

**Engineered Devices Corp. v Halal Bldg. & Constr.,  
Inc.**

2021 NY Slip Op 31180(U)

April 6, 2021

Supreme Court, Kings County

Docket Number: 518780/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

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**ENGINEERED DEVICES CORP.,**

**Plaintiff,**

**-against-**

**HALAL BUILDING & CONSTRUCTION, INC. and  
AVO CONSTRUCTION LLC,**

**Defendants.**

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***Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of  
defendant Avo Construction LLC's motion to dismiss***

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**DECISION / ORDER**

**Index No.: 518780/2018**

**Motion Seq. No. 6**

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed .....	<u>95 - 100</u>
Answering Affirmation .....	<u>101</u>
Reply .....	<u>106</u>

**Upon the foregoing cited papers, the Decision and Order on this Motion is  
as follows:**

This action arises from a dispute over materials and equipment supplied by plaintiff for a construction project at 283 Greene Avenue, Brooklyn, New York. Plaintiff alleges that it fabricated, sold, rented, and delivered items to defendant Halal Building & Construction, Inc. ("Halal") in connection with the project. The items, both materials and equipment, were provided by plaintiff to Halal pursuant to a "Credit Application and Personal Guarantee" as well as a "Master Rental Agreement." Plaintiff's second amended complaint alleges that Halal, the concrete subcontractor for the project, was terminated by defendant Avo Construction ("Avo") the general contractor and failed to pay the plaintiff's outstanding invoices. Plaintiff filed a mechanic's lien against the property on June 28, 2018 for \$51,182.68.

This court previously granted plaintiff's motion for summary judgment on its causes of action for an account stated and breach of contract as against defendant Halal only (Doc 92 [10/07/2020 Order]). Avo allegedly "terminated Halal and used Plaintiff's material and equipment to complete . . . construction services at the Project." Plaintiff's summary judgment motion against defendant Avo Construction, LLC ("Avo") was previously denied (*see id.*).

Subsequently, 283 Greene LLC ("Greene"), the property owner, paid \$15,000 to plaintiff, in exchange for plaintiff's discharge of its mechanic's lien. A Stipulation of Partial Discontinuance as against 283 Greene LLC was filed on July 8, 2019, even though 283 Greene LLC was not a party to this action.

Plaintiff's second amended complaint, NYSCEF Doc 36, filed with leave of court following defendant Avo's prior motion to dismiss (MS #1), order dated June 21, 2019, states "Greene directed Plaintiff that the payment of \$15,000.00 was to be credited against the amount Plaintiff claimed from Avo". Thus, plaintiff's sixth cause of action seeks, "[a]fter crediting [\$15,000 to Greene], . . . the amount of [\$14,772.90]" from Avo in this case (*id.*). In the seventh cause of action, plaintiff asserts that Avo was unjustly enriched in that amount (\$14,772.90). In the eighth cause of action, plaintiff asserts that defendant diverted Lien Law trust funds in that amount.

Avo now moves to dismiss the complaint as against it pursuant to CPLR 3211(a)(2) [the court has no jurisdiction of the subject matter] and (a)(7) [the pleading fails to state a cause of action]. It argues that the complaint must be dismissed because summary judgment has been granted against Halal, and that the three remaining claims against Avo (the sixth, seventh, and eighth causes of action of plaintiff's second

amended complaint) allege a “jurisdictionally defective” amount in controversy of only \$14,772.90.

Alternatively, Avo asks the court to transfer the case to Civil Court pursuant to CPLR 325 for the same reasons if the complaint is not dismissed. Avo further argues that the sixth and seventh causes of action are duplicative in that they both seek to recover under a theory of unjust enrichment.<sup>1</sup>

The court notes that defendant Avo does not argue that plaintiff’s claim against Halal in some fashion overlaps with plaintiff’s claim against Avo. Thus, if there is any confusion in the complaint, it is now clear that the claims are separate.

In response, plaintiff’s attorney argues that the motion to dismiss should be denied because the court has jurisdiction over this case, which sought more than \$25,000 at the outset. Plaintiff also argues that the second amended complaint adequately alleges claims for “breach of contract and account stated against both non-owner defendants [and] also alleged a diversion of trust funds claim under the Lien Law.”

Neither party cites any cases in their attorneys’ affirmations. Avo cites CPLR 325 (a) (removal of cases mistakenly commenced in Supreme Court) and CPLR 325 (d) (removal of cases that do not meet the jurisdictional limit of damages in controversy).

### ***Discussion***

Avo provides no authority for its argument that the complaint should be dismissed as against it now that the amount in controversy as against it has been reduced to a sum below \$25,000. In fact, while Civil Court only has jurisdiction over

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<sup>1</sup> Plaintiff’s sixth cause of action seems to be a claim for quantum meruit, for the use of materials and rented equipment, as against Avo.

cases for \$25,000 or less, Supreme Court is a court of general jurisdiction, with no minimum. The purpose of CPLR 325(a) is, generally, to *avoid* dismissing cases that properly belong in other courts, not to dismiss such actions altogether. Section 325(d) permits the transfer of cases to Civil Court, but may only be employed in cases where the note of issue has been filed. Thus, it is not applicable here.

The branch of the motion that seeks to dismiss the second amended complaint on the basis that the court does not have jurisdiction over the subject matter, here, that the amount in controversy is somehow below the monetary jurisdiction of the Supreme Court, is denied. There is no basis to transfer the Avo-related portions of this action to Civil Court under 325 (a), which permits the Supreme Court to transfer cases in which a jurisdictional “mistake” as to the choice of courts was made. Defendant identifies no mistake.

CPLR 325 (d) permits nonconsensual transfers from Supreme Court to a lower court provided that the “lower court must independently possess nonmonetary subject matter jurisdiction over the case in controversy in order to properly act upon the transfer” (*Caffrey v North Arrow Abstract & Settlement Servs., Inc.*, 160 AD3d 121, 128-129 [2d Dept 2018]). Avo does not contend that Civil Court would have had original jurisdiction over all of plaintiff’s claims, which included Lien Law Article 3A claims. In any event, it is within this court’s discretion whether to transfer this case under CPLR 325(d), and Avo presents no compelling reason why the policy not to transfer pre-note cases should not apply here.

Accordingly, it is **ORDERED** that Avo Construction LLC’s motion to dismiss the complaint is denied.

A Preliminary Conference Order shall be prepared by the Intake Part and uploaded to NYSCEF so discovery, if needed, may commence.

This shall constitute the decision and order of the court.

Dated: April 6, 2021

ENTER:



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Hon. Debra Silber, J.S.C.