

Fidelis Contr., Inc. v BG Natl. Plumbing & Heating, Inc.

2021 NY Slip Op 33155(U)

December 15, 2021

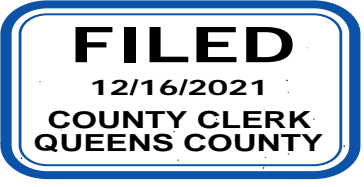
Supreme Court, Queens County

Docket Number: Index No. 718390/19

Judge: Carmen R. Velasquez

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.



SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

FIDELIS CONTRACTING, INC.,

Index No. 718390/19

Plaintiff,

Motion

Date: August 9, 2021

-against-

M# 1

BG NATIONAL PLUMBING & HEATING, INC.
ET AL.,

Defendants.

The following papers numbered EF 11-40 read on this Order to Show Cause by the defendant BG National Plumbing & Heating, Inc. for an order authorizing it to continue to maintain and use the scaffolding, netting and sidewalk shedding installed by the plaintiff for a NYC School Construction contract at PS 31Q in BAYSIDE, Queens, and enjoining the plaintiff from interfering with the defendant BG National's maintenance and use of the scaffolding until the project is complete and it is safe to remove the scaffold.

PAPERS NUMBERED

Table with 2 columns: Document Description and Page Range. Includes Order to Show Cause - Affidavits - Exhibits... (EF 11-23), Affirmation in Opposition - Exhibits (EF 25-39), and Replying Affirmation (EF 40).

Upon the foregoing papers, it is ordered that this Order to Show Cause by BG National Plumbing & Heating, Inc. the is decided as follows:

Defendant BG National Plumbing & Heating, Inc. ("BGN") is the general contractor on a New York City School Construction project known as PS 31Q Boiler Conversion/Parapets/Roofs/Exterior Masonry. PS 31Q is an elementary school located in Bayside, Queens. Plaintiff is the subcontractor on the project pursuant to an agreement dated June 29, 2017. The work herein involved removal and restoration of the parts of the roof, parapets and exterior masonry. Under the terms of the subcontract, plaintiff agreed to

furnish and install scaffolding and sidewalk shedding at the school. Defendant agreed to make rental payments for the use of plaintiff's equipment at the work site. Due to the nature of the work, the entire school building is covered in scaffolding, netting and the sidewalks surrounding the building are protected by shedding.

By letter dated May 2, 2019, BGN advised plaintiff that it intended to terminate the subcontract pursuant to Article 11(a) of the subcontract if plaintiff did not complete the required work within five days. Subsequently, by letter dated May 13, 2019, BGN terminated the subcontract pursuant to Article 10(a) of the subcontract. The letter further advised that "the scaffolding shall remain on the jobsite until BG National notifies Fidelis in writing that it may be removed."

Plaintiff commenced the instant action alleging that defendant BGN is in arrears in the required rental payments for the equipment. The complaint alleges causes of action for, *inter alia*, breach of contract and conversion.

Defendant now brings the instant Order to Show Cause to enjoin the plaintiff from interfering with the maintenance and use of the scaffolding at the school. Defendant contends that the removal of the scaffolding, which plaintiff seeks, would endanger the life and safety of the employees and students at the school. Defendant also explains that the scaffolding cannot easily be removed or replaced. Plaintiff argues, in opposition, that the subcontract it signed did not contain either an Article 10 or 11, which defendant relied on in terminating the subcontract. Plaintiff also states that the subcontract it received from the School Construction Authority pursuant to a FOIL request, which did contain missing pages, was not the contract it signed. Plaintiff further states that BGN's current use and possession of the equipment is without contractual authorization.

The decision to grant a preliminary injunction is a matter ordinarily committed to sound discretion of the court hearing the motion. (*Dixon v Malouf*, 61 AD3d 630, 630 [2d Dept 2009]; *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1072, 1073 [2d Dept 2008].) In order to demonstrate entitlement to a preliminary injunction, the movant must establish (1) a probability of success on the merits, (2) the danger of irreparable injury in the absence of injunctive relief and (3) a balancing of the equities in favor of the movant. (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Mangar v Deosaran*, 121 AD3d 650, 650 [2d Dept 2014].) The purpose

of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. (*1650 Realty Assocs., LLC v Golden Touch Mgt., Inc.*, 101 AD3d 1016, 1018 [2d Dept 2012]; *Ying Fung Moy v Hoho Umeki*, 10 AD3d 604, 604 [2d Dept 2004].) This is true even in situations where a factual dispute exists. (*Melvin v Union Coll.*, 195 AD2d 447, 448 [2d Dept 1993].)

In the case at bar, the movant has established its right to a preliminary injunction. The movant will suffer irreparable harm in the absence of an injunction. The scaffolding at issue is integrated throughout the school building, and it is unclear whether such removal could be done safely or what implications the removal of the scaffolding would have with respect to the safety of others. Were this scaffolding to be removed, members of the school, as well as the public, who use the surrounding sidewalks, may be exposed to falling debris and other hazards.

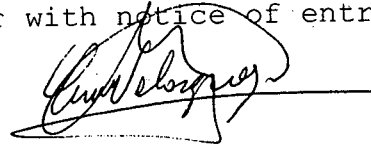
In addition, regardless of whether paragraphs 10 or 11 of the subcontract are applicable in this case, under paragraph 18 of the subcontract, "whenever it may be useful or necessary for BG National to do so, BG National shall be permitted to occupy and/or use any portion of the Work which has been either partially or fully completed by the Subcontractor before final and section acceptance thereof by Owner..." Therefore, there is a likelihood of success on the merits by the defendant. Finally, plaintiff's claim for payment is secured by a payment bond from Berkeley Insurance Company, and thus, balancing of the equities favors the granting of an injunction.

Accordingly, this Order to Show Cause by the defendant BG National Plumbing & Heating, Inc. is granted, and it is

ORDERED, that defendant BG National Plumbing & Heating, Inc. is authorized to continue to maintain and use the scaffolding, netting and sidewalk shedding installed by the plaintiff for the NYC School Construction Contract No. C14564 pursuant to the subcontract between the plaintiff and the defendant BG National Plumbing & Heating, Inc. at PS 31Q, located at 211-45 46th Road, Bayside, N.Y., and it is further

ORDERED, that plaintiff is enjoined from interfering with defendant BG National Plumbing & Heating, Inc.'s maintenance and use of the scaffolding during the pendency of this case, and it is further

ORDERED, that the foregoing is conditioned upon the filing of an undertaking in accordance with CPLR 6312 in the amount of \$360,000.00 in the Office of the Clerk of the County of Queens, together with a copy of this order with notice of entry.



Dated: December 15, 2021

CARMEN R. VELASQUEZ, J.S.C.

