

**Empire Tri-State Serv. LLC v Streamline Remodeling,
Inc.**

2023 NY Slip Op 32379(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 157825/2020

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58

Justice

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EMPIRE TRI-STATE SERVICE LIMITED LIABILITY
COMPANY,

Plaintiff,

INDEX NO. 157825/2020

MOTION DATE 12/12/2022

MOTION SEQ. NO. 001

- v -

STREAMLINE REMODELING, INC. DBA STREAMLINE
CONSTRUCTION, UNITED STATES FIRE INSURANCE
COMPANY, METROPOLITAN TRANSPORTATION
AUTHORITY, METROPOLITAN TRANSPORTATION
AUTHORITY CAPITAL CONSTRUCTION COMPANY

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 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, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

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

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment in the amount of \$140,064.98, with interest and attorneys' fees, against defendants Streamline Remodeling, Inc. d/b/a Streamline Construction (Streamline) and United States Fire Insurance Company (USFIC), or, alternatively, for partial summary judgment in the amount of \$99,702.98, with interest and attorneys' fees, or partial summary judgment on the issue of liability with an inquest to be held to determine plaintiff's damages. Streamline and USFIC oppose.

I. PERTINENT BACKGROUND

A. Complaint (NYSCEF 1)

Plaintiff alleges that on or about December 5, 2018, defendants Metropolitan Transportation Authority Capital Construction Company (MTCA), a subsidiary of defendant

Metropolitan Transportation Authority (MTA), entered into an agreement with Streamline for Streamline to serve as contractor for a specific public construction and improvement project.

On or about June 1, 2019, Streamline, as contractor, and plaintiff, as subcontractor, entered into a subcontract for plaintiff to provide certain labor, equipment, materials and services for the project at issue. Plaintiff alleges that it performed its obligations but Streamline failed to pay.

In plaintiff's first cause of action, entitled "Foreclosure of Public Improvement Mechanic's Lien," plaintiff asserts that prior to and on May 2, 2020, Streamline owed it \$145,745.40, and that on or about June 11, 2020, it timely filed and served "a Notice Under Mechanic's Lien Law for Account of Public Improvement" in the amount of \$145,745.40, by which it seeks to foreclose on the lien and recover the amount due, with interest. Plaintiff seeks a judgment on this claim: (1) adjudicating that its lien is valid; (2) adjusting and determining the equities of the parties and determining the validity, extent and priority of asserted claims and liens; and (3) adjudicating that it may recover judgment against Streamline and MTA for the amount of its lien and claim.

As for its claims against Streamline only, plaintiff seeks the amount due under theories of breach of contract (second cause of action), quantum meruit (third cause of action), and an account stated (fourth cause of action).

Against USFIC, plaintiff asserts a claim for breach of a payment bond which Streamline, as principal, executed with USFIC in the sum of approximately \$2.1 million. Plaintiff alleges that on June 17, 2020, it served a notice of claim upon USFIC for the total value of the labor it performed and material it furnished for the project; that it satisfied all applicable conditions precedent; that at least \$145,745.40, remains unpaid; that such failure to pay is a material breach

of the bond; and that, therefore, USFIC owes it \$ 145,745.40, plus interest, costs and disbursements (fifth cause of action). As for its sixth cause of action, against USFIC, plaintiff seeks attorney's fees pursuant to New York State Finance Law Section 137.

B. Other pleadings

By amended answer and counterclaims dated November 20, 2020, Streamline denies plaintiff's allegations, asserts 19 affirmative defenses, and advances two counterclaims against plaintiff, for breach of contract and willful exaggeration of the mechanic's lien (NYSCEF 9).

By answer dated November 20, 2020, USFIC denies the allegations and asserts 24 affirmative defenses (NYSCEF 8).

In its response to Streamline's counterclaims, plaintiff denies them and asserts several affirmative defenses (NYSCEF 10).

II. SUMMARY JUDGMENT

The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for*

the Blind, 3 NY3d 295, 315 [2004]). “On a summary judgment motion, facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The role of the court in determining the “drastic remedy” of summary judgment is “issue - finding,” not “issue - determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotation marks and citation omitted]).

A. Contentions

1. Plaintiff (NYSCEF 51)

Plaintiff contends that there are no remaining issues of fact genuinely in dispute as to Streamline’s breach of the subcontract and the amount of money Streamline owes it, or as to USFIC’s breach of the payment bond. It relies on an affidavit from its president, who states therein that “[he is] fully familiar with the facts and circumstances set forth” therein, and that he bases his statements on his personal knowledge and review of plaintiff’s books and records (NYSCEF 22). However, the president does not attest that plaintiff created the documents, which it either attached as exhibits or referenced, in the regular course of business and/or that it was plaintiff’s regular course of business to make such documents at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter. The annexed documents include the subcontract (NYSCEF 23), change orders and a document referred to as a change order log (NYSCEF 24); requisitions for payment and final requisition (NYSCEF 25); and checks allegedly reflecting payments (NYSCE 26).

Plaintiff’s president asserts that in the final requisition, allegedly sent to Streamline on or about May 20, 2020, plaintiff had completed all of its work and had performed all of its obligations pursuant to the subcontract and any applicable change orders, other than those

waived or prevented by defendants, but the president does not set forth the factual basis for his assertions, nor does he detail which obligations were waived or prevented by defendants.

Annexed to counsel's affirmation in support of the motion are pleadings and discovery documents, along with emails, email thread(s), and correspondence, several of which are redacted; the deposition transcript of Streamline's president and exhibits; a specific sales order; a payment bond, bond claim, acknowledgement of bond claim, and proof of claim; and initial lien, second lien, and release of lien (NYSCEF 27-49).

Based on these documents, plaintiff alleges that Streamline conceded that it owes plaintiff money via its own statements made in emails and other correspondence and during the deposition of Streamline's president, who "repeatedly and freely admitted on multiple occasions that it owes Plaintiff at least \$99,702.98" (NYSCEF 51).

2. Defendants' opposition

Streamline and USFIC contend that triable issues remain, relying on the opposition affidavit of Streamline's president and attached exhibits (NYSCEF 56-67). While the president states that his allegations therein are based on his personal knowledge, he does not provide that the attached documents were made and kept in the ordinary course of business and/or that it was Streamline's regular practice to maintain such documents.

Streamline/USFIC also submit the deposition transcript of plaintiff's principal, which they contend contains relevant admissions, including that lien was filed although the work was not fully complete and work on the punch list and training was outstanding, and documents and the as-built drawings were only later provided (NYSCEF 69). They also assert that plaintiff failed to perform under the subcontract, there are triable issues as to the amount of money allegedly owed to plaintiff by Streamline, plaintiff failed to execute and provide partial lien

waivers although required by the subcontract, and plaintiff's accounting does not include credits owed to Streamline, among others.

Streamline/USFIC further assert that plaintiff made false statements in its lien and filed an exaggerated lien in the amount of \$153, 621.68, wrongfully including sums claimed for work that was not yet completed, payments that were not yet due, and MTA's lack of agreement with plaintiff's calculations and claimed extra work.

B. Analysis

“The elements of a breach of contract claim are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages” (*Alloy Advisory, LLC v 503 W. 33rd St. Assoc., Inc.*, 195 AD3d 436, 436 [1st Dept 2021], citing *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

The majority of plaintiff's documents are not in admissible form, as no foundation was laid for their admission as plaintiff's business records, given plaintiff's failure to provide that the documents were kept in its regular course of business and that “that it was the regular course of such business to make [the documents], at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter” (CPLR 4518 [a]). Absent a proper foundation for the documents pursuant to CPLR 4518[a], they are inadmissible and may not be considered on a summary judgment motion (*see Oldham v City of New York*, 155 AD3d 477, 478 [1st Dept 2017]; *JPMorgan Chase Bank, N.A. v Clancy*, 117 AD3d 472, 472 [1st Dept 2014]; *Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 [1st Dept 2007]; *see also Matter of Leon RR*, 48 NY2d 117, 122-23 [1979]).

Plaintiff also qualifies its assertion that it performed under the subcontract by stating that it performed all of its obligations “except those waived or prevented by Defendants” (NYSCEF

