

**Mohawk Constr. & Supply Co., Inc. v Walsh/Consigli
JV**

2022 NY Slip Op 35216(U)

March 30, 2022

Supreme Court, Dutchess County

Docket Number: Index No. 2021-52921

Judge: Maria G. Rosa

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 DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

MOHAWK CONSTRUCTION AND SUPPLY
COMPANY, INC.,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 2021-52921

Motion Sequence: 1

WALSH/CONSIGLI JV, WALSH CONSTRUCTION GROUP, LLC, individually and doing business as WALSH/CONSIGLI JV, and CONSIGLI CONSTRUCTION CO., INC., individually and doing business as WALSH/CONSIGLI JV, WALSH CONSTRUCTION COMPANY II, LLC, individually and doing business as WALSH/CONSIGLI JV, WALSH NORTHEAST, individually and doing business as WALSH/CONSIGLI JV, CONSIGLI & ASSOCIATES, LLC, individually and doing business as WALSH/CONSIGLI JV, CONSIGLI CONSTRUCTION NY, individually and doing business as WALSH/CONSIGLI JV, VASSAR BROTHERS HOSPITAL d/b/a VASSAR BROTHERS MEDICAL CENTER, and JOHN DOE "1" through JOHN DOE "10" AND ABC CORPS. "1" through "10" and being fictitious names, the real names being unknown to Plaintiff at this time, and being intended to designate individuals, corporations, or other legal entities who may claim an interest in the property sought to be foreclosed hereon,

Defendants.

The following papers were read on the motion to dismiss submitted by Defendants Walsh Construction Group, LLC, Consigli Construction Co., Inc., Walsh Northeast and Consigli & Associates, LLC:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBIT A

AFFIDAVIT IN SUPPORT
EXHIBITS A-C
AFFIDAVIT IN SUPPORT
EXHIBITS A-B
MEMORANDUM OF LAW IN SUPPORT

AFFIRMATION IN OPPOSITION
EXHIBITS A-C
AFFIDAVIT IN OPPOSITION
EXHIBITS A-B
MEMORANDUM OF LAW IN OPPOSITION

REPLY AFFIRMATION
EXHIBITS A-B
MEMORANDUM OF LAW IN REPLY

PLAINTIFF'S LETTER TO COURT DATED MARCH 8, 2022

DEFENDANT'S LETTER TO COURT DATED MARCH 10, 2022

PLAINTIFF'S SUR-REPLY

DEFENDANTS' SUR-REPLY

Plaintiff executed a subcontract with co-defendant Walsh/Consigli JV to perform certain work on the Vassar Brothers Medical Center Project located in Poughkeepsie, New York. Defendants Walsh Construction Group, LLC, Consigli Construction Co., Inc., Walsh Northeast and Consigli & Associates, LLC (hereinafter collectively referred to as the "Moving Defendants") move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(4) for failure to state a cause of action based upon the documentary evidence on the grounds that they are not proper parties to this action.

In support of their motion, the Moving Defendants submit relevant portions of the Joint Venture Agreement dated July 14, 2016. The Joint Venture Agreement lists two members of the joint venture, namely co-defendants Walsh Construction Company II, LLC and Consigli Construction NY, LLC. The resulting joint venture was named "Walsh/Consigli JV," another co-defendant to this action.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), this court must afford the claims a liberal construction, accept all facts alleged as true and accord the claimant the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]). A motion to dismiss based on documentary evidence will be granted where the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of a plaintiff's claim

(see *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). To be considered “documentary” the evidence must be unambiguous and of undisputed authenticity (see *id.*).

The documentary evidence submitted by the Moving Defendants establishes that the only two members to the Joint Venture Agreement are Defendants Walsh Construction Company II, LLC and Consigli Construction NY, LLC. It is undisputed by the parties that the subcontract at issue was entered into between defendant Walsh/Consigli JV and Plaintiff. Plaintiff has failed to submit documentary evidence sufficient to overcome the Moving Defendants’ showing that they are not members of the joint venture and are not parties to the contract. The Court rejects Plaintiff’s argument that the Moving Defendants should be treated as *de facto* members of the joint venture. The cases relied upon by Plaintiff do not involve situations in which a party is seeking to add another member to an existing written joint venture agreement. Nor is the Court persuaded that the designation of a business location on the website for Defendant Walsh/Consigli JV defeats the documentary evidence of the written joint venture agreement that is clear and unambiguous on its face as its members and their principal places of business. Moreover, Plaintiff has failed to plead sufficient facts to support an alter ego claim against the Moving Defendants (see *Matter of Goldman v Chapman*, 44 AD3d 938, 940 [2d Dept 2007]). Based upon the foregoing, it is hereby

ORDERED that the Defendants Walsh Construction Group, LLC, Consigli Construction Co., Inc., Walsh Northeast and Consigli & Associates, LLC’s motion to dismiss the complaint as against them is granted; and it is further

ORDERED that **the caption is hereby amended to remove Walsh Construction Group, LLC, Consigli Construction Co., Inc., Walsh Northeast and Consigli & Associates, LLC as defendants;** and it is further

ORDERED that a preliminary conference shall be held on April 13, 2022 at 9:15am.

The foregoing constitutes the decision and order of the Court.

Dated: March 30, 2022
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its

entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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