

**Hudson Meridian Constr. v Bayport Constr. Corp.**

2021 NY Slip Op 31644(U)

May 13, 2021

Supreme Court, New York County

Docket Number: 654901/2018

Judge: Melissa A. Crane

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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. MELISSA ANNE CRANE PART IAS MOTION 15EFM

Justice

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INDEX NO. 654901/2018

HUDSON MERIDIAN CONSTRUCTION

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 003

- v -

BAYPORT CONSTRUCTION CORP.

DECISION + ORDER ON MOTION

Defendant.

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BAYPORT CONSTRUCTION CORP., SENATOR CONSTRUCTION GROUP INC.

Third-Party Index No. 595882/2018

Plaintiff,

-against-

63RD AND 3RD NYC LLC, LIBERTY MUTUAL INSURANCE COMPANY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 151, 155, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237

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

Upon the foregoing documents, it is

On October 3, 2018, Hudson commenced this action against Subcontractors asserting individuals breach of contract claims against the Subcontractors, seeking damages in the amount of \$1,000,000 against Senator, and \$500,000 against Bayport. Hudson alleged that the Subcontractors breached the Subcontract by: (i) failing to perform work within the scope of the

Subcontract, (ii) failing to progress work in a timely fashion, (iii) wrongfully walking off the job, and (iv) failing to pay suppliers and vendors adequately and in a timely manner.

On October 12, 2018, Subcontractors filed their answer asserting four counterclaims against Hudson, alleging that: (i) Hudson's failure to make timely payments to both Senator and Bayport breached the Subcontract, (ii) Hudson improperly converted Subcontractors' hoists and landing platforms, and sidewalk sheds (the "Equipment"), and (iii) Hudson took improper possession of the Equipment.

On November 1, 2018, Subcontractors filed the third-party complaint asserting two claims for foreclosure of the Liens.

### DISCUSSION

As a preliminary matter, the parties agreed during oral argument that the Subcontractors' claims of payment arising from unpaid requisitions are limited to requisitions 7, 8, and 9 only (the "Requisitions") (November 19, 2020 Transcript, 12:22-13:6 [NYSCEF Doc. No. 237] [the "Transcript"]; Subcontractor's Aff., Exs. L, M, N [NYSCEF Doc. Nos. 173-175]). Subcontractors further agreed to waive any claims arising from an unsigned change order (Transcript, 5:19-6:7; Hudson Aff., Ex. E [NYSCEF Doc. No. 129]).<sup>1</sup>

Hudson seeks summary judgment dismissing Senator's first counterclaim for breach of contract and first third-party claim for discharge of the Senator Lien. Hudson further seeks a reduction of Bayport's second counterclaim for breach of contract and second third-party claim for partial discharge of the Bayport Lien on the basis that the Subcontractors signed releases and waivers that bar their claims (the "Releases").

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<sup>1</sup> Subcontractors contend that they are owed payment on two change orders that were signed and acknowledged by Hudson however those change orders are not included with the papers for this motion.

Hudson argues the Releases provide that no outstanding payments are due, Subcontractors have been paid in full for all work completed to date, and Subcontractors waive any claims for payment against Hudson as of the execution date (Hudson Aff., Ex. D [NYSCEF Doc. No. 128]). Subcontractors contend the Releases should be construed as receipts because Hudson conditioned payments on their execution. Further, the record establishes Hudson routinely made payments to Subcontractors after they executed a Release (Subcontractors' Aff., Ex. C [NYSCEF Doc. No. 164]).

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 evidence to demonstrate the absence of any material issues of fact” (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015][internal quotation marks and citation omitted]).

“Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*).

A “[p]laintiff may not avoid enforcement of such release by arguing, in a conclusory manner, that he signed the document because it represented his only means of assuring his receipt of compensation for past services...” (*Collins v E-Magine*, 291 AD2d 350, 351 [1st Dept 2002]). However, “[w]here a waiver form purports to acknowledge that no further payments are owed, but the parties’ conduct indicates otherwise, the instrument will not be construed as a release” (*West End Interiors v Aim Constr. & Contr. Corp.*, 286 AD2d 250, 252 [1st Dept

2001)). “[T]he intent to waive a right must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act” (*id.* [internal quotation marks and citation omitted]).

The Releases are receipts and do not act as a bar to Subcontractors’ claims. Vytas Sipas, Vice President of Hudson, admits in his reply affidavit that Hudson would withhold payments to the Subcontractors until execution of the Releases. (Sipas Reply Aff., ¶¶ 65-67 [NYSCEF Doc. No. 203]; Transcript, 4:24-26). Consequently, summary judgment is denied with respect to Requisitions 7 and 8. Sipas testifies in his affidavit that Hudson withheld payments due to the Subcontractors’ breaches, raising a triable issue of fact as to whether payments were properly withheld under the Subcontract (Sipas Reply Aff., ¶¶ 7, 70-71). By contrast, the court dismisses any claim related to Requisition 9 as Hudson did not sign that Requisition (Subcontractor’s Aff., Ex. O [NYSCEF Doc. No. 176]). Further, claims arising from Requisitions 1 through 6, and 9, and any claims related to unsigned change orders are dismissed. To the extent that either Lien relies on these claims, their amounts are reduced.

Triable issues of fact relating to the back charges, rental fees, and delay damages preclude Subcontractors’ cross-motion seeking summary judgment on counterclaims and dismissal of Hudson’s Complaint. Although the Subcontract provides that the Subcontractors are entitled to payment after termination should the outstanding balance owed exceed the cost of completing work due under the Subcontract, no evidence suggests this is the case (Article 23.6 [NYSCEF Doc. No. 162]). Hudson submits evidence in the form of back charge summaries that are sufficient to raise a triable issue as to whether the cost to complete the work due under the Subcontract greatly exceeds the amounts the Subcontractors are allegedly owed (Back Charge Summaries [NYSCEF Doc. Nos. 212, 213]). Further, Hudson submits inspection reports

demonstrating it had to remediate certain work the Subcontractors performed, increasing the cost of work due under the Subcontract (Inspection Reports [NYSCEF Doc. Nos. 205, 208]).

The evidentiary record is similarly inconclusive with respect to Hudson's claims for delay damages. Hudson fails to submit evidence that establishes costs of the delays attributable to Subcontractors, or provide a rational basis for measuring the impact of such delays (*Manshul Const. Corp. v Dormitory Auth. of State of N.Y.*, 79 AD2d 383, 387 [1st Dept 1981] ["When claims are made for damages for delay, plaintiff must show that defendant was responsible for the delay; that these delays caused delay in completion of the contract (eliminating overlapping or duplication of delays); that the plaintiff suffered damages as a result of these delays; and plaintiff must furnish some rational basis for the court to estimate those damages, although obviously a precise measure is neither possible nor required"]).

Sipas testified that there were numerous delays and contends that his calculations rely solely on delays attributable to Senator or Bayport. However, the documents he provides do not clearly demonstrate this (Delay Charges [NYSCEF Doc. Nos. 227-229]). In opposition, Subcontractors submit evidence of other delays, excluded from the Delay Charges, involving various violations and a stop work order that Subcontractors argue contributed to the purported delay damages (NYSCEF Doc. Nos. 188-192).

Hudson fails to raise a triable issue of fact with respect to ownership of the Hoists as it has not submitted any evidence to establish that Subcontractors do not own the Hoists. Hudson contends that Rock Group NY Corp. ("Rock"), as successor to Subcontractors, acquired the Hoists as required under Rock's subcontract, but fails to submit any payment record demonstrating Rock acquired the Hoists (Subcontractor's Aff., Ex. Q, Ex. B [NYSCEF Doc. No. 178] ["Rock Subcontract"]). Further, Hudson does not demonstrate that Subcontractors are not

the owners of the Hoists beyond asserting conclusory allegations that UCEL may be the actual owner, despite conceding that UCEL has submitted an affidavit stating that it has no title to the Hoists. Therefore, it is Senator that owns the Hoists.

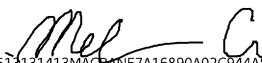
Lastly, a triable issue exists with respect to the rental payments due for Hudson’s continued usage of the Hoists, a term not included in the Subcontract. Subcontractors submit an unsigned proposal that purportedly identifies the rental costs, however Hudson denies that it agreed to those amounts (Hoist Proposal [NYSCEF Doc. No. 163]). Hudson further raises a triable issue as to its entitlement to any reduction in rental fees resulting from the Subcontractors inability to perform the included “routine inspection and maintenance” services in the Hoist Proposal following their termination from the Project (*id.* at 1-2).

Accordingly it is,

ORDERED that Hudson and Liberty’s motion for partial summary judgment is granted in part, to the extent that: (i) all requisition claims except for Requisition 7 and 8 and all claims related to any unsigned change orders are dismissed, and (ii) the Senator and Bayport liens are reduced to the extent they include requisition claims except for Requisition 7 and 8 and all claims related to any unsigned change orders; and denied in all other respects, and it is further

ORDERED that defendants’ cross motion for summary judgment is partially granted as to its fourth counterclaim for recovery of the Hoists to Senator; and it is further

ADJUDGED, DECREED AND DECLARED that Senator is the owner of the Hoists.

  
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5/13/2021

DATE

MELISSA ANNE CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE