

Absolute Elec. Contr., Inc. v IBEX Constr. Co., LLC
2016 NY Slip Op 30412(U)
March 11, 2016
Supreme Court, New York County
Docket Number: 161282/13
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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ABSOLUTE ELECTRICAL CONTRACTING, INC.,

Plaintiff,

Index No. 161282/13

-against-

DECISION/ORDER

IBEX CONSTRUCTION COMPANY, LLC,

Defendant.

-----X

HON. CYNTHIA KERN, J.S.C.

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>
Answering Affidavits	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Absolute Electrical Contracting, Inc. ("Absolute") commenced the instant action seeking damages arising out of a contract between it and defendant Ibex Construction Company, LLC ("Ibex"). Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its first cause of action for breach of contract against Ibex. For the reasons set forth below, plaintiff's motion is denied.

The relevant facts are as follows. In or around September 2009, Ibex, as general contractor, and the Rubin Museum of Art (the "Museum"), as owner, entered into a contract in connection with the renovation of an education facility affiliated with the Museum located at 132 West 17th Street, New York, New York (the "Project"). On or about July 30, 2010, plaintiff, an electrical contractor, and Ibex entered into a subcontract pursuant to which plaintiff would perform certain electrical work for the Project for the price of \$240,000.00 (the "Agreement").

Plaintiff alleges that during its performance of the Agreement, it performed additional and extra work at the direction of Ibex and that Ibex approved and issued change orders to plaintiff for said additional work totaling \$99,438.00. Plaintiff alleges that after it performed the work under the Agreement, Ibex paid plaintiff \$301,867.92 leaving a balance of \$37,570.08, the amount it now claims is due and owing under the Agreement. On or about August 30, 2012, plaintiff filed with the New York County Clerk a notice of mechanic's lien on the property.

On or about December 6, 2013, plaintiff commenced the instant action against Ibex and The Shelly and Donald Rubin Cultural Trust (the "Trust") asserting causes of action for breach of contract, quantum meruit and account stated against Ibex and foreclosure of a mechanic's lien against Ibex and the Trust. Thereafter, Ibex and the Trust moved to dismiss the complaint's causes of action for quantum meruit and foreclosure of a mechanic's lien, which was granted by this court. Thus, the only remaining defendant in the action is Ibex. Plaintiff now moves for summary judgment on its cause of action for breach of contract against Ibex.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

To establish a *prima facie* right to summary judgment on a claim for breach of contract, a plaintiff must show: (1) the existence of a contract; (2) the plaintiff's performance under the

contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. See *Noise in Attic Prod., Inc. v. London Records*, 10 A.D.3d 303 (1st Dept 2004).

In the instant action, plaintiff has established its *prima facie* right to summary judgment on its cause of action for breach of contract against Ibex. Plaintiff has shown the existence of the Agreement between plaintiff and Ibex; that plaintiff fully performed under the Agreement, including the additional and extra work directed by Ibex; that defendant Ibex breached the Agreement by failing to fully pay plaintiff for the labor, materials and equipment it furnished; and damages in the amount of \$37,570.08 as a result of Ibex's breach.

However, in response, defendant Ibex has raised issues of fact sufficient to defeat plaintiff's motion for summary judgment on its cause of action for breach of contract. As an initial matter, there exists an issue of fact as to whether plaintiff properly performed under the Agreement. The Agreement provides, in pertinent part, that

Upon receipt of pricing for change orders, [Absolute] must submit said price to Ibex within one business day of the request. (Time being of the essence). If [Absolute] fails to provide pricing within said one business day, Ibex will determine the price that [Absolute] will be paid for the requested change order, which price is not subject to further negotiation or review.

Pursuant to the Agreement, Absolute further agreed to "[m]aintain harmonious labor relations through the entirety of th[e] project," "[p]rovide schedule of values" for all work performed at the Project and "to expedite the job to maintain schedule provided by Ibex...." Finally, the Agreement provides that Ibex "has the right to withhold payment because of: (i) defective work; (ii) failure by [Absolute] to make payment for labor and/or material; (iii) failure by [Absolute] to maintain the schedule; (iv) reasonable evidence the Work cannot be completed for the unpaid balance of the Total Purchase Order hereinafter provided; (v) failure by [Absolute] to comply with any of the other Terms and Conditions." In opposition to Absolute's motion, Ibex has

provided e-mails between it and Absolute which memorialize issues Ibex had with Absolute's performance, issues which it alleges affected Ibex's client, the Museum. Specifically, the e-mails state that the owner "is not pleased w/ any performance [by Absolute] to date," that "Absolute made an incorrect submission," that Ibex "had a heated session with Absolute...They told me they had pricing yesterday but need to 'fine tune' this morning. I have Rockmor looking at the Service tomorrow AM to appease [the Museum]" and in an e-mail to Absolute, "[y]ou still have not responded to getting the [Change Orders] resolved quickly at [the Museum]. You are hurting us...."

Plaintiff's assertion that defendant fails to raise an issue of fact because it has not provided an affidavit of someone with personal knowledge of the facts affirming the contents of said e-mails is without merit. The First Department has found that e-mails, standing alone, constitute documentary evidence for the purposes of a motion to dismiss pursuant to CPLR § 3211(a)(1) so this court sees no reason why they would not be sufficient to raise an issue of fact on a motion for summary judgment. *See Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 58 (1st Dept 2015)("we reject Supreme Court's conclusion that correspondence such as the emails here do not suffice as documentary evidence...there is no blanket rule by which email is to be excluded from consideration as documentary evidence"); *see also Langer v. Dadabhoy*, 44 A.D.3d 425, 426 (1st Dept 2007)("documentary evidence in the form of e-mails conclusively established that the parties intended to finalize their agreement in a writing....")

Additionally, defendant has raised an issue of fact sufficient to defeat plaintiff's motion for summary judgment based on its assertion that discovery is outstanding pursuant to CPLR § 3212(f). "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant

evidence.” *Ruttire & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). A party seeking to oppose summary judgment on the ground that further discovery is needed must show “a substantial likelihood that additional persons sought for deposition possess[] information material and necessary to oppose the motion.” *Hayden v. City of New York*, 26 A.D.3d 262 (1st Dept 2006). Further, courts have held that it is proper to deny a motion for summary judgment where a party deposition has not been conducted and where material facts are in the exclusive knowledge of said party. *See Colon v. Klindt*, 302 A.D.2d 551, 552 (1st Dept 2003)(“The Supreme Court properly denied the defendant’s motion with leave to renew upon the completion of discovery...[as] the defendant had yet to be deposed at the time that this motion was made”); *see also Baron v. Incorporated Vil. of Freeport*, 143 A.D.2d 792, 792-93 (2d Dept 1988)(“It is well established that where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion” (internal citations omitted)).

Here, defendant has established that plaintiff’s motion for summary judgment should be denied on the ground that no party depositions have been held. Specifically, defendant asserts that despite the fact that it noticed plaintiff’s deposition in May 2014, over a year and a half ago, plaintiff has refused to produce someone for said deposition. Indeed, this court ordered plaintiff to appear for a deposition in at least three conference orders yet plaintiff filed the Note of Issue and moved for summary judgment prior to producing anyone for said deposition. As a result, lbex has been precluded from questioning plaintiff, under oath, regarding its performance on the

Project, including any causes of the alleged delays, cost of goods, application of credits and other facts that are exclusively within the knowledge of the plaintiff.

Based on the foregoing, plaintiff's motion for summary judgment is denied. The parties are to appear for a conference in Part 55 on April 12, 2016 at 11:00 a.m. to address the outstanding discovery in this action. This constitutes the decision and order of the court.

Dated: 3/11/16

Enter: _____

CSK

J.S.C.