

**ACC Concrete Corp. v Core Cont. Constr., LLC**

2011 NY Slip Op 33574(U)

December 23, 2011

Sup Ct, NY County

Docket Number: 600822/2010

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS  
J.S.C. Justice

PART 46

Index Number : 600822/2010  
ACC CONCRETE  
vs.  
CORE CONTINENTAL CONSTRUCTION  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

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

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

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

PAPERS NUMBERED

1, 3  
2, 4  
5-6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

*The court grants defendant Bank of East Asia (U.S.A.) N.A.'s motion to dismiss the complaint against this defendant and grants in part and denies in part defendant Manigold LLC's cross-motion for summary judgment on plaintiff's third and fourth claims against this latter defendant, pursuant to the accompanying decision. C.P.L.R. §§ 3211(a)(7), 3212(b) and (c).*

**FILED**

FEB 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/23/12

Lucy Billings  
LUCY BILLINGS 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):

\* 2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x  
ACC CONCRETE CORP.,

Index No. 600822/2010

Plaintiff

- against -

DECISION AND ORDER

CORE CONTINENTAL CONSTRUCTION, LLC,  
MARIGOLD LLC, and BANK OF EAST ASIA  
(U.S.A.) N.A.,

**FILED**

Defendants

FEB 07 2012

-----x  
LUCY BILLINGS, J.S.C.:

NEW YORK  
COUNTY CLERK'S OFFICE

The complaint in this action alleges that plaintiff subcontracted with defendant general contractor Core Continental Construction, LLC (CCC), to provide services for construction on premises owned by defendant Marigold LLC at 371 West 126th Street in New York County, for which plaintiff still is owed \$183,000.00. Plaintiff seeks payment from CCC and Marigold, but not from defendant Bank of East Asia (U.S.A.) N.A., for the improvements plaintiff made to the premises.

Plaintiff's only claim against Bank of East Asia is its fourth claim: because trust funds under New York Lien Law § 77 that the bank loaned to the building owner for the construction were not used for their intended purpose of improving real property, plaintiff was not paid what it is owed. Plaintiff does not claim, however, that Bank of East Asia misused the funds it loaned. Thus plaintiff's right to enforce the trust funds' purpose does not implicate any violation of Lien Law § 77 by or

relief against Bank of East Asia.

In fact, plaintiff does not dispute that Bank of East Asia terminated the loan as satisfied and discharged because Marigold never drew any funds from the credit the Bank had made available to Marigold. Thus the available funds never actually became trust funds, because the owner of the property to be improved never received the funds. Since they remained with Bank of East Asia, and Marigold never received them, neither were any trust funds diverted as plaintiff claims. Therefore the court grants Bank of East Asia's motion to dismiss and Marigold's cross-motion for summary judgment dismissing plaintiff's fourth claim against these defendants. C.P.L.R. §§ 3211(a)(7), 3212(b) and (e).

Marigold's cross-motion for summary judgment also seeks dismissal of plaintiff's third claim for unjust enrichment or quantum meruit against this defendant. Insofar as Marigold benefitted from plaintiff's work pursuant to its subcontract with CCC, Marigold is not liable for compensating plaintiff's services unless it agreed to pay for that work. Metropolitan Elec. Mfg. Co. v. Herbert Constr. Co., 183 A.D.2d 758, 759 (2d Dep't 1992); Sybelle Carpet & Linoleum of Southampton v. East End Collaborative, 167 A.D.2d 535, 536 (2d Dep't 1990); Perma Pave Contr. Corp. v. Paerdegat Boat & Racquet Club, 156 A.D.2d 550, 551 (2d Dep't 1989). See Stanfill Plumbing & Heating Corp. v. New York Athletic Club, 260 A.D.2d 163 (1st Dep't 1999). The original subcontract between plaintiff and CCC specified a scope of work, labor, and materials that plaintiff was to provide. The

[\*4]

\$183,000.00 plaintiff seeks is for work outside the subcontract's scope, which plaintiff claims CCC also requested, and for which plaintiff undeniably retains a remedy against CCC for breach of contract. Plaintiff claims a remedy against Marigold as well, however, for unjust enrichment or quantum meruit, based on its president Henry Ting's agreement to one or more "change orders" from CCC for additional work clearing out rocks by plaintiff at an additional cost. Aff. of Anthony Isola ¶ 5. See Stanfill Plumbing & Heating Corp. v. New York Athletic Club, 260 A.D.2d 163; Metropolitan Elec. Mfg. Co. v. Herbert Constr. Co., 183 A.D.2d at 759; Sybelle Carpet & Linoleum of Southampton v. East End Collaborative, 167 A.D.2d at 536; Perma Pave Contr. Corp. v. Paerdegat Boat & Racquet Club, 156 A.D.2d at 551.

While Ting's affidavit supporting Marigold's cross-motion denies any such agreement with CCC, Ting does admit discussions regarding plaintiff's performance of additional work for additional compensation. Marigold points to the lack of evidence specifying when these discussions occurred, but the evidence does specify their context as well as content.

Plaintiff's president Anthony Isola attests to specific conversations with Ting, when Ting acknowledged the discovery of rock that was undetected until the construction project was in progress due to the inaccuracy of Marigold's soil boring reports, necessitating corrective removal measures by plaintiff to allow a foundation to be built for the construction. In reliance on Marigold's acknowledgment of the need for this additional work by

\* 5]  
plaintiff, it performed the extra foundational work, and CCC presented the extra expense for this work to Marigold, which it never paid to CCC or plaintiff.

Isola's account thus raises an inference that Marigold, through Ting, orally agreed, whether jointly with CCC or not, to plaintiff undertaking this extra corrective work. Stanfill Plumbing & Heating Corp. v. New York Athletic Club, 260 A.D.2d 163. Such an agreement in advance of the work, in contrast to simply acquiescing to plaintiff's improvements to Marigold's premises and accepting the benefits of those improvements, indicates its assumption of an obligation to pay for the work agreed to and supports its liability to plaintiff sufficiently to defeat summary judgment at this juncture. See Metropolitan Elec. Mfg. Co. v. Herbert Constr. Co., 183 A.D.2d at 759; Sybelle Carpet & Linoleum of Southampton v. East End Collaborative, 167 A.D.2d at 536; Perma Pave Contr. Corp. v. Paerdeqat Boat & Racquet Club, 156 A.D.2d at 551.

The record at this juncture is not even clear whether plaintiff ever actually contracted with CCC for the extra foundational work. The record certainly contains no executed written agreement for this work. Any agreement between plaintiff and Marigold, moreover, is concededly oral and thus unsusceptible of easy proof. Therefore no indisputable express agreement for the work between plaintiff and CCC precludes plaintiff at this stage from pursuing unjust enrichment or quantum meruit claims against both defendants in the event a breach of contract claim

fails, even though at a later point, after the evidence develops, plaintiff may need to forego particular claims. See Spectrum Painting Contrs., Inc. v. Kreiser Borg Florman Gen. Constr. Co., Inc., 64 A.D.3d 565, 577 (2d Dep't 2009); Metropolitan Elec. Mfg. Co. v. Herbert Constr. Co., 183 A.D.2d at 759; Sybelle Carpet & Linoleum of Southampton v. East End Collaborative, 167 A.D.2d at 536; Perma Pave Contr. Corp. v. Paerdegat Boat & Racquet Club, 156 A.D.2d at 551.

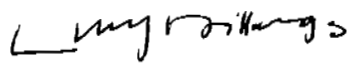
In sum, Isola's version of his discussions directly with Ting regarding plaintiff's corrective rock removal, especially in advance of its opportunity to depose Ting and CCC, is enough to defeat Marigold's motion for summary judgment dismissing plaintiff's third claim for unjust enrichment or quantum meruit against Marigold. Depositions will allow plaintiff to confront Ting regarding his conversations with plaintiff and to elicit details of his conversations directly with CCC.

Consequently, the court (1) grants defendants Bank of East Asia (U.S.A.) N.A.'s motion to dismiss and Marigold LLC's cross-motion for summary judgment dismissing plaintiff's fourth claim against each of these defendants, but (2) denies Marigold's cross-motion for summary judgment dismissing plaintiff's third claim against this defendant. C.P.L.R. §§ 3211(a)(7), 3212(b) and (e). Since plaintiff's only claim against Bank of East Asia is its fourth claim, this decision dismisses the complaint against this defendant. Marigold's cross-claim against Bank of East Asia is premised on (1) the latter defendant's degree of

culpability for plaintiff's damages, which upon dismissal of the complaint against the bank is no culpability, and (2) breach of a contract, which is nowhere alleged between Marigold and the bank. Although Bank of East Asia does not move to dismiss cross-claims, upon Marigold's motion for summary judgment dismissing the fourth claim, the only claim also against the bank, the court also dismisses Marigold's cross-claim against Bank of East Asia. C.P.L.R. § 3212(b); Siegel Consultants, Ltd. v. Nokia, Inc., 85 A.D.3d 654, 656-57 (1st Dep't 2011); RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d 618, 619-20 (1st Dep't 2009); Rose v. Citywide Auto Leasing, Inc., 60 A.D.3d 520 (1st Dep't 2009).

Since no party has presented the answer of defendant Core Continental Construction, LLC, however, this record does not permit the court to ascertain even whether CCC interposes any cross-claim against Bank of East Asia, let alone whether the premises of any such claim remain viable. Atiencia v. MBBCO II, LLC, 75 A.D.3d 424 (2010); RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 620. Plaintiff's fourth claim remains against CCC as well. This decision constitutes the court's order.

DATED: December 23, 2011



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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.

**FILED**

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