

**Fitzcon Constr./Ren Corp. v 5531 - 321 E. 22nd St.
Manhattan LLC**

2022 NY Slip Op 30837(U)

March 10, 2022

Supreme Court, New York County

Docket Number: Index No. 651631/2021

Judge: Joel M. Cohen

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.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

-----X

FITZCON CONSTRUCTION/REN CORP.,

Plaintiff,

- v -

5531 - 321 EAST 22ND STREET MANHATTAN LLC, A &
 V STEEL, LLC, AVINASH JAMNAPRASAD, VISHAL
 JAMNAPRASAD, PRIME MIX CORP, CASA REDIMIX
 CONCRETE CORP., NEW YORK CITY LAND
 SURVEYOR P.C., NEW YORK STATE DEPARTMENT OF
 TAXATION AND FINANCE, NEW YORK CITY
 DEPARTMENT OF FINANCE, JOHN DOES 1- 100

Defendants.

-----X

INDEX NO. 651631/2021

MOTION DATE 11/29/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
 MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45

were read on this motion to

DISMISS CROSS-CLAIMS

On this motion, Defendant A & V Steel, LLC (“AV Steel”) seeks to dismiss the cross-claims asserted by Defendant 5531-321 East 22nd Street Manhattan, LLC (“Manhattan”) pursuant to CPLR 3211 [a] [4], on the ground that Manhattan’s cross-claims are identical to Manhattan’s *counter*claims against AV Steel in another, earlier-filed action. For the following reasons, the motion is granted.

On March 9, 2021, AV Steel initiated an action against Manhattan and others in Supreme Court, Queens County (the “AV Steel Action”) (*see* NYSCEF 19 in this action [compl. in Index No. 705460/2021]). In that action, AV Steel seeks, among other things, to foreclose a lien against Manhattan and others based on work it allegedly performed on a construction project at 321 East 22nd Street, New York, NY (the “Project”) (*id.* ¶ 16). Two days later, on March 11,

FitzCon initiated this action against Manhattan, AV Steel, and a number of other entities (the “FitzCon Action”), in which FitzCon seeks to foreclose a lien against Manhattan based on work *it* allegedly performed on the same Project (NYSCEF 2 ¶¶ 39-50).

Then on May 14, Manhattan filed an Answer with Counterclaims in the AV Steel Action, asserting three counterclaims against AV Steel (NYSCEF 20). Manhattan’s counterclaims all stem from a written contract Manhattan entered into with AV Steel, under which AV Steel agreed to provide certain construction services for the Project (*id.* ¶ 7). Manhattan alleges that AV Steel (1) breached the contract by failing to perform prescribed work on the Project, (2) intentionally filed false mechanic’s liens, and (3) was obligated to “defend, indemnify, and hold Defendants harmless from any liability and/or damages/costs resulting from the FitzCon Action” (*id.* ¶ 36).

A couple of weeks later, on May 26, Manhattan filed an Answer in this action – the FitzCon Action – containing three cross-claims against AV Steel that duplicate its three previously-filed counterclaims (NYSCEF 22).

Manhattan’s First Counterclaim (AV Steel Action)	Manhattan’s First Cross-Claim (FitzCon Action)
Breach of Contract	Breach of Contract
“Manhattan LLC and AV entered into the Agreement for AV to perform labor and materials and other construction related services for structural steel, masonry and cold formed steel joist work in accordance with applicable laws, statutes, ordinance, codes, rules and regulations” (NYSCEF 20 ¶ 17).	“Manhattan LLC and AV entered into the Agreement for AV to perform labor and materials and other construction related services for structural steel, masonry and cold formed steel joist work in accordance with applicable laws, statutes, ordinance, codes, rules and regulations” (NYSCEF 22 ¶ 22).
“AV breached the Agreement by, among other things, failing to perform its work in accordance with Agreement, applicable laws, statutes, ordinances, codes, rules and regulations” (<i>id.</i> ¶ 21).	“AV breached the Agreement by, among other things, failing to perform its work in accordance with Agreement, applicable laws, statutes, ordinances, codes, rules and regulations” (<i>id.</i> ¶ 26).

“As a direct and proximate result of AV’s various breaches, Defendants have been damaged in an amount to be proven at trial, but believed not to be less than five hundred thousand (\$500,000.00) dollars” (<i>id.</i> ¶ 23).	“As a direct and proximate result of AV’s various breaches, Defendants have been damaged in an amount to be proven at trial, but believed not to be less than five hundred thousand (\$500,000.00) dollars” (<i>id.</i> ¶ 28).
---	---

Manhattan’s Second Counterclaim (AV Steel Action)	Manhattan’s Second Cross-Claim (FitzCon Action)
Wrongfully Filed/Willfully Exaggerated Mechanics Liens	Wrongfully Filed/Willfully Exaggerated Mechanics Liens
“AV willfully and intentionally filed two (2) false mechanics liens for the Project claiming payment for work AV did not complete and for unjustified amounts (<i>id.</i> ¶ 26). AV filed the false mechanics liens with the intent to encumber the Project and exact from Defendants’ money to which AV was not and is not entitled (<i>id.</i> ¶ 27). The wrongfully filed and/or willfully exaggerated mechanics liens delayed construction and lessened the value of the Project” (<i>id.</i> ¶ 28).	“AV willfully and intentionally filed a false mechanics lien for the Project claiming payment for work AV did not complete and for unjustified amounts (<i>id.</i> ¶ 31). AV filed the false mechanics lien with the intent to encumber the Project and exact from Defendant’s [sic] money to which AV is not and is not [sic] entitled (<i>id.</i> ¶ 32). The wrongfully filed and/or willfully exaggerated mechanics liens delayed construction and lessened the value of the Project” (<i>id.</i> ¶ 33).

Manhattan’s Third Counterclaim (AV Steel Action)	Manhattan’s Third Cross-Claim (FitzCon Action)
Declaratory Relief, Indemnification, and Contribution	Declaratory Relief, Indemnification, and Contribution
“AV has failed to indemnify, defend and hold Defendants harmless in the Fitzcon Action” (<i>id.</i> ¶ 41).	“AV has failed to indemnify, defend and hold Defendant harmless in the Fitzcon Action” (<i>id.</i> ¶ 46).

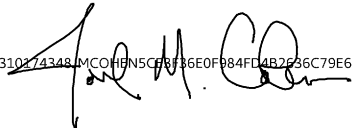
Under CPLR 3211 [a] [4], dismissal is appropriate where “there [is] another action pending between these parties involving the same causes of action” (*Chang v Zapson*, 67 AD3d 435, 435 [1st Dept 2009], citing CPLR 3211 [a] [4]; *GSL Enterprises, Inc. v Citibank, N.A.*, 155 AD2d 247 [1st Dept 1989] [“The instant complaint was properly dismissed because a pending action existed between the same parties for essentially the same relief and involving the same

actionable wrong”] [internal citation omitted]). That is clearly the case here. The AV Steel Action, which was filed first, appears to provide Manhattan a forum to obtain precisely the same relief it seeks here. Manhattan does not dispute that the cross-claims and counterclaims implicate the same parties, the same contracts, and the same Project. To be sure, there are differences between the two Actions as a whole – for example, FitzCon, a sub-subcontractor on the Project, is not involved in the AV Steel Action. But the differences do not alter the essential identity between Manhattan’s cross-claims and counterclaims against AV Steel.¹ Nor does Manhattan articulate, in its opposition, any reason why it cannot obtain full, complete relief against AV Steel solely through the AV Steel Action.

Therefore, it is

ORDERED that the motion is GRANTED and Manhattan’s cross-claims against AV Steel are dismissed.

This constitutes the Decision and Order of the Court.

<p><u>3/10/2022</u> DATE</p>	 <small>20220310274348 JMC0HN5CER736E0F84FD4B2F36C79E63FC190</small> <hr/> JOEL M. COHEN, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE

¹ Manhattan argues that the two sets of claims “are not duplicative,” but suggests that a different result might be reached “if the actions are . . . consolidated” (NYSCEF 40 ¶ 17). This only underscores why dismissal here is proper. If the two sets of claims sought distinct relief, presumably they would survive consolidation. But if the only difference between them is the forum in which they were brought, then dismissing the counterclaims in favor of the earlier-filed cross-claims is appropriate under CPLR 3211 [a] [4].