

**Atco Contr. Group, Inc. v Universal Constr.
Resources, Inc.**

2023 NY Slip Op 32321(U)

July 11, 2023

Supreme Court, New York County

Docket Number: Index No. 450484/2018

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON

PART

37

Justice

-----X

ATCO CONTRACTING GROUP, INC.,

Plaintiff,

- v -

UNIVERSAL CONSTRUCTION RESOURCES, INC., NEW
YORK CITY HOUSING AUTHORITY, GENERAL
CASUALTY COMPANY OF WISCONSIN,

Defendants.

-----X

INDEX NO. 450484/2018MOTION DATE 02/21/2023MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents, and for the reasons stated hereinbelow, plaintiff's motion for summary judgment is granted.

Background

This action arises out of the renovation of four residential complexes owned by the New York City Housing Authority ("NYCHA"): Lafayette Houses, Mariners Harbor Houses, Roosevelt Houses, and South Beach Houses. In 2014, NYCHA hired defendant Universal Construction Resources, Inc. ("UCR") as general contractor on the renovations, and UCR subsequently subcontracted its asbestos abatement work to plaintiff, Atco Contracting Group, Inc. ("Atco"). NYSCEF Doc. No. 142.

Atco alleges it completed its part of the subcontract and that UCR failed to pay ten percent of certain agreed fees that it had withheld as retainage. NYSCEF Doc. No. 142.

On March 5, 2017, Atco commenced this action in Queens County against UCR, NYCHA, and General Casualty Company of Wisconsin ("GCCW"), asserting three causes of action: (1) breach of contract against NYCHA and UCR; (2) unjust enrichment against NYCHA and UCR, and (3) bond-maker liability against GCCW. NYSCEF Doc. No. 1.

On September 14, 2017, UCR answered with a general denial, sixteen affirmative defenses, two cross-claims against NYCHA, and four counter-claims against Atco for: (1) contractual indemnity; (2) tortious interference; (3) breach of contract; and (4) equitable indemnity. NYSCEF Doc. No. 5.

In a Decision and Order dated December 11, 2017, Justice Salvatore Modica granted a motion to transfer venue to Supreme Court, New York County. NYSCEF Doc. No. 44.

In a Decision and Order dated May 17, 2019, this Court denied plaintiff's motion to amend and granted NYCHA's motion to dismiss the complaint and the cross-claims against it only. NYSCEF Doc. No. 110.

In a Decision and Order dated November 22, 2021, this Court denied plaintiff's motion to strike defendants' answers for failing to comply with discovery, as plaintiff had failed to provide the requisite affirmation of good faith. NYSCEF Doc. No. 139.

On January 26, 2023, Atco moved, pursuant to CPLR 3212, for summary judgment on its first cause of action against UCR in the amount of \$161,532.45, with interest from October 15, 2015, and for dismissal of UCR's counterclaims. NYSCEF Doc. No. 141.

Atco asserts that "[t]here are no material issues of fact as to whether Atco performed its obligations" and that "the work was satisfactorily completed pursuant to the Subcontracts." NYSCEF Doc. No. 164. In support, Atco submits, inter alia, the affidavit of Atco's vice president, Peter Viennas ("Viennas Affidavit"); the four subcontracts, and the four applications for payment; and four "Asbestos Project Completion Form-ACP21" documents from the New York City Department of Environmental Protection ("NYCDEP"), which Atco alleges prove it completed its work. NYSCEF Doc. Nos. 142, 146-157.

In moving to dismiss UCR's counterclaims, Atco argues that UCR failed: to produce any contractual indemnification agreements; to show how Atco breached, or caused the breach of, UCR's contract with NYCHA; and to allege any of the required elements of a breach of contract cause of action. NYSCEF Doc No. 164. Atco also argues that New York law does not recognize a cause of action for equitable indemnity. Id.

In opposition, UCR attacks Atco's documents, specifically the ACP-21 Forms, arguing that they are unauthenticated and therefore inadmissible. NYSCEF Doc. No. 168. UCR also argues that NYCHA did not finally approve Atco's work, submitting a mostly redacted spreadsheet that UCR alleges shows NYCHA disputing nearly \$400,000 of plaintiff's work and refusing to pay UCR. NYSCEF Doc. No. 175.

UCR also argues that: its contractual indemnification counterclaim arises from the subcontracts, and notes that discovery has not yet concluded; that in the posture of summary judgment this Court must assume that UCR will be able to show plaintiff's alleged \$921,347.64 overcharge interfered with its contract with NYCHA; and that UCR clearly plead the required elements of a breach of contract by asserting that Atco misrepresented facts to UCR about Atco's work for NYCHA. NYSCEF Doc. No. 168. UCR has failed to defend its fourth counterclaim, for equitable indemnity. Id.

To support its opposition, UCR submitted an attorney affirmation and an unsigned and unnotarized document titled "Affirmation in Opposition" containing the purported testimony of

non-party Jigar Patel, a Senior Project Manager of UCR (the “Purported Patel Affirmation”). NYSCEF Doc. Nos. 167 and 166.

On April 4, 2023, Atco replied, arguing that the Purported Patel Affirmation, being unsigned and unnotarized, is inadmissible, and urging this Court not to consider it. NYSCEF Doc. No. 178. Atco additionally argued that UCR’s attorney affirmation, being offered without personal knowledge of the facts, amounted to hearsay, and should not be considered either. Id.

On April 5, 2023, UCR’s attorney sur-replied in the form of a letter to this Court to aver that his firm had filed the Purported Patel Affirmation inadvertently and alleged he had corrected the error by submitting a signed version in which the “text is identical to the erroneously filed version” (the “Purported Patel Affidavit”). NYSCEF Doc. Nos. 179 and 180.

On April 6, 2023, Atco, in turn, wrote the Court to draw attention to its concerns with the new Purported Patel Affidavit, specifically that, despite UCR’s claims that the Affirmation and Affidavit were essentially the same, the Affidavit’s text contained modifications and, further, the tenth and final page of the document, which contains *only* the signatures of Mr. Patel and a notary, is labeled “12 of 12,” while the page before is labeled “9 of 10.” NYSCEF Doc. No. 181.

Also on April 6, 2023, UCR again wrote the Court to defend against Atco’s “accusations of unethical conduct.” NYSCEF Doc. No. 182. In support, UCR submits an email from Mr. Patel dated March 14, 2023, that appears to include an attachment that UCR alleges contained Mr. Patel’s notarized signature. NYSCEF Doc. No. 183. UCR’s counsel does not explain the discrepancy in page numbers on the signature page of the Purported Patel Affidavit.

Discussion

In order to obtain summary judgment, the “movant must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests’ [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ for this purpose.” Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988).

To establish a prima facie case for breach of contract, the plaintiff must allege that “(1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations; and (4) defendant’s breach resulted in damages.” 34-06 73, LLC v Seneca Ins. Co., 39 NY3d 44, 53 (2022) (citations omitted).

Atco’s submission of the four subcontracts satisfies the first element. Doc. Nos. 146, 147, 148 and 149. The Viennas Affidavit, Asbestos Project Completion Form-ACP21 documents, and email correspondence between Atco and UCR show that Atco performed in accordance with the contract, thus satisfying the second element. NYSCEF Doc. Nos. 142, 146, 147, 148, 149 and 160. Further, Atco alleges that the Viennas Affidavit and Atco’s applications for payment from UCR show that defendant breached by failing to pay the retainage, thereby satisfying the third element. NYSCEF Doc. Nos. 142, 150, 151, 152 and 153. Finally, Atco alleges damages in the amount of \$161,532.45, with interest from October 15, 2015. NYSCEF Doc. Nos. 141.

To defeat summary judgment, UCR must have produced admissible evidence demonstrating material questions of fact. Gilbert. If a party fails to submit admissible evidence, that submission cannot be considered in determining summary judgment. Perez v Brux Cab Corp., 251 AD2d 157, 159 (1st Dept 1998). As there are questions surrounding the authenticity of the Purported Patel Affidavit, this Court may not consider it in deciding the instant motion.

Affidavits must be "by a person having knowledge of the facts." CPLR 3212(b). Because of this personal knowledge requirement, "the submission of a hearsay affirmation by counsel alone" cannot raise a factual issue. Zuckerman v City of New York, 49 NY2d 557, 557 (1980). The affirmation of attorney Peter Sullivan, is therefore of no probative value on this motion.

An attorney's affirmation "may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form.'" Zuckerman at 563. UCR's affirmation fails to provide any evidence which explains, through personal knowledge, how these exhibits came to be, let alone how they raise material issues of fact.

In opposition to Atco's attempt to dismiss UCR's first counterclaim for contractual indemnity, UCR repeatedly asserts that this Court should not grant summary judgment, as discovery is ongoing. NYSCEF Doc. No. 168. However, UCR fails to explain how further disclosure will uncover relevant evidence, and so the counterclaim must be dismissed. Bailey v New York City Tr. Auth., 270 AD2d 156, 157 (1st Dept 2000) ("A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.") (citations omitted).

UCR's second and third counterclaims, for tortious interference and breach of contract, must be dismissed, as the only evidence proffered in support is in the Purported Patel Affidavit. Finally, as UCR entirely failed to defend its fourth counterclaim, for equitable indemnity, and as this Court sees no basis for it, it must be dismissed.

This Court has considered the UCR's other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, the instant motion of plaintiff Atco Contracting Group, Inc., for summary judgment on its first cause of action against defendant, Universal Construction Resources, Inc., is hereby granted; defendant's counterclaims dismissed; and the Clerk is directed to enter judgment in the amount of \$161,532.45, with interest from October 15, 2015, accordingly.

7/11/2023			
DATE		ARTHUR F. ENGORON, 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