CJS Indus. Inc. v High Ct. Downtown LLC
2022 NY Slip Op 32788(U)
August 15, 2022
Supreme Court, New York County
Docket Number: Index No. 153335/2021
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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CJS INDUSTRIES INC.,

Plaintiff,

- v -

HIGH COURT DOWNTOWN LLC,ACE WIRE & CABLE CO., INC.,BEDROCK PLUMBING & HEATING, INC.,CANNON MECHANICAL, INC.,COMPLETE CONSTRUCTION CONTRACTING CORP., CONNECT DRYWALL & ACOUSTICS CORP., DAL ELECTRICAL CORPORATION, DJH MECHANICAL CORP., FERGUSON ENTERPRISES, LLC,LIBERTY DOORWORKS, INC.,MASPETH WELDING, INC., and SIGNATURE AIR CORP.,

Defendants.

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CANNON MECHANICAL, INC.

Defendant/ Cross- Claimant,

-against-

ATLANTIC SPECIALTY INSURANCE COMPANY

Cross- Claim Defendant.

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INDEX NO. 153335/2021

MOTION DATE 8/17/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 118, 119, 120, 121, 122, 123

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiff commenced this action seeking to foreclose on two mechanics liens, which were subsequently bonded, based on work done for High Court Downtown, LLC (High Court) at the

building known as 385-387 Broadway, New York, New York. High Court hired CJS as the general contractor. CJS alleges $4,185,047.88 in unpaid invoices are due.

PENDING MOTION

On April 15, 2022, plaintiff moved for summary judgment on the first, third and fourth causes of action in the complaint.

The motion was fully briefed and on August 17, 2022, the court heard oral argument and reserved decision.

For the reasons stated below, the motion is denied.

ALLEGED FACTS

High Court was to be a leisure club, which was to have its flagship location at 385-387 Broadway, New York. High Court intended to blend social and sporting culture under one roof through active and intelligent leisure - eating, drinking, exercising in small groups, chefs tables, and more. A key element of High Court's business model was its in-person social gathering aspect.

Originally, when High Court took possession of the Premises in November 2018, it undertook it to renovate the Premises for use as a club with a fitness center, spa, roof deck lounge, kitchen, restaurant, retail store, and office space.

On August 8, 2019, High Court and CJS, entered into the Construction Management Agreement (CMA) whereby, CJS served as the construction manager for High Court's renovations to the Premises. During construction, Trevor Stahelski, served as High Court's project manager and liaison between High Court and CJS.

On or about February 28, 2020, a stop work order was issued by DOB due to site violations. The stop work order Was rescinded as of March 9, 2020. On or about March 10,

2020, the project re-opened for roughly 14 days of construction work, until approximately March 25, 2020 when the Governor issued an executive order which ceased all construction work due to the COVID-19 pandemic. The ban on construction continued through June 2020.

During this period Plaintiff had issued invoices that High Court was questioning. On October 15, 2020, High Court's landlord, United Prime Broadway, LLC (Landlord) commenced an action (Landlord Litigation) against High Court alleging, *inter alia*, breach of contract and sought to eject High Court from the premises. *See United Prime Broadway, LLC, v. High Court Downtown, LLC and Michael Novogratz*, Index No. 655311/2020. CJS was not a party to that action.

High Court's landlord sought a preliminary injunction to recover possession of the Premises by alleging that High Court had allowed the building to fall into a dangerous state of disrepair. High Court opposed its landlord's motion by telling Justice Cohen that CJS had already completed approximately 71% of the construction work. Specifically, High Court's CEO (Colleen Brooks) swore in an affidavit that "it is undisputed that as of March 17, 2020, [High Court] completed approximately 71% of the required construction work . . . .". High Court also included copies of CJS' latest invoices as exhibits with its opposition – to make the point to Justice Cohen that High Court's construction project was in much better shape than its landlord was telling Justice Cohen. Michael Novogratz, a High Court director and investor, also weighed in with his own construction professional to confirm the quality and value of CJS' construction work. Mr. Novogratz offered an affidavit from James A. Schwartz, who observed the construction work personally and wrote that "the structural steel work that I observed, first hand, which I understand was performed by High Court's construction professionals, was done with a

high level of craftsmanship." Mr. Schwartz also wrote that CJS' construction work enhanced the value of the building.

The motion was resolved by a stipulation that was so-ordered by the court on February 5, 2021. The stipulation did not include a preliminary injunction.

On September 30, 2021, the Landlord Litigation was discontinued pursuant to a stipulation of discontinuance that was not so-ordered by the court.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to

determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

As A Matter of Law, Judicial Estoppel Is Inapplicable to The Instant Action and Does Not Serve as The Basis for Summary Judgment

Under the doctrine of judicial estoppel, a party successfully taking a position in one proceeding may not thereafter assume an inconsistent position in a subsequent proceeding, simply because the party's interests have changed [*Kalikow 78/79 Co. v. State of New York* 174 A.D.2d 7, 11 (1st Dept 1992); *Baje Realty Corp. v. Cutler,* 32 AD3d 307, 310 (1st Dept 2006); *Gale P. Elston P.C. v. Dubois,* 18 AD3d 301, 303 (1st Dept 2005)]. Courts apply the doctrine of judicial estoppel to ensure that a party does not adopt a contrary position in another action simply because their interests have changed. *See Anonymous v. Anonymous*, 137 A.D.2d 739, 741 (2nd Dep't 1988).

The application of the rule is not limited to cases where the legal position at issue was ruled upon in the context of a judgment (*D & L Holdings, LLC v. RCG Goldman Co., LLC,* 287 A.D.2d 65, 72 [1st Dept 2001], *lv denied* 97 N.Y.2d 611 [2001]), it also applies where a party obtains some other type of success or relief through judicial acceptance of his or her position (*see Festinger,* 32 AD3d 412; *D & L Holdings,* 287 A.D.2d 65; *All Terrain Props. v. Hoy,* 265 A.D.2d 87 [1st Dept 2000]; *see also Bianchi v. N.Y. State Div. of Hous. & Community Renewal,* 5 AD3d 303 [1st Dept 2004]).

Generally, estoppel does not apply where the prior action was settled because a settlement is not considered to have been adopted by the court (*Matter of Costantino,* 67 AD3d 1412, 1413 [4th Dept 2009]; *Manhattan Ave. Dev. Corp. v. Meit,* 224 A.D.2d 191, 192 [1st Dept 1996], *lv denied* 88 N.Y.2d 803 [1996]). However, a court that so-orders a stipulation of settlement has been deemed to have endorsed a party's position sufficiently to estop it from later

asserting a contrary position. [*See Manhattan Ave. Dev. Corp.,* 224 A.D.2d 191; *Ennismore Apts., Inc. v. Gruet*, 29 Misc. 3d 48, 49-50 (App. Term 1st Dep't 2010)]. "For the doctrine to apply, there must be a final determination endorsing the party's inconsistent position in the prior proceeding" (*Ghatani v AGH Realty, LLC*, 181 AD3d 909, 911 [2020]).

In the case at bar, the court does not find that the stipulation resolving an interim motion for relief warrants the application of judicial estoppel, notwithstanding the fact that the stipulation was so ordered by the court. A review of the stipulation establishes that the so ordered stipulation was not a judgment that CJS was owed the amounts it claimed in the disputed invoices. Moreover, neither Mr. Schwartz' affidavit, Ms. Brooks' affidavit or any of their statements regarding their views on the construction work are referenced in the stipulation. The stipulation primarily consists of a list of construction related items that High Court represented had been completed.

The court does not find that said stipulation supports the application of the doctrine of Judicial Estoppel in this action.

Material Questions of Fact Preclude an Award of Summary Judgment

The court finds that Plaintiffs papers set forth a *prima facie* case for summary judgment on its claims for breach of contract and foreclosure on the bonds. However, in opposition, Highcourt has raised material questions of fact, including but not limited to the amounts of the invoices supporting the lien and whether the demobilization charges were fair and reasonable.

Bearing in mind the function of the court as issue finding, not issue determination *(Cruz v. American Export Lines*, 67 NY2d 1, 13; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404), summary judgment is inappropriate here. The drastic remedy should not be granted where there is any doubt as to the existence of a triable issue *(Moskowitz v. Garlock*, 23

AD2d 943, 944), or where the issue is even arguable *(Barrett v. Jacobs*, 255 NY 520, 522), since it serves to deprive a party of his day in court.

CONCLSUION

Wherefore it is hereby:

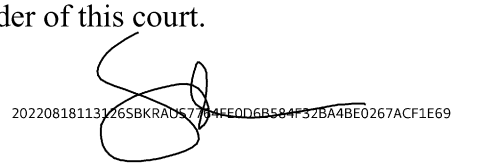
ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff 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.



8/15/2022							
DATE				SABRINA KRAUS, J.S.C.			
CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION		
	☐	GRANTED	X DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE