

<b>Prima Contr. Ltd. v Taktl LLC</b>
2018 NY Slip Op 33988(U)
July 11, 2018
Supreme Court, Nassau County
Docket Number: 604172-18
Judge: Timothy S. Driscoll
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**ORIGINAL**

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**PRIMA CONTRACTING LTD.,**

**Plaintiff,**

**-against-**

**TAKTL LLC, ADELPHI UNIVERSITY, and  
EDA CONTRACTORS, INC.,**

**Defendants.**

**TRIAL/IAS PART: 11**

**NASSAU COUNTY**

**Index No: 604172-18**

**(formerly Queens County  
Index No. 710802-16)**

**Motion Seq. Nos. 1 and 2  
Submission Date: 6/29/18**

-----X  
**The following papers having been read on this motion:**

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Notice of Cross Motion, Affirmation in Support/Opposition and Exhibit....X**
- Defendants' Reply/Opposition.....X**

This matter is before the Court for decision on 1) the motion filed by Defendants Taktl, LLC ("Taktl"), and EDA Contractors, Inc. ("EDA") ("Defendants") on June 18, 2018, and 2) the cross motion filed by Plaintiff Prima Contracting Ltd. ("Prima" or "Plaintiff") on June 20, 2018, both of which were submitted on June 29, 2018. For the reasons set forth below, the Court 1) grants Defendants' motion and directs that the above-captioned matter is joined for trial with the matter titled *Prima Contracting Ltd. v. EDA Contractors, Inc. and U.S. Specialty Insurance Company*, Nassau County Supreme Court Index Number 601767/17; and 2) denies Plaintiff's cross motion.

**BACKGROUND**

**A. Relief Sought**

Defendants move for an Order, pursuant to CPLR § 602, consolidating the above-captioned action (the "First Action") with the matter titled *Prima Contracting Ltd. v. EDA Contractors, Inc. and U.S. Specialty Insurance Company*, Nassau County Supreme Court Index Number 601767/17 (the "Second Action" or "Foreclosure Matter").

Plaintiff opposes Defendants' motion and cross moves for an Order, pursuant to CPLR § 603, severing Taktl's counterclaims against Plaintiff.

**B. The Parties' History**

The complaint in the First Action ("First Complaint") alleges as follows:<sup>1</sup>

Plaintiff is a New York corporation that provides operation, design and construction services. Defendant Taktl is a Pennsylvania corporation that provides designing and manufacturing services. Defendant Adelphi University ("Adelphi") is a private university in New York. Defendant EDA is a Pennsylvania corporation that provides exterior envelopes to all commercial, institutional and industrial buildings. Exterior envelopes provided include wall panels, accessories, roofing, waterproofing, air and vapor barriers, and vegetative root systems.

Prima provided Taktl with panel re-staining services. EDA is the general contractor in the matter who approved of and authorized the re-staining work on the panels. Adelphi is the owner of the property where the re-staining work was to be done. On October 14, 2015, Taktl and EDA approved re-staining work at the cost of \$60,121. On November 16, 2015, the first contract was amended to include more work at the cost of \$18,655. On February 23, 2016, Taktl and EDA approved a second contract for re-staining at the cost of \$54,547. On April 18, 2016, Prima completed all re-staining work.

On October 27, 2015 Prima submitted invoices to Taktl for 50% of the contract work. Plaintiff invoiced Taktl regarding payment without receiving payment back. Taktl has not made any valid payments towards this debt. Prima repeatedly advised Taktl of the balance, which remains unpaid. As of September 8, 2016, Defendants owe Plaintiff \$132,323.00 plus 1.5% interest for a total of \$134,307.85. As of September 8, 2016, Plaintiff provided \$132,323.00 in panel re-staining services to Defendants, for which Defendants have failed to compensate Plaintiff. The First Complaint contains a cause of action alleging breach of contract and a cause of action alleging an account stated.

Counsel for Defendants ("Defendants' Counsel") affirms that on or about October 5, 2016, Adelphi filed a demand for change of venue of the First Action from Queens County to Nassau County. That motion was granted on or about February 1, 2017, and the First Action

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<sup>1</sup> The complaints in the First and Second Actions, referred to as Exhibits A and B to the Smith Affirmation in Support, were not electronically filed as exhibits to Defendants' instant motion, or included with the hard copy of the instant motion provided to the Court. The Court has obtained copies of those documents from e-courts.

was thereafter assigned Nassau County Supreme Court Index Number 604172-18.

The complaint in the Second Action (“Second Complaint”), which is titled “Verified Complaint to Foreclose a Discharge of Mechanic’s Lien Bond,” alleges as follows:

Adelphi was the owner in fee of premises located at 1 South Avenue, Garden City, New York (the “Property”). On or before October 14, 2015, Prima, as general contractor, entered into an agreement pursuant to which it was to provide panel re-staining services to EDA on a project (“Project”) located at Adelphi, with the knowledge and consent of the owner. Pursuant to the agreement, Prima agreed to provide the re-staining for the agreed sum of \$132,323.00. Prima performed under the agreement by furnishing the re-staining to EDA, thereby earning the sum of \$132,323.00, no part of which has been paid to Prima, despite demand.

On or about July 7, 2016, Prima filed a Notice of Mechanic’s Lien in the sum of \$143,855.03 with the State of New York, Nassau County, Clerk’s Office (“Nassau County Clerk”) in connection with the improvements made to Adelphi. Prima filed its Notice of Mechanic’s Lien based on labor provided on the Project in the amount of \$132,323.00, as well as approximately \$10,000.00 in work performed outside of the agreement for panels that needed to be re-stained, with the cost of labor determined based on prior dealings on a per-panel basis. Prima’s Mechanic’s Lien was served, and proof of service of said lien was filed with the Nassau County Clerk.

On or about August 2, 2016, EDA executed a Discharge of Mechanic’s Lien Bond in the sum of \$158,240.53 with the Nassau County Clerk, to discharge the lien from the Premises. Defendant’s Discharge of Mechanic’s Lien was served, and proof of service of said lien was filed with the Nassau County Clerk. The Discharge of Mechanic’s Lien Bond names Prima as obligee, EDA as Principal and U.S. Specialty as Surety.

By reason of the foregoing, and by filing and docketing of the Discharge of Mechanic’s Lien Bond and affidavits of service regarding the Discharge of Mechanic’s Lien Bond, Prima acquired a good, valid, and subsisting lien on the Discharge Bond. Defendant U.S. Specialty is the surety on the undertaking to discharge Prima’s Notice of Lien and, for that reason, is made a party hereto. No person has any subsequent liens or claims against said bond by way of judgment, mortgage or otherwise. Accordingly, Plaintiff alleges, Plaintiff is entitled to equitably foreclose its lien to recover the unpaid sum of \$132,323.00.

In the Second Complaint, Plaintiff seeks judgment 1) determining and adjudging Prima to have a valid and subsisting lien on the interest of EDA in the Discharge of Mechanic’s Lien

Bond; 2) in favor of Prima for the enforcement of said lien against the Discharge Bond, in form only for the purpose of satisfying the condition of said bond; 3) declaring the surety liable and awarding Prima judgment in the sum of \$132,323.00 against the surety; 4) in favor of Prima in the sum of \$132,323.00 with interest; 5) adjusting and determining the equities of all parties to the Instant Action and determining the validity, extent and priority of the claims and liens to be asserted herein; 6) directing EDA to pay over to Plaintiff the amount adjudicated as the amount of its lien and claim herein, with interest, and granting Plaintiff judgment for any deficiency, together with the costs and disbursements of the Instant Action; and 7) if it is determined that Plaintiff did not have a valid and subsisting lien, granting Plaintiff a personal judgment against EDA in the sum of \$132,323.00 with interest thereon, together with the costs and disbursements of the Instant Action.

Defendants' Counsel submits that the First and Second Complaints are substantially similar. Defendants contend that, as the First and Second Actions involve the same services, the same dates of services, and the same monetary amount for work performed at Adelphi, consolidation of the two Actions is warranted.

In opposition to Defendants' motion and in support of Plaintiff's cross motion, counsel for Plaintiff ("Plaintiff's Counsel") provides a copy of Taktl's Verified Answer with Affirmative Defenses filed in the First Action ("Taktl Answer") (Ex. A to Freeman Aff.). In its Answer, Taktl asserts five (5) counterclaims ("Counterclaims") against Plaintiff based on the following allegations:

In connection with the work that is the subject matter of the First Complaint, Plaintiff was to apply color coating to installed Taktl wall panels on the Property. On or about October 12, 2015, after the scope of installed panels at the Property requiring color remediation increased from the 407 estimated in August 2015 to 629 in October 2015, Plaintiff agreed to perform such work for \$60,121.00. Thereafter, on or about February 23, 2016, Plaintiff and Taktl entered into a second agreement pursuant to which Plaintiff agreed to perform similar remediation work on an additional 340 panels on the Property for \$53,547.00, and included in the \$53,547.00 quote from Plaintiff was a line item of \$10,500.00 for equipment rental, which was ultimately provided by EDA instead of Plaintiff. Consequently, the total contract price for the Project was \$103,168.00. On or about July 7, 2016, however, Plaintiff filed a "vastly exaggerated and unlawful" mechanic's lien in connection with the Project in the amount of \$143,855.05 (Taktl counterclaim at ¶ 4).

Plaintiff and Taktl had ongoing contractual relationships involving not only the Project, but also other projects. In connection with those other projects, Plaintiff owed Taktl certain payments as a result of labor, drawings, materials and hardware provided to Plaintiff. In total, the amount owed by Plaintiff to Taktl equals \$182,282.86, which amount has not been paid by Plaintiff. The outstanding amount owed by Plaintiff to Taktl exceeds any amount owed by Taktl to Prima.

The five (5) Counterclaims asserted by Taktl are:

- 1) willful exaggeration of lien/violation of New York State Lien Law based on the allegation that Plaintiff willfully exaggerated its lien in connection with the Adelphi Project;
- 2) breach of contract based on the allegation that Taktl entered into various contracts with Plaintiff for work in connection with projects referred to as the 133 Greenwich, Embassy Suites, The Hub, 164 1<sup>st</sup> Street and Lakewood Professional Office (Counterclaims at ¶ 16) and that Plaintiff failed to compensate Taktl in connection with those other projects;
- 3) breach of the implied covenant of good faith and fair dealing in connection with Plaintiff's failure to make required payments on the other projects;
- 4) negligence/defective work at the Lakewood Professional Office Project; and
- 5) unjust enrichment based on Plaintiff's failure to compensate Taktl in connection with the other projects.

Plaintiff's Counsel disputes Defendants' contention that if both Complaints remain separate, relief in one action would be dispositive as to the other and could possibly lead to inconsistent results (*see* Smith Aff. in Supp. at ¶¶ 17 and 18). Plaintiff's Counsel submits that disposition on the Foreclosure Matter will not resolve the First Action because Taktl now contends, in the First Action, that it is owed substantial sums from other projects with Prima. Thus, should Prima prevail in the Foreclosure Matter, that result would not resolve the First Action due to the issues surrounding additional projects named in Taktl's Counterclaims. Plaintiff contends, further, that these two Actions no longer involve common issues of law and fact in light of Taktl's Counterclaims, which expand the parties' dispute beyond the Project at Adelphi and seek compensation in connection with numerous other projects. Plaintiff contends, further, that the Court should sever Taktl's counterclaims in light of the new and unrelated factual allegations related to the other projects, and the possible prejudice to Plaintiff that would

result if those counterclaims were not severed, in part because the factual and legal issues raised in connection with these other projects may confuse the jury

C. The Parties' Positions

Defendants submit that the Court should consolidate the First and Second Actions. Defendants contend that the Second Action seeks discharge on a bond related to monies allegedly owed for work performed pursuant to an agreement with Taktl, which are the same monies that are the subject of the First Action. Defendants submit, further, that if Prima were to prevail in the First Action, the bond would be released to Prima as a result, obviating the need to address the Second Action. In addition, if the Complaints remain separate, there exists the possibility that there could be inconsistent results in the two Actions, potentially prejudicing one or more parties. Thus, as the two Actions involve common questions of law and fact, the interests of judicial economy and consistency of verdicts would be served by having a single trial.

Plaintiff opposes Defendants' motion submitting that, in light of the allegations in the Counterclaims regarding the projects other than the Project at Adelphi, the two Actions do not involve common questions of law and fact. Moreover, in light of the Counterclaims regarding the additional projects, disposition of the Foreclosure Matter will not dispose of the Counterclaims and, therefore, there is no concern regarding inconsistent verdicts. In addition, conducting separate discovery and separate trials on the two Actions will not unduly burden the court because separate discovery and separate trials are necessary. Plaintiff asserts, *e.g.*, that it may be necessary to add certain property owners, general contractors, subcontractors, vendors and architects involved in the other projects that are the subject of Taktl's Counterclaims.

Plaintiff submits that the Court should sever Taktl's Counterclaims from the First Action in the interests of convenience, and to avoid prejudice against Plaintiff. Plaintiff notes that the Complaints focus strictly on the Adelphi Project, while most of Taktl's Counterclaims focus on other projects between the parties. Plaintiff contends that severance is necessary to avoid jeopardizing Plaintiff's rights by confusing the jury and preventing them from fairly apportioning damages. Plaintiff submits, further, that severance would avoid inconvenience to parties uninvolved in those other projects, specifically Adelphi and EDA.

Defendants oppose Plaintiff's cross motion submitting that Taktl's Counterclaims involve common questions of law and fact with Prima's claims against Taktl. Moreover, any amount owed by Taktl to Prima should be offset against amounts owed by Prima to Taktl, and vice versa. Thus, judicial economy and common sense dictate that all of the issues between the parties should be litigated together. Defendants submit that as the First Complaint and the Counterclaims involve contractual disputes between Prima and Taktl, there are common issues of law and fact, and a single trial of all of the related disputes is warranted. Defendants submit that a jury would not be confused about the issues presented, in light of the fact that the Counterclaims involve simple breach of contract claims regarding similar services performed on similar projects. Moreover, any potential confusion can be eliminated with appropriate jury instructions that can minimize any prejudice that might otherwise result from the joinder of claims.

#### RULING OF THE COURT

##### A. Consolidation

Consolidation or a joint trial should be ordered when the actions involve common questions of law and fact so as to avoid unnecessary duplication of trials, save unnecessary costs and to avoid the possibility of inconsistent decisions based upon the same facts. *Viafax Corp. v. Citicorp Leasing, Inc.*, 54 A.D.3d 846 (2d Dept. 2008); *Gutman v. Klein*, 26 A.D.3d 464 (2d Dept. 2006). A motion to consolidate rests in the sound discretion of the trial court. *Mattia v. Food Emporium, Inc.*, 259 A.D.2d 527 (2d Dept. 1999).

The party seeking consolidation must establish the existence of common questions of law or fact. *Beerman v. Morhaim*, 17 A.D.3d 302 (2d Dept. 2005). Once the movant has established the existence of common questions of law or fact, the party opposing consolidation must demonstrate that it will suffer prejudice to a substantial right if consolidation is granted. *Mattia v. Food Emporium, Inc.*, 259 A.D.2d at 527.

##### B. Severance

In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. *Utica Mut. Ins. Co. v. American Re-Insurance Co.*, 132 A.D.3d 1405 (4<sup>th</sup> Dept. 2015), quoting CPLR §603. The determination of a severance motion under CPLR § 603 is a matter of judicial discretion which

will not be disturbed on appeal absent an abuse of discretion or prejudice to a substantial right of the party seeking severance. *Utica Mut. Ins. Co. v. American Re-Insurance Co.*, 132 A.D.3d at 1405, quoting *Finning v. Niagara Mohawk Power Corp.*, 281 A.D.2d 844 (3d Dept. 2001). While the granting of a motion for consolidation or joint trial hinges upon a finding of common issues of law or fact, the granting of severance generally depends upon an absence of such commonality. *Utica Mut. Ins. Co. v. American Re-Insurance Co.*, 132 A.D.3d at 1406, quoting *Herskovitz v. Klein*, 91 A.D.3d 598, 599 (2d Dept. 2012).

C. Application of these Principles to the Instant Action

The Court grants Defendants' motion based on its conclusion that the First and Second Actions, including the Counterclaims asserted in the First Action, contain common questions of law and fact, and that the joint trial of the two Actions will avoid unnecessary duplication of trials, save unnecessary costs and avoid the possibility of inconsistent decisions based upon the same facts. The Court denies Plaintiff's motion for severance because although several of Taktl's Counterclaims in the First Action seek relief in connection with projects other than the Adelphi Project, the Court concludes that those Counterclaims involve similar factual and legal issues as the First Complaint. In addition, trying those Counterclaims regarding the other projects at the same time as the disputes regarding the Adelphi Project will not prejudice a substantial right of Plaintiff, and will promote judicial efficiency. As noted by Defendants, the Court can, if necessary, fashion an appropriate jury instruction to minimize any prejudice that might arise from the joinder of claims.

All matters not decided herein are hereby denied.

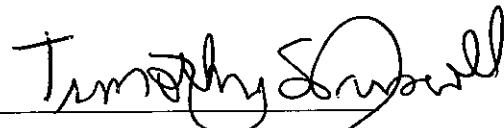
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on August 10, 2018 at 9:30 a.m.

ENTER

DATED: Mineola, NY

July 11, 2018



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
JUL 11 2018  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE