

**Metropolis HVAC Contrs. Inc. v J&Z Mech. Constr.
Corp.**

2019 NY Slip Op 34872(U)

October 28, 2019

Supreme Court, Kings County

Docket Number: Index No. 504988/17

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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METROPOLIS HVAC CONTRACTORS INC.,

Plaintiff,

Decision and order

- against -

Index No. 504988/17

J & Z MECHANICAL CONSTRUCTION CORP., GERALD
CAMPBELL JR., individually, CENTRIFUGAL
ASSOCIATES GROUP, STEPHEN YAGER, individually,
421 KENT DEVELOPMENT LLC, a.k.a. XIN
DEVELOPMENT MANAGEMENT EAST LLC, ARCH
INSURANCE COMPANY, JOHN/JANE DOES 1-10,
fictitious names, and ABC COMPANIES 1-10,
fictitious names,

Defendants,

October 28, 2022

-----x
J & Z MECHANICAL CONSTRUCTION CORP.,

Third Party Plaintiff,

- against -

WONDER WORKS CONSTRUCTION CORP.,

Third Party Defendant,

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PRESENT: HON. LEON RUCHELSMAN

The third party defendant Wonder Works Construction Corp., has moved pursuant to CPLR §3212 seeking to dismiss the four claims of the third party complaint. The plaintiff has moved seeking partial summary judgement regarding claims against defendant Arch Insurance Company and to dismiss the affirmative defenses. The defendant Centrifugal Associates Group has cross-moved seeking summary judgement on the sixth cause of action. The motions have been opposed respectively and papers have been

submitted by the parties. After reviewing all the arguments this court now makes the following determination.

This lawsuit concerns a construction project located at 421 Kent Avenue in Kings County. The owner of the property, defendant 421 Kent entered into a contract with third party defendant Wonder Works who was hired to serve as the construction manager. Wonder Works entered into a contract with defendant Centrifugal Associates Group, which entered into a sub-contract with defendant J and Z Mechanical Construction Corp., which entered into a sub-contract with the plaintiff. The plaintiff alleges it is owed approximately \$1,641,562.25 for work performed and has sued the defendants seeking recovery of the amount owed. The defendant J and Z instituted a third party action against Wonder Works, the construction manager. The parties have moved seeking summary judgement as noted.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the

trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

The motion of Wonder Works seeking summary judgement dismissing the third party complaint is granted without opposition.

Concerning the plaintiff's motion against Arch Insurance, the plaintiff seeks a summary determination that Arch breached its contract by failing to remit payment pursuant to the terms of the payment bond. This is supported by deposition testimony of Gerald Campbell the president of J and Z that \$871,826 is owed to the plaintiff. Thus, the plaintiff seeks a summary determination they are entitled to that amount and that Arch breached its contract by failing to pay that amount. However, Mr. Campbell only admitted that was owed to the plaintiff had J and Z been paid all the money owed to them by Centrifugal. Mr. Campbell specifically noted that he had overpaid the plaintiff due to various change orders (see, Deposition of Gerald Campbell, pages 83-87 [NYSCEF Doc. No. 224]). That concession regarding overpayment is repeated again on page 99 of the deposition transcript. Thus, there can be no summary determination that the plaintiff is owed the funds sought based upon an alleged admission gleaned from incomplete and isolated language of a deposition transcript when upon reading the actual transcript in context no such admission is present.


Further, there is no merit to the plaintiff argument that J and Z never opposed the motion and thus tacitly admits the plaintiff is owed the money sought (see, Memorandum in Further Support, pages 3, 4 [NYSCEF Doc. No. 240]). The relief sought was opposed and there is no admission at all. While it is true that the plaintiff maintained a contract with J and Z and that any changes made by the owner do not affect that contract, however, J and Z asserts the plaintiff was overpaid. That contention raises questions of fact which cannot be summarily decided.

Likewise, there are questions of fact whether the plaintiff was paid for all outstanding orders or is owed any money. Therefore, there can be no summary determination either way. Consequently, the motion seeking summary judgement on the sixth cause of action and the motion seeking to dismiss that cause of action are both denied. The plaintiff's claim for outstanding funds must be presented to a trier of fact.

So ordered.

ENTER:

DATED: October 28, 2019
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC