Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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INDEPENDENT TEMPERATURE CONTROL SERVICES, INC.,

Plaintiff,

Index No.: 2107/11
Motion Date: 7/13/11
Motion Cal. No.: 27

-against-

WDF INC., FIDELITY AND DEPOSIT COMPANY, OF MARYLAND, M.A. ANGELIADES, INC., NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY and FEDERAL INSURANCE COMPANY,

Defendants.

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The following papers numbered 1 to 16 read on this motion by defendant **M.A. ANGELIADES, INC** ("M.A.") and **FIDELITY AND DEPOSIT COMPANY, OF MARYLAND** ("FIDELITY") for an order pursuant to CPLR 3211 (a) (1) dismissing the cross-claims by defendant WDF against M.A. and FIDELITY; and cross-motion by **WDF INC.** ("WDF") for an Order imposing sanctions against M.A. pursuant to 22 NYCRRR 130-1.

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Upon the foregoing papers it is ordered that this motion by defendant M.A. and FIDELITY for an order pursuant to CPLR 3211 (a) (1) dismissing the cross-claims by defendant WDF against M.A and cross-motion by WDF for an Order imposing sanctions against M.A. pursuant to 22 NYCRR 130-1, are denied for the following reasons:

According to the complaint, plaintiff Independent Temperature Control Services, Inc. (hereinafter "ITC") commenced this action against WDF alleging, inter alia, that ITC is owed more than $200,000 from WDF in connection with the Subcontractor Agreement entered into between ITC and WDF in connection with the public works project located at the Art Leathers

High School (H.S. 744Q), 45-10 94th Street, East Elmhurst, Queens (hereinafter "the Project"). ITC also named M.A., the general contractor for the project, along with the New York City School Construction Authority (hereinafter "SCA"), as owner, in order to perfect ITC's lien foreclosure cause of action. By Stipulation entered into between the parties on April 26, 2011, defendant Federal, the surety of M.A., was added as a defendant pursuant to CPLR § 3025(b) and 1003. WDF timely served its Second Amended Verified Answer ("Answer") wherein WDF asserted various cross-claims against M.A.

According to WDF's Answer, as a condition to the Prime Contract, Angeliades secured and delivered to the SCA a Labor and Material Payment Bond No. 8204-18-95 (the "Bond") which was issued by Federal, as surety, in the sum of $74,440,000. In general terms, the purpose of the Bond was to assure payment by Federal to Angeliades' subcontractors if Angeliades failed to make payment. On or about June 20, 2007, WDF, as subcontractor, entered into a Subcontract Agreement with Angeliades, as general contractor, to provide labor, services and materials for the installation of HVAC facilities at the Project. The originally agreed upon price of the Subcontractor Agreement was $15,350,000.00, subject to any price changes for "Extra Work" which was to be agreed upon between WDF and Angeliades. During the performance of the work, WDF, at the request of M.A, performed additional work which was not within the scope of the Subcontract Agreement, pursuant to various "Change Orders". WDF has provided a copy of the requisition by WDF which summarizes the items billed and the approved change orders regarding the Project. As a result of the Change Orders, the sum of money due to WDF under the terms of the Subcontract Agreement was increased from $15,350,000.00 to $17,093,186.24. Thereafter, WDF fully performed all of its obligations under the Subcontract Agreement and the above-referenced Change Orders. WDF has only been paid the sum of $15,353,334.57 for the work performed and is currently owed from Angeliades the sum of $1,739,851.67, together with interest at the legal rate. Despite WDF"s due demand, Angeliades has failed and/or refused to make payment of the remaining sum due and owing.

Based on these allegations, WDF cross-claimed against M.A for Breach of Contract, Account stated, Unjust Enrichment, Quantum Meruit, and a cross-claim against defendant Federal against the Surety Bond. M.A and Federal have now moved to dismiss the cross-claims asserted in WDF's Answer on the grounds that the documentary evidence establishes that WDF has no claim for change order proposals that were not approved, that the cross-claim against Federal is time barred, and WDF's failure to pay itw own subcontractors bars its claims. WDF has opposed this motion.

The branch of the motion pursuant to CPLR 3211 (a) (1) is denied. CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense

is founded on documentary evidence . . . " In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . " Berger v Temple Beth-El of Great Neck, 303 AD2d 346, 347 (2d Dept 2003), *quoting* Trade Source v Westchester Wood Works, 290 AD2d 437 (2d Dept 2002).

Here, moving defendants have submitted in support of their motion, *inter alia*, an affidavit of Ramdeo Arjune, project manager for M.A. on its contract with the SCA on the subject projects, the contract between WDF and M.A, the contract between Angeliades and SCA, and various correspondence between the parties. In his affidavit, Arjune states that WDF filed a Notice of Mechanic's Lien dated April 28, 2010 on the project in the amount of $1,743,186. WDF served a Verified Itemized Statement of its lien on June 7, 2010 which identifies each item for which WDF seeks to be paid as an unapproved or unsigned change order proposal. The first item is identified as an unapproved or unsigned change order by the note: "We have not yet received countersigned change orders yet." The remaining items are identified as "Pending Change Orders," which is another way of saying unapproved or unsigned change order proposals. As such, Arjune claims that WDF's cross claims against Angeliades and Federal consist only of claims for unapproved or unsigned change order proposals. Moreover, Arjune states that M.A has never been paid by the SCA for the unapproved and unsigned change order proposals for which WDF seeks to be paid in this action and the SCA never issued a Notice of Direction for any of the unapproved and unsigned change order proposals for which WDF seeks to be paid in this action. Finally, Arjune states that Angeliades has received claims from WDF's subcontractors that WDF did not pay them.

WDF's contract with Angeliades on the project, states at Article 14, the following:

> The parties hereto agree that no oral modification of this SUBCONTRACT shall have any force or effect. The Subcontractor [WDF] shall not be entitled to receive any extra compensation for modifications or changes of any kind whatsoever, regardless of whether the same were ordered by the Owner [NYCSCA] or any of its representatives, unless said order is given IN WRITING and IS SIGNED BY AN OFFICER or Project Manager of the General Contractor [MA Angeliades], and the Subcontractor specifically agrees that it will make no claim that it was authorized to do any extra work or make any modification to the work by the General Contractor or any representative at the site or elsewhere and if such Work was so ordered and the Subcontractor has performed the same but has received no written order therefore as herein provided, the Subcontractor shall and hereby does waive any claim for extra compensation therefore regardless of any subsequent written or

> verbal protests or claims by the Subcontractor, except as provided under the Principal Contract or if the General Contractor receives payment for same from Owner.

Angeliades' contract with the NYCSCA on the project states, at Section 7.01, the following:

> The SCA may at times, without notice to Contractor's [MA Angeliades'] surety and without invalidating the Contract, order Extra Work or make changes by altering, adding to, or deducting from the Work, and may adjust the Contract price accordingly, pursuant to Paragraph B, below. The Contractor shall not deviate from, add to, or delete from, or make changes in the Work required to be performed hereunder unless so directed by a written Notice of Direction of the SCA signed by a properly authorized representative of the SCA. If the Contractor is directed by the SCA to perform Extra Work prior to an agreement on costs or time, the Contractor shall promptly comply with the Notice of Direction of the SCA. No claim for Extra Work or any change in the Work shall be allowed or made unless such Extra Work or change is ordered by a written Notice of Direction from the SCA.

Consequently, the moving defendants claim the unapproved and unsigned change order proposals for which WDF seeks to be paid in this action have never been approved by the SCA or M.A, and thus WDF cannot claim payment for this work.

Regarding what qualifies as "documentary evidence", it is well recognized that "[t]he word apparently aims at a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based … Neither the affidavit nor the deposition can ordinarily qualify under such a test" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21). It has been found that documentary evidence means judicial records, judgments, orders, contracts, deeds, wills, mortgages. Webster v. State of New York, 2003 N.Y. Misc. LEXIS 2009, 2003 WL 728780 (Court of Claims 2003). La Cara Mia Bar Lounge, Inc. v. Great Locations, Inc., 2009 NY Slip Op 50064U (N.Y. Sup. Ct. 2009)
Based upon the definition set forth above, this court finds that, the affidavit fails to constitute documentary evidence within the meaning of CPLR 3211 (a) (1). *See*, Fleming v. Kamden Props., LLC, 41 AD3d 781 (2d Dep't 2007.) Consequently, the court finds that the moving defendants have failed to submit documentary evidence that established its defense to the cross-claims.

Moreover, in opposition to this motion, WDF has submitted a copy of the change order executed by Mr. Arjune which relates to items 2, 4, 5, 6, 7, 8, 9 and 10 of the twenty-one (21)

items which comprise WDF's claim. Furthermore, WDF has submitted an affidavit of Neil Walash, Senior Vice President of WDF, wherein he states that Angeliades' regular course of conduct at the Project included ordering and directing, through e-mail and facsimile correspondence, WDF to perform extra work on behalf of Angeliades. He also details instances wherein Arjune specifically confirm that WDF was directed to perform work and that the e-mail and/or facsimile handwritten letters would constitute a change order related to the extra work requested of WDF. This evidence clearly contradicts the moving defendants evidence and thus prohibits this Court from finding the moving defendants have established a defense that disposes of the cross-claims. Accordingly, defendant's motion to dismiss pursuant to CPLR 3211 (a) (1) is hereby denied.

The branch of the motion claiming that WDF's cross claims against Federal time barred is denied. The moving defendants claim that the bond issued by Federal Insurance, which is its only potential basis of liability, has a two-year limitations period. Section 3(b) of the bond provides that, "[n]o suit or action shall be commenced hereunder by any claimant: After the expiration of two (2) years following the date on which Principal [MA Angeliades] ceased work of said Contract. . ." According to the moving defendants "[t]here is no dispute herein that MA Angeliades ceased work on or before October 16, 2008, i.e., more than two years before WDF commenced this action. This is based upon the SCA's acceptance of the project as Substantially Complete as of October 16, 2008. The General Conditions of the prime contract between the SCA and Angeliades define "Substantial Completion" as follows:

> The Work shall be deemed substantially complete when, at the sole discretion of the SCA: i) all Work has been satisfactorily completed in accordance with the Contract; ii) all equipment, machinery, instruments and other systems furnished or installed as part of the Work have been tested, demonstrated, and commissioned and are fully operational; iii) all documents, certifications, permits and proofs of compliance required by the Contract for the lawful use of the Work have been provided; and iv) the Work can be safely used for its intended purpose.

The General Conditions of the prime contract between the SCA and Angeliades define "Work" as follows:

> All activities of the Contractor and its Subcontractors required by the Contract. Work includes, but is not limited to, procurement of materials, construction of

the Project in whole or in part, and administration and coordination of subcontracts. The Work shall include not only Contractor's obligations that are expressly set forth in the Contract, but also all that is reasonably inferable from the express description of the Work. The Work shall include the activities that Contractor itself performs as well as activities it delegates to its Subcontractors and third parties, and includes, but is not limited to, all documents, reports,

studies, tests, inspections and repairs required by the Contract.

The moving defendants also point out that the issue of when the work was completed was before Justice Rosengarten in the proceeding to vacate WDF's lien and that Court found that WDF "failed to show any evidence of ongoing work by [WDF] or any other party on the subject project after 10/22/08."

WDF claims that the moving defendants are mistaken by suggesting that "ceased work" means the date of "substantial completion" and by failing to apprise the Court that the parties were still performing work well into 2010; and by suggesting that, based upon Justice Rosengarten's decision, which evaluated the sufficiency of WDF's lien law notice, collateral estoppel applies to the dispute as to when the parties actually "ceased working" at the Project.

The Certificate of Substantial Completion relied upon by the moving defendants provides that "minor items appearing on an SCA approved punch list may be corrected or provided after the SCA concurs that Substantial Completion has been achieved. Failure to include an item does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract documents." The definition of "Work" in the principal contract between M.A and the SCA is defined as " all activities of the Contractor and its Subcontractors required by the Contract.. ." Furthermore, the Subcontract Agreement between Angeliades and WDF sets forth in detail the Scope of the Work which Angeliades delegated to WDF, which contemplated and included the Work that Angeliades delegated to WDF, its subcontractor. Moreover, work delegated to WDF included a list of requirements which required WDF to extend labor and materials to the Project, including performing punch list items, well after the substantial completion date specified by the SCA. In fact, the SCA's own "Certificate of Substantial Completion" specifically mandated the completion of punch list items. Accordingly, "substantial completion" is not equivalent to "ceased work" for purposes of the statute of limitations. Furthermore, WDF has shown that it was performing punch list work following the substantial completion certification by the SCA and as late as 2010. Mr. Walash sets forth many examples of the work which was being performed by Angeliades and WDF well into 2010. Consequently, the cross-claims by WDF are not time-barred.

Finally, the doctrine of collateral estoppel does not apply to this action. The equitable doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue raised in a prior action and decided against that party or those in privity. For collateral estoppel to apply, "there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling … The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party" (Buechel v Bain, 97 N.Y.2d 295, 303-304, 740 N.Y.S.2d 252, 766 N.E.2d 914, cert denied 535 US 1096, 122 S. Ct. 2293).

See, Davidson v. Am. Bio Medica Corp., 299 A.D.2d 390 (N.Y. App. Div. 2002)

In the instant case, moving defendants' claim that the prior decision by Justice Rosengarten', in a special proceeding to discharge the lien on the basis that the lien was facially defective and that the lien was filed late, is misplaced. Specifically, Justice Rosengarten observed that "In filing the Notice of Lien of 5/18/09 however [WDF] failed to state when the Lien of $1,536,386.28 amount became due." Justice Rosengarten did not decide when the work was completed, rather before him was the issue of whether the Notice of Lien was facially defective because the Notice failed to give "any dates or description of the work performed as required by Lien Law 12." In the instant case, the issue is when the work ceased, not when it was performed or when the Lien became due. Furthermore, Justice Rosengarten's Decision was not a judgment on the merits of WDF's claim to monies owed by M.A., but rather, a determination of whether or not WDF properly noticed its lien on public improvement funds. Accordingly, the doctrine of collateral estoppel regarding the issue of when work ceased does not apply since the prior proceeding did not involve the identical issue as the instant action. .

The branch of the motion seeking dismissal of WDF's cross-claims on the ground that WDF did not pay its subcontractors is denied. Moving defendants claim that Article 2 of WDF's contract with MA provides that final payment shall not be due WDF until WDF submits evidence that "no unpaid claims exist against [WDF] for labor, materials, services, supplies of other obligations incurred by [WDF] in the performance of the Work hereunder." Since WDF has not paid its own subcontractors, which is a condition precedent to it receiving final payment on the project, they cannot seek payment from the moving defendants. Based on the allegations in WDF's cross-claims and the affidavit by Neil Walash of WDF, there is an issue if M.A directly caused the dispute between WDF and its subcontractors regarding payments. As such, since the alleged condition precedent is linked to the implied obligation of M.A to do something which would have enabled WDF to meet the condition precedent, M.A cannot insist upon the condition precedent, when its non-performance is its own doing. *See*, A.H.A. General Const., Inc. v. New York City Housing Authority, 92 N.Y.2d 20 (1998) In any event, assuming arguendo the condition precedent has not been met, WDF may recover under the doctrine of substantial performance. Accordingly, the branch of the motion seeking dismissal based upon WDF's failure to pay its subcontractors is denied.

The cross-motion for an Order imposing sanctions against defendant M.A. Angeliades, Inc. pursuant to 22 NYCRRR 130-1is denied. WDF claims Angeliades is liable to WDF for its frivolous conduct in light of the blatantly false material factual statements which it utilized as a basis for dismissal. WDF claims that Angeliades' motion misleads the Court with drastic, false statements which simply ignore the documentation which Angeliades authored. Contrary to WDF's claims, this Court finds that the motion for dismissal is premised upon assertions that

are reasonably related to the evidence presented. As such, this Court cannot find the moving defendants' motion to be frivolous and the cross-motion is denied.

In sum, the motion and cross-motion are denied in their entirety.

Dated: July 21, 2011

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ORIN R. KITZES, J.S.C.