

**McGovern & Co., LLC v Midtown Contr. Corp.**

2014 NY Slip Op 30154(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 150827/2013

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

Index Number : 150827/2013  
MCGOVERN & COMPANY, LLC  
vs  
MIDTOWN CONTRACTING  
Sequence Number : 001  
DISMISS

PART 19  
INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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


Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

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

decided per the memorandum decision dated 1/16/14  
which disposes of motion sequence(s) no. 001

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

Dated: 1/16/14

  
\_\_\_\_\_, J.S.C.  
**SALIANN SCARPULLA**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X  
McGOVERN & COMPANY, LLC,

Index Number: 150827/13  
Submission Date: 9/25/13

Plaintiff,

- against -

**DECISION and ORDER**

MIDTOWN CONTRACTING CORPORATION,

Defendant.

-----X  
MIDTOWN CONTRACTING CORPORATION,

Third-Party Plaintiff,

- against -

CENTURY 21, INC. and NGM INSURANCE COMPANY,

Third-Party Defendants.

-----X  
NGM INSURANCE COMPANY,

Fourth-Party Plaintiff,

- against -

CENTURY 21 DEPARTMENT STORES, LLC,

Fourth-Party Defendant.

-----X

For Plaintiff and Century 21:  
Howard Blum, Esq.  
286 Madison Avenue, 18<sup>th</sup> Floor  
New York, NY 10017

For Midtown Contracting Corporation:  
Mikel J. Hoffman, Esq.  
193 East Main Street  
Babylon, NY 11702

For NGM Insurance Co.:  
Torre Lentz Gamell Gary & Rittmaster, LLP  
100 Jericho Quadrangle, Ste. 309  
Jericho, NY 11753-2702

Papers considered in review of this motion for summary judgment (motion seq. no. 001):

Notice of Motion . . . . .	1
Aff. in Supp. . . . .	2
Affs. Opp. . . . .	3

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**HON. SALIANN SCARPULLA, J.:**

In this action arising from an alleged breach of a subcontract, plaintiff McGovern & Company, LLC (“McGovern”) moves for summary judgment dismissing defendant Midtown Contracting Corporation’s (“Midtown”) counterclaim and vacating Midtown’s mechanic’s lien pursuant to CPLR § 3212.

In September 2011, McGovern, a general contractor, hired Midtown as a subcontractor to perform structural steel work on a renovation project of the Century 21 department store located at 22 Cortlandt Street, New York, NY (“the premises”). McGovern and Midtown entered into a subcontract, which described the scope of work that Midtown must perform for the project (“the subcontract”).

In the complaint, McGovern alleges that Midtown failed to complete its work, failed to perform its work properly and in a timely manner, and failed to pay union benefits as required by the subcontract. McGovern asserts two causes of action against Midtown for: (1) breach of contract; and (2) to vacate Midtown’s mechanic’s lien that it filed against the premises on April 25, 2012, in the amount of \$955,852.00.

In its answer, Midtown denies that it breached the subcontract. Midtown also asserts a counterclaim against McGovern for breach of a separate contract, which

Midtown refers to as the “Midtown Agreement.” Midtown claims that it “performed work, labor and services in compliance with the [Midtown] agreement and extras thereto, which resulted in the agreed and reasonable amount due and owing Midtown in the sum of \$1,990,852.00, of which partial payment was made leaving a remaining outstanding balance to Midtown totaling \$955,852.00.”

Midtown also asserts a third-party claim to enforce its mechanic’s lien against the bond issued by Century 21, Inc. (“Century 21”), as principal, and NGM Insurance Company, as surety. In May 2012, Century 21, as tenant of the premises, filed a bond to discharge Midtown’s mechanic’s lien against the premises.

In the current motion, McGovern argues that it is entitled to summary judgment dismissing Midtown’s counterclaim and vacating the mechanic’s lien because Midtown did not suffer any damages. McGovern claims that Midtown partially performed its work under the subcontract, and that it paid Midtown for the partial work performed.

In his affidavit, McGovern’s member, Sal Caiola (“Caiola”), states that it “is undisputed that Midtown did not completely perform its work.” Caiola further states that Midtown was paid a total of \$1,035,000 for the work that it performed on the project.<sup>1</sup> Caiola estimates that Midtown expended approximately \$1,036,942.60 on the project

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<sup>1</sup> Specifically, Caiola states that McGovern paid \$735,000 to Midtown, and Century 21 paid \$300,000 to Midtown, for a total of \$1,035,000.

consisting of \$536,942.60 in labor costs and \$500,000 in materials cost.<sup>2</sup> Based on the amount that Midtown was paid (\$1,035,000), and the estimated amount of Midtown's costs (\$1,036,942.60), Caiola concludes that Midtown's damages could only amount to "\$1,000 more than it was paid."

In opposition, Midtown argues that McGovern's summary judgment motion should be denied because: (1) McGovern failed to meet its burden of showing an absence of a material issue of fact; and (2) McGovern's motion is barred by collateral estoppel.

First, Midtown argues that an issue of fact exists as to the amount that McGovern owes to Midtown. Midtown submits an affidavit from its vice president, Ronald Sancho ("Sancho"). In his affidavit, Sancho states that McGovern "failed to pay Midtown; 2) failed to coordinate the trades and other work on the project allowing Midtown to complete its work; and 3) either delayed or completely failed to issue change orders." According to Sancho, Midtown filed an itemized statement of its mechanic's lien, which provides the basis for the amount due to Midtown.

Second, Midtown argues that McGovern's motion should be denied based on the doctrine of collateral estoppel. Midtown claims that the parties previously litigated the issue of whether Midtown is entitled to the amount claimed in its mechanic's lien, and the Court determined that an issue of fact exists as to the amount owed to Midtown.

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<sup>2</sup> Caiola calculated Midtown's labor costs using the labor rate of \$208.40 per hour as specified in Midtown's itemized statement of its mechanic's lien (exhibit 12), and 2,576.5 hours, as the number of hours worked from the report of Westway Iron Works (exhibit 13).

According to Midtown, the previous litigation between the parties was a special proceeding commenced by McGovern to vacate, cancel, and discharge Midtown's mechanic's lien. In that proceeding, McGovern argued that the lien was invalid for willful exaggeration, and that the lien was waived by Midtown. In her decision and order dated October 5, 2012, Justice Carol E. Huff determined that "[w]ith respect to willful exaggeration, respondent [Midtown] has submitted evidence in support of its assertion that it is entitled to the amount it claimed on the notice of lien. In a mechanic's lien case concerning a dispute over the amount owed, when the party opposing a summary disposition produces evidence to raise an issue of fact – as respondent has done here – the issue is properly tried in the action to foreclose the lien." *McGovern & Co., LLC v. Midtown Contracting Corp.*, New York Supreme Court, New York County, Index No. 102684/12.

### **Discussion**

Collateral estoppel bars parties to a litigation from "re-litigating issues necessarily decided in a prior litigation." *Stumpf AG v. Dynegy Inc.*, 32 A.D.3d 232, 233 (1st Dep't 2006). The doctrine of collateral estoppel is "intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456 (1985).

To determine whether collateral estoppel applies, a two-part test must be satisfied. “First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination.” *Id.*; *Sepulveda v. Dayal*, 70 A.D.3d 420, 421 (1st Dep’t 2010); *Zimmerman v. Tower Ins. Co. of New York*, 13 A.D.3d 137, 139 (1st Dep’t 2004).

In its motion for summary judgment, McGovern argues that Midtown’s counterclaim should be dismissed and its mechanic’s lien should be vacated because Midtown is not owed \$955,852.00 as it claims. McGovern contends that Midtown was paid for all of the work that it performed, and therefore Midtown did not suffer any damages.

Based on the parties’ submissions, I deny McGovern’s motion for summary judgment based on the doctrine of collateral estoppel. McGovern seeks to litigate an issue here that has already been previously litigated and determined by this court – whether Midtown is entitled to recover \$955,852.00 from McGovern, the amount claimed in its mechanic’s lien. In the prior proceeding to vacate Midtown’s mechanic’s lien, Justice Huff found that an issue of fact exists as to the amount owed to Midtown under the mechanic’s lien. This prior determination is necessarily decisive of the present motion as the factual basis for Midtown’s mechanic’s lien and counterclaim against McGovern are the same.

McGovern did not assert any opposition to Midtown's collateral estoppel argument. McGovern therefore failed to meet its burden of showing that collateral estoppel does not apply. A party attempting to defeat the application of collateral estoppel bears the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action. *Kaufman*, 65 N.Y.2d at 456; *Grassini v. Paravalos*, 270 A.D.2d 52, 53 (1st Dep't 2000).

Moreover, Midtown again raised an issue of fact as to whether it is entitled to the amount of \$955,852 under its mechanic's lien and counterclaim against McGovern.

Accordingly, I deny McGovern's motion for summary judgment dismissing Midtown's counterclaim and vacating Midtown's mechanic's lien.

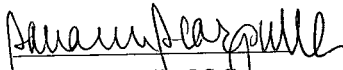
In accordance with the foregoing, it is

ORDERED that plaintiff McGovern & Company, LLC's motion for summary judgment dismissing defendant Midtown Contracting Corporation's counterclaim and vacating Midtown's mechanic's lien pursuant to CPLR § 3212 is denied.

This constitutes the decision and order of the Court.

Dated:           New York, New York  
                  January 10, 2014

ENTER:

  
Saliann Scarpulla, J.S.C.