

**Senator Constr. Group Inc. v Hudson Meridian
Constr. Group LLC**

2020 NY Slip Op 30103(U)

January 13, 2020

Supreme Court, New York County

Docket Number: 650102/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 650102/2019

SENATOR CONSTRUCTION GROUP INC.,

MOTION DATE 09/26/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

HUDSON MERIDIAN CONSTRUCTION GROUP LLC,
LIBERTY MUTUAL INSURANCE COMPANY

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents and for reasons set forth on the record at oral argument (1/13/2020), the plaintiff's motion for partial summary judgment pursuant to CPLR 3212 on the issue of its ownership of the scaffolding and its claim for breach of contract of a purported rental agreement for the scaffolding (discussed below) against Hudson Meridian Construction Group LLC (**Hudson**) is denied.

This is a subcontract dispute arising out of three construction subcontracts. According to the complaint, Senator Construction Group Inc. (**Senator**) was hired as a subcontractor by Hudson to perform masonry work on three construction projects located at: (1) 16 Nepperhan Street, Yonkers, New York (the **Nepperhan Project**), (2) 28-30 Jackson Avenue, Tower B1, Long Island City, New York (the **Tower B1 Project**), and (3) 28-30 Jackson Avenue, Amenity Building, Long Island City, New York (the **Amenity Building Project**). The complaint asserts

eight causes of action for breach of contract and mechanic's lien foreclosure with respect to each of these projects and claims for conversion and recovery of chattel as follows:

1. Breach of Contract – Nepperhan Project
2. Breach of Contract – Tower B1 Project
3. Breach of Contract – Amenity Building Project
4. Mechanic's Lien Foreclosure – Nepperhan Lien
5. Mechanic's Lien Foreclosure – Tower B1 Project
6. Mechanic's Lien Foreclosure – Amenity Building Project
7. Recovery of Chattel
8. Conversion

(NYSCEF Doc. No. 1).

Reference is made to a Scope of Work agreement dated November 11, 2016 between Senator and Hudson (the **Nepperhan Subcontract**) (NYSCEF Doc. No. 31). Reference is also made six invoices (the **Invoices**) dated from 1/31/2018 through 6/30/2018, numbered 1-6, from Senator to Hudson reflecting a rental charge for "Larkin Plaza rent for: Scaffolding" at the rate of \$6,000/month" (NYSCEF Doc. No. 33). Finally, reference is made to an alleged rental agreement, further discussed below, between Senator and Hudson for the rental of scaffolding equipment following Senator's termination from the Nepperhan project.

This partial summary judgment motion concerns only the Nepperhan Project. As relevant, Senator claims that it purchased scaffolding equipment valued at approximately \$300,000 to facilitate construction of the Nepperhan Project (NYSCEF Doc. No. 32), that after Senator installed the scaffolding, it was terminated and that Hudson has refused to pay Senator the rental value of the scaffolding despite having reached an agreement to do so at a meeting held in February 2018 (Ghuman Aff., 11-12). Senator claims Hudson had previously agreed to the rental amount and that Senator prepared Invoices for the scaffolding accordingly (NYSCEF Doc.

No. 33). By this motion, Senator seeks the return of the scaffolding or, in the alternative, payment of the rental fees owed to it pursuant to the parties' purported agreement. In support of its motion, Senator attaches certain emails (the **Emails**) dated February 23, 2018 discussing the purported scaffolding rental agreement (NYSCEF Doc. No. 35). The Emails reference a "rental agreement" but do not clearly indicate that one was ever actually reached. To wit, Senator's

Usman Ghumman writes to Hudson's Richard Cote:

Can you please check with main office and confirm when I can send someone to pick up check. Also please sign my rental agreement. I want to close this project in our books.

(NYSCEF Doc. No. 35)

Richard Cote replies:

I am working with Peter to get checks signed it will require a little more time he was not in close out meeting so I need to take him through it

(*id.*).

In opposition to the instant motion, Hudson argues, among other things, that it is not in possession of Senator's scaffolding equipment because Senator collected same in July of 2018, and that the work Senator performed prior to its termination was defective and required Hudson to incur more than \$61,295 to correct and that Hudson was required to expend an additional \$315,105 to complete the work and Hudson is, therefore, entitled to off set any rental payments that may be due to Senator (Cote Aff., 17). Hudson has counterclaimed for these amounts in this action.

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-

50 [2006]). The two key elements of this tort are (1) the plaintiff's possessory right or interest in the subject property and (2) the defendant's dominion over the property or interference with it, in derogation of the plaintiff's rights (*id.* at 50). The Nepperhan Subcontract provides that in the event of a "Termination by Contractor for Cause," Hudson may, "take possession of the site and all materials, equipment, tools, and construction equipment and machinery thereon" (NYSCEF Doc. No. 40, 23.3). However, in the event of "Termination by Contractor Without Cause,"

Subcontractor shall: (i) assign and transfer to Contractor all materials, equipment, tools, plant and facilities for which payment has or will be made under this subcontract and Subcontractor shall execute and deliver all such papers and take all such action as Contractor may require to fully vest in Contractor the rights of Subcontractor in and to the same... (iii) sell at prices approved by Contractor such materials, equipment, tools, plant and facilities as Contractor shall direct, the proceeds to be paid or credited to Subcontractor as Contractor shall direct."

(*id.*, 24.3).

The parties dispute whether Senator was terminated for cause. Originally, Senator did receive a "Termination for Cause" letter dated January 23, 2018, however Senator denies that it was in breach of any obligations and, subsequently, Hudson expressly superseded the Termination for Cause letter with a Notice of Termination for Convenience dated March 16, 2018 (NYSCEF Doc. No. 55). This dispute, however, may be immaterial for purposes of the conversion claim as – most significantly – where the original possession is lawful, conversion does not occur until a defendant refuses to return the property after a demand has been made (*White v City of Mount Vernon*, 221 AD2d 345 [2d Dept 1995]). A demand is an essential prerequisite to any conversion claim and intent is a critical element. The complaint is silent as to whether a demand for return of the scaffolding was ever made and Hudson has sufficiently raised an issue of fact at least as to its subjective intent in holding on to the scaffolding after the initial termination for cause (i.e., between the initial termination for cause in January 2018 when Hudson may have

been entitled to retain the scaffolding and the superseding Notice of Termination for Convenience in March of 2018). Contrary to Senator’s argument, it is unclear if the parties reached a subsequent rental agreement for the scaffolding equipment as the February 23, 2018 Emails are ambiguous at best. Accordingly, it is

ORDERED that the plaintiff’s partial summary judgment motion is denied.



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1/13/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE