

**Integrated Project Delivery Partners, Inc. v Susan L. Schuman Family Trust**

2021 NY Slip Op 31364(U)

April 23, 2021

Supreme Court, New York County

Docket Number: 160102/2016

Judge: Erika M. Edwards

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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. ERIKA M. EDWARDS**

**PART 11**

*Justice*

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INDEX NO. 160102/2016

INTEGRATED PROJECT DELIVERY PARTNERS, INC.,

MOTION DATE 02/27/2020

Plaintiff,

MOTION SEQ. NO. 003

- v -

SUSAN L. SCHUMAN FAMILY TRUST, ILENE OSHEROW,  
SUSAN SCHUMAN, and "JOHN DOE 1" through "JOHN  
DOE 10," said parties being lienors who have yet to perfect  
their liens and being fictitious and unknown to the Plaintiff,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 76, 77, 79, 80, 81, 82, 83, 84, 85, 88, 89, 90, 91 were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the applicable law, and arguments made during oral argument on April 22, 2021, the court grants in part Defendants' summary judgment motion to the extent that the court grants dismissal of Plaintiff's first cause of action for breach of contract as against Defendant Susan L. Schuman Family Trust, but denies it against the other defendants, grants dismissal of Plaintiff's fourth cause of action for violation of construction trust funds as against all defendants, and denies summary judgment in Defendants' favor on its first and third counterclaims for breach of contract and willful and intentional exaggeration of a mechanics lien.

Plaintiff Integrated Project Delivery Partners, Inc. ("Plaintiff") filed this action against Defendants Susan L. Schuman Family Trust ("Trust"), Ilene Osherow ("Osherow"), Susan Schuman ("Schuman"), and John Doe Defendants 1-10 (collectively "Defendants") alleging damages in the amount of \$48,250.29 for nonpayment of renovation and construction work performed on a condominium unit in which the Trust owns and Defendants Osherow and

Schuman reside. Plaintiff's claims initially included breach of contract, unjust enrichment, foreclosure of a mechanics lien and violation of construction trust funds, but the court previously granted dismissal of Plaintiff's unjust enrichment and lien foreclosure claims. Defendants counter-claimed for breach of contract, unjust enrichment, and willful and intentional exaggeration of the mechanic's lien.

Defendants now move under motion sequence 003 for summary judgment in their favor and for dismissal of Plaintiffs claims for breach of contract and violation of construction trust funds, under the first and fourth causes of action in Plaintiff's complaint and for a judgment in their favor on their counterclaims for breach of contract and exaggeration of the mechanic's lien in Defendants first and third counterclaims. Defendants also seek attorney's fees and costs associated with the motion.

Plaintiff entered into a contract with Defendants Osherow and Schuman on or about June 25, 2014, to perform work on the premises, including plumbing, electrical, carpentry, tile, HVAC, and flooring for a total of over \$909,025, which was subsequently increased to \$974,480.63. Plaintiff claims in substance that it is entitled to payment in full for completion of the work, including the additional work performed to address almost all of the items listed on Defendant Schuman's list of work for which she was dissatisfied. Plaintiff further argues that the only outstanding work on the list would cost \$2000 or less and it could not be completed because they did not have access to the premises. Plaintiff filed a mechanics lien against the condominium unit, but such lien was subsequently vacated by the court.

The parties disagree as to whether Plaintiff is entitled to payment of the outstanding balance and they accuse the other of breaching the contract. Defendants claim in substance that Plaintiffs failed to complete the work in a workman-like manner and performed the work in a

negligent, careless and defective manner. Defendants complained and provided Plaintiff with a punch list of repair work needed. Defendants allege that Plaintiff failed to complete the work so they terminated Plaintiff. Additionally, Defendants' architect refused to certify Plaintiff's application for payment and determined that the work was not substantially completed. Defendants allege that they hired others to complete the work at their own additional expense. Additionally, Defendants allege they incurred unnecessary costs due to Plaintiff's improper mechanics lien and that they are entitled to attorney's fees and costs of this motion.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his

failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

Here, the court finds that Defendants demonstrated their entitlement to judgment as a matter of law in their favor as to Plaintiffs’ fourth cause of action for violation of construction trust funds and for dismissal of Plaintiff’s first cause of action for breach of contract as against Defendant Susan L. Schuman Family Trust and Plaintiff failed to demonstrate the existence of any material issues of fact as to these issues. However, the court denies Defendants’ motion for summary judgment as to Plaintiff’s breach of contract claim against Defendants Osherow and Schuman and as to Defendants counter-claims for breach of contract and willful exaggeration of a mechanics lien, as the court finds that material issues of fact remain preventing summary judgment in Defendants’ favor as to these claims.

The parties raise sufficient factual issues to dispute whether Plaintiff is entitled to the amount claimed pursuant to the terms of the contract, the manner and extent of the work performed, and whether either side breached the terms of the contract. The remaining factual issues in dispute include, but are not necessarily limited to, whether Plaintiff substantially completed the agreed upon work in a professional, workman-like, acceptable manner pursuant to the terms of the contract; whether Plaintiff substantially performed the work on Defendant Schuman’s punch list in a professional, workman-like manner, or whether any work was completed in a defective, negligent or reckless manner; whether Defendants’ architect was

entitled to refuse to certify Plaintiff's final payment request when the previous payment requests were submitted directly to Defendants; and whether the architect actually inspected the work.

As to Plaintiff's first cause of action for breach of contract and Defendants' first counter-claim for breach of contract, the court finds that since Plaintiff's contract was with Defendants Osherow and Schuman and not with the Trust Defendant, the Trust Defendant owed Plaintiff no obligation under the terms of the contract. Therefore, Plaintiff failed to demonstrate a valid breach of contract claim against the Trust Defendant and the court grants dismissal of this claim against the Trust Defendant.

However, the court denies dismissal of Plaintiff's breach of contract claim as against Defendants Osherow and Schuman and denies summary judgment in Defendants' favor as to Defendants first counter-claim for breach of contract as the above-mentioned material issues of fact remain.

As to Plaintiff's fourth cause of action for violation of construction trust funds, the court finds that Plaintiff failed to demonstrate a prima facie case that Defendants obtained financing from a bank or other source to fund this project, that Defendants used the money from Defendant Trust, or that Defendants acted as trustees of funds designated for Plaintiff's benefit, pursuant to Lien Law §§ 70 and 71. Defendants maintain that they used cash from their own sources to pay Plaintiff. Plaintiff claimed that Defendants advised Plaintiff that they obtained financing in connection with the project and Plaintiff noted that Defendants always paid by check and not cash. However, Plaintiff failed to provide any evidence to support its claim that financing was used and such bare assertion does not raise an issue of material fact necessary to defeat dismissal of this claim. Therefore, the court grants summary judgment dismissal of this claim.

As to Defendants' third counter-claim for willful and intentional exaggeration of a mechanics lien, pursuant to lien law §§ 39 and 39-a, the court finds that an issue of fact remains as to whether Plaintiff willfully exaggerated the amount of the lien or whether it calculated it in good faith based upon the balance owed pursuant to the terms of the contract and nature and extent of the work performed. Additionally, as set forth above, the court finds that questions of fact remain as to whether Plaintiff breached the contract and whether Defendants owe Plaintiff money pursuant to the contract.

Additionally, the court determines that Defendants failed to demonstrate their entitlement to attorney's fees and costs related to this motion.

Therefore, the court grants in part Defendants' summary judgment motion to the extent that the court grants dismissal of Plaintiff's first cause of action for breach of contract as against Defendant Susan L. Schuman Family Trust, but denies it against the other defendants, grants dismissal of Plaintiff's fourth cause of action for violation of construction trust funds as against all defendants, and denies summary judgment in Defendants' favor on its first and third counterclaims for breach of contract and willful and intentional exaggeration of a mechanics lien.

As such, it is hereby

ORDERED that the motion for summary judgment of Defendants Susan L. Schuman Family Trust, Ilene Osherow, Susan Schuman, and John Doe Defendants 1-10 is granted in part to the extent that the court grants dismissal of Plaintiff Integrated Project Delivery Partners, Inc.'s first cause of action for breach of contract as against Defendant Susan L. Schuman Family Trust, but denies it against the other defendants, and it is further

ORDERED that the court grants dismissal of Plaintiff's fourth cause of action for violation of construction trust funds as against all defendants, and it is further


ORDERED that the court denies summary judgment in Defendants' favor on its first and third counterclaims for breach of contract and willful exaggeration of a mechanics lien; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of Defendant Susan L. Schuman Family Trust as to Plaintiff's first cause of action for breach of contract and in favor of all defendants as to Plaintiff's fourth cause of action for violation of construction trust funds; and it is further

ORDERED that Plaintiff's first cause of action regarding breach of contract claim against the remaining defendants and Defendants counter-claims against Plaintiff are severed and the balance of the action shall continue; and it is further

ORDERED that the parties must appear for a settlement conference before this court on June 29, 2021, at 11:30 a.m., via Microsoft Teams (link will be provided).

4/23/2021  
DATE

  
ERIKA M. EDWARDS, J.S.C.  
**HON. ERIKA M. EDWARDS**  
**J.S.C.**

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: