

Eastgate Whitehouse LLC v Gordon H. Smith Corp.
2022 NY Slip Op 32325(U)
July 14, 2022
Supreme Court, New York County
Docket Number: Index No. 656231/2018
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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EASTGATE WHITEHOUSE LLC

Plaintiff,

- v -

GORDON H. SMITH CORPORATION,

Defendant.

-----X

INDEX NO. 656231/2018

MOTION DATE 04/22/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 55, 56, 57, 58, 59, 60 were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of allegations of breach of contract in a construction project.

Defendant moves for an order, pursuant to CPLR § 3212, granting summary judgment in its favor on its first, second and third counterclaims for breach of contract, account stated and delay damages and granting summary judgment dismissing plaintiff's two remaining causes of action for breach of contract and anticipatory breach of contract. Plaintiff opposes the instant motion. For the reasons set forth below, defendant's motion is granted.

On or about November 17, 2015, the parties entered into an agreement whereby defendant was to provide plaintiff with architectural and engineering consulting services in connection with plaintiff's project to be in compliance with Local Law 11. The project was projected to be complete within 12 weeks, however, the project was delayed and lasted 2 years, through no fault of defendant.

It is undisputed that, from March 2018 to March 2019, defendant emailed ten (10) invoices to Plaintiff totaling \$53,354.02, for work performed after January 2018, none of which

Plaintiff paid. The unpaid invoices were for the review of Jerrick Associates Inc.'s¹ submittals and payment applications, examination of façade photographs, preparation of a draft Local Law 11 report, telephone consultations with Mr. Koeppel, plaintiffs' counsel, and others, drafting of memoranda, site inspections, preparation of drawings and specifications for the inspection and repairs to the South Wall, and addressing adjacent building issues in discussions, reports, and correspondence. Plaintiff did not object in writing to any invoices and never informed defendant in writing that any particular invoice was excessive.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Defendant may establish an account stated by any one of three alternative means: (1) the retention of bills without objection for a reasonable period of time, (2) partial payment, or (3) the plaintiff's acknowledgment of the debt. *See Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 [1st Dept 1983] (account stated established by receiving and retaining bills without any timely objection); *Liddle O'Connor, Finkelstein & Robinson v Koppelman*, 215 AD2d 204 [1st Dept 1995] (account stated based only on partial payment); *Bracken & Margolin*,

¹ Plaintiff engaged Jerrick Associates Inc., a licensed contractor, "to conduct and maintenance or repairs that may be required under the FISP." Defendant oversaw Jerrick's work.

LLP v Schambra, 270 AD2d 221 [2d Dept 2000] (account stated based on retention of invoices without objection and acknowledgment of obligation to pay).

In support of its motion, defendant has submitted un rebutted admissible evidence that it submitted invoices to the plaintiff, that plaintiff did not object to the invoices and that plaintiff has failed to timely pay defendant the amount of the invoices. Plaintiff has simply failed to rebut defendant's *prima facie* showing of entitlement to judgment as a matter of law. Accordingly, it is hereby

ORDERED that summary judgment is granted in favor of defendant dismissing Plaintiff's two remaining causes of action for breach of contract (first cause of action) and anticipatory breach of contract (second cause of action); and it is further

ORDERED that summary judgment is granted in favor of defendant on its First and Third Counterclaims for breach of contract and account stated, in the sum of \$53,354.02 plus interest from March 19, 2019 at the contractual rate of 1.5% per month; and it is further

ORDERED that summary judgment is granted in favor of the defendant on its Second Counterclaim for delay damages; and it is further

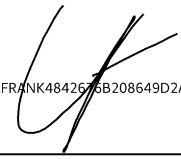
ORDERED that an assessment of damages as to attorney's fees and the Second Counterclaim is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office 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).

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7/14/2022
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE