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| <b>AWR Group v GMCM</b>                                                                                                                                                                                                                                          |
| 2016 NY Slip Op 31640(U)                                                                                                                                                                                                                                         |
| August 23, 2016                                                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 150294/2016                                                                                                                                                                                                                                       |
| Judge: Carol R. Edmead                                                                                                                                                                                                                                           |
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMOND  
J.S.C.  
Justice

PART 35

AWR Group

-v-

Gmcm

INDEX NO. 150294/116

MOTION DATE 6/16/16

MOTION SEQ. NO. 001

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

In this breach of contract action, plaintiff AWR Group, Inc. ("plaintiff") moves for summary judgment against defendant GCMC Contracting Corp. ("defendant") and defendant Guardian Group Solutions ("Guardian") cross moves for summary judgment dismissing the complaint as asserted against it.

### *Factual Background*

According to the complaint, plaintiff, a general contractor, hired defendant, a subcontractor, pursuant to two agreements (the "Agreements") in connection with two construction projects: one at 44 West 4<sup>th</sup> Street, New York, New York (the "New York Project") and one at 101 Johnson Street, Brooklyn, New York (the "Brooklyn Project"). The Agreements required defendant to provide, *inter alia*, workers' compensation and employment liability coverage for the Projects. Defendant provided certificates of insurance purporting to provide workers' compensation and employment liability coverage. The certificates were allegedly issued by Guardian. However, the New York State Insurance Fund ("SIF") assessed charges against plaintiff for approximately \$63,000 as a result of defendant's failure to obtain proper insurance. Thus, plaintiff commenced this action against defendants for breach of contract, indemnification, misrepresentation, and attorneys' fees.

In support of its motion, plaintiff submits an affidavit by its shareholder, Alan Schinderman, wherein he attests that defendant indicated to plaintiff that it procured the necessary insurance, however, an audit by SIF revealed that defendant never procured such insurance and that the certificates were fraudulent. Plaintiff submits the SIF August information

Dated: \_\_\_\_\_, J.S.C.

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

page, which indicates “GMCM Contracting Corp.” as “uninsured subcontractor” and “carpentry” as the classification description. Guardian advised plaintiff that it did not issue the certificate bearing Guardian’s name, followed by an affidavit by defendant’s owner, Gerardo Marino, stating that Guardian did not issue or sign the certificate bearing Guardian’s name. Through text messages, plaintiff then demanded payment from defendant, and defendant advised plaintiff that plaintiff “will get paid.” Therefore, argues plaintiff, defendant breached the Agreements and is liable to plaintiff for fraud and for contractual indemnification and attorneys’ fees based on the Agreements’ indemnification clauses.

In its cross-motion, Guardian asserts that it did not issue or sign the Certificate of Liability Insurance which is the subject of this lawsuit (*see* Affidavit of Nina Pantelakis, President of Guardian).

In opposition, defendant contends that plaintiff provided SIF with incorrect information that defendant performed carpentry work and that defendant had \$304,423.00 total in payroll for both Projects. However, defendant never performed carpentry work, but performed roofing, painting, waterproofing, and bricklaying work during both Projects and accumulated \$174,000 in total payroll for both Projects. Plaintiff incorrectly classified defendant’s work as carpentry, which is the lowest risk type of work with a lower cost rate than masonry, waterproofing, and painting. Plaintiff failed to submit any proof defendant completed carpentry work during the Projects or proof that defendant submitted \$304,423.00 in payroll for both Projects. Thus, issues of fact exist as to deny summary judgment.

In reply, plaintiff argues that defendant does not deny that the certificates it produced to plaintiff were fraudulent, or that they failed to procure the proper insurance. Plaintiff paid SIF the assessed cost and the only issue raised by defendant is the amount due and owing. Therefore, at a minimum, partial summary judgment should be awarded to plaintiff’s as to liability. Further, the SIF conducted its audit by first sending plaintiff a notice for an independent review of plaintiff’s records. Plaintiff made no representations to SIF in connection with the audit. Defendant offers no documentary evidence that its payroll was less than the total payroll sum used by SIF.

#### *Discussion*

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR §3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1<sup>st</sup> Dept 2013]; *Ryan v Trustees of Columbia University in City of New York, Inc.*, 96 AD3d 551, 947 NYS2d 85 [1<sup>st</sup> Dept 2012]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1<sup>st</sup> Dept 2012]; *Madeline D’Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1<sup>st</sup> Dept 2012], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Wing Wong Realty Corp. v. Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1<sup>st</sup> Dept 2012] citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986]; *Ostrov v Rozbruch*, 91 AD3d 147, 936 NYS2d 31 [1<sup>st</sup> Dept 2012]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1<sup>st</sup> Dept 2011]).

Plaintiff's submissions, namely the SIF audit form, establish that SIF assessed plaintiff a certain amount based on "uninsured," "carpentry" work by defendant. However, plaintiff failed to establish that SIF's uninsured carpentry classification assigned to defendant was caused by any representation of *defendant*. In light of the fact that SIF inspected the records of the *plaintiff*, the record fails to demonstrate that the source of such information to the SIF was the defendant. Notably, plaintiff submitted the Agreements to establish defendant's obligation to procure workers compensation and employment liability insurance; however, such Agreements are incomplete in that they do not indicate the scope of defendant's work and fail to indicate that defendant was engaged to perform carpentry work upon which SIF issued "uninsured" "carpentry" assessments to plaintiff. Furthermore, the Agreements are undated and do not indicate the period or dates for which defendant's work was to be performed. And, plaintiff's motion is silent as to the Certificate of Insurance issued by Allen Freeman (as opposed to Guardian) on July 28, 2014 for both Projects. At this juncture, plaintiff fails to establish, *prima facie*, that defendant failed to procure workers compensation and employer liability insurance as required under the Agreements for which SIF issued the assessment, or that defendant made a misrepresentation to plaintiff in this regard. And, defendant's statements in a text message that plaintiff "will get paid," when read in context among other text messages, does not establish defendant's liability as a matter of law, at this juncture. The failure to make such a *prima facie* showing results in the denial of the motion, regardless of the sufficiency of the opposing papers (*Corprew v City of New York*, 106 AD3d 524, 965 NYS2d 108 [1<sup>st</sup> Dept 2013]; *TrizecHahn, Inc. v Timbil Chiller Maintenance Corp.*, 92 AD3d 409, 937 NYS2d 586 [1<sup>st</sup> Dept 2012]; *Santos v New York City Transit Authority*, 99 AD3d 550, 952 NYS2d 179 [1<sup>st</sup> Dept 2012]).

In any event, even assuming plaintiff satisfied its burden on the motion, defendant's submissions raise an issue of fact as to whether defendant was the source of the incorrect classification which gave rise to the assessment. Defendant submits the worksheet for the Brooklyn Project, which indicates that its work included concrete repair work, roof protection, and rigging, and caulking. The worksheet for the New York Project indicates, *inter alia*, roof replacement work. And, defendant's owner, Marino, attests that defendant never completed any carpentry work during either Project, and that \$304,423.00 did not consist of payroll only, but consisted of payroll as well as supplies, benefits, materials, rental, taxes, *and insurance* for both Projects; the maximum payroll for both Projects was \$174,000.00. According to Marino, plaintiff informed the SIF auditor that defendant performed carpentry work. Defendant also

submits the SIF rates for carpentry, masonry, painting, and roofing, to indicate that the carpentry classification cost less than the other three trades. Contrary to plaintiff's contention, such documentation raises a question of fact as to liability and damages.

Therefore, based on the above, plaintiff's request for summary judgment against defendant is denied.

Notwithstanding, the cross-motion by defendant Guardian Group Solutions to dismiss the complaint is granted, without opposition.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant GMCM Contracting Corp. is denied; and it is further

ORDERED that defendant Guardian Group Solutions' cross-motion for summary judgment dismissing the complaint as asserted against it is granted, and the action against Guardian Group Solutions is severed and dismissed; and it is further

J ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED:

8/23/16



HON. CAROL R. EDMED J.S.C.  
J.S.C.

1. CHECK ONE :

2. CHECK AS APPROPRIATE :

3. CHECK IF APPROPRIATE :

☐ DO NOT POST

MOTION IS: ☐ CASE DISPOSED  
☒ GRANTED ☐ DENIED  
☐ SETTLE ORDER

☐ FIDUCIARY APPOINTMENT

☒ NON-FINAL DISPOSITION  
☒ GRANTED IN PART ☐ OTHER  
☐ SUBMIT ORDER

☐ REFERENCE