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| <b>Reliable Enters., Inc. v Nagori Contr. Corp.</b>                                                                                                                                                                                                              |
| 2012 NY Slip Op 33733(U)                                                                                                                                                                                                                                         |
| June 19, 2012                                                                                                                                                                                                                                                    |
| Supreme Court, Orange County                                                                                                                                                                                                                                     |
| Docket Number: 11355/2010                                                                                                                                                                                                                                        |
| Judge: Catherine M. Bartlett                                                                                                                                                                                                                                     |
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SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

**ORIGINAL**

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

-----x  
RELIABLE ENTERPRISES, INC.,

Plaintiff,

-against-

NAGORI CONTRACTING CORP., THE HANOVER  
INSURANCE GROUP, HANOVER INSURANCE  
GROUP, INC., HANOVER INSURANCE COMPANY  
and CITIZENS INSURANCE COMPANY OF  
AMERICA,

Defendants.

To commence the statutory time  
period for appeals as of right  
(CPLR 5513 [a]), you are  
advised to serve a copy of this  
order, with notice of entry,  
upon all parties.

Index No. 11355/2010  
Motion Date: May 2, 2012  
-----x (adjourned to June 13, 2012)

The following papers numbered 1 to 15 were read on defendants' motion for summary  
judgment to CPLR 3212:

|                                                                         |       |
|-------------------------------------------------------------------------|-------|
| Notice of Motion-Affirmation-Affidavit-Exhibits-Memorandum of Law ..... | 1-5   |
| Affirmation in Opposition-Affidavits-Exhibits .....                     | 6-8   |
| Affidavit of Kenneth Otten, Jr. In Opposition-Exhibits .....            | 9-10  |
| Reply Affirmation-Exhibits .....                                        | 11-12 |
| Reply Affidavit-Exhibits .....                                          | 13-14 |
| Reply Memorandum of Law .....                                           | 15    |

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:.

This is an action for breach of contract based upon three theories which is breach of  
contract itself, unjust enrichment and quantum meruit. Plaintiff also seeks damages from the

[\* 2]  
insurance company defendants who were to act as sureties for payments of any monies due any owing by defendant Nagori.

This action stems from construction work performed at Stewart Airport. Defendants move for summary judgment on all causes of action claiming that plaintiff cannot demonstrate through any admissible evidence that it has not been paid fully in accordance with the contract between plaintiff and defendant Nagori. Plaintiff claims that there was work performed outside the scope of the contract between it and Nagori and that it billed Nagori for the work for which it was never paid. Moreover, the plaintiff claims that even if the work was not encompassed by the original contract between the parties, defendants will be unfairly enriched by the work plaintiff did allegedly perform and therefore would be entitled to payment therefor.

The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage, *Furia v Furia*, 116 AD2d 694 (2<sup>nd</sup> Dept. 1986); see *Ascoli v Lynch*, 2 AD3d 553 (2<sup>nd</sup> Dept. 2003). In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based, *Sud v Sud*, 211 AD2d 423 (1<sup>st</sup> Dept. 1995); *Atkinson v Mobil Oil Corp.*, 205 AD2d 719 (2<sup>nd</sup> Dept. 1994).

In *Andre v Pomeroy*, 35 NY2d 361, 364 (1974), the Court of Appeals held that:

[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

In support of their motion, defendants submit the testimony of plaintiff's principal,

[\* 3]

Kenneth Otten, Sr. as well as the testimony of one time employee, Kenneth Otten, Jr. As demonstrated by their testimony, of all the 16 invoices submitted by plaintiff to justify work it allegedly performed outside the confines of the specific contract, not one of the invoices could be substantiated and justified as to how the amount was arrived at by plaintiff. Otten, Sr. testified that his son, Otten Jr., kept a log book in which any additional work outside the contract was noted. Despite defendants' calls for that book, it was not produced prior to or during Otten, Jr.'s deposition. Subsequent to the depositions, when the log book was produced, it provided no further insight into the extra charges for which plaintiff now seeks a recovery.

Defendants made out a prima facie case that they paid plaintiff fully under the terms of the contract and that plaintiff was paid almost \$300,000 for extra work approved by the Port Authority on a time and materials basis.

A party opposing a motion for summary judgment must lay bare his or her proof. *Del Giacco v Noteworthy Company*, 175 AD2d 516, 517 (3<sup>rd</sup> Dept., 1991). In order for a party to successfully oppose a motion for summary judgment, he must demonstrate a bona fide defense to the action which defense must be fairly debatable and of a substantial character. *See, Kaye v Keret*, 89 AD2d 885, 886 (2<sup>nd</sup> Dept. 1982). If the papers show no real defense, or at best a shadowy or perfunctory defense, summary judgment may be granted. *See, Sabato v Soffes*, 9 AD2d 297, 300 (1<sup>st</sup> Dept. 1959). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient [cit. om.]" *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "To defeat summary judgment the opponent must present evidentiary facts sufficient to raise a triable issue of fact, and averments merely stating conclusions, of fact or of law, are insufficient." *Mallad Const. Corp. v County Fed. Sav. & Loan Ass'n*, 32 NY2d 285

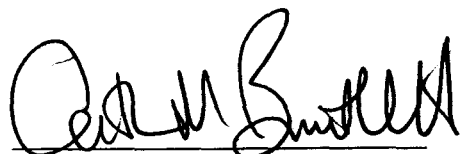
[\* 4]  
(1973). In opposition, plaintiff submitted no admissible evidence demonstrating that it is owed any additional money. Plaintiff could not substantiate any of the invoices for which it claims monies are owed, but nevertheless seeks payment. Therefore, defendants are entitled to summary judgment on the breach of contract theory.

The Court then turns to the issue of plaintiff's claim in quantum meruit. "[I]n order to make out a claim in quantum meruit, a claimant must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" *Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 484, (1<sup>st</sup> Dept. 1991). The failure of a plaintiff to demonstrate the reasonable value of the services, warrants dismissal of a claim for quantum meruit payment. *See, Geraldi v Melamid*, 212 AD2d 575, 576 (2<sup>nd</sup> Dept. 1995). In the instant case, as previously stated, there is no substantiation by plaintiff for the reasonable value of the services they allegedly provided outside of what it has already been paid. The plaintiff's failure to make out this essential element in opposition to the prima facie case established by defendants warrants the granting of defendants' motion on that theory as well.

The remaining causes of action seeking payment from the insurance companies are rendered moot by these determinations and therefore all causes of action are dismissed.

The foregoing constitutes the decision and order of the court.

Dated: June 19, 2012      E N T E R  
Goshen, New York



HON. CATHERINE M. BARTLETT,  
A.J.S.C.

**JUDGE NY STATE COURT OF CLAIMS  
ACTING SUPREME COURT JUSTICE**