

Lekkos Constr. Corp. v Cordial Constr., Inc.

2011 NY Slip Op 32066(U)

July 21, 2011

Supreme Court, New York County

Docket Number: 102127/08

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK

PART 2

Index Number : 102127/2008
LEKKOS CONSTRUCTION CORP.
 vs.
CORDIAL CONSTRUCTION INC.
 SEQUENCE NUMBER : 004
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

JUL 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/27/11

Luy
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 2

-----X
LEKKOS CONSTRUCTION CORP.,
Plaintiff,

Index No. 102127/08

-against-

CORDIAL CONSTRUCTION, INC.,
Defendant.

FILED

-----X
LOUIS B. YORK, J.:

JUL 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff commenced this action to recover \$68,000 plus interest allegedly due on a subcontract between plaintiff and defendant for construction services. Defendant moved for summary judgment on its counterclaim for breach of contract. Plaintiff then filed a cross-motion for summary judgment on its breach of contract claim and for sanctions against defendant. The Court heard arguments on the motions on July 7, 2011. Based on the arguments, pleadings, and discovery materials, the Court grants defendant's motion and denies plaintiff's motion.

A motion for summary judgment must establish a prima facie entitlement to judgment as a matter of law by providing evidence sufficient to demonstrate the absence of any issues of material fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986). Once the movant makes a prima facie showing, the burden shifts to the party opposing the motion to provide admissible evidentiary proof that raises a triable issue of fact. *Id.* Both plaintiff and defendant move for summary judgment on a claim for breach of contract. To establish such a claim, a party must prove the existence of a contract, its performance thereunder, the other party's breach thereof, and resulting damages. *See Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426, 913 N.Y.S.2d 161, 163 (1st Dept. 2010).

Defendant has established a prima facie entitlement to judgment as a matter of law on each of the four required elements of its breach of contract claim. First, defendant provides evidence of a written subcontract between plaintiff and defendant. Plaintiff does not dispute the existence or validity of the subcontract and admits its existence in the affidavit filed in support of its cross-motion. Second, defendant demonstrates it performed its obligations under the subcontract by making payments to plaintiff in the amount of \$87,700. In opposition to defendant's motion, plaintiff does not dispute that defendant paid plaintiff \$87,700 via check and admits that defendant periodically issued checks to pay for plaintiff's workmen and supplies. Third, defendant showed that the New York Office of General Services and New York Installation, the general contractor, rejected plaintiff's work and thus that plaintiff breached the subcontract by failing to perform in a "workmanlike manner." *Bialo v. Walter Lawlor, Inc.*, 160 A.D.2d 559, 560, 554 N.Y.S.2d 208, 209 (1st Dept. 1990) (finding even if contract does not include express terms regarding performance, party is bound by "an implied promise to perform the contract in a skillful and workmanlike manner"). In its affidavit opposing defendant's motion, plaintiff does not dispute that plaintiff breached the subcontract by failing to perform in a workmanlike manner and by having its work rejected.

Finally, defendant demonstrated it incurred \$91,477.54 in damages as a result of plaintiff's breach by providing evidence of payments to additional subcontractors required to remedy plaintiff's defective work. *See Luckoff v. Sussex Downs, Inc.*, 104 A.D.2d 636, 637, 480 N.Y.S.2d 16, 18 (2d Dept. 1984) (finding damages incurred where plaintiffs proved they were required to hire another contractor to remedy defendant's defective original work). In opposition to this motion, plaintiff claims defendant cannot verify that the additional contractors it hired were required specifically to remedy plaintiff's faulty work. However, in opposing defendant's

motion, the burden is on plaintiff to provide evidence that raises an issue of material fact and not merely to object to defendant's claim. *See Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d at 925; *see also Freeman v. Johnston*, 84 N.Y.2d 52, 57 614 N.Y.S.2d 377, 379 (1994) ("If the evidence is merely colorable . . . or is not significantly probative . . . , summary judgment may be granted.") (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50 (1986)). Plaintiff fails to meet this burden with respect to defendant's showing of \$91,477.54 in damages.

In opposition to defendant's motion for summary judgment, plaintiff fails to provide admissible evidentiary proof that raises an issue of material fact regarding any of the four elements of defendant's breach of contract claim. *See Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d at 925. Accordingly, defendant has established a right to judgment as a matter of law on its counterclaim for breach of contract and the Court grants its motion.

Plaintiff also moves for summary judgment on its breach of contract claim. In its cross-motion, plaintiff sets forth no factual support for its claim. CPLR § 3212(b); *see Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d at 925. While plaintiff demonstrates the existence of the subcontract, it fails to establish support for the other three elements of a breach of contract claim. First, plaintiff neglects to supply evidence indicating it performed its obligations under the subcontract. Indeed, in plaintiff's affidavit, plaintiff does not dispute that the New York Office of General Services rejected its work. Second, plaintiff fails to prove that defendant breached the subcontract. Finally, plaintiff also neglects to provide evidence that it incurred damages as a result of defendant's alleged breach. Accordingly, plaintiff has not established a prima facie entitlement to judgment on three of the elements of its breach of contract cause of action and the Court denies its motion for summary judgment.

Plaintiff also seeks sanctions pursuant to CPLR § 3126, but makes no specific requests for relief under § 3126. This section provides that, in its discretion, a court may impose various penalties on a party who disobeys an order for disclosure or willfully fails to produce information that should have been disclosed. CPLR § 3126; *see Morano v. Westchester Paving & Sealing Corp.*, 7 A.D.3d 495, 496, 776 N.Y.S.2d 83, 84 (2d Dept. 2004). Defendant correctly notes that resorting to a motion for sanctions is not the proper procedure for addressing discovery deficiencies unless the parties have exhausted all good faith efforts to bring about a resolution of the dispute. *See Lopez v. New York City Transit Auth.*, 925 N.Y.S.2d 84, 85, 2011 WL 2375675, at *1 (1st Dept. June 16, 2011) (finding the Transit Authority's "resort to a contempt motion on a routine discovery dispute absent application for any other remedy under CPLR § 3126" meritless and inexplicable); *see also Barber v. Ford Motor Co.*, 250 A.D.2d 552, 553, 673 N.Y.S.2d 642, 643 (1st Dept. 1998) (finding plaintiff should have first requested production pursuant to CPLR § 3120 or moved to compel discovery pursuant to CPLR § 3124 to address the lack of response to discovery demands). Here, plaintiff failed to move to compel discovery and failed to comply with the December 16, 2009 Order requiring that, in the event of disclosure problems, the affected parties arrange a telephone conference through the Part. Furthermore, plaintiff fails to demonstrate any prejudice caused against it by defendant's alleged neglect in producing discovery. *See Lopez*, 925 N.Y.S.2d at 85. Plaintiff also fails to show that defendant intentionally violated court orders directing him to provide discovery. *See id.* Accordingly, plaintiff's motion for general sanctions under CPLR § 3126 is denied.

Based on the above, therefore it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon submission of

an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 7/21/11

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LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

FILED

JUL 27 2011

**NEW YORK
COUNTY CLERK'S OFFICE**