

<b>AMEC Constr. Mgt., Inc. v City of New York</b>
2013 NY Slip Op 30104(U)
January 16, 2013
Supreme Court, New York County
Docket Number: 111906/2005
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE  
J.S.C.  
*Justice*

PART 12

Mazzocchi Wrecking  
- v -  
Evergreen Recycling  
OF Corona

INDEX NO. 111906/2005  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for vacate NIT

	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 IS **DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

JAN 23 2013

NEW YORK  
COUNTY CLERK'S OFFICE  
BARBARA JAFFE  
J.S.C. J.S.C.

Dated: JAN 17 2013

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
AMEC CONSTRUCTION MANAGEMENT, INC.,

Index No. 604391/04

Plaintiff,  
-against-

Argued: 5/16/12  
Mot. Seq. Nos. 004, 005, 006

CITY OF NEW YORK, AND MAZZOCCHI  
WRECKING, INC.,

**DECISION AND ORDER**

Defendants.

-----X  
MAZZOCCHI WRECKING, INC.,

Index No. 111906/05

-against-

Motion Seq. No. 002

EVERGREEN RECYCLING OF CORONA, and CITY  
OF NEW YORK,

Defendants,

-----X  
TULLY ENVIRONMENTAL, INC. (named herein and  
d/b/a EVERGREEN RECYCLING OF CORONA),

Third-Party Index No. 591292/05

Third-Party Plaintiff,

-against-

AMEC CONSTRUCTION MANAGEMENT, INC., and  
BOVIS LEND LEASE LMB, INC.,

Third-Party Defendant.

-----X  
BARBARA JAFFE, JSC.:

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**FILED**  
JAN 23 2013

This matter involves the massive clean-up efforts in New York City in the aftermath of

the September 11, 2001 attack on the World Trade Center. For years after, individuals, companies, and government agencies worked to alleviate the effects of the attack.

Motions under the above-referenced index numbers have been consolidated for decision. There are three motions under index no. 604391/04 (AMEC complaint). Under motion sequence 004, plaintiff AMEC Construction Management, Inc. (AMEC) moves for summary judgment dismissing the counterclaims of Mazzocchi Wrecking, Inc. (Mazzocchi). Under motion sequence 005, Mazzocchi moves to dismiss the AMEC complaint for failure to state a claim upon which relief can be granted. Under motion sequence 006, Mazzocchi's motion for summary judgment against City on its cross-claim has been withdrawn.

Under index no. 111906/05 (Mazzocchi complaint) Bovis Lend Lease LMB, Inc. (Bovis) seeks an order striking the note of issue and certificate of readiness in order to compel responses to interrogatories and depose AMEC, Mazzocchi, City, and Tully Environmental, Inc. (Tully), named herein and d/b/a Evergreen Recycling of Corona (EROC) (motion sequence 002).

### I. BACKGROUND

In the aftermath of the September 11, 2001 attacks, New York City was immediately thrust into a state of emergency. Ground Zero was inundated with more than three billion pounds of dangerously hot and unstable debris, burning underground fires, and victims' remains. The area was covered with the contents of the affected buildings, including furniture, office equipment, personal effects, live ammunition, and explosives. A state of emergency was declared and the process of responding to the destruction immediately began by, among other actions, engaging construction managers (CMs), AMEC, Bovis, Turner Construction, Inc. (Turner), and Tully to direct and control various subcontractors in the clean-up work. City would

eventually enter into contracts with the CMs, who then entered into contracts with the subcontractors.

The subcontractors were thus under the control and direction of the CMs. As issues arose concerning a subcontractor's work or billings, City would communicate with the CM for which the subcontractor performed work, and the CM would, in turn, communicate with the subcontractor. The subcontractors looked to their respective CMs for direction and sent their bills and invoices to the CMs who evaluated, adjusted, approved, and certified the work to the City as part of their own payment requisitions. City made payments only to the CMs.

Mazzocchi, as a subcontractor to AMEC, allegedly performed work at Ground Zero from September 11, 2001 through January 6, 2002, or Phase I of the clean-up and evacuation of the site. On or about October 4, 2001, Mazzocchi entered into a contract with AMEC (AMEC-Mazzocchi Contract), pursuant to which AMEC authorized Mazzocchi to work at Ground Zero, and AMEC obligated itself to pay Mazzocchi for the work performed as "expressly authorized by AMEC," despite AMEC not having entered into "a definitive contract for demolition, cleanup and construction services" with City. (*See Gardner Aff., Exh. A, Letter Agreement, dated Oct. 4, 2001*).

In the AMEC complaint, it is alleged that AMEC paid Mazzocchi approximately \$13 million as the reasonable value for work performed pursuant to the AMEC-Mazzocchi contract. AMEC's payments to Mazzocchi were approved by City and its accounting consultants. AMEC then, at City's request, performed a post-performance audit of payments to Mazzocchi, applying City's audit standards then in effect. The audit yielded a determination that payments made by AMEC to Mazzocchi exceeded City standards then in effect by approximately \$3 million, the

amount here in dispute. As a result, City determined that Amec had been overpaid by \$3 million.

According to the Mazzocchi complaint, on or about January of 2002, Phase II of the clean-up and excavation of Ground Zero commenced. At that time, Mazzocchi was allegedly informed by City that it should report for directions from, and should submit its invoices for payment to, EROC. EROC allegedly failed to pay Mazzocchi for the work performed. Finally, EROC entered an agreement with AMEC and third-party defendant Bovis for services that it performed at Mazzocchi's instruction.

## II. PROCEDURAL BACKGROUND

In its complaint, AMEC alleges that it entered into a contract with City pursuant to which it performed construction management services at the site, including, among other things, paying contractors with City funds for the "reasonable value" of work performed. It also alleges that City failed to pay it for all of the services it performed at the site, and that this failure to pay was based on City's improper reduction of payments to AMEC by an amount of funds City belatedly claimed should not have been paid out by AMEC to, among others, Mazzocchi. AMEC seeks judgment against City for breach of contract for the funds that have not been paid or reimbursed.

AMEC also brought suit against Mazzocchi, to which it allegedly overpaid some \$3 million. AMEC argues that if it does not obtain reimbursement from City of the funds paid to Mazzocchi, and should it be adjudicated that City does not owe AMEC these funds, then Mazzocchi should be liable to it for those funds.

Mazzocchi, by counterclaim, alleges that on September 11, 2001, it began performing services at the site at City's request, and that on or about September 17, 2001, it was assigned to work as a subcontractor under AMEC. It maintains that although it operated as a subcontractor

with AMEC, both City and AMEC oversaw, directed and controlled its work. Consequently, it argues, should it be adjudicated that AMEC overpaid it, recovery from City for its work under the theories of breach of contract, breach of implied contract, and unjust enrichment is appropriate because both City and AMEC expressly and independently became obligated to pay for the work, and failed to do so.

In its complaint, Mazzocchi seeks payment from EROC and City for compensatory damages, prejudgment interest, and attorney fees based on breach of contract and breach of implied contract. In addition, because EROC had entered into an agreement with AMEC and Bovis to perform services at Mazzocchi's instruction, EROC seeks damages from AMEC and Bovis, alleging that, should it be found that Mazzocchi is entitled to recover from EROC, then AMEC and Bovis should be held responsible for any such amounts due.

### III. ANALYSIS

The instant actions hinge on claims against City, and are now obviated by settlements. All of AMEC's and Mazzocchi's claims against City have been settled. The parties were then given an opportunity to specify which claims, if any, remain. Based on the responses and the original submissions, the motions are disposed of as follows:

AMEC's motion for summary judgment dismissing Mazzocchi's counterclaims (motion sequence 004), is now superfluous. Mazzocchi's counterclaim is for monies due from City for amounts with which Mazzocchi may be required to reimburse AMEC. However, as AMEC has settled its claims with City, the eventuality against which Mazzocchi sought to protect itself, namely, that it may be required to return monies to AMEC, has been eliminated.

Mazzocchi moved to dismiss the AMEC complaint for failure to state any claims upon

which relief can be granted (motion sequence 005). Again, AMEC's complaint against Mazzocchi was based on the possibility of an adjudication that City does not owe AMEC these funds. Settlement of the claims against City may have also rendered the AMEC complaint moot, and having failed to identify any remaining claims against Mazzocchi, and absent any breach of contract claim other than one based on what had been and is no longer a potential adjudication, Mazzocchi's motion to dismiss the AMEC complaint is also moot. While there may exist remaining claims against Mazzocchi, none have been identified.

Mazzocchi has withdrawn its motion for summary judgment against City (motion sequence 006).

Having settled its claims against City, Mazzocchi's action against it under index no. 111906/05 is also moot. And having sought relief against EROC in the alternative to recovery against City, and having failed to identify any remaining claims against EROC, and absent any alleged claim for breach of contract in the complaint other than one based on a now non-existent potentiality, nothing remains left to decide.

Bovis's motion, under index no. 111906/05, seeking to strike the note of issue in order to compel responses to interrogatories and depose AMEC, Mazzocchi, the City, and Tully, is also now moot, as the action upon which it is based is dismissed.

Accordingly, it is hereby

ORDERED, that the motion of plaintiff AMEC Construction Management, Inc. for summary judgment dismissing the counterclaims of Mazzocchi Wrecking, Inc. (index no. 604391/04, motion sequence 004) is denied; it is further

ORDERED, that the motion of defendant Mazzocchi Wrecking, Inc. to dismiss the

complaint for failure to state any claims upon which relief can be granted (index no. 604391/04, motion sequence 005) is granted and the complaint is dismissed in its entirety as against said defendant; it is further

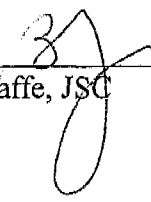
ORDERED, that the motion of Mazzocchi Wrecking, Inc. for summary judgment against the City of New York (index no. 604391/04, motion sequence 006) has been withdrawn on notice, and all claims against the City of New York terminated; it is further

ORDERED, that the motion of Bovis Lend Lease LMB, Inc. (Bovis) to strike the Note of Issue and Certificate of Readiness (index no. 111906/05, motion sequence 002) is denied as moot; it is further

ORDERED, that plaintiffs on index nos. 604391/04 and 111906/05 are granted leave to serve amended complaints so as to replead any remaining causes of action within 20 days after service on each of plaintiffs' attorneys of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiffs in index nos. 604391/04 and 111906/05 fail to serve and file amended complaints in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by defendants' counsel attesting to such non-compliance, is directed to enter judgment dismissing index nos. 604391/04, 111906/05, and 591292/05, with prejudice.

ENTER:

  
Barbara Jaffe, JSC

**FILED**

**JAN 23 2013**

**NEW YORK  
COUNTY CLERK'S OFFICE**

DATED: January 16, 2013  
New York, New York