

Portfab LLC v QBE Ins. Corp.

2023 NY Slip Op 31875(U)

May 31, 2023

Supreme Court, New York County

Docket Number: Index No. 656636/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

-----X

PORTFAB LLC D/B/A THE WENIG COMPANY,

Plaintiff,

INDEX NO. 656636/2021

MOTION DATE 12/09/2022

MOTION SEQ. NO. 001

- v -

QBE INSURANCE CORPORATION, ABCD
CONSTRUCTION CORPORATION, CITY OF NEW YORK,
NEW YORK CITY HOUSING AUTHORITY, and
ENDURANCE AMERICAN INSURANCE COMPANY,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, plaintiff’s motion for summary judgment against defendants QBE Insurance Corporation (“QBE”), ABCD Construction Corporation (“ABCD”), and Endurance American Insurance Company (“Endurance”) is granted,¹ without opposition, for the reasons set forth in the moving papers (NYSCEF Doc. Nos. 25, 40, 47), and the exhibits attached thereto, in which the court concurs, as summarized herein. This is action on a public improvement lien, mechanic’s lien, and for breach of contract and various commercial torts arising out of plaintiff’s performance as subcontractor for a construction project located at NYCHA’s Justice Sonia Sotomayor Houses, 1090 Rosedale Avenue, Bronx, NY 10472, for which work plaintiff asserts it was not paid by the general contractor, ABCD. QBE served as the surety on a payment bond between ABCD and NYCHA (QBE payment bond, NYSCEF Doc.

¹ Plaintiff previously discontinued the action against defendants the City of New York and the New York City Housing Authority (“NYCHA”) (NYSCEF Doc. Nos. 45-46).

No. 26), and Endurance provided the same function on a bond discharging plaintiff's mechanic's lien (Endurance bond, NYSCEF Doc. No. 39).

Plaintiff has established prima facie entitlement to summary judgment on its sixth cause of action against ABCD for an account stated by submission of the invoices sent to ABCD (NYSCEF Doc. Nos. 29-35), the check written to plaintiff by ABCD in partial payment (NYSCEF Doc. Nos. 27),² and the affidavit of plaintiff's president Bill Friedman (NYSCEF Doc. No. 25), who testifies to ABCD's retention of the invoices without complaint and failure to pay the outstanding balance (*Bartning v Bartning*, 16 AD3d 249, 250 [1st Dept 2005] ["An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time"]). Because plaintiff failed to attach a copy of its contract with ABCD, the court declines to grant summary judgment on the third cause of action for breach of contract at this time. The fourth cause of action for unjust enrichment and fifth cause of action for misappropriation of funds pursuant to Lien Law Art. 3-A may be dismissed as duplicative of the claim for an account stated, as they arise out of the same facts and seek the same damages (*e.g. Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]; *Soni v Pryor*, 102 AD3d 856, 858 [2d Dept 2013]). ABCD, by failing to oppose the motion, has failed to raise an issue of fact requiring trial.

Plaintiff has also established prima facie entitlement on its claims against QBE and Endurance as sureties on the payment bond and the bond discharging the mechanic's lien, respectively. A claim against a surety of a payment bond requires proof of the bond principal's liability and failure to pay (*American Bldg. Supply Corp. v Avalon Props, Inc.*, 8 AD3d 515, 517 [2d Dept 2004]). Similarly, to foreclose on a mechanic's lien, plaintiff need only establish that it

² ABCD previously claimed that they had sent an additional check to plaintiff satisfying the outstanding balance (NYSCEF Doc. No. 28), but such check never reached plaintiff (Friedman, aff., NYSCEF Doc. No. 25, ¶ 13).

was hired to perform work on the project, did perform the contracted-for work, and that it has not been paid (*Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616, 617 [1st Dept 2012]). As set forth above, plaintiff has already established these facts. Neither QBE nor Endurance have opposed the motion, and thus neither have raised an issue of fact requiring trial.

Finally, plaintiff's request for attorney's fees is denied. It is settled law that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise" (*Peter v Nantkwest, Inc.*, -- US --, 140 S Ct 365, 370 [2019]). Here plaintiff cites no statutory or contractual provision entitling it to recover attorney's fees.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted, in part, as to the first, second, and sixth causes of action against defendants QBE Insurance Corporation, ABCD Construction Corporation, and Endurance American Insurance Company; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants QBE Insurance Corporation, ABCD Construction Corporation, and Endurance American Insurance Company, jointly and severally, in the amount of \$51,720.00, with interest thereon at the statutory rate from May 12, 2021, through entry of judgment, as calculated by the Clerk, and continuing to so accrue thereafter through satisfaction of judgment, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

Louis L. Nock

5/31/2023

DATE

LOUIS L. NOCK, 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