

**Quest Bldrs. Group, Inc. v 125th & Lenox Owner
LLC**

2022 NY Slip Op 31012(U)

March 28, 2022

Supreme Court, New York County

Docket Number: Index No. 153278/2017

Judge: Margaret Chan

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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. MARGARET CHAN PART 49M

Justice

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QUEST BUILDERS GROUP, INC.,	INDEX NO. <u>153278/2017</u>
Plaintiff,	MOTION DATE <u>09/28/2021</u>
- v -	MOTION SEQ. NO. <u>002</u>

125TH & LENOX OWNER LLC, KSK CONSTRUCTION
GROUP, LLC, RELIABLE ELECTRIC OF NYC, INC.,
ROBERT CURRIE,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for

JUDGMENT - SUMMARY

In this action to recover for allegedly unpaid work on a construction project, plaintiff Quest Builders Group (Quest) moves for an order granting summary judgment on its complaint. Defendant KSK Construction Group, LLC (KSK) opposes the motion.

Quest was the trade contractor on a project (the Project) involving construction of a Burlington Coat Factory store at 100 West 125th Street, New York, New York (the Premises) owned by defendant 125th & Lenox Owner, LLC (the Owner). KSK, which was the Construction Manager on the Project, entered into a contract with Quest dated November 17, 2015, for the provision of trade contracting services (Services) for which KSK agreed to pay Quest \$ 3,300,000 (NYSCEF # 47-KSK Contract). Defendant Reliable Electric, NYC (Reliable), was an electrical subcontractor on the Project, and defendant Robert Currie was Reliable's officer/shareholder (the Reliable defendants).

The complaint asserts claims against KSK for breach of contract, an account stated, and unjust enrichment, based on allegations that KSK failed to pay Quest for three approved changes totaling \$29,069.93 (NYSCEF # 1-Complaint, ¶¶ 45-60). The complaint also asserts a claim to foreclose on a mechanics lien in the amount of \$29,069.93 (*id.*, ¶¶ 32-44), and a claim for \$10,613.93 against the Reliable defendants for diversion of trust assets on the allegation that Reliable failed to pay the subcontractors even though Reliable was fully paid for its work (*id.*, ¶¶ 61-70; and Wherefore Clause [e]).

The Reliable defendants did not answer or otherwise respond to the complaint, and Quest moved for a default judgment against these defendants, which did not oppose the motion (NYSCEF #s 8-17). However, the motion was denied by Decision and Order of Justice Barbara Jaffe dated September 11, 2018, on the ground that the subject claim was “alleged solely upon information and belief” (NYSCEF # 18).

Following the completion of discovery and the filing of the note of issue, Quest made this motion for summary judgment on the complaint. In support of the summary judgment motion, Quest submits the KCR Contract, Change Order Nos. 57, 59, and 60 totaling \$29,069.63, and Applications and Certifications for Payment requesting payment for the change orders which also show that Quest provided KSK a credit of \$48,061.34 for KSK’s direct payment to Reliable (NYSCEF #s 48-51). Quest also submits the deposition transcript of KSK’s Senior Project Manager, Mehmet Ayverdi, and the affidavit of Quest’s President, Patrick Fitzpatrick, averring to the amounts and KSK’s approvals of the three change orders (NYSCEF #42-Fitzpatrick Aff., ¶¶ 9-11).

“The proponent of a motion for summary judgment must establish that there are no material issues of fact in dispute and that it is entitled to summary judgment as a matter of law” (*Mazurke v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). Once a movant makes such a showing, the burden shifts to the opposing party to produce evidentiary proof sufficient to raise an issue of fact (*CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]).

At the outset, the court notes that while Quest’s notice of motion seeks summary judgment on the complaint and against the Reliable defendants, the evidence submitted on summary judgment is insufficient to make a prima facie showing as to these claims except with respect to the breach of contract claim against KSK. The elements of a breach of contract claim are: (1) formation of a contract between the parties; (2) performance by one party; (3) failure to perform by the other party; and (4) resulting damage (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Here, Quest has met its burden of proffering evidence showing that it entered into the KSK Contract, performed its obligations under the contract, and that the contract was breached when Quest was not paid in full for the work and materials furnished (*Nevco Contracting Inc v R.P. Brennan General Contractors & Builders, Inc.*, 139 AD3d 515, 515 [1st Dept 2016])[plaintiff subcontractor made prima facie showing of the existence of the parties’ agreement, its performance thereunder, and defendant general contractor’s failure to perform, resulting in harm to plaintiff]; *Deere & Co. v M.P. Jones Cos., Inc.*, 93 AD3d 1208 [4th Dept 2012] [plaintiff met its initial burden on summary judgment on its breach of contract claim by submitting contract and evidence establishing the defendants

failed to make payments as required under its terms)). The burden thus shifts to KSK to controvert this showing and raise a triable issue of fact (*CitiFinancial Co [DE] v McKinney*, 27 AD3d at 226).

In opposition, KSK argues that as the “disclosed agent” of the Owner, it was not responsible for paying Quest for the Services performed under the KSK Contract. This argument is unavailing for the following reasons: that (i) the KSK Contract states that it is “hereby made by and between KSK... and Quest” (NYSCEF # 47, at 2), which KSK ignores; (ii) section 10, titled “Compensation,” provides that “Construction Manager [KSK] shall pay Trade Contractor [Quest] the Contract Price upon such terms and conditions that are set forth in the contract between the Owner and [KSK]” (*id.*, § 10); (iii) the KSK Contract was signed by its Senior Project Manager, Mehmet Ayverdi; and (iv) the dispute resolution clause in section 18 is between KSK and Quest (*id.*, §18).


KSK points out that under section 3 of the KSK Contract titled “Duties to Owner,” Quest agreed to “be bound by the terms and conditions” of a separate contract between the Owner and KSK. However, section 3 is not to the contrary because the clear intent of section 3 is to eliminate KSK’s potential liability to Quest for the Owner’s obligations under that separate contract. In this connection, while it is well settled that when an agent, such as KSK, enters a contract on behalf of a disclosed principal, such as the Owner, it cannot be held liable under the contract (*Landmark Ventures, Inc. v InSightec, Ltd.*, 179 AD3d 493, 495 [1st Dept 2020]). But that rule has no application here since the KSK Contract is between KSK and Quest.

That said, however, for the reasons below, summary judgment is not warranted in Quest’s favor since although KSK does not deny that Quest performed its obligations under the KSK Contract, its opposition raises factual questions as to whether Quest has been fully paid. In particular, KSK submits the affidavit of its Senior Project Manager, Ayverdi, who states that the documents submitted by Quest in support of the three change orders at issue were not sent to KSK but to JBS Project Management, which was not KSK’s authorized agent, and that the record is devoid of documentary evidence that KSK provided written approval of the subject change orders (NYSCEF # 56-Ayverdi Aff., ¶¶ 8-10). In addition, Ayverdi states that as a result of Quest’s failure to pay Reliable, KSK was required to pay it \$60,092.10 and not just the \$48,061.34 sum that Quest had agreed to, and, in support, KSK submits a copy of the check from KSK to Reliable in the amount of \$60,092.10, and a lien release signed by Quest agreeing to hold KSK and the Owner harmless for, *inter alia*, any liens or claims by a subcontractor such as Reliable (*id.*, ¶¶ 11-13; NYSCEF #’s 57-58). Ayverdi adds that taking into account the \$60,092.10 payment to Reliable, KSK overpaid Quest \$31,022.42 (NYSCEF # 57, ¶¶ 17, 18).

In reply, Quest points out that the assertions of overpayment fail to take into account the \$48,061.34 credit that Quest gave to KSK for payment of Reliable. Quest also notes that Ayverdi was copied on the approval email relating to change order 59, and cites Ayverdi's deposition testimony that Quest had not been paid the \$29,069.93 for the three change orders (NYSCEF # 46-Ayverdi Dep. at 53-54). That said, however, Ayverdi also testified the amount could not be paid to Quest because of "the lien issue" (*id.*, at 53). Because the evidence submitted by KSK in opposition is sufficient to raise an issue of material fact as to whether Quest has been fully paid under the KCR Contract, plaintiff's motion for summary judgment must be denied (*L & L Painting Co., Inc. v Odyssey Contracting Corp.*, 140 AD3d 519, 520 [1st Dept 2016][affirming trial court's denial of summary judgment on subcontractor's breach of contract claim where issues of fact existed as to whether there were amounts due and owing subcontractor]).

Accordingly, it is

ORDERED that the motion for summary judgment by plaintiff Quest Builders Group is denied.

3/28/2022			
DATE			MARGARET CHAN, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE