

**Board of Educ. of the City Sch. Dist. of the City of
N.Y. v Summit Rest. Repairs & Sales, Inc.**

2023 NY Slip Op 31229(U)

April 18, 2023

Supreme Court, New York County

Docket Number: Index No. 451569/2018

Judge: Andrew Borrok

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 NEW YORK: COMMERCIAL DIVISION PART 53

-----X

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK

Plaintiff,

- v -

SUMMIT RESTAURANT REPAIRS & SALES, INC.,

Defendant.

INDEX NO. 451569/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 003 004

DECISION + ORDER ON
MOTION

-----X

SUMMIT RESTAURANT REPAIRS & SALES, INC.,

Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

DECISION/ORDER
Index No. 651845/2012
(Action #1)

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 151, 152

were read on this motion to/for PRECLUDE

The following e-filed documents, listed by NYSCEF document number (Motion 004) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 149, 150, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Summit Restaurant Repairs & Sales, Inc.'s (Summit) motion (Mtn. Seq. No. 003) to preclude (i) the testimony of the Danielle Giovannone and the DRO Decisions (NYSCEF Doc. Nos. 88-89) that she issued, and (ii) the testimony of the Department of Education's (DOE) expert J. Scott Friesen must be denied.

Summit's motion for summary judgment (Mtn. Seq. No. 004) must also be denied.

By way of background, two related cases – **Action 1** (Index. No. 651845/2012) and **Action 2** (451569/2018) have been consolidated for trial.¹ Ms. Giovannone's testimony is not precluded by the law of the case or otherwise. Ms. Giovannone, an Agency Attorney in the Commercial Unit of the DOE's Office of Legal Services, and who served as the Dispute Resolution Officer (the **DRO**) made certain determinations as to the claims at issue in this case based on her review of what purport to be DOE's business records.

Previously, the Appellate Division held that by virtue of participating in this litigation, the DOE had waived its right to compel Summit to submit their claims to the dispute resolution process otherwise required under the parties' contract (*Summit Rest. Repairs & Sales, Inc. v New York Dept. of Educ.*, 201 AD3d 612, 612 [1st Dept 2022]). The Appellate Division did not however hold that the DOE was precluded from litigating those issues and calling fact witnesses like Ms. Giovannone and that such witnesses were not permitted to testify as to their assessment of Summit's conduct.

For clarity, the Appellate Division held that, on the record before the court, they were unable to determine whether the totality of the claims including those not submitted to the DRO were part of the same transaction or occurrence such that they would be barred by res judicata (*id.*). Thus, the branch of the motion must be denied.

¹ All NYSCEF Doc. Nos. referenced shall be those in Action 2 unless otherwise noted.
451569/2018 BOARD OF EDUCATION OF THE vs. SUMMIT RESTAURANT REPAIRS &
Motion No. 003 004

The branch of the motion seeking to bar J. Scott Friesen from testifying must also be denied. It does not matter that (i) Mr. Friesen is not currently licensed in New York (although he is in the process of being licensed) (*Schechter v 3320 Holding LLC*, 64 AD2d 446, 449-450 [1st Dept 2009]), or (ii) Mr. Friesen's methodology is one that does not account for certain factors that Summit thinks are important because Mr. Friesen has testified that his methodology for determining whether Summit improperly overbilled the DOE for refrigerants is generally accepted in his area of expertise and Summit has failed to establish otherwise (*Frye v US*, 293 F 1013, 1014 [US App DC 1923]; *Marso v Novak*, 42 AD3d 377, 378 [1st Dept 2007], citing *People v Wesley*, 83 NY2d 417 [1994]). At most they have raised issues properly explored through cross-examination.

Summit's motion (Mtn. Seq. No. 004) for summary judgment must also be denied because material issues of fact remain that require trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Among other things, and as discussed by the Appellate Division, issues of fact remain as to (i) whether Summit's claims in this case arise from the same transaction or series of transactions as the claims previously submitted to the dispute resolution proceeding, (ii) when and under what circumstances the contract was terminated, if it was terminated at all, and (iii) whether the Summit's submission of fabricated letters to the DOE was a central or dominant part of the parties' course of conduct, such that Summit is barred from recovering under the contract (*Summit Rest. Repairs & Sales, Inc.*, 201 AD3d at 612-613). The discovery that has taken place since the Appellate Division issued its decision has not mooted these issues. Indeed, it has only highlighted the need for trial. The motion for summary judgment must therefore be denied.

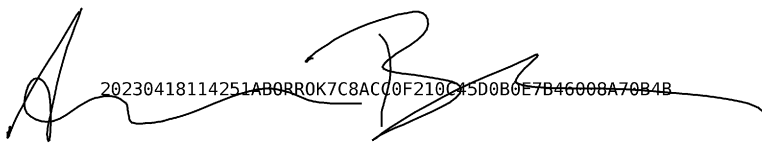
It is hereby ORDERED that Summit's motion (Mtn. Seq. No. 003) is denied; and it is further

ORDERED that Summit's motion (Mtn. Seq. No. 004) for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on May 16, 2023, at 11:30am.

4/18/2023

DATE



20230418114251AB0RR0K7C8AC0F210C45D0B0E7B46008A70B4B

ANDREW BORROK, 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