for "cash" are not accounted for at all.

The motion by plaintiff for summary judgment is, therefore, granted in its entirety.

**Conclusion**

In accordance herewith it is hereby:

ORDERED that plaintiff's motion for summary judgment against defendant on the second and third causes of action is granted in its entirety, and it is further

ORDERED that the Clerk of the Court is directed to enter a money judgment in favor of plaintiff, 277 Mott Street LLC and against defendant, Fountainhead Construction, LLC, in the amount of \$1,533.839.00 with interest at the statutory rate from February 25, 2008, together with the costs and disbursements of this action, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and that this constitutes the decision and order of the court.

Dated: New York, NY  
December 17, 2010

**FILED**  
DEC 21 2010  
NEW YORK COUNTY CLERK'S OFFICE  
Page 4 of 4.

SO ORDERED:  
\_\_\_\_\_  
J.G. J.S.C.