

Northe Group, Inc. v Spread NYC, LLC

2012 NY Slip Op 30650(U)

March 13, 2012

Supreme Court, New York County

Docket Number: 600068/10

Judge: Cynthia S. Kern

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

PRESENT: _____
Justice

PART _____

3/13/12
PK

Index Number : 600068/2010
NORTHE GROUP, INC.
vs.
SPREAD NYC LLC
SEQUENCE NUMBER : 008
PARTIAL SUMMARY JUDGMENT

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

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is decided in accordance with the annexed decision.

Dated: 3/13/12 _____
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: Part 55

-----X
NORTHE GROUP, INC.,

Plaintiff,

Index No. 600068/2010

-against-

DECISION/ORDER

SPREAD NYC, LLC, WAH KOK REALTY CORP.
and "JOHN DOE 1" through "JOHN DOE 10"
inclusive, as those persons and entities having an
interest in real property located at 209 Mulberry Street,
New York, New York,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	<u>3</u>

Plaintiff Northe Group, Inc. ("Northe") commenced the instant action for breach of contract and to foreclose on a mechanic's lien. Northe now moves for partial summary judgment on its cause of action for breach of contract and, pursuant to CPLR 2221, for a stay of enforcement of the interim judgment entered in favor of defendant Spread. Defendant Spread cross-moves to compel Northe to post an undertaking to secure that judgment, cross-moves for attorneys' fees and cross-moves for sanctions.

The relevant facts are as follows. Spread and Northe entered into a contract whereby Northe would serve as construction manager for a restaurant located at 209 Mulberry Street in

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Manhattan. The contract provided that Spread would pay Northe a monthly fee of \$12,000 per month as well as a \$5,000 retainer. Spread alleges that the monthly fee was reduced to \$7,000 per month in February 2009. The contract also provided that "Staffing and Field supervision, if required during Construction, and other project related expenses, such as blueprinting , copying, field office expenses, permit expenses, etc... would be billed at cost." Spread terminated the contract and Northe's services as of May 15, 2009.

The instant case already has a lengthy procedural history. Northe commenced this action by filing a summons and verified complaint setting forth two causes of action. The first cause of action is for breach of contract and the second is for foreclosure of Northe's mechanic's lien. By order of the court dated June 2010, Northe's mechanic's lien was vacated on grounds of willful exaggeration. The court found that the contract provision which states that, "Staffing and Field supervision, if required during Construction, and other project related expenses, such as blueprinting, copying, field office expenses, permit expenses, etc... would be billed at cost" means that Northe was prohibited from marking up the cost of the contractors it hired. The court found that, in violation of this provision, Northe had been charging Spread more than it was being charged by its subcontractors. Northe subsequently moved for leave to reargue, which was granted, but upon reargument, the court adhered to its prior decision. Northe then submitted an order to show cause for leave to renew, which was denied. Next, Northe moved before the appellate court to stay all proceedings and modify that denial, which was also denied. Northe then appealed the June 2010 order, which was unanimously denied by the First Department on October 20, 2011. Northe now has filed a motion in the Appellate Division to reargue the appeal or for permission to appeal to the Court of Appeals. That motion is pending. On November 9,

2011, this court issued an order confirming the report of special referee Stanley L. Sklar which recommended an award of reasonable attorneys' fees in the amount of \$71,235.00 under Section 39-a of the Lien Law.

Northe now moves for partial summary judgment on its breach of contract claim based on its argument that Spread owes it \$64,838.59 under the contract even if it bills Spread "at cost". It argues that it is owed this sum based on the \$12,000 monthly fee, based on payments it made to contractors and based on other costs it incurred in connection with the project. The motion for partial summary judgment by Northe is denied as there are disputed issues of fact as to the amounts that are due under the contract. In the first instance, there is an issue of fact as to whether the contract between Northe and Spread was orally modified to adjust the monthly payments from \$12,000 to \$7,000. The fact that the invoices starting in February average \$7,000 per month and were paid as billed is sufficient to raise the question of whether the contract was modified.

Spread also raises issues of fact with regard to the amounts purportedly paid to subcontractors and/or suppliers. Although Northe submits receipts for the amounts that it claims, Spread submits an affidavit of Nicolas Dutko, a managing director of Spread, who enumerates alleged misrepresentations by Northe with respect to each amount claimed by Northe. Spread alleges that some of the amounts claimed by Northe were for work on other projects, that some checks are dated after Northe was terminated and that some amounts claimed do not match the amounts of the checks at issue. Spread also submits the affidavit of Bogdan Malinowski, president of M & A Projects, Inc. ("M & A"), a subcontractor hired by Northe in connection with the Spread restaurant project. He states that Northe has claimed amounts it paid to M & A for

work on other projects and states that Northe has tampered with certain checks. These affidavits are sufficient to raise questions of fact as to how much Northe actually paid its subcontractors and/or suppliers and how much, if anything, Spread still owes Northe.

Spread also disputes the “soft costs” now claimed by Northe. Mr. Dutko states that Spread was never previously billed for these alleged costs. This statement raises an issue of fact as to whether Spread owes Northe for these costs. Finally, Spread states that the fees for “project supervision” constitute double billing and that project supervision is exactly what the monthly fee compensated Northe for. Again, there is an issue of fact as to what these fees are for and whether they duplicate fees already paid by Spread.

Northe’s motion for a stay of enforcement of the interim judgment against it is granted on the condition that Northe post an undertaking to secure the full amount of that interim judgment, assuming that Spread has not yet executed on the judgment. CPLR §5519 provides that a notice of appeal stays all proceedings to enforce the judgment, if, in the case of a money judgment, the judgment debtor furnishes an undertaking in the sum of the judgment. In the instant case, Northe has appealed the court’s November 9, 2011 decision but has not posted an undertaking. Therefore, in order to stay the enforcement of the judgment, Northe must post an undertaking to secure the full amount of that judgment.

The court now turns to Spread’s cross-motion seeking reasonable attorneys’ fees expended in defending against Northe’s appeal and appellate motion seeking to reinstate Northe’s mechanic’s lien. The court defers a decision on this cross-motion until litigation regarding the mechanic’s lien is concluded so that all the attorneys’ fees and costs can be reviewed at one time. At the conclusion of litigation regarding the mechanic’s lien, Spread may

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bring a motion for attorneys' fees.

Finally, Spread's motion for sanctions is denied. Spread has not shown that Northe's motion is frivolous.

Accordingly, Northe's motion for partial summary judgment is denied. Northe's motion, pursuant to CPLR 2221 for a stay of enforcement of the interim judgment entered in favor of defendant Spread is granted on the condition that Northe post an undertaking in the amount of the interim judgment. Spread's cross-motion seeking that Northe post an undertaking in the amount of the judgment is granted. Spread's cross-motion for attorneys' fees is denied with leave to renew at the conclusion of litigation regarding the mechanic's lien. Spread's motion for sanctions is denied. This constitutes the decision and order of the court.

Dated: 3/13/12

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