

RVS Constr. Corp. v RPH Props., LLC

2024 NY Slip Op 30164(U)

January 11, 2024

Supreme Court, Kings County

Docket Number: Index No. 524303/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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RVS CONSTRUCTION CORPORATION,

Plaintiff,

-against-

**RPH PROPERTIES, LLC
and FEDERAL INSURANCE COMPANY,**

Defendants.

-----X

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of defendant RPH Properties' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, and Exhibits Annexed	<u>99-117</u>
Affirmation in Opposition and Exhibits Annexed	<u>119-132</u>
Affirmation in Reply	<u>135-139</u>

Upon the foregoing cited papers, the Decision and Order on this motion is as follows:

In this action involving a dispute over the construction of a building at 231 Kent Street in Brooklyn, New York, defendant RPH Properties (hereinafter RPH) seeks an order granting it summary judgment dismissing the plaintiff's complaint and also granting it summary judgment on its counterclaims.

At the time this dispute arose, defendant RPH was the owner of the premises and the plaintiff, RVS Construction Corporation (hereinafter RVS) was the general contractor that the plaintiff had retained to do work at the above referenced address. As a result of disagreements regarding the work, defendant owner RPH terminated the contract with the plaintiff on or about September 6, 2018. RPH claims that the contract with RVS was terminated "for cause due to the failure of RVS to maintain insurances and building permits as required by the Contract." RPH contends that "[t]he intentional lapse of insurance and

building permits by RVS was a tactic by plaintiff to attempt to force RPH to pay sums plaintiff was not entitled to under the agreement between the parties.”

It is undisputed that the contract price for the project was \$3,265,700.00. It is also undisputed that RPH paid RVS \$4,282,108.00 for work that RPH performed at the project. However, RVS claims that after the contract was signed, “RPH required additional materials and labor in the sum of \$1,491,341.00 making the total Contract amount \$4,757,041.00.” RVS further contends that it “completed all of the work for the Property as required by the Contract,” but that defendant RPH only made payments totaling \$4,282,108.00. As such, RVS claims that RPH still owes it a balance of \$474,933.00. It is unclear if these “change orders” were in writing, and this is the apparent basis for the additional labor and materials plaintiff claims it is entitled to be paid for.

On September 21, 2018, RVS filed a mechanic’s lien against the block and lot with the Kings County Clerk’s Office. The property is known as Block 2552, Lot 10. The lien states that RVS was owed \$185,000.00 for unpaid labor performed and materials furnished. On October 23, 2018, RVS filed a “Release of Mechanic’s Lien” with regard to the aforementioned \$185,000.00 lien. That same day, October 23, 2018, RVS filed a second mechanic’s lien [Doc 106] in the amount of \$474,933.00, which states that it is for unpaid labor performed and materials furnished.

Thereafter and timely, on December 4, 2018, RVS commenced the within action for breach of contract, for an account stated, and to foreclose on its lien. On March 19, 2019, defendant RPH interposed an answer, verified by counsel, which includes a counterclaim for breach of contract and associated damages in the amount “of at least \$500,000.00,” and another counterclaim which contends that the plaintiff willfully exaggerated the amounts of the first and second liens and that, as a result, RPH is entitled to damages in

the amount of \$289,933.00. According to the parties, as well as a review of the file, defendant Federal Insurance Company (the surety on the bond filed as an undertaking) has not been served with the complaint. Thus, it has not answered or appeared. Defendant RPH's counsel states in his affirmation [Doc 117] that this defendant was not served. He states, "Federal's only contact in the action is that it is the surety company licensed to do business in the state of New York and the surety on a Notice of Mechanic's Lien Discharged Bond filed by RPH, as principal to remove a lien claim by plaintiff from the Project." However, and puzzlingly, Document 140, a consent to change attorneys for defendants, states clearly that the incoming attorneys represent both defendants. This document was filed after this motion was fully briefed by prior counsel.

Prior to making the within motion, the parties engaged in motion practice regarding their discovery disputes. This case is now on the trial calendar. In this motion [MS #4], RPH timely moves for summary judgment seeking dismissal of the plaintiff's complaint in its entirety, granting it summary judgment on its first counterclaim for breach of contract, and granting it summary judgment on its second counterclaim seeking an order discharging the plaintiff's mechanic's lien pursuant to Lien Law §§ 39 and 39-a, based on its claim that the plaintiff willfully filed an exaggerated mechanic's lien.

In support of the motion, RPH offers proof of NY corporate status for both RPH and RVS; select portions of the contract between RPH and RVS dated June 23, 2016; the letter from RPH to RVS terminating their agreement; copies of the first and second liens filed by RVS against RPH; select portions of the deposition of George Samaras, the president of RVS; a copy of the undertaking filed by RPH as lienee and Federal Insurance Company as surety, to discharge the second lien filed by RPH, with the Kings County Clerk on November 19, 2018; a single page from the deposition of Paul Marino, plaintiff's expert

who apparently inspected the premises in 2022; four unsworn and inadmissible reports from The Vertex Companies, Inc., an engineering/forensics company retained by the defendant; and two affirmations from counsel for movant/defendant RPH, as well as a memorandum of law. There is no EBT transcript of a witness who was deposed for movant/defendant RPH.

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 eliminate any material issues of fact from the case (see, *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers [*Matter of Redemption Church of Christ v Williams*, 84 AD2d 648 [1981]; *Greenberg v Manlon Realty*, 43 AD2d 968 [1974]].

The court finds that defendant RPH has not made a *prima facie* showing of its entitlement to summary judgment with regard to either branch of its motion. “A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.” (see CPLR 3212(b); *S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]).

RPH, the movant, has failed to include an affidavit by someone with personal knowledge of the facts. If someone from RPH was deposed, there is no transcript in the record. Unless he or she has personal knowledge of the facts, which is the exception rather than the rule, an attorney’s affirmation will not suffice. The failure of the movant to include

an affidavit from someone with personal knowledge is fatal to the instant motion (*Mobil Oil Corp. v. Penna*, 139 AD2d 501 [2d Dept 1988]). The movant must set forth a *prima facie* showing of its entitlement to summary judgment, and if it fails to meet its burden, then the motion for summary judgment must be denied without regard to the papers submitted in opposition. (*Arma Textile Printers, Inc. v Spectrachem, Inc.*, 254 AD2d 382 [2d Dept 1998]). For example, counsel for defendant avers that “It cannot be denied the building constituting the underlying Project leaks when it rains” [Doc 100 ¶31]. An attorney cannot be a fact witness.

The court notes that not only is there nothing in admissible form from the moving party, but none of the four reports from RPH’s engineering/forensic expert, The Vertex Companies, Inc., on which RPH so heavily relies in its effort to establish that it is entitled to summary judgment, are in admissible form. This defect cannot be overlooked. An unsworn report by an expert witness cannot be considered in support of a summary-judgment motion. “The only evidence submitted by the plaintiff to rebut the defendant’s showing that the defect did not come from a part of its own manufacture was the report of an ‘expert’, which was unsworn and failed to specify the purported expert’s qualifications. Because the plaintiff failed to oppose the defendant’s *prima facie* showing with evidentiary proof in admissible form, the defendant was properly granted summary judgment.” (*Hagan v General Motors Corp.*, 194 AD2d 766 [1993]; *Ellis v Willoughby Walk Corp. Apartments*, 27 AD3d 615 [2d Dept 2006]).

In response to plaintiff’s opposition on this basis, defendant provides several new documents in its reply papers. Defendant’s former counsel submits an affidavit from Richard Turchiano, a “member” of defendant RPH, who claims to be “fully familiar with the facts and circumstances” of the dispute, as well as an affidavit from Keith Olsen, an

architect and “division manager” from The Vertex Companies, Inc. These affidavits must be rejected by this court, however, as they seek to remedy deficiencies in the original motion papers rather than to respond to arguments contained in the plaintiff's opposition to the motion (See *Henry v Peguero*, 72 AD3d 600 [1st Dept 2010]; *Batista v Santiago*, 25 AD3d 326 [1st Dept 2006]). “A party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply, and generally, evidence submitted for the first time in reply papers should be disregarded by the court” (see *Cox v 118 E. 60th Owners, Inc.*, 189 AD3d 1169, 1170 [2d Dept 2020]; *Wells Fargo Bank, N.A. v Osias*, 156 AD3d 942, 943-944 [internal quotation marks omitted]; *Nationstar Mtge., LLC v Tamargo*, 177 AD3d 750, 753).

As defendant RPH has failed to meet its prima facie burden, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Accordingly, it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: January 11, 2024

ENTER :



Hon. Debra Silber, J.S.C.