

**Universal Superior Group, Ltd. v Legacy Bldrs./Devs.
Corp.**

2023 NY Slip Op 33732(U)

October 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 503714/2023

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of October 2023

HONORABLE FRANCOIS A. RIVERA

-----X
UNIVERSAL SUPERIOR GROUP, LTD.

Plaintiff,

DECISION & ORDER

Index No.: 503714/2023

- against -

LEGACY BUILDERS/DEVELOPERS CORP. et al.

-----X
Defendants.

By notice of motion, filed on June 14, 2023, under motion sequence number one, defendant Legacy Builders/Developers Corp. (hereinafter LBD) seeks an order pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) dismissing the complaint of plaintiff Universal Superior Group, Ltd. (hereinafter USG). USG has opposed the motion.

The following NYSCEF documents numbers 7-25 were considered.

BACKGROUND

On February 3, 2023, USG commenced the instant action by filing a summons and complaint (hereinafter the commencement papers) with the Kings County Clerk's office. The complaint alleges twenty-one allegations of fact in support of three causes of action. The first cause of action is for breach of contract; the second is for an account stated; and the third is to foreclose a mechanic's lien.

In support of the motion, LBD submitted an affirmation of its counsel and an affidavit of its chief executive officer. The Chief Executive Officer identified four

annexed exhibits labeled A through D. Exhibit A is the commencement papers. Exhibit B is described as a subcontractor agreement between LBD and USG. Exhibit C is described as an application and certificate for payment. Exhibit D is described as a record of a payment by LBD to USG.

LAW AND APPLICATION

After review of the motion papers submitted and hearing oral argument, the order of the Court is as follows for the reasons set forth herein. A motion to dismiss based on CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). For evidence to be considered documentary, it must be unambiguous and of undisputed authenticity (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]).

In assessing a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint, a court must accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). Where evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*Graphic Arts Mut. Ins. Co. v Pine*

Bush Cent. Sch. Dist., 159 AD3d 769, 771[2d Dept 2018]).

To be considered documentary, evidence must be unambiguous and of undisputed authenticity (*Fontanetta*, 73 AD3d at 86). Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case (*Bedford-Carp Constr., Inc. v Brooklyn Union Gas Co.*, 215 AD3d 907, 908 [2d Dept 2023]).

Here, the affirmation of LBD's counsel, the affidavit of its Chief Executive Officer and the document described as a record of payment do not constitute documentary evidence within the intendment of CPLR 3211[a][1] (*see County of Westchester v Unity Mech. Corp.*, 165 AD3d 883, 885 [2d Dept 2018]). The remaining documents, that is, the pleadings, the subcontractor agreement and the payment application do not utterly refute the plaintiffs' allegations or conclusively establish a defense as a matter of law (*see 25-01 Newkirk Ave., LLC v Everest Nat. Ins. Co.*, 127 AD3d 850 [2d Dept 2015]).

Furthermore, the evidentiary materials submitted by LBD did not, as a matter of law, resolve the parties' factual disputes such that it could be said that the allegations in the complaint were not facts at all (*Bonavita v Gov't Emps. Ins. Co.*, 185 AD3d 892, 894 [2d Dept 2020], citing *County of Westchester*, 165 AD3d at 886).

CONCLUSION

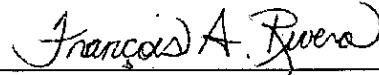
The motion by defendant Legacy Builders/Developers Corp. for an order pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) dismissing the complaint of plaintiff

Universal Superior Group, Ltd. is denied.

The defendant Legacy Builders/Developers Corp. shall file an answer within thirty (30) days of entry of this Order.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.