

**Hudson Meridian Constr. Group, LLC v H&H
Woodworking Inc.**

2023 NY Slip Op 33218(U)

September 14, 2023

Supreme Court, New York County

Docket Number: Index No. 151267/2016

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,

Plaintiff

Index No. 151267/2016

-against-

DECISION AND ORDER

H&H WOODWORKING INC.,

Defendant
-----x
-----x

H&H WOODWORKING INC.,

Third Party Plaintiff

-against-

WESTCHESTER FIRST INSURANCE COMPANY,
"JOHN DOE NO. 1" through "JOHN DOE NO.
5," "ABC CORP.," "DEF CORP.," and
"GHI CORP.,"

Third Party Defendants
-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

The parties' dispute relates to a construction project at a residential apartment building at 60 East 86th Street, New York County. Plaintiff, the construction manager, subcontracted with defendant to perform construction work on the project. The total planned value of the subcontract was \$1,375,000. Plaintiff paid defendant \$221,625 and terminated the subcontract because

defendant had not timely performed any physical work on the site. Plaintiff covered defendant's work by hiring another contractor, at a cost of \$1,884,930. Plaintiff claims defendant's breach of the subcontract and unjust enrichment.

Defendant counterclaims for plaintiff's breach of the subcontract, an account stated, unjust enrichment, and quantum meruit, contending that defendant billed plaintiff on or about February 11, 2016, seeking \$381,120 for completed work, which plaintiff failed to pay. Defendant further counterclaims for foreclosure of defendant's mechanic's lien and also instituted the same claim in a third party action against Westchester Fire Insurance Company as plaintiff's surety and against any unknown individuals or entities with an interest in the real property at issue.

Plaintiff and third party defendant Westchester Fire Insurance now move for summary judgment on the complaint's claims and dismissing defendant's counterclaims and third party claim based on defendant's failure to perform the subcontract between the plaintiff and defendant. At oral argument January 11, 2023, both plaintiff and defendant discontinued their unjust enrichment and quantum meruit claims, leaving the breach of contract claim and counterclaim and the account stated and lien foreclosure counterclaims.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, plaintiff and third party defendant must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence eliminating all material factual issues. C.P.L.R. § 3212(b); Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d 173, 179 (2020); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014). If the moving parties fail to make this evidentiary showing, the court must deny the motion. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Dorador v. Trump Palace Condo., 190 A.D.3d 479, 481 (1st Dep't 2021). Only if the moving parties meet this initial burden, does the burden shift to the defendant to rebut that prima facie showing by producing admissible evidence sufficient to require a trial of material factual issues. Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d at 179; De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008). In evaluating the evidence for purposes of the summary judgment motion, the court

construes the evidence in the light most favorable to defendant. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d at 475; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503.

III. BREACH OF CONTRACT CLAIM AND COUNTERCLAIM

To establish breach of a contract, a party must demonstrate a contract, that party's performance, the opposing party's breach, and damages from the breach. Alloy Advisory, LLC v. 503 W. 33rd St. Assocs., Inc., 195 A.D.3d 436, 436 (1st Dep't 2021). The parties do not dispute the validity of the subcontract between plaintiff and defendant and stipulate that the subcontract plaintiff presents is authenticated and admissible.

Plaintiff claims that defendant failed to complete the work and announced its intention not to continue, constituting an anticipatory breach of the subcontract. As evidence of defendant's repudiation, plaintiff relies on an email dated January 27, 2016, by David Cannizzo from defendant, declaring that: "Its [sic] all legal now. The job is stopped 100%." Aff. of Stephen Schiavone Ex. M, NYSCEF Doc. No. 60. Plaintiff's witness Stephen Schiavone, did not receive the email and thus is incompetent to authenticate it, nor does any other witness authenticate it as a communication sent or received, even if not offered for its truth. Clarke v. American Truck & Trailer, Inc.,

171 A.D.3d 405, 406 (1st Dep't 2019); Kenneth J. v. Lesley B., 165 A.D.3d 439, 440 (1st Dep't 2018); B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017); AO Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015).

Plaintiff also points to defendant's failure to obtain approval by the project owner's architect of shop drawings, failure to provide a schedule for completion of defendant's work, and failure to complete the work on schedule, as material breaches. According to the subcontract, however, defendant owed no obligation to submit drawings to the owner's architect. Schiavone Aff. Ex. D, NYSCEF Doc. No. 51, § 5.1. Defendant was to provide the drawings to plaintiff, not the owner's architect. Therefore defendant's failure to provide drawings to the architect does not constitute a breach.

Plaintiff presents an email exchange from January through February 2016 in which plaintiff and defendant dispute dates for completing work, who is first obligated to provide information to whom, and when defendant would have access to the site to take field measurements necessary to provide a schedule for completion of defendant's work and to complete the work on schedule. Reply Aff. of Stephen Schiavone, Ex. V, NYSCEF Doc. No. 166. This evidence raises factual issues as to whether plaintiff provided defendant all the required information and access to allow defendant to complete its contractual obligations. Plaintiff

thus has not eliminated all material factual issues whether plaintiff breached its obligations under the subcontract or procured defendant's breach of its obligations to provide drawings and schedules or to complete the planned work by an agreed time. Therefore the court denies plaintiff summary judgment on its claim and dismissing defendant's counterclaim for breach of the subcontract. C.P.L.R. § 3212(b).

IV. ACCOUNT STATED COUNTERCLAIM

Defendant's account stated counterclaim requires defendant to show that it sent invoices to plaintiff to which plaintiff failed to object. Garr Silpe, P.C. v. Weir, 208 A.D.3d 1098, 1099 (1st Dep't 2022); Anderson Kill, P.C. v. Bd. of Mgrs. of Honto 88 Condominium, 192 A.D.3d 551, 551 (1st Dep't 2021). The parties do not dispute that plaintiff sent defendant an invoice dated February 11, 2016, seeking \$381,120. Plaintiff contends that it already had sent a notice of default February 9, 2016, Schiavone Aff. Ex. N, NYSCEF No. 61, and then sent a notice of termination for defendant's material breach of the sublease February 15, 2016, id. Ex. P, NYSCEF Doc. No. 63, which operated to dispute the alleged debt. Schiavone does authenticate both notices.

An account stated claim resolves the amount of a liability when the liability is established. Michael J. Devereaux & Assocs., P.C. v. Tufo, 192 A.D.3d 506, 506 (1st Dep't 2021). An

account stated claim may not circumvent the requirements for establishing the underlying breach of the subcontract. Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 A.D.3d 434, 438 (1st Dep't 2012); Unclaimed Prop. Recovery Serv., Inc. v. UBS PaineWebber Inc., 58 A.D.3d 526, 526 (1st Dep't 2009).

Plaintiff's notices include its intent to deduct payment for work related to the construction of railings, for which the unpaid invoice seeks payment. Even if plaintiff's notices of default and termination did not operate to dispute the alleged debt, defendant does not rebut that each notice also specifically objected to at least part of the unpaid invoice. Thus the account stated counterclaim attempts to circumvent the contractual dispute. Therefore the court grants plaintiff summary judgment dismissing defendant's counterclaim for an account stated. C.P.L.R. § 3212(b) and (e).

V. LIEN FORECLOSURE COUNTERCLAIM

Plaintiff and third party defendant seek summary judgment dismissing defendant's lien foreclosure counterclaim and third party claim because the claim depends on defendant's right to payment under the subcontract, which fails due to defendant's breach of that contract. Since the court denies summary judgment on plaintiff's breach of contract claim, however, this counterclaim survives.

VI. CONCLUSION

For the reasons explained above, the court grants plaintiff's motion for summary judgment dismissing defendant's account stated counterclaim, but otherwise denies plaintiff's motion. C.P.L.R. § 3212(b) and (e). Defendant also discontinues its unjust enrichment and quantum meruit counterclaim, in exchange for plaintiff's discontinuance of its unjust enrichment claim. C.P.L.R. § 3217(a)(2) and (b).

DATED: September 14, 2023

LUCY BILLINGS, J.S.C.