

AKSH Quality Contr. Corp. v Pizzaroti IBC, LLC

2022 NY Slip Op 30631(U)

March 2, 2022

Supreme Court, New York County

Docket Number: Index No. 450915/2018

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR

Justice

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INDEX NO. 450915/2018

AKSH QUALITY CONTRACTING CORP.,

MOTION DATE 02/04/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

PIZZAROTI IBC, LLC,PIZZAROTI, LLC,FIDELITY AND
DEPOSIT COMPANY OF MARYLAND, ZURICH
AMERICAN INSURANCE COMPANY

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

This action centers on a dispute between a contractor and subcontractor about monies alleged due by each party to the other after the subcontract was terminated.

On or about October 31, 2016, defendant Pizzarotti LLC (Pizzarotti) entered into a written agreement with non-party RXR North Hills Phase II Owner LLC to perform construction management services for the construction of the project. On or about November 9, 2016, Pizzarotti entered into three written subcontract agreements with AKSH Quality Contracting Corp. ("AKSH") whereby AKSH agreed to perform the roofing, EIFS, and masonry scopes of work required at the project in exchange for the lump sum prices of \$2,450,000, \$1,850,000, and \$4,000,000 respectively, and in accordance with the terms and conditions of the agreements (the "Subcontracts").

There were disputes among the parties and Pizzarotti terminated the Subcontracts by formal notices issued to AKSH on May 3, 2017.

At the time of AKSH's termination, AKSH performed work only under the Masonry Subcontract, and Pizzarotti requested AKSH to provide a final accounting breakdown for the work performed so that Pizzarotti and AKSH could have a final close-out meeting to negotiate the final payment to be released to AKSH considering the actual work performed and the recent termination.

A meeting was held between the parties on June 23, 2017. The parties disagree as to what each one is owed as a result of said meeting and subsequent work defendants allege they had to pay other sub-contractors for.

Pizzarotti acknowledges that by its own accounting an additional \$65,850.00 is due to plaintiff. However, Pizzaroti claims that it is withholding said sum to recover from “replacement costs incurred” following the termination of AKSH.

AKSH asserts that \$124,439.82 was the amount remaining to be paid by Pizzaroti, that said sum was never paid and that Pizzaroti is not entitled to any “replacement costs” incurred after termination of the Subcontracts.

DISCUSSION

It is well settled that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material issue of fact. *Black v. Kohl's Dept. Stores, Inc.*, 80 A.D.3d 958 (3rd Dept. 2011); *Benizii v. Bank of Hudson*, 50 A.D.3d 1372 (2008). Considering the drastic nature of the remedy, the party moving for summary judgment must establish *prima facie* entitlement to judgment as a matter of law. *Jacobsen v. New York City Health and Hospitals Corp.*, 22 N.Y.3d 824 (2014); *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728

(2014). “This 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* at 833.

The non-moving party must be accorded the benefit of every reasonable inference from the record proof. *Winne v. Town of Duanesburg*, 86 A.D.3d 779 (2011). It is not the Court’s role to determine issues of fact or credibility, but merely to determine whether such issues exist. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499 (2012); *Green v. Quincy Amusements, Inc.*, 108 A.D.3d 591 (2013); *Pearson v. Dix McBride, LLC*, 63 A.D.3d 895 (2009). If the proponent of summary judgment fails to make a *prima facie* showing of entitlement to judgment as a matter of law, then the court must deny the motion, regardless of the sufficiency of the opposition set forth by the opponent of the motion. *Voss, supra*; *Smalls v. AJI Industries, Inc.*, 10 N.Y.3d 733 (2008). The proponent of a motion for summary judgment cannot rely merely on conclusory, unsubstantiated assertions. *Longtemps v. Oliva*, 110 A.D.3d 1316 (2013). It is likewise insufficient for the proponent of summary judgment to merely point to gaps in the defendant’s proof. *DiBartolomeo v. St. Peter’s Hosp. of City of Albany*, 73 A.D.3d 1326 (2010); *Rachlin v. Michaels Arts & Crafts*, 118 A.D.3d 1391 (2014). A motion for summary judgment should not be granted if there is uncertainty as to the existence of triable issues of fact when viewing the evidence in the light most favorable to the party opposing the motion. *Flower v. Noonan*, 271 A.D.2d 825 (2000).

In this action defendants have fallen far short of meeting their burden of establishing judgment as a matter of law.

There are material questions of fact to be determined at trial including the amount due to plaintiff based on the parties final accounting and reconciliation and whether there is any basis for Pizzaroti to collect on its counterclaims.

The record is insufficient to grant either party judgment as a matter of law on these issues.

Based on the foregoing, the motion is denied in its entirety.

Wherefore it is hereby:

ORDERED that defendant Pizzaroti LLC’s motion for summary judgment is denied; and it is further

ORDERED that, within 20 days from entry of this order, Pizzaroti, LLC shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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3/2/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: