

**Amadeo Constr. Corp. of N.Y. v Positive Elec.  
Assoc., Inc.**

2010 NY Slip Op 34101(U)

June 1, 2010

Supreme Court, New York County

Docket Number: 112183/09

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39

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AMADEO CONSTRUCTION CORP. OF N.Y.,

Plaintiff,

-against-

POSITIVE ELECTRICAL ASSOCIATES, INC.,  
and FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND,

Defendants.  
-----x

BARBARA R. KAPNICK, J.:

**DECISION/ORDER**  
Index No. 112183/09  
Motion Seq. No. 001

In this action, plaintiff Amadeo Construction Corp. of N.Y. ("Amadeo"), a subcontractor, seeks to recover damages:

(a) against defendant Positive Electrical Associates, Inc. ("Positive"), a prime contractor, in the amount of \$66,786.83, plus interest, (i) representing the balance allegedly due and owing to Amadeo for labor, materials, equipment, work and services allegedly provided by Amadeo in connection with a public improvement construction project involving science demonstration labs at three schools (the "Trio Project") (first cause of action); (ii) for the reasonable value of the labor, equipment, services and materials for which payment has not been made (second cause of action); and (iii) based on an account stated (third cause of action);

(b) against defendant Fidelity and Deposit Company of Maryland ("Fidelity"), the issuer of a labor and material payment bond, in the amount of \$66,786.83, plus interest (i) for the balance allegedly due (fourth cause of action); and (ii) for the

reasonable value of the labor, equipment, services and materials for which payment has not been made in connection with the Trio Project (fifth cause of action);

(c) against defendant Positive in the amount of \$19,400.00, plus interest, (i) representing the balance allegedly due and owing to Amadeo for labor, materials, equipment, work and services allegedly provided by Amadeo in connection with another public improvement construction project, the science lab upgrade at Central Park East @ M013 (the "Central Park Project") (sixth cause of action); (ii) for the reasonable value of the labor, equipment, services and materials for which payment has not been made (seventh cause of action); and (iii) based on an account stated (eighth cause of action);

(d) against defendant Fidelity in the amount of \$19,400.00, plus interest (i) for the balance allegedly due (ninth cause of action); and (ii) for the reasonable value of the labor, equipment, services and materials for which payment has not been made in connection with the Central Park Project (tenth cause of action);

(e) against defendant Positive in the amount of \$225,367.00, plus interest, (i) representing the balance allegedly due and owing to Amadeo for labor, materials, equipment, work and services allegedly provided by Amadeo in connection with another public improvement construction project involving climate control and school safety at Morris Park High School in the Bronx (the "Morris

Park Project") (eleventh cause of action); (ii) for the reasonable value of the labor, equipment, services and materials for which payment has not been made (twelfth cause of action); and (iii) based on an account stated (thirteenth cause of action); and

(f) against defendant Fidelity in the amount of \$225,367.00, plus interest (i) for the balance allegedly due (fourteenth cause of action); and (ii) for the reasonable value of the labor, equipment, services and materials for which payment has not been made in connection with the Morris Park Project (fifteenth cause of action).

Plaintiff now moves for partial summary judgment:

(1) against the defendants in the sum of \$45,104.86,<sup>1</sup> plus interest from June 1, 2009, on the first, third and fourth causes of action relating to the Trio Project;

(2) against the defendants in the sum of \$19,440.00, plus interest from March 30, 2009, on the sixth, eighth and ninth causes of action relating to the Central Park Project;

(3) dismissing defendants' affirmative defenses;

(4) setting this matter down for a hearing as to plaintiff's reasonable attorneys' fees, pursuant to State Finance Law § 137(4); and

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<sup>1</sup> This amount does not include two additional invoices claimed under these causes of action.

(5) permitting plaintiff to continue litigating the remaining sums claimed in this action.

In opposition, defendants have submitted an Affidavit from Christos Fakatselis, the President of Positive, who claims, *inter alia*, that

there are no funds due to Plaintiff at this time, if ever, since contrary to what it claims, the funds it seeks have not been approved for payment by the owner of the project (the SCA) [the School Construction Authority], nor agreed to by Positive. Moreover, while Plaintiff would like to separate the projects and try to recover on them piecemeal, a review of the entire relationship between the parties is required to fully understand why, in the end, it is Plaintiff that will likely have to reimburse Positive for overpayments made to Plaintiff.

Mr. Fakatselis further claims that

while Plaintiff attempts to portray Payment Requisitions that were submitted and accepted, nothing can be further from the truth. Indeed, in multiple communications and meetings with the SCA, in discussing Plaintiff's wish list charges on its requisitions, Plaintiff was advised by myself and SCA representatives in certain terms that his requisitions (which are unsigned, unsworn, unapproved and otherwise baseless) [emphasis included in original] were rejected.

Defendants, however, have failed to submit any proof to refute the documentation annexed by plaintiff showing that Positive was, in fact, paid by the SCA for the invoices which are the subject of this motion.

Moreover, defendants have failed to allege any facts in support of their laundry list of affirmative defenses, several of which are clearly not applicable to the facts in this case.

Accordingly, based on the papers submitted and the oral argument held on the record on April 27, 2010, plaintiff is granted partial summary judgment, and it is hereby

ORDERED that the Clerk may enter judgment in favor of plaintiff Amadeo Construction Corp. of N.Y. and against defendants Positive Electrical Associates, Inc. and Fidelity and Deposit Company of Maryland in the sum of \$45,104.86 on the first, third and fourth causes of action, together with interest to be calculated by the Clerk from June 1, 2009, and in the sum of \$19,440.00 on the sixth, eighth and ninth causes of action, together with interest to be calculated by the Clerk from March 30, 2009, and it is further

ORDERED that defendants' affirmative defenses are dismissed, and it is further

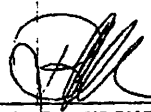
ORDERED that the issue of attorneys' fees is reserved for a determination at the conclusion of the case, and it is further

ORDERED that plaintiff's remaining claims are severed and continued.

A preliminary conference shall be held in IA Part 39, 60 Centre Street, Room 208 on June 9, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: June / , 2010

  
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BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**