

Dworkin Constr. Corp. (USA) v Kelly's Sheet Metal, Inc.

2022 NY Slip Op 33676(U)

October 24, 2022

Supreme Court, New York County

Docket Number: Index No. 652974/2022

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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DWORKIN CONSTRUCTION CORP. (USA)

Plaintiff,

- v -

KELLY'S SHEET METAL, INC.,

Defendant.

-----X

INDEX NO. 652974/2022

MOTION DATE 10/21/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for CONSOLIDATE.

Plaintiff's ("Dworkin") motion to consolidate this case with a matter currently pending in Civil Court and to compel defendant ("Kelly") to comply with certain discovery demands is denied.

Background

Dworkin contends it entered into a subcontract with Kelly in which Kelly agreed to perform various HVAC work in connection with a construction project. It contends that Kelly failed to perform under this subcontract and that Dworkin incurred delay damages that total at least \$90,000.

Dworkin moves to consolidate this action with a matter, commenced by Kelly, currently pending in Civil Court. It claims that Kelly seeks damages arising out of its work for Dworkin in the Civil Court case. Dworkin claims that both cases have just begun and that Kelly has refused to comply with discovery obligations in this matter. Dworkin contends that when Kelly filed the Civil Court action (in January 2022), the subject matter monetary maximum was only \$25,000

but that this defect was remedied in August 2022 when the maximum was increased to \$50,000.

Dworkin insists that Civil Court is better suited for self-represented litigants and small matters.

In opposition, Kelly insists the matter should not be consolidated with its Civil Court case and disputes the notion that the Civil Court case is in its infancy. Kelly points out that the Civil Court case is on the trial calendar. It also observes that Dworkin waited until October 3, 2022 to seek discovery in the Civil Court case. Kelly questions why Dworkin did not file the claims it alleges in this action as counterclaims in the Civil Court case. And it observes that there is a pre-trial conference scheduled in Civil Court for October 24, 2022 and consolidation would severely prejudice Kelly.

In reply, Dworkin argues that consolidation would promote judicial economy and avoid inconsistent findings of fact. It emphasizes that the two matters concern the same construction project and subcontract. Dworkin complains that Kelly filed a notice of trial in Civil Court on September 23, 2022 before Dworkin “could possibly have known that Kelly had no intention of complying with its discovery obligations.”

Discussion

“Where common questions of law or fact exist, a motion to consolidate should be granted absent a showing of prejudice to a substantial right by the party opposing the motion” (*Kally v Mount Sinai Hosp.*, 44 AD3d 1010, 1010, 844 NYS2d 415 [2d Dept 2007]).

The Court denies the motion. The fact is that Kelly demonstrated that it would suffer substantial prejudice if the Court were to consolidate the two matters. The Civil Court case is currently scheduled for a pre-trial conference (although Dworkin has apparently moved to strike the case from the trial calendar). Dworkin indisputably did nothing to pursue its own claims from the time the Civil Court matter was commenced, in January 2022, until recently. It did not

promptly raise the issue about whether the Civil Court case exceeded the monetary maximum (it does not now) or serve discovery demands until October 3, 2022. Nor did it file counterclaims in that case. Instead, Dworkin decided to commence a separate action in this Court on August 18, 2022, more than 8 months after the Civil Court case had started. It would certainly not promote judicial economy or efficiency to let a case progress to the eve of trial only to, essentially, start it over in another court. The fact that there might be inconsistent findings is solely the result of Dworkin's failure to promptly pursue its own claims. The Court also rejects Dworkin's rationale that somehow, the Civil Court is incapable of handling any matters other than those involving self-represented parties or very small amounts of damages. The damages maximum was recently increased to \$50,000, well above the amount sought by Kelly in its Civil Court case.

In other words, this Court sees no reason to pull the rug out from a case that has been pending for nine months. Dworkin, for whatever reason, decided to wait for months and months before starting this case. And then, it let this case sit (it failed to file an RJI until it made the instant motion) until the Civil Court case progressed to the trial calendar. The Court declines to condone the litigation tactics employed by Dworkin, whether that is forum shopping or simply an effort to delay Kelly's case. The fact is that Civil Court has unlimited jurisdiction over counterclaims and is perfectly capable of adjudicating this matter. Dworkin's refusal to assert whatever claims it has in that forum is not a reason to deprive Kelly of a speedy resolution of its claims. And Dworkin's claims of judicial economy rings hollow, considering ten months ago it knew it could counterclaim in Civil Court (there was always unlimited jurisdiction over counterclaims) but chose instead to litigate its claims here.

With respect to the branch of the motion that seeks to compel discovery, the Court declines that request. While Dworkin is certainly entitled to discovery, the fact is that this part's

rules clearly provide that “No discovery motions are allowed until after a preliminary conference is held.” Dworkin did not file an RJJ or even ask for a conference before it filed the instant motion. The parties are free to submit a preliminary conference order via e-filing or, as described below, follow the discovery procedures of this part.

Summary

The Court recognizes that there are likely overlapping factual issues between Kelly’s Civil Court case and this action. But the parties have each chosen the course of their disputes. Kelly filed a Civil Court case in January 2022 and that case seems to be on the eve of trial. Dworkin started this separate case in August 2022 and waited until October to get this case assigned to a judge. Because of Dworkin’s purposeful strategy, these cases are on two separate tracks. The Court sees no reason to grant Dworkin’s request to consolidate under these circumstances.


The Court also declines to issue any sanctions (both parties make this request). Nothing contained in the papers submitted on this motion comes close to justifying the imposition of sanctions.

Accordingly, it is hereby

ORDERED that Dworkin’s motion to consolidate and for discovery is denied.

The Court will schedule a preliminary conference for December 12, 2022 at 10 a.m. By December 5, 2022, the parties are directed to upload a preliminary conference order signed by all parties or 2) a stipulation of partial agreement (that highlights the areas in dispute) or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether an in-person conference is necessary (if the parties submit a stipulation, then the Court

may find that a conference is not needed). The failure to upload anything will result in an adjournment of the conference.

<u>10/24/2022</u> DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE