

**B N Restoration, Inc. v Rogers & Dawson Bldg. Co.,  
LLC.**

2018 NY Slip Op 33315(U)

January 10, 2018

Supreme Court, Kings County

Docket Number: 522775/2016

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10<sup>th</sup> day of January, 2018.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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BN RESTORATION, INC.,

Index No.: 522775/2016

*Plaintiff,*

- against -

ROGERS & DAWSON BUILDING CO., LLC,

DECISION AND ORDER

*Defendant.*

Motions Sequence #1, #2

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**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:**

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	<u>1/2, 3/4</u>
Opposing Affidavits (Affirmations).....	<u>          </u>
Memorandum of Law .....	<u>5</u>

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Plaintiff BN Restoration, Inc. (hereinafter the "Plaintiff" or "BN") has commenced this action by filing of a summons and verified complaint on October 7, 2016. Plaintiff's action is based upon both a cause of action for Breach of Contract and an Account Stated for alleged construction services, material, labor and equipment for the sum of \$23,000.00. Plaintiff alleges that it performed these services for Defendant Rogers and Dawson Building Co., LLC (hereinafter the "Defendant" or "R & D") which Defendant was acting as general contractor at a premises known as 346 13<sup>th</sup> Street, Brooklyn, N.Y. (the "Premises"), pursuant to a contract (the "Contract") dated on or about July 28, 2015.

R&D moves (Motion Sequence #1) for the following relief: 1) dismissal of the complaint pursuant to CPLR §3211(a)(1) based upon documentary evidence, 2) dismissal of the Complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, 3) attorneys' fees and expenses for the cost of bringing the instant motion pursuant to CPLR §3123(c) and for Plaintiff's improper denial of the Defendant's Notice to Admit and 4) such other relief as the Court finds just and proper.

BN opposes the Defendant's motion and cross-moves (Motion Sequence #2) for the following relief: 1) compelling Defendant to comply with the Plaintiff's Notice of Discovery and Inspection, 2) compelling the Defendant to comply with the Plaintiff's demand for a Bill of Particulars, 3) compelling the Defendant to tender an authorization in relation to the Plaintiff's judicial subpoena duces tecum concerning Bank Leumi, 4) an application for fees and sanctions in the form of legal fees for having to oppose the Defendant's frivolous motion and, 5) such other and further relief as the Court finds just and proper.

In support of its motion the Defendant concedes that the parties did enter into the Contract for construction at the Premises, and that the total Contract price was \$230,000.00. The Defendant contends that the Contract (Defendant's motion at Exhibit "C") at section 6.1 provides for mediation as a condition precedent to suit. The Defendant further contends that the Contract also contained a rider to Contract (the "Rider") (Defendant's motion at Exhibit "D"). The Defendant contends that the Rider at paragraph 12 provides as follows:

"It was agreed that no performance bond is required, however, retention of 10% shall be held until Bank Leumi, USA, signoffs for the project or TCO, whichever is sooner."

The Defendant represented that as of the date of the motion Bank Leumi USA had not signed off on the project and no Temporary Certificate of Occupancy had been issued.

Defendant argues that it has attempted to resolve this dispute by directing Plaintiff to the retention provision and that Plaintiff has had many opportunities to discontinue the action but has nonetheless refused to do so. Defendant in support of its motion has also proffered an affidavit by its purported Chief Executive Officer, Perry Finkelman (Plaintiff's Motion, Exhibit "F"). Finkelman confirms the accuracy of the Contract and Rider and states that "[t]he Project is currently ongoing", and that "[t]o date, Bank Leumi, USA has not signed off on the Project and a Temporary Certificate of Occupancy has not been issued."

The Plaintiff opposes the motion. The Plaintiff as an initial matter argues that the Defendant's relief seeking attorneys fees and expenses is based upon the Plaintiff's denial of the Defendant's Notice to Admit but that the Defendant's moving papers do not include the Notice to Admit and the papers make no further reference thereto. As such, the Plaintiff contends, the relief must be denied and the Plaintiff has no need to address the matter further. Although the Plaintiff does acknowledge the Contract and Rider (Plaintiff's motion, Exhibit "A") the Plaintiff contends that the Defendant has failed to submit any documentary evidence or even competent testimonial evidence that the conditions to payment have not been achieved. The Plaintiff argues that the documentation he has sought through discovery is needed in order to bring meaning to the Contract and Rider and that the Plaintiff should not have to rely upon the Defendant's mere representation concerning sign offs and temporary certificates.

The Plaintiff also points to provisions in the Contract that provide for final payment. Plaintiff contends that the principals of the Defendant and the owner are the same and that Page 31, Article 9.6.2 of the Contract provides in pertinent part that "[t]he Contractor shall promptly pay each subcontractor, upon receipt of payment from the owner"... "reflecting percentages actually retained from payments to the contractor on account of such subcontractor's portion of the work." Plaintiff alleges that the Defendant in light of maintaining common principals with the owner of the Premises "control[s] all the documentation between it, the owner (which in

reality is the Defendant itself) and Bank Leumi.” As such the Plaintiff alleges bad faith on the part of the Defendant.

As to the issue of mediation being a condition precedent to suit the Plaintiff contends ~~that~~ the totality of the Contractual Provisions 6.1 and 6.1.2 provide the Defendant with the right to demand mediation and provides for a stay of legal proceedings. The provision at 6.1.2 reads as follows:

“Legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or Court Order.”

The Plaintiff contends that a **fair reading** of the provision permits the Defendant to seek mediation and contemplates post commencement mediation. Further, the Plaintiff argues that the Defendant’s engagement in the legal process (ie, responsive pleading and discovery exchange) served to waive the Defendant’s right to demand mediation.

Premised upon this argument and in opposition to the Defendant’s motion Plaintiff supports its motion seeking that the Defendant comply with outstanding discovery demands. Plaintiff in support of the relief sought provides a Preliminary Conference Order on Consent of the Parties dated January 18, 2017 (Plaintiff’s Motion, Exhibit “E”)

Defendant in reply and opposition contends that the Rider is clear in that it provides that:

“In the event any inconsistency between the printed form agreement, preprinted form of general conditions and the Rider, this Rider shall control and the inconsistent provisions of the printed forms shall be deleted.”

As such the Defendant contends that the retainage provision at Paragraph 12 of the Rider, to the extent it is inconsistent with other payment provisions of the Contract, shall control. The Defendant avers that the Plaintiff’s reliance on the Contract Provisions is of no moment in that

the Rider is clear that without project sign off by Bank Leumi or the issuance of a temporary certificate of occupancy, Plaintiff is not entitled to the release of retainage.

In order to prevail on a motion to dismiss pursuant to CPLR § 3211(a)(7), “the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action.” *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153, 155 [2<sup>nd</sup> Dept, 2010]; see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1997]; *Foley v. D’Agostino*, 21 A.D.2d 60, 64–65, 248 N.Y.S.2d 121 [1<sup>st</sup> Dept, 1960]. Moreover, a Court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720 [2007], quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994].

A motion to dismiss pursuant to CPLR §3211(a)(1) will be granted only if the “documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” *Fontanetta v. Doe*, 73 A.D.3d 78, 83–84, 898 N.Y.S.2d 569, 573 [2<sup>nd</sup> Dept, 2010], quoting *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 737 N.Y.S.2d 40 [2<sup>nd</sup> Dept, 2002]. “Although documents such as deeds, which reflect out-of-court transactions and are essentially unassailable, qualify as “documentary evidence” within the intended scope of CPLR §3211(a)(1), affidavits and deposition testimony do not.” *Suchmacher v. Grocery*, 73 A.D.3d 1017, 1017, 900 N.Y.S.2d 686 [2<sup>nd</sup> Dept, 2010].

As an initial matter the lack of mediation prior to suit is not, pursuant to the clear language of the contract, a basis to dismiss this action. The language contemplates a stay of legal proceedings which implies that legal proceedings may be commenced without the resort to alternative dispute resolution. Further the Defendant has engaged in the litigation process and has

not asserted mediation as a precondition to suit as an affirmative defense. *See LZG Realty, LLC v. H.D.W. 2005 Forest, LLC*, 71 A.D.3d 642, 643, 896 N.Y.S.2d 389, 390 [2<sup>nd</sup> Dept, 2010].

In relation to the remainder of the Defendant's argument, it essentially rests on the notion that neither of the conditions to the release of retention have been satisfied. However, as one of the conditions relates to the acts of non-party Bank Leumi USA the Defendant's evidence in support of the motion is insufficient under both CPLR §§3211(a)(1) and (7). Although the Contract and Rider are clear in relation to the release of retainage the representation by the Defendant's CEO in relation to the action of Bank Leumi USA is insufficient. Plaintiff states a cause of action and is entitled to proceed unless the Defendant can show that the condition has not been achieved. The Defendant has failed to do this and as such the Defendant's motion pursuant to CPLR §§3211(a)(1) and (7) is denied. The Court also agrees with the Plaintiff in that the relief seeking attorney's fees and expenses is unsupported by the Defendant's papers and is therefore also denied.

In relation to the Plaintiff's motion the Court finds that it is also denied. The moving party on a motion seeking resolve a discovery dispute has the burden of demonstrating that they have satisfied the requirements of 22 NYCRR §202.7[c]. Said rule provides as follows:

The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held. 22 NYCRR §202.7[c].

The purpose of the rule requiring an affirmation in good faith is to ensure that the parties can attempt to resolve disputes prior to the Court's involvement so as to narrow the focus of the dispute and potentially eliminate the Court's involvement. In the instant proceeding, the Plaintiff has failed to provide an Affirmation in Good Faith regarding any communications between the parties related to what discovery was outstanding and what steps were taken to resolve the

discovery dispute at issue. Instead, the Plaintiff merely attaches the Preliminary Conference Order and various other discovery related documents. This is insufficient and a lack of good faith on the Plaintiff's part. As a result, the instant motion is procedurally defective and is therefore denied. See *Quiroz v. Beitia*, 68 A.D.3d 957, 960, 893 N.Y.S.2d 70, 74 [2<sup>nd</sup> Dept, 2009]; *Hegler v. Loews Roosevelt Field Cinemas, Inc.*, 280 A.D.2d 645, 646, 720 N.Y.S.2d 844 [2<sup>nd</sup> Dept, 2001]; *Barnes v. NYNEX, Inc.*, 274 A.D.2d 368, 711 N.Y.S.2d 893 [2<sup>nd</sup> Dept, 2000]; *Romero v. Korn*, 236 A.D.2d 598, 654 N.Y.S.2d 38 [2<sup>nd</sup> Dept, 1997]; *Gonzalez v. International Bus. Machs. Corp.*, 236 A.D.2d 363, 654 N.Y.S.2d 327 [2<sup>nd</sup> Dept, 1997].

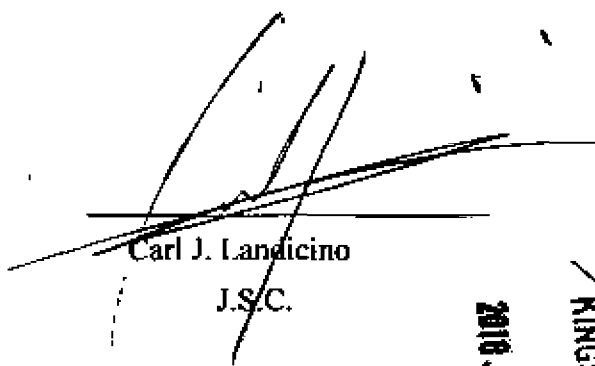
Based on the foregoing, it is hereby ORDERED as follows:


- The Defendant's motion (Motion Sequence #1) is denied.
- The Plaintiff's motion (Motion Sequence #2) is denied.

The foregoing constitutes the Decision and Order of the Court.

Date: January 10, 2018

ENTER:

  
 Carl J. Landicino  
 J.S.C.

  
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 KINGS COUNTY CLERK  
 FILED