| **Rick's Constr. & Ironworks, Inc. v Biltwel Gen. Contr. Corp.** |
| --- |
| 2021 NY Slip Op 30517(U) |
| February 18, 2021 |
| Supreme Court, New York County |
| Docket Number: 655346/2017 |
| Judge: Shawn T. Kelly |
| 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
COUNTY OF NEW YORK: PART IAS MOTION 57

----------X

RICK'S CONSTRUCTION & IRONWORKS, INC.,

Plaintiff,

- v -

BILTWEL GENERAL CONTRACTOR CORP., THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SENECA INSURANCE COMPANY, INC.

Defendant.

**INDEX NO.** 655346/2017

**MOTION DATE** 08/26/2020, 12/04/2020

**MOTION SEQ. NO.** 005 006

**DECISION + ORDER ON MOTION**

----------X

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 126, 127, 128, 129, 130, 131, 132, 133, 134

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 006) 118, 119, 120, 121, 122, 123, 124, 125, 135, 136

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, it is

In this action to foreclose on a mechanic's lien, plaintiff Rick's Construction & Ironworks, Inc., (RCI) moves (Motion Seq. 005) (Doc No. 81) [1] for summary judgment (CPLR 3212) in its favor on its Third Cause of Action for quantum meruit and Fourth Cause of Action for unjust enrichment against defendant Biltwel General Contractor Corp. (Biltwel). RCI seeks an award of $80,838.99 with interest from December 19, 2015, costs and disbursements.

Defendant, The New York City Department of Environment Protection (DEP) moves (Motion Seq. 006) (Doc No. 118) for summary judgment (CPLR 3212) dismissing RCI's claims

[1] References to "Doc No." followed by a number refers to documents filed in NYSCEF.

against DEP. The parties agreed by stipulation dated September 29, 2020 (Doc No. 135) that any opposition papers to DEP's application herein would be filed no later than November 13, 2020. Opposition papers were never filed and DEP's application to dismiss this action against it is granted.

## FACTUAL AND PROCEDURAL BACKGROUND

On September 21, 2015, defendants Biltwel and DEP executed a job order contract (Job Order) (Doc No. 86). The Job Order was part of a public improvement project at DEP's personnel headquarters in Queens County, NY (the premises) and specified the detail of Biltwel's scope of work as follows: "The Scope of this work is to provide and install the glass canopy and enclosure and connectors over a stair structure as per drawings prepared in Phase 1, engineering design services" (the Project). The Job Order price is listed as $162,500.00.

Biltwel thereafter entered into an agreement with plaintiff RCI on September 24, 2015 (the Subcontract) (Doc No. 102). Pursuant to the Subcontract, RCI would be compensated in the amount of $68,500.00 "[t]o supply all type 316 S. S angle frames with fasteners (brackets, tees & sheer plates) as per drawing provided" (the Construction Materials). The Subcontract did not provide for any installation work.

In his affidavit dated May 27, 2020 Norman Jalayer (Jalayer), the vice president of Biltwel, confirms that the Subcontract was for RCI to "provide the project [with] stainless steel frames for a certain glass canopy" for DEP (Jalayer aff at ¶ ¶ 5 and 7) (Doc No. 101). Biltwel executed another contract with non-party Florian Glass Services, Inc. (Florian) to supply the glass that would fit into the steel frames that were manufactured and provided by RCI. Biltwel "intended that Florian would install both the stainless steel frames supplied by [RCI] and the glass supplied by Florian" (*id.* at ¶ 21). The installation portion of Florian's contract, according

to Biltwel, was approved for $9,000.00[2] (*id.* at ¶ 22). When the time came for Florian to do the steel frame and glass installations, the glass did not fit the steel frames. After this discovery, Florian left the job. The Project was subsequently delayed and Biltwel was left to remedy the mismeasurements and complete its contractual obligations to DEP.

According to Ghagawallah Misra a/k/a Rick (Rick) a member of RCI, on or about November 25, 2015, Biltwel requested that RCI perform the steel installation work that Florian was hired to do. Jalayer contends that it agreed to have RCI install the steel frames and railings for safety purposes as required by DEP (Jalayer aff at 29). However, RCI does not mention that it agreed to install the subject plexiglass. In fact, in the same affidavit Jalayer admits that Biltwel "hired and paid its own crews to install the plexiglass" (Jalayer aff at ¶ 37).

Biltwel asserts that it agreed to pay RCI for the steel installation work with "the money that Biltwel would be paid from the DEP" and this amount would be in addition to RCI's Subcontract amount due and owing (Jalayer aff at ¶ 30). "The agreement was that the parties would complete the work, seek payment from the DEP and resolve any issues once subcontract price is agreed and payment made by the DEP" (*id.* aff at ¶ 32). Biltwel also "intended that [RCI] would submit its subcontractor approval papers to DEP and be paid as a subcontractor the money that the DEP would approve" (*id.* aff at ¶ 35).

RCI began the safety railing and steel installation work (collectively, the Installation Project) on or about November 27, 2015 and completed it on or about December 19, 2015 (see Rick's affidavit dated February 20, 2020) (Doc No. 82). It is undisputed that when RCI began the Installation Project, the parties had not come to an agreement as to the amount RCI would be

[2] Jalayer asserts that Biltwel paid Florian $82,455.00 for materials it never received (Jalayer aff at ¶ 34).

compensated for this additional work. By email dated December 3, 2015 (Doc No. 88) RCI asked Biltwel for a clear understanding on how RCI would be compensated for the Installation Project. In response, Biltwel asserted that it would have a response by the following day, but RCI never received a clear answer to its request for a mutual understanding of the amount of compensation for the Installation Project. RCI asserts that after it completed the Installation Project, it never received any payments for this additional work performed which was never part of the original Subcontract it had with Biltwel.

On August 9, 2016, Biltwel and DEP supplemented the Job Order (Supplemental Job Order) (Doc No. 110) and Jalayer avers that this new contract with DEP decreased "the scope [of work] for the glass, and adding the plexiglass materials" (Jalayer aff at 33). The Supplemental Job Order details Biltwel's scope of work as follows: "The scope of this work is to provide and install the canopy, enclosure and connectors over the existing stair structure leading from the third floor to the rooftop garage." The Supplemental Job Order price is listed as $31,044.11.

On November 30, 2016, Rick emailed Jalayer (Doc No. 111) asking for a meeting "to determine the contract value (for sub-contractor approval) and the necessary paperwork to be done." There is no evidence presented that Rick ever received a response confirming a meeting date and/or details for the paperwork necessary to determine the contract value of the Installation Project.

Biltwel asserts that the Project was delayed because of Florian and RCI which required that a substantial portion of the Project be redone, resulting in damages to Biltwel. As a result, Biltwel commenced an action in Suffolk County entitled *Biltwel General Contractor Corp., v Florian Glass Services, Inc., and Rick's Construction & Ironworks, Inc.*, Index No. 605494/2016 (the Suffolk County Action), for breach of contract against both Florian and RCI for failure to

perform their obligations under their respective subcontract. Florian asserts in the Suffolk County Action that RCI failed to properly measure the dimensions and that the steel templates for the subject project were incorrect (see Jalayer aff at ¶ 12). RCI claims that it was Florian that mis-measured the glass. Biltwel contends in the Suffolk County Action that although "it was Florian's responsibility to measure and supply the proper glass," RCI was responsible for that error because RCI "supplied improper templates and measurements to Florian" and therefore both subcontractors breached their agreements to Biltwel (id. at ¶ 13). Additionally, Biltwel also asserts that the project was delayed because RCI failed to meet its deadline requirements (*id.* at ¶¶ 17 and 18).

On or about August 14, 2017, RCI served and filed a Summons and Complaint (the Complaint) (Doc No. 1) against Biltwel, DEP and Seneca Insurance Company, Inc., asserting the following causes of action: lien foreclosure (First Cause of Action); breach of contract against Biltwel (Second Cause of Action); quantum meruit (Third Cause of Action); unjust enrichment (Fourth Cause of Action); and trust fund diversion (Fifth Cause of Action).

In response, Biltwel filed and served a Verified Answer[3] (Doc No. 22) generally denying the allegations in the complaint and asserting the following affirmative defenses: (1) failure to state a cause of action; (2) estoppel and unclean hands; (3) RCI's alleged damages were caused by persons or entities outside of Biltwel's control; (4) failure to mitigate damages; (5) barred by material breach; and (6) wrongful and willful lien exaggeration resulting in a void and unenforceable lien pursuant to New York Lien Law § 39 and § 39-a.

On or about February 21, 2020, RCI moved herein (Motion Seq. 005) for summary judgment (CPLR 3212) on its Third Cause of Action for quantum meruit against Biltwel on

[3] DEP filed its Verified Answer on or about September 5, 2017 (Doc. No. 23).

grounds that RCI "performed and furnished certain labor, work, equipment, and services for and on behalf of the Project in good faith at the specific instance and request of" Biltwel and "with an expectation of compensation from" Biltwel which "accepted the labor, work, equipment, and services performed and furnished by" RCI. The "[f]air and reasonable value of the work performed by" RCI at Biltwel's "specific instance and request is $76,725.80" and [t]here is a remaining balance of $76,725.80 due and owing to" RCI "for labor, work, equipment, and services furnished by" RCI which Biltwel "refuses to pay" despite RCI's submitted demands for payment" (see the Complaint at ¶¶ 41-47). RCI also seeks judgment on its Fourth Cause of Action for unjust enrichment against Biltwel on grounds that Biltwel has "been unjustly enriched in that they have received the benefit of the labor, work, equipment, and services furnished by" RCI "without paying for same to Plaintiff's detriment" and there "is a remaining balance of $76,725.80 due and owing to" RCI "for labor, work, equipment, and services furnished by" RCI which Biltwel "refuses to pay" (see the Complaint at ¶¶ 49-51). RCI seeks a total award of eighty thousand eight hundred thirty-eight dollars and ninety-nine cents ($80,838.99) with interest thereon beginning from December 19, 2015, plus the costs and disbursements.

**ARGUMENTS**

RCI argues that its application for summary judgment on its Third Cause of Action for quantum meruit and its Fourth Cause of Action for unjust enrichment against Biltwel must be granted because: (1) the Installation Project was never part of the Subcontract; (2) RCI did not receive compensation for the work and labor it provided in completing the Installation Project to Biltwel and DEP's satisfaction; (3) RCI met its burden of proof on both its claims for quantum meruit and unjust enrichment against Biltwel; (4) RCI's itemized log (Doc No. 90) clearly sets forth the certified payrolls and sign in sheets for the workers who performed the steel installation

work (Doc No. 89) and Rick's affidavit (Doc No. 82) asserting the itemization of the hourly labor costs and union dues for the subject work performed and the total amount now due and owing by Biltwel for the Installation Project is $80,838.99; (5) Biltwel does not dispute that it owes RCI "reasonable" payment for the Installation Project; and (6) after the commencement of this action, Jalayer sent Rick a text message on November 16, 2018 (Doc No. 90) offering RCI $15,000.00 for the steel installation work as Biltwel could only afford to pay that amount and that he "would split all awards until up to when you have been made whole ($75K total)" which RCI contends is proof that the value of the Installation Project was at least $75,000.00 according to Jalayer himself.

Biltwel contends that RCI's application for summary judgment on its Third and Fourth Causes of Action must be denied because: (1) the parties had a Subcontract and when there is a written agreement between the parties, relief pursuant to quantum meruit and unjust enrichment is unavailable; (2) RCI breached the Subcontract agreement and therefore is not entitled to payment for the Installation Project; (3) payments, if any, had to be approved by DEP and RCI failed to submit the required paperwork in order to obtain said approval; (4) there was no agreement to pay RCI for the errors it made in the measurement of the steel frame which caused delays in the Project and required remedial measures such as having RCI do the installation work after Florian left the job; (5) RCI's itemized log (Doc No. 90) was never presented to Biltwel for billing purposes to DEP; (6) RCI's itemized log does not properly reflect the labor actually expended by RCI for the Installation Project; (7) RCI's itemized log demonstrates that it paid a total of $34,872.05 for labor, rather than the $75,000.00 it claims it its pleadings; (8) Biltwel's contemporaneous job diary (Doc No. 109) and RCI's itemized log differ as to the number of people who actually worked in the Installation Project and the number of hours actually worked;

(9) Biltwel is not be responsible for RCI to install safety railings required by DEP because the need for the safety railings was caused by RCI's own errors in supplying measurements to Florian which delayed the Project; (11) RCI failed to submit any proof that it paid its workers for the Installation Project: (12) Biltwel did send the text message to Rick offering to settle this dispute, as evidenced by the unsigned and rejected settlement proposal (Doc No. 117) and offered RCI $15,000.00 in exchange for a RCI's release and cooperation agreement for recovery of any additional money from Florian in the Suffolk County Action, but the reference to the $75,000.00 represented damage claimed in that other pending matter; (13) RCI failed to supply the Construction Materials in a proper manner causing a breach of its Subcontract and resulting in offsets against any money claimed by RCI; and (14) Biltwel never agreed to pay RCI's workers "on an open time basis" and the "[t]he agreement was that [RCI] would be paid the reasonable sum for work it performed, that such work and price would be approved by DEP" (Jalayer aff at ¶31).

**DISCUSSION**

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the "light most favorable to the party opposing

the motion" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

The court will not address Biltwel's arguments respecting its claims against Florian and RCI in the Suffolk County Action, including offsets for purportedly defective materials and/or breach of the Subcontract. In its decision and order dated April 18, 2018 (Doc No. 24) this court denied an application to consolidate this matter with the Suffolk County Action.

Quasi-contractual remedies such as quantum meruit (RCI's Third Cause of Action) and unjust enrichment (RCI's Fourth Cause of Action) would not be available if a valid and enforceable contract existed which governed the particular subject (see *MG W. 100 LLC v St. Michael's Prot. Episcopal Church*, 127 AD3d 624, 626 [1st Dept 2015]). Here, the Installation Project was not part of the Subcontract between Biltwel and RCI. Although there is evidence to suggest that RCI was willing to submit necessary paperwork in order to facilitate the determination of the contract value for the Installation Project, there was no evidence presented to the court to suggest that a contract value was ever subsequently agreed upon. Moreover, Biltwel agrees that RCI is to be "reasonably" compensated for the Installation Project. Contrary to Biltwel's assertion, Rick's November 30, 2016 email to Jalayer (Doc No. 111) was not evidence that the sum to be paid to RCI would be based on the prior $9,000.00 amount alleged to have been previously approved by DEP for Florian (see Jalayer aff at ¶ 36). In fact, this email makes no mention of a previously approved amount for the Installation Project. Moreover, the Installation Project entailed work performed outside of the Subcontract requirements.

To assert a claim for quantum meruit, RCI must demonstrate: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are

rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Caribbean Direct, Inc. v Dubset LLC*, 100 AD3d 510, 511 [1st Dept 2012]). Here, RCI has established its claim against Biltwel for quantum meruit as alleged in RCI's Third Cause of Action. RCI completed the Installation Project in good faith, Biltwel accepted those services, RCI expected to be compensated for those services (as evidenced by the numerous emails inquiring as to compensation) and RCI set forth a reasonable value of said services through its itemized log, albeit it an amount disputed by Biltwel.

Likewise, to establish a claim for unjust enrichment, RCI must establish that it "conferred a benefit upon" Biltwel, and Biltwel "obtained such benefit without adequately compensating" RCI (*Matter of Alpert v M. R. Beal & Co.,* 162 AD3d 491, 492 [1st Dept 2018]) quoting *Nakamuro v Fuji*, 253 Ad2d 387, 390 [1st Dept 1998]). Here again, RCI met the elements of entitlement to summary judgment on its claim for unjust enrichment based upon the undisputed fact that RCI was not compensated for the work and labor performed in the Installation Project and Biltwel benefited from the work performed by RCI.

The affirmative defenses raised by Biltwel are not applicable to the causes of action for quantum meruit and unjust enrichment alleged against it by RCI and fail to defeat RCI's motion for summary judgment. However, questions remain as to the amount to be paid for the labor and work performed for the Installation Project. Accordingly, the judgment amount as to the reasonable compensation to be awarded to RCI will be referred to a court Referee to hear and determine.

## CONCLUSION

The court has considered all the remaining arguments raised by the parties and finds them to be without merit.

Accordingly, it is

ORDERED that the application (Motion Seq. 005) by plaintiff Rick's Construction & Ironworks, Inc., for summary judgment (CPLR 3212) on its Third and Fourth Causes of Action for quantum meruit and unjust enrichment respectively, is granted on the issue of liability against defendant Biltwel General Contractor Corp., only; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date this order, serve a copy of this order with notice of entry, together with a completed Information Sheet[4], upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date to hear and determine the judgment amount to be awarded to plaintiff for the labor on the Installation Project referenced herein; and it is further

ORDERED that the application (Motion Seq. 006) by defendant, The New York City Department of Environment Protection for summary judgment dismissing this action against it, is granted, without opposition; and it is further

ORDERED that the Clerk of The Court shall enter judgment in favor of defendant, The New York City Department of Environment Protection, and against plaintiff, Rick's

[4] Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).

Construction & Ironworks, Inc., dismissing this action as against The New York City Department of Environment Protection, only.

2/18/2021
DATE

SHAWN TIMOTHY KELLY, J.S.C.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | | CASE DISPOSED | | X | NON-FINAL DISPOSITION | | |
| | X | GRANTED | ☐ DENIED | | GRANTED IN PART | ☐ | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | ☐ | REFERENCE |