

Wesco Ins. Co. v 1421 Dekalb Ave., LLC
2018 NY Slip Op 33082(U)
November 29, 2018
Supreme Court, New York County
Docket Number: 651522/2018
Judge: Arlene P. Bluth
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NYSCEF DOC. NO. 98

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

X

WESCO INSURANCE COMPANY,

Plaintiff,

- v -

1421 DEKALB AVE., LLC, TRINCHESE CONSTRUCTION, INC.

Defendants.

INDEX NO. 651522/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION AND ORDER

X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81

were read on this motion to/for

JUDGMENT - SUMMARY

The motion by defendant Trinchese Construction, Inc. ("Trinchese") for summary judgment on its counterclaim against plaintiff is granted. The cross-motion by plaintiff is denied as moot.

Background

This action arises out of a fire that occurred at a property owned by defendant 1421 Dekalb Ave., LLC ("Dekalb") in Brooklyn. After the fire, Trinchese alleges that it entered into a written agreement with Dekalb to reconstruct the property and to accept proceeds of the building portion of the insurance policy as payment. That insurance policy was issued by plaintiff.

Trinchese contends that it did the work and was not paid. Trinchese commenced a lawsuit in Queens County (Index No. 704796/2017) and its motion for summary judgment was granted after Dekalb failed to submit opposition. Trinchese obtained a judgment against Dekalb

for \$75,546.83. Trinchese claims that Dekalb's time to appeal the Queens decision has expired and that it is entitled to the remaining proceeds of the insurance policy to satisfy its judgment.

Dekalb opposes the motion and contends that Trinchese abandoned the work and left the job mostly unfinished. Dekalb also contends that Trinchese obtained the judgment in Queens under "highly improper and duplicitous circumstances" by serving process on the New York Department of State. Although Dekalb acknowledges that its attorney changed his address and failed to notify the Secretary of State (thus resulting in a default), it emphasizes that a courtesy copy of the Queens complaint was not sent to its attorney. Dekalb contends that it is in the process of moving to vacate the default judgment. Dekalb argues that Trinchese's motion should be denied because Trinchese failed to attach Dekalb's answer to its moving papers, Trinchese improperly obtained a default judgment, and there is an ongoing controversy about the amount of work done by Trinchese.

Plaintiff cross-moves to deposit the funds in controversy into Court. Plaintiff acknowledges that there is a final payment owed under the policy and emphasizes that it is a neutral in this litigation.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged

facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *aff'd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court finds that Trinchese is entitled to the funds held by plaintiff in the amount of \$75,546.83. Here, Trinchese has a judgment in Queens against Dekalb (NYSCEF Doc. No. 50) and there is no dispute that plaintiff is holding money in escrow because of the instant action.

Dekalb's references to questionable service or arguments about the underlying work performed by Trinchese are irrelevant to this case. This action has nothing to do with the merits of the Queens County case. As Dekalb's attorney appears to recognize in his papers, Dekalb must seek relief in Queens to vacate the judgment and this Court cannot ignore a valid judgment obtained by Trinchese against Dekalb.

Dekalb's argument that Trinchese's motion should be denied because Trinchese did not include Dekalb's answer in its moving papers is rejected. Of course Trinchese should have attached the document. But this an e-filed case and the Court can easily access Dekalb's answer (*see* NYSCF Doc. No. 26). That is not a reason to deny Trinchese's motion.

Summary

Based on these circumstances, the Court must grant Trinchese's motion. Trinchese has a judgment against Dekalb. Although Dekalb argues it will move to vacate that judgment in Queens, that is not this Court's concern. This Court cannot consider the merits of Dekalb's defenses or whether Dekalb was served properly in the Queens action. The proper venue for those disputes is in Queens and, therefore, there is no reason to require plaintiff to deposit the disputed amount into Court. If Dekalb successfully vacates the Queens judgment and ultimately prevails, then it may seek redress from Trinchese. But that outcome is purely hypothetical—here, the only finding before this Court is that Trinchese is entitled to the money.

Accordingly, it is hereby

ORDERED that Trinchese Construction, Inc.'s motion for summary judgment on its counterclaim is granted and plaintiff Wesco Insurance Company is directed to disburse the funds it is holding in escrow to Trinchese Construction, Inc. in the amount of \$75,546.83 within 30 days of this decision; and it is further

ORDERED that the cross-motion by plaintiff is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly

11/29/18

DATE

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

☐

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☒

OTHER

☐

REFERENCE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH