

<b>Skycom SRL v FA &amp; Partners, Inc.</b>
2016 NY Slip Op 32451(U)
December 13, 2016
Supreme Court, New York County
Docket Number: 152035/2014
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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SKYCOM SRL,

Plaintiff,

**DECISION/ORDER**  
**Index No. 152035/2014**

-against-

FA & PARTNERS, INC. and DOMENICO ALESSIO,

Defendants.

-----X  
HON. CYNTHIA KERN, J.:

Plaintiff Skycom SRL commenced the instant action to recover sums allegedly due and owing by defendants FA & Partners, Inc. (“FA”) and Domenico Alessio (“Alessio”) in connection with three separate construction projects based on defendants’ alleged diversion of trust funds in violation of Article 3-A of the Lien Law. Plaintiff now moves for an Order pursuant to CPLR § 2221 for leave to reargue and renew its most recent motion for partial summary judgment, which the court denied in a decision dated August 22, 2016, and, upon reargument or renewal, granting its motion for partial summary judgment. For the reasons set forth below, plaintiff’s motion is denied.

The relevant facts and procedural history of this case are as follows. Plaintiff is a manufacturer of glass walls and windows, typically for use in high-rise buildings. FA is a subcontractor that contracted with plaintiff with regard to three construction projects and Alessio is FA’s principal. In or around June 2012, plaintiff and FA entered into an agreement for plaintiff to design, manufacture and install windows in a building located at 3710 Webster Avenue, Bronx, New York (the “Webster Avenue Project”). Plaintiff and FA also entered into an agreement for plaintiff to design, manufacture and install windows in a building located at 218 West 50th Street, New York, New York (the “50th Street Project”) in or around October

2012. In or around November 2012, plaintiff and FA entered into a third agreement for plaintiff to design, manufacture and install windows in a building located at 136 West 42nd Street, New York, New York (the “42nd Street Project”). Plaintiff claims that FA, as a subcontractor, received funds from the general contractors on these three projects required to be held in trust pursuant to Article 3-A of the Lien Law. However, plaintiff claims that these funds were knowingly diverted by the defendants and that plaintiff was never paid the full sums it was owed pursuant to the three agreements.

Thus, in or around March 2014, plaintiff commenced the instant action asserting three separate claims for trust fund diversion relating to each project, three separate claims for an accounting relating to each project and a claim for attorney’s fees. In or around July 2016, plaintiff moved for partial summary judgment on its three causes of action alleging trust fund diversion on the ground that defendants failed to furnish an adequate verified statement of lien as required by Lien Law § 76 and are therefore presumptively liable for diverting trust assets. In a decision dated August 22, 2016, this court denied plaintiff’s motion on the ground that there is a material issue of fact as to whether plaintiff is entitled to payments pursuant to its agreements with FA in the first instance. Specifically, the court held that although plaintiff made a *prima facie* showing that it is entitled to payments pursuant to its agreements with FA, defendants raised an issue of fact as to whether plaintiff is entitled to payments through their submission of Alessio’s affidavit wherein Alessio affirmed that plaintiff failed to supply certain contracted-for materials, that the materials plaintiff did supply were defective or late and that FA was forced to pay for alternate manufacturers and express shipping to replace or repair plaintiff’s defective, missing or late materials on all three projects.

Plaintiff’s motion for leave to reargue its motion for partial summary judgment is denied. On a motion for leave to reargue, the movant must show that the court overlooked or misapprehended matters of fact or law. *See* CPLR § 2221(d)(2). In the present case, plaintiff has failed to establish its entitlement to a reargument of its motion for partial summary judgment as plaintiff has failed to show that the court overlooked or misapprehended matters of fact or law. Plaintiff’s conclusory argument that the court erred

in denying its motion for partial summary judgment because defendants failed to produce any admissible evidence to raise an issue of fact is without merit. The court specifically found that Alessio's affidavit raised an issue of fact as to whether plaintiff is entitled to payments pursuant to its agreements with FA.

Plaintiff moves for leave to renew its motion for partial summary judgment on the ground that defendants have failed to respond to discovery demands made both before and after the court's August 22, 2016 decision regarding the payments that FA allegedly made to alternate manufacturers and payments that FA made for express shipping to replace or repair plaintiff's defective, missing or late materials. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and...shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e)(2)-(3).

In the present case, plaintiff has failed to establish its entitlement to a renewal of its motion for partial summary judgment as defendants' alleged failure to produce the discovery demanded by plaintiff is not a new fact that would change the court's prior determination. Defendants' alleged failure to produce discovery with regard to any payments made by FA to alternate manufacturers and for express shipping, including documentary evidence of any such payments, would not change the court's prior determination as the court found that Alessio's affidavit in and of itself raised an issue of fact as to whether plaintiff is entitled to payments pursuant to its agreements with FA. If defendants have failed to respond to plaintiff's discovery demands, the appropriate response is not for plaintiff to move for a renewal of its motion for partial summary judgment but rather to move pursuant to CPLR § 3124 to compel disclosure and/or pursuant to CPLR § 3126 for penalties for refusal to comply with discovery orders or to disclose information that ought to have been disclosed.

Moreover, with regard to both the reargument and renewal portions of plaintiff's motion, plaintiff failed to submit reply papers and thereby concedes the correctness of defendants' arguments in opposition

that they produced admissible evidence to raise an issue of fact in the form of Alessio's affidavit and that they sufficiently responded to plaintiff's discovery demands.

Accordingly, plaintiff's motion is denied. This constitutes the decision and order of the court.

DATE : 12/13/16

  
KERN, CYNTHIA S., JSC  
HON. CYNTHIA S. KERN  
J.S.C.