

Advanced Scaffold Serv., LLC v Berkley Ins. Co.

2020 NY Slip Op 32712(U)

August 13, 2020

Supreme Court, Kings County

Docket Number: 523046/2018

Judge: Reginald A. Boddie

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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 13th day of August 2020.

PRESENT:

Honorable Reginald A. Boddie, JSC

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ADVANCED SCAFFOLD SERVICE, LLC,
Plaintiff,

Index No. 523046/2018
Cal. No. 1 MS 1

Against

BERKLEY INSURANCE COMPANY,
Defendant.

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BERKLEY INSURANCE COMPANY,
Third-Party Plaintiff,

Against

DYNASTY STAINLESS STEEL & METAL
INDUSTRIES, INC., MING KUN LEE, and SU CHU
CHAN,
Third-Party Defendants.

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Papers

Numbered

Notice of Motion & Annexed Affirmation/Affidavit in Support (MS 1) Docs. # 21-32, 34-52

Upon the foregoing cited papers, the decision and order on third-party defendants' motion for summary judgment, pursuant to CPLR 3212, is as follows:

Plaintiff, Advanced Scaffold Service, LLC (Advanced) commenced this action to recover \$72,682.44 from defendant/third-party plaintiff Berkley Insurance Company (Berkley), as surety, against a payment bond for materials furnished to third-party defendant Dynasty Stainless Steel & Metal Industries, Inc. (Dynasty). Dynasty, a general contractor, posted, and Berkley issued, the payment bond on September 7, 2014, in the amount of \$8,576,359.38 to secure payment to Dynasty's subcontractors on a construction project known

as the Whitman Houses ST-2 in Brooklyn, New York, Contract No. CM9014765/Project No. 5922 (Whitman Houses). Berkley brought a third-party action against Dynasty for indemnification. Dynasty moved to dismiss Berkley's third-party complaint based on its alleged overpayment to Advanced. Plaintiff and Berkley opposed.

Dynasty entered into a subcontract with Advanced on February 19, 2015, for labor and materials to replace the interior stairs at the Whitman Houses. Pursuant to Article 3 of the subcontract, total compensation owed to Advanced was \$575,000. According to Brian Lee (Lee), Vice President of Dynasty, there were two change orders which increased the total amount owed to Advanced to \$666,500.00. Dynasty produced a change order, dated July 29, 2015, for an additional one-time payment of \$25,000 as an advanced payment for its complete performance of Building #135 in accordance with the contract. Dynasty also produced a second change order, dated September 18, 2015, in the amount of \$66,500, for work Dynasty directed Advanced to perform that was not included in its subcontract. Dynasty averred it paid Advanced \$730,192.68, \$63,692.68 more than it owed.

According to Paul Trinks (Trinks), President of Advanced, Advanced was hired to, and did perform additional work beyond the scope of the February 19 subcontract. He stated the additional work approved by Dynasty included scaffolding, permits & drawing in the amount of \$75,000.00, epoxy, bolts & nuts in the amount of \$10,000.00, Change Order No. 1 in the amount of \$25,000.00, and Change Order No. 2 in the amount of \$66,500.00. He conceded that Dynasty paid for all of this work, although it only signed Change Orders No. 1 and 2, and not for the scaffolding or epoxy. Advanced proffered Dynasty's Statements #4, 5, 6, 7, 7 revised, 8, 9, 10, 11, and 12 as proof of Dynasty's acknowledgment of such payments. Lee denied Dynasty agreed to extra work concerning scaffolding, epoxy, bolts, and nuts. The Court notes, according

to Trinks' testimony, it appears Advanced concedes Dynasty paid a total of \$751,500, which is \$21,307.32 more than Dynasty alleged it paid and \$17,407.32 more than Advanced alleged Dynasty paid.

Trinks averred that Advanced invoiced Dynasty for rented trucks, proffered in Exhibit C, which were accepted by Dynasty without objection and never paid. Lee denied ever renting or using Advanced's trucks. Trinks further averred, "Advanced performed all the work and provided all the materials that it was obligated to under the contract, including the additional work documented in the invoices for additional work." Advanced alleged it furnished a total of \$806,721.12 in materials to Dynasty and was paid \$734,092.68. It produced a ledger of open invoices, dated May 1, 2015 through May 5, 2016, which corresponds with the invoices in Exhibit C and shows a balance owed of \$72,628.44.

Berkley admitted it has no personal knowledge as to the veracity of the allegations in the complaint, does not possess or control documents containing information about the subcontract, the performance of it, or the payments made pursuant to it. Berkley argued Dynasty's admission that it paid Advanced a sum substantially in excess of the approved change order amount establishes triable issues of fact exist concerning whether Dynasty waived the change order limitation of the subcontract.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562). Once a prima facie showing has been made, the burden shifts to the party opposing the motion to

produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad*, 64 NY2d at 853; *Zuckerman*, 49 NY2d at 562).

Here, Dynasty sought to dismiss the third-party complaint for indemnification filed against it by Berkley on the ground that it had a negative balance with Advanced. Dynasty argued, and Advanced conceded, it paid \$666,500 at a minimum, plus some additional amount. Advanced averred it provided additional materials and services that were beyond the scope of the subcontract, for which Dynasty paid. Dynasty denied such, but failed to explain why it overpaid the balance of \$666,500 it allegedly owed. This record also contains discrepancies as to the amount Dynasty paid, as demonstrated by the affidavits of Lee and Trinks and the proof proffered. Therefore, there are questions of whether Dynasty waived the change order limitation of the subcontract, breached by failing to pay for the additional services, and the amount, if any, owed to Advanced. Accordingly, Dynasty's motion for summary judgment is denied.

ENTER:

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Honorable Reginald A. Boddie
Justice, Supreme Court

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