

**GTX Constr. Assoc., Corp. v City of New York**

2020 NY Slip Op 33894(U)

November 24, 2020

Supreme Court, New York County

Docket Number: 450348/2019

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART IAS MOTION 14**

*Justice*

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**INDEX NO. 450348/2019**

GTX CONSTRUCTION ASSOCIATES, CORP.,

**MOTION DATE N/A**

Plaintiff,

**MOTION SEQ. NO. 002**

- v -

THE CITY OF NEW YORK, MAYOR'S OFFICE OF  
HOUSING RECOVERY OPERATIONS A/K/A BUILD IT  
BACK

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 70, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment is denied.

**Background**

This action arises out of a contract to rebuild a home in Breezy Point. Plaintiff, a contractor, was hired using disaster relief funds allocated to the City of New York for reconstruction and rehabilitation of homes damages by Hurricane Sandy. Plaintiff contends it was hired by homeowners in April 2016 and that it was supposed to be paid \$455,513.93 for the work by the City.

Plaintiff maintains that it was not paid the entire amount it is owed and now moves for summary judgment on its claims. It argues that it complied with supplemental job orders and change orders requested by the City and it is owed over \$300,000. Plaintiff points to an email from a representative of the Build it Back Program in which it agreed to pay plaintiff pursuant to an invoice for over \$80,000.

Plaintiff maintains that it performed under the contract and defendant refused to pay. It also seeks dismissal of defendant's affirmative defenses. Plaintiff also wants a declaratory judgment that defendant is liable.

In opposition, defendants argue that plaintiff failed to meet its prima facie burden. They insist that the email upon which defendants purportedly agreed to a partial payment actually states that payment was conditioned on an audit and is not evidence of an agreement to make payments. Defendants point out that plaintiff failed to provide the Court with the contract terms concerning the City's payment obligations.

They contend that plaintiff was paid as construction progressed for a total of \$608,748.40. Defendants maintain that plaintiff was told about issues regarding outstanding work between October 2018 and June 2019, that plaintiff improperly sought double payment of work it had already been paid for, and that there is a mandatory audit prior to the issuance of a final payment. Defendants argue that plaintiff failed to prove full performance under the contract, that defendants breached the contract and insist that its declaratory judgment action is duplicative of its breach of contract claim.

In reply, plaintiff claims that defendants improperly asserted that the multiplier (which was to be used to calculate to the contract amount) was "double counted" and plaintiff is entitled to the relief it seeks. Plaintiff acknowledges that "there may be a dispute between the parties regarding the total amounts that will ultimately be due to Plaintiff in connection with the project" but still asserts it should be able to recover in this motion.

## **Discussion**

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court denies the motion. There are clearly issues of fact with respect to how much is owed to plaintiff and whether defendants actually breached the contract. Moreover, as defendants point out, plaintiff did not attach its contract with the City, it only attached the contract between plaintiff and the homeowners.

The fact is that defendants sent a letter to plaintiff in March 2019 detailing the dispute about double-counting the multiplier and that appropriate final signoffs were required before any final payments could be released (NYSCEF Doc. No. 79). The letter details that the City had

already paid over \$600,000 for the project (*id.*). Another letter is attached from June 2019 in which plaintiff was informed that certain items had already been paid (NYSCEF Doc. No. 80).

Simply put, the instant dispute cannot be decided on a motion for summary judgment. The parties disagree about how much is due and plaintiff has not met its burden to show that defendants breached the contract or that it should be paid the amount it seeks as a matter of law. The Court is unable to find that there was an admission, as plaintiff argues, by the City that certain amounts were supposed to be paid and were not.

The June 17, 2019 letter from defendants to plaintiff (sent after the instant action was commenced) makes the dispute clear. Defendants noted that “as we have discussed numerous times, because it is the final requisition, GTX must complete its outstanding work, including resolving any open permit issues, to receive any payment towards that invoice” (NYSCEF Doc. No. 81). They added that plaintiff’s “current position, in which it is demanding over 100% payment on what it invoiced for an incomplete job, defies both logic and mathematics” (*id.*). Nothing in the record before this Court shows that the dispute was ever resolved or that plaintiff is entitled to the amount it seeks as a matter of law.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff is denied in its entirety.

Remote Conference: March 5, 2021.

11/24/2020  
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: