

New Millennium Bldg. v 125th Lenox Owner LLC

2020 NY Slip Op 32954(U)

September 8, 2020

Supreme Court, New York County

Docket Number: 653989/2016

Judge: Melissa A. Crane

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MELISSA ANNE CRANE PART IAS MOTION 15EFM

Justice

-----X

NEW MILLENNIUM BUILDING

Plaintiff,

- v -

125TH LENOX OWNER LLC

Defendant.

-----X

INDEX NO. 653989/2016

MOTION DATE 08/08/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER; Cross Motion for Partial SJ).

Plaintiff New Millennium Building Systems, LLC (Millennium) moves for an order, pursuant to CPLR 3212, for summary judgment on its complaint based on a mechanic's lien in the amount of \$179,130.71, and for breach of contract seeking the balance due on the underlying contract. Defendant KSK Construction Group (KSK) cross-moves for an order, pursuant to CPR 3212 (e), for partial summary judgment dismissing \$73,531.71 of plaintiff Millennium's mechanic's lien claim.

BACKGROUND

This is an action arising out of a commercial construction project located at 100 West 125th Street, New York, New York (the Project). Defendant 125 & Lenox Owner LLC (Owner) is the owner of the property. Defendant KSK entered into a general

construction contract with the Owner, agreeing to act as construction manager for the Project. Plaintiff Millennium's predecessor, CSI International, is a materials subcontractor providing steel joists and metal decking to contractors and specializing in custom-engineered structural steel building systems (NYSCEF Doc. No. 28, affidavit of Robert Hudson, dated August 7, 2019 [Hudson aff], para. 1). In September 2015, Millennium acquired the assets of Consolidated Systems Incorporated (CSI), including CSI International, a unit of CSI, acquiring all the open customer accounts held by CSI (hereafter referred to as Millennium) (*id.*, paras. 2-3).

On January 28, 2014, KSK and Millennium entered into a contract in which Millennium would provide some of the materials in the form of metal decking and steel joists for the Project (the Materials Contract) that KSK was obligated to provide Owner under its general construction contract (*id.*, paras. 7-12). Pursuant to the Materials Contract, Millennium supplied the materials only, and was not obligated to install the materials or to ensure that the materials were installed pursuant to the drawings and specifications (see NYSCEF Doc. Nos. 29-31). In Millennium's proposal, that KSK signed and accepted, Millennium agreed to provide deck sheets, the use of deck connection tools, and field use drawings (Millennium's Proposal) (NYSCEF Doc. No. 29, Millennium's Proposal at 2). The Proposal stated that "Shoring will be required as designated" (*id.*, Millennium's Proposal at 2), but that the decking shoring materials were specifically excluded from its scope of work (*id.* at 4, para. J): "[the Proposal] specifically excludes . . . [p]ermanent or temporary deck sheet support materials, including deck shoring, unless specifically listed in the Materials Package above" (*id.*).

Millennium's Proposal provided that the material package total price was \$979,918.00 and indicated "+ NYC Sales Tax" under the price (*id.* at 3). It further indicated that the invoice schedule was 40% invoiced upon execution, 60% upon delivery of materials with AIA payment forms, and final payment 60 days after final delivery (*id.*). Both parties signed this agreement (*id.*).

On that same day, January 28, 2014, KSK executed a Purchase Order, mirroring and confirming the purchase of the materials for the purchase value of "Lump Sum \$979,918.00." (NYSCEF Doc. No. 30, Purchase Order at 3). Under the section entitled "Exclusions," the Purchase Order excluded: "Local and State Taxes, Installation; unloading; Pour stops; Reinforcement including wiremesh; Shoring; Material added to scope after execution of contract thru revised plans" (*id.*). The Purchase Order listed all the contract documents, including a document entitled Contract Plan No. S-700.00, that Gambino & Laporta Architecture, DPC drafted and that outlined the "Shoring Requirements" for the decking system KSK purchased from Millennium (NYSCEF Doc. No. 53).

Millennium then sent an Order Acknowledgment, confirming KSK's order and the lump sum purchase price of \$979,918.00 (NYSCEF Doc. No. 31). This Order Acknowledgment provided that Millennium shall sell and KSK shall buy from Millennium the materials in accordance with the quantity and price described in the Order Acknowledgment, and that unless KSK "expressly rejects the Order Acknowledgment and its Terms and Conditions within five (5) days of receipt, the Order Acknowledgment becomes a contract . . ." (*id.*).

Thereafter, the parties executed several change authorization requests that added \$43,600.00 to the Materials Contract bringing the total contract price to \$1,023,518.00 (NYSCEF Doc. No. 32). From March 2015 through October 2015, Millennium delivered materials to the Project site pursuant to the Materials Contract (NYSCEF Doc. No. 33). KSK accepted all the materials it used in the Project (see NYSCEF Doc. No. 28, Hudson aff, para. 17). KSK did not notify Millennium that any of the materials were defective or nonconforming (*id.*, para. 19). KSK paid the invoices, except for the final three. This left an outstanding amount due of \$179,130.71 (see *id.*, para. 18; see also NYSCEF Doc. No. 25, affidavit of Christopher Short, dated August 7, 2019 [Short aff], para. 7).

On June 16, 2015, a portion of the second floor deck at the Project site collapsed during a concrete pour by KSK's concrete subcontractor (NYSCEF Doc. No. 28, Hudson aff, para. 23). On that date, shortly after the collapse, KSK's senior project manager, Mehmet Ayverdi, emailed KSK's structural project manager, Mike Wilson, P.E. from DCI-Engineers, and Jennifer Smith from CSI Steel (Millennium's predecessor). Mr. Ayverdi indicated that the "reason of collapse was that shoring shown with a stringer in the middle of the span was overlooked by all at site. The missing shorings are circled on the attached sketch" (NYSCEF Doc. No. 35, KSK email at 2). He went on to state "unfortunately for one looking at shoring plans . . . at this and similar locations these shorings can easily be taken as beam shoring as they line up with beams" (*id.*).

Millennium states that KSK paid in full 28 out of the 31 invoices it issued pursuant to the contract (NYSCEF Doc. No. 25, Short aff, para. 5). KSK failed to pay: (1) invoice no. PJI018401 dated October 13, 2015 in the amount of \$28,476.84; (2)

invoice no. PJI018428 dated October 27, 2015 in the amount of \$28,452.61; and (3) invoice no. 8858 dated November 1, 2015 in the amount of \$123,549.56, for a total amount of \$179,130.71 (*id.*, paras. 6-7).

On May 18, 2016, Millennium filed in the New York County Clerk's Office a Notice of Mechanic's Lien in the amount of \$179,130.71 against the property at 100 West 125th Street, New York, New York (Mechanic's Lien) (NYSCEF Doc. No. 17). On June 7, 2016, defendant Liberty Mutual Insurance Company (Liberty), as surety, bonded off Millennium's Mechanic's Lien, pursuant to a lien discharge bond in the amount of 110% of Millennium's Mechanic's Lien, which was \$197,043.78 (NYSCEF Doc. No. 18).

On August 1, 2016, Millennium filed this action against KSK, the Owner, and Liberty (together, Defendants) for enforcement of the Mechanic's Lien (first cause of action) and for breach of contract (second cause of action) (NYSCEF Doc. No. 2). Defendants filed an answer and counterclaims, denying the material allegations, setting forth various affirmative defenses, and asserting three counterclaims for breach of contract, violation of New York Lien Law sec. 39, and slander of title (NYSCEF Doc. No. 6).

In its motion, Millennium contends that the Materials Contract, along with its proof of the final three unpaid invoices, supports summary judgment in its favor on its breach of contract and mechanic's lien claims for the amount unpaid of \$179,130.71. It asserts that KSK accepted the materials it supplied, and that Millennium had no

obligation to install the materials or to ensure that the shorings on the drawings were installed.

In opposition and in support of its cross motion, KSK seeks to limit Millennium's claim to \$105,599.00. KSK contends that the parties' practice was for Millennium to use AIA forms to send bills, and there were a total of seven AIA form requisitions for the entire Materials Contract (NYSCEF Doc. No. 38, affidavit of Mehmet Ayverdi, dated October 9, 2019 [Ayverdi aff], para. 16). It asserts that it paid six of those requisitions in the total amount of \$910,224.49, and admits that the final requisition in the amount of \$105,599.00 was not paid. In connection with each AIA form requisition and payment, KSK asserts that Millennium signed periodic waivers and releases (*id.*, paras. 16-19). The last release dated August 24, 2015, states that for the consideration of \$910,224.00 Millennium was fully paid and released all claims for materials that it had delivered "up to and including" July 31, 2015 (*id.*, para. 28; see also NYSCEF Doc. No. 41). The seventh requisition indicates that the original contract sum was \$979,918.00 plus change orders of \$35,905.00 for a total sum of \$1,015,823.00, and that amount minus the payments of \$910,224.00 equals \$105,599.00 due on the seventh requisition. Further, Millennium released any additional sums by the terms of the waiver (NYSCEF Doc. No. 38, Ayverdi aff, para. 29).

Millennium is claiming \$179,130.71, which is \$73,531.71 more than the contract price. KSK contends that this amount (\$73,531.71) is the amount of the state and local sales taxes. It asserts that the Purchase Order expressly excludes "Local and State Taxes," and that it paid these taxes directly. KSK submits a copy of its quarterly New

York State and Local Sales and Use Tax for June 1, 2015 to August 31, 2015 along with an audit voucher indicating that it paid the taxes in connection with the materials from Millennium (*id.*, paras. 32-38; see also NYSCEF Doc. No. 44).

As to the remainder amount of \$105,599.00 due, KSK contends that the Purchase Order provides, in section 3, that KSK could “deduct or retain out of any payments due or to become due to [Millennium] an amount sufficient to completely protect [KSK] from any and all loss, damages or expense therefrom” any breach by Millennium. KSK asserts that the materials Millennium supplied were deficient, because the decking was not self-supporting as promised, and the notations in Millennium’s drawings about shoring requirements were obscured (*id.*, paras. 21, 26; see also NYSCEF Doc. No. 30, Purchase Order, sec. 3). KSK maintains that it incurred costs of \$106,824.00 resulting from defective drawings and materials and seeks an offset in that amount (NYSCEF Doc. No. 38, Ayverdi aff, paras. 39-43).

In response to KSK’s cross motion, Millennium contends that the cross motion is untimely because it was not made within 120 days of the filing of the April 9, 2019 Note of Issue. Millennium is correct that the cross motion is late, and therefore, the court must deny it under *Brill v. City of New York*, 2 N.Y.3d 648 (2004); *see also Cullity v. Posner*, 143 A.D.3d 513, 514 (2016). However, given the preference to adjudicate cases on their merits, and, in the interests of judicial economy, the court deems the entirety of KSK’s papers to constitute opposition to Millennium’s motion.

On the merits, KSK does not dispute that it failed to pay Millennium \$105,599.00 for materials it furnished KSK pursuant to the Materials Contract, and that KSK’s

purported reason for not paying was a deck collapse that it claimed was due to a lack of shoring. Millennium argues that the Materials Contract did not obligate Millennium to provide a deck system with shoring, and, in fact, shoring was specifically excluded from its scope of work in KSK's own Purchase Order (NYSCEF Doc. No. 30, Purchase Order, sec. 3 "Exclusions"). Moreover, Millennium's Proposal which was "expressly agreed and accepted" by KSK provided that "Shoring will be required as designated," but that decking shoring materials were specifically excluded from Millennium's scope of work (NYSCEF Doc. No. 40, Millennium's Proposal at 4, para. J). Millennium urges that shoring is part of "Means and Methods" and, as such, was not included in this Materials Contract, and that it was incumbent upon KSK as the general contractor, or its shoring subcontractor, to secure a structural engineer to design the shoring system materials, and sequence the shoring installation and removal (NYSCEF Doc. No. 52, affidavit of Martin Williams, dated December 13, 2019, para. 8). KSK did hire a structural engineer who created the shoring plans based on Millennium's shop drawings (*id.*, para. 9; see also NYSCEF Doc. No. 46). Millennium submits a copy of Contract Plan No. S-700.00, that outlines the shoring requirements apparently drafted by KSK's architect, and Millennium's shop drawings (NYSCEF Doc. Nos. 53, 54), and contends that the shoring was accurately reflected on the contract documents and the shop drawings, but that KSK just missed it. It was not Millennium's scope of work to ensure adherence to shoring requirements, that were clearly set forth on the contract documents and shop drawings.

DISCUSSION

The motion is granted only to the extent that the outstanding amount due under the parties contract is \$105,599.00, and Millennium is awarded judgment in that amount on its complaint. In accordance with the parties' course of dealing, Millennium signed and submitted its seventh and final AIA requisition on August 24, 2015 indicating that the amount of \$105,599.00 was due, and executed releases stating it was fully paid and waived any claims for materials it delivered up to and including July 31, 2015 (NYCEF Doc. No. 41, 42). The requisition, that Millennium's predecessor, CSI International signed, clearly states that it is the final requisition and summarizes the total amount of the contract as \$1,015,823.00, less the payments KSK already made of \$910,224.00. This demonstrates that the amount due on the seventh and final requisition is \$105,599.00. The terms of the waiver released any additional sums (see *id.*). The release unequivocally stated that Millennium, as a trade contractor, "in consideration of payments made to date, hereby waives and releases all actions, debts, claims, liens, and demands" against KSK and the Owner on account of all work and materials furnished "prior to the date of this release" (NYSCEF Doc. No. 42). Millennium does not dispute this, and fails to explain why it seeks a greater amount. If Millennium is seeking payment for state and local sales taxes, KSK submits undisputed proof that it paid these taxes directly to New York State (see NYSCEF Doc. No. 44), and that the parties excluded these taxes from the contract (NYSCEF Doc. No. 30). Therefore, the outstanding amount due on the Materials Contract and subject to the mechanic's lien is \$105,599.00.

To the extent KSK claims an offset of \$106,824.00 under the Materials Contract for defective shop drawings and defective materials, it fails to raise a triable issue that Millennium was obligated under the contract for the shoring failures at the Project. In the Materials Contract, the parties clearly agreed to exclude shoring materials installation, and reinforcement, and that shoring “will be required as designated” on the shop drawings (see NYSCEF Doc. No. 29, 30 and 54). Millennium was not obligated to install the decking or any shoring. Both Contract Plan No. S-700.00, that KSK’s architect prepared, and Millennium’s shop drawings, that referred the installer to drawing “D2” to review the shoring requirements, stated the shoring requirements for the decking (NYSCEF Doc. Nos. 53, 54).

Because Millennium was not responsible for the installation or shoring, KSK hired a structural engineer who was responsible for and created a shoring plan. Contrary to KSK’s contentions, the Materials Contract did not obligate Millennium to ensure that the installation met the shoring requirements on the shop drawings, the contract documents and KSK’s structural engineer’s shoring plan.

KSK claims that the shop drawings were deficient because “everyone in the field” missed the required shoring on the shop drawings (NYSCEF Doc. No. 38, Ayverdi aff, para. 42). That KSK was not alone in misreading the shop drawings does not provide a basis for an offset. That responsibility lies with the party obligated to ensure the shorings’ installation per the documents. In an email to both its own structural engineer and a representative of CSI International, Mr. Ayverdi of KSK clearly stated that the reason for the second floor deck collapse “was that shoring shown with a stringer in the

mid of the span was overlooked by all at the site,” and that at these and other similar locations the shorings “can easily be mistaken as a beam shoring as they line up with beams” (NYSCEF Doc. No. 35 at 2, June 16, 2015 4:59 pm email). Mr. Ayverdi went on to state that to avoid delays and “putting people’s lives in danger . . . we shall support all decks regardless of span length or width” (*id.*).

Moreover, the shop drawings themselves clearly refer to drawing “D2 for shoring requirements” (see Ex B to the Affidavit of Martin Williams, sworn to 12/13/2019 [EDOC no. 54, pg. 3]). This is in addition to Contract Plan No. S-700.00 which also outlines the shoring requirements for Millennium’s decking (*id.*, Ex A, EDOC no 53).

There is nothing in the Materials Contract obligating Millennium to pay for these additional shorings. KSK fails to show that the additional amounts it expended for additional shorings are due to defective materials Millennium supplied. KSK’s assertion that Millennium should have provided self-supporting decking has no foundation, while the contract demonstrates the need for shoring, and that Millennium was not responsible for supplying such shoring. Thus, KSK fails to show there is a triable issue of fact as to the amount due under the Materials Contract of \$105,599.00, pursuant to the seventh AIA requisition. According to Millennium’s Mechanic’s Lien, it furnished the last materials under that requisition to KSK on October 15, 2015. Under the terms of payment in the Purchase Order, “final payment shall be made within sixty (60) days of delivery” (NYSCEF Doc. No. 30, Purchase Order, sec. 3.2; see also NYSCEF Doc. No. 29, Millennium Proposal at 3), and, therefore, December 14, 2015 constitutes the date of

KSK’s breach. Accordingly, Millennium is granted summary judgment on its complaint in the amount of \$105,599.00 with interest running from December 14, 2015.

Millennium’s request for attorneys’ fees relies on paragraph 9 of the Purchase Order that provides for reasonable attorneys’ fees to the prevailing party that institutes an action against the other party or the surety “in connection with any dispute or matter arising under this Agreement” (NYSCEF Doc. No. 30, Purchase Order, para. 9; see also NYSCEF Doc. No. 31, Order Acknowledgment, para. L). This dispute arises under the agreement and Millennium is the prevailing party. However, Millennium does not submit proof of the amount of attorneys’ fees. Accordingly, the court denies that part of Millennium’s motion for attorney’s fees, without prejudice to making a separate motion for same.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment is granted and plaintiff is awarded its mechanic’s lien and breach of contract damages in the total amount of \$105,599.00 with statutory interest from December 14, 2015, with costs and disbursements to plaintiff as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant KSK’s cross motion is denied; and it is further

ORDERED that the counterclaims are severed and continued.

9/8/2020
DATE


MELISSA ANNE CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

J.S.C.