

**Greystone Bldg. & Dev. Corp. v Makro Gen. Contrs.,
Inc.**

2023 NY Slip Op 31294(U)

April 20, 2023

Supreme Court, New York County

Docket Number: Index No. 450271/2016

Judge: David B. Cohen

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

GREYSTONE BUILDING & DEVELOPMENT CORP.,

Plaintiff,

- v -

MAKRO GENERAL CONTRACTORS, INC., THE NEW
YORK CITY TRANSIT AUTHORITY, HERCULES
ARGYRIOU,

Defendant.

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INDEX NO. 450271/2016

MOTION DATE 02/24/2023

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248

were read on this motion to/for JUDGMENT - SUMMARY.

Defendants Makro General Contractors, Inc. and Hercules Argyriou (collectively, Makro) move for summary judgment pursuant to CPLR § 3212(b) (NYSCEF 195). Defendant Greystone Building & Development Corp. cross-moves for summary judgment (NYSCEF 219).

FACTUAL AND PROCEDURAL BACKGROUND

In December 2010, after competitive bidding, Makro entered into a contract with the New York City Transit Authority (NYCTA), No. C-34768, to be the general contractor on a contract for the structural rehabilitation of elevated portions of the transit system in Rockaway, Queens (NYSCEF 197). On July 8, 2011, Makro entered into a subcontract with Greystone for Greystone to perform demolition, lead abatement, painting and related work on the project (NYSCEF 203).

Among other things, the subcontract provides for the following:

- Periodic requisitions, 5% retainage, and payment within 180 days (Article 6);
- Change orders (article 16), including language that if the parties cannot agree on the value of the work "to be changed, added or omitted, the Subcontractor shall proceed with the Work promptly" and "the determination of the value of the Work shall be referred to the Owner [i.e., the NYCTA] whose decision shall be final and binding.";
- A dispute resolution provision (Article 17) which provides for litigation rather than arbitration, and requires all claims to be made within one year of substantial completion;
- A provision that permits early termination of the agreement (Article 30) but which states that in the event of early termination "[t]he Subcontractor shall not be entitled to anticipated profits on work unperformed or on materials or equipment unfurnished."

There was a change order entered into between the NYCTA and Makro, AWO #13, which reduced the scope of the work subcontracted out to Greystone (NYSCEF 204, 227). Makro alleges this was due to Greystone's failure to perform, which Greystone denies (Argyriou Aff., ¶¶8-14, NYSCEF 201, and Melittas Aff., ¶¶4-10, NYSCEF 225).

By August 2013, Greystone had ceased further work, and Makro alleges that it had to hire a replacement subcontractor, Aquacolor, to help complete Greystone's portion of the work under the subcontract, and "self-performed" other portions (Argyriou Aff., ¶¶16-17, NYSCEF 201). Greystone concedes that it "did not wish to perform the remaining change order." (Melittas Reply Aff., ¶7, NYSCEF 246).

Protracted negotiations with NYCTA ensued over how to value the work deleted pursuant to the change order, with input from Greystone (NYSCEF 208, 211, 216). Eventually NYCTA made its determination (NYSCEF 208, 225).

Greystone filed this action alleging breach of the subcontract and claiming: (1) breach of contract, (2) quantum meruit, (3) foreclosure of its mechanic's lien, (4) trust fund diversion, and

(5) recovery on the related surety bond (NYSCEF 197). It named as one of the defendants Hercules Argyriou, Makro's president.

Makro counterclaimed for breach of the subcontract (NYSCEF 198), naming Greystone's president, Theodore Melittas, as an additional defendant on the counterclaim on the ground that he guaranteed Greystone's performance of the subcontract in lieu of posting a bond (NYSCEF 208, Rider C). While NYCTA and Safeco Insurance Company are named as defendants, it appears Safeco was never served and has not appeared in the action, and NYCTA was dismissed by stipulation (*see* Makro Defendants' Mem. of Law at p. 2, NYSCEF 216).

On May 25, 2018, Greystone moved for summary judgment, characterizing this as a "collection case," seeking payments allegedly due under the contract (NYSCEF 34, 141). Makro cross-moved to dismiss, alleging that Greystone failed to file its action within one year, as required by Article 17 of the subcontract (NYSCEF 76, 141).

On December 4, 2018, Greystone's motion was denied as there remained "significant material issues of fact regarding plaintiff's performance under the subcontract. and whether plaintiff earned the fees it seeks." (NYSCEF 141). Makro's cross motion to dismiss was granted, however, based on Article 17's language stating that "[a]ny claim or action by Subcontractor against Contractor must be commenced within (1) year after substantial completion of this Subcontract." It is undisputed that NYCTA certified that substantial completion occurred on December 30, 2013 (NYSCEF 225), even though negotiations about what was owed went on for more than a year thereafter.¹

The Appellate Division affirmed the denial of Greystone's motion for summary judgment, finding that "[s]ummary judgment in plaintiff's favor on its claim for payment for

¹ Greystone also moved to reargue, which this Court likewise denied (NYSCEF. 145, 157).

work performed is precluded by issues of fact as to the portion of the contract that was performed and the portion that was deleted." The Court also ruled that "[w]hile there is nothing inherently unreasonable about the one-year limitations period, it is unenforceable under the circumstances of this case." As negotiations with NYCTA continued until September 2015, after the one-year limitations period had expired, the Court held that "the one-year limitation period had run before the final negotiations were complete, i.e., before NYCTA would have paid Makro." Relying on the Court of Appeals' decision in *Executive Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511, 518 (2014), the Court concluded that "[a] 'limitations period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim." (181 AD3d 468 [1st Dept 2020]).

Following the appeal, Greystone filed a Note of Issue and Certificate of Readiness, which Makro moved to vacate (NYSCEF 166). Greystone again cross-moved for summary judgment, alleging "that they calculated the amount due from the Makro Defendants' admissions and that there is no genuine issue of material fact." On November 10, 2021, the Court granted Makro's motion and denied Greystone's cross-motion, "since Greystone does not offer any new evidence for the same motion that it brought three years ago," and, thus, "Greystone's cross motion for partial summary judgment is barred by the law of the case doctrine." (NYSCEF 187).

Makro now seeks summary judgment, by motion dated January 24, 2023 (NYSCEF 195). Greystone again cross-moves, seeking summary judgment for the third time (NYSCEF 219).

LEGAL ANALYSIS

The same issues of fact concerning Greystone's performance, its alleged breach and failure to complete work assigned to it under the contract, and the work required by Makro and/or Aquacolor to complete it, still exist and preclude summary judgment for either party.

Makro acknowledge that "the end goal here was to determine the 'reasonable value' by which the prices of both the General Contract and Greystone's Subcontract should be reduced to account for the work that Greystone would no longer perform as Makro's subcontractor." (NYSCEF 216, at p. 8). It argues that the amount Greystone owes on Makro's counterclaims can in fact be calculated with reference to NYCTA's determination of how much of a "credit" to allow for the deletion of work assigned to Greystone pursuant to the change order.

While NYCTA made its determination after apparently extensive negotiations, and with Greystone's input and participation, no party offers any authority related to what legal weight must be given to the determination. In any event, even if the determination was enforced, there would still be issues as to the quality of Greystone's performance and the damages allegedly suffered by Makro to complete Greystone's work. Thus, the Makro defendants fail to demonstrate their prima facie entitlement to summary judgment on their counterclaim for breach of contract, or that Greystone's breach of contract claim should be dismissed.

However, as there is no dispute that the parties' relationship is governed by a contract between them and that Greystone seeks the same damages in its quantum meruit claim as it does in its breach of contract claim, Greystone's quantum meruit claim is dismissed as duplicative (*Tycoon Constr. Corp. v New York City Hous. Auth.*, 213 AD3d 540 [1st Dept 2023]).

Greystone's fourth cause of action for alleged trust diversion by Makro and Argyriou was already dismissed (NYSCEF 141), and absent any legal basis for holding Argyriou personally liable here, Greystone's claims against him are dismissed.

Greystone’s cross motion for summary judgment is denied as it offers no basis for filing a third successive summary judgment motion (see Jones ex rel. Cline v 636 Holding Corp., 73 AD3d 409, 409 [1st Dept 2010] [“successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification”]).

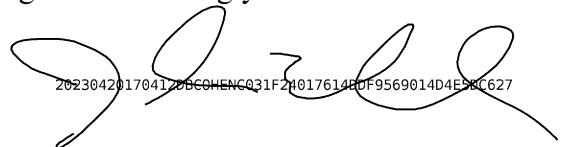
CONCLUSION

Accordingly, it is hereby:

ORDERED, that Makro’s motion for summary judgment is granted to the extent of severing and dismissing Greystone’s claims for quantum meruit and trust diversion and any claims against Hercules Argyriou personally, and is otherwise denied; it is further

ORDERED, that Greystone’s cross motion for summary judgment is denied; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.



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4/20/2023

DATE

HON. DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: