

**S.I. Victory Constr. & Dev. Corp. v
40-50 Brighton First Rd. Apts. Corp.**

2024 NY Slip Op 31884(U)

May 23, 2024

Supreme Court, Kings County

Docket Number: Index No. 506650/2021

Judge: Leon Ruchelsman

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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 : CIVIL TERM: COMMERCIAL 8

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S.I. VICTORY CONSTRUCTION & DEVELOPMENT
CORPORATION and T&S CONSTRUCTION CORP.,

Plaintiffs,

Decision and order

- against -

Index No. 506650/2021

40-50 BRIGHTON FIRST ROAD APARTMENTS CORP.
and TKR PROPERTY SERVICES, INC.,

Defendants,

May 23, 2024

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #4

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue a decision and order dated April 2, 2024 which granted the defendant's motion seeking summary judgement dismissing the action. The defendant TKR Property Services Inc., [hereinafter 'TKR'] opposes the motion. Papers were submitted by the parties and arguments held and after reviewing all the arguments, this court now makes the following determination.

As recorded in a prior order, the plaintiffs are two construction companies that were hired to perform work at defendant's premises located at 40 Brighton First Road and 50 Brighton First Road, both in Kings County. The complaint alleges that plaintiffs S.I. Victory and T&S Construction Corp., are both owed significant sums of over \$400,000 and over \$100,000 respectively. The parties all moved seeking summary judgement. The court denied the plaintiff's motion seeking summary judgement on the grounds there were questions of fact whether a contract had been formed utilizing the custom and usage established

between the parties. The court acknowledged that custom and usage can establish a meeting of the minds even without a written contract, however, the court presented three reasons there were questions whether such usage was present. First, there was no expert testimony establishing the existence of such custom and usage. Second, the affidavits of the owners of the plaintiffs were self-serving and failed to conclusively establish such contracts. Lastly, there was no evidence presented the custom and usage alleged was "so notorious" and pervasive throughout the industry.

Upon reargument the plaintiff asserts the court failed to consider the testimony of Rimma Bonn the former president of the defendant board of directors. She testified that, indeed, the defendant TKR Property Services Inc., prepared payments after approval from the defendant board as argued by the plaintiffs thereby establishing beyond any question the defendants admitted and conceded the amounts sought are owed. As noted, the defendant argues the testimony of Ms. Bonn does not remove all questions of fact.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank

National Trust Co., v. Russo, 170 AD3d 952, 96 NYS3d 617 [2d Dept., 2019]).

Ms. Bonn testified that when an invoice was presented to the defendant it was reviewed at a board meeting (see, Deposition of Rimma Bonn, pages 28, 29 [NYSCEF Doc. No. 88]). Once such invoice was approved it was then sent to defendant TKR Property Services Inc., who would then pay the invoice (*id.*). Thus, Ms. Bonn explicitly stated that TKR would not issue any payment until they received approval from the board of the owner. Later in the deposition, Ms. Bonn confirmed this procedure by explaining that after an invoice was approved it was then 'stamped' by TKR which signified the board had already approved the invoice (see, Deposition of Rimma Bonn, pages 44, 45 [NYSCEF Doc. No. 88]). Thus, the question that must be addressed is whether the mere approval of an invoice constitutes a binding contract for work performed (*cf.*, UCC §2-204(1)).

It is well settled that "the existence of a contract may be established through the conduct of the parties recognizing the contract" (Apex Oil Co. v. Vanguard Oil & Serv. Co., 760 F2d 4172 [2d Cir. 1985]). Further, "in determining whether the parties' conduct is consistent with the existence of a binding contract, it is necessary that the totality of all acts of the parties, their relationship and their objectives be considered" (H/R Stone, Inc. v. Phoenix Bus. Sys., Inc., 660 F.Supp. 351 [S.D.N.Y.

1987])). The facts of this case, as presented, surely support the existence of contracts. The invoices were submitted by the plaintiffs and were approved for payment. The defendants object and assert that questions of fact still exist, specifically concerning the work performed by the plaintiffs (see, Affirmation in Opposition, ¶16 [NYSCEF Doc. No. 132])). However, Ms. Bonn testified that there were no invoices submitted by Staten Island Victory that were not approved by the board of directors (see, Deposition of Rimma Bonn, page 29 [NYSCEF Doc. No. 88])). Thus, if any issues arose concerning the performance of the work there would have been objections at that time. The approval of the invoices when submitted necessarily means the work performed as expressed in those invoices was acceptable to the board of directors. Consequently, there are no issues that can be raised at this point regarding the work performed. Thus, a more accurate understanding of the approval process, whereby the board of directors approved the invoices and then TKR was charged with the ministerial task of merely paying the invoice, demonstrates that a contract was formed when approval was consummated. TKR's role in the actual payment has no bearing on the contract formation. The contract was formed when the board accepted all of the terms of the invoice.

Further, there is no merit to the argument that Ms. Bonn is an invalid witness since she was an invalid board president. The

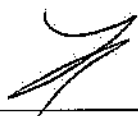
contents of her testimony regarding the approval process are not disputed. Thus, there are no questions of fact concerning the amount owed. Any invoice approved by the board and not yet paid is thereby owed. Further, the defendants cannot argue that they approved the invoice when submitted but the passage of time necessitates objections to the invoice for faulty work performed or any other reason. Once the invoice had been approved for payment the acceptance had been completed. Any subsequent change from that understanding can be nothing other than a breach.

Therefore, based on the foregoing, the motion seeking reargument is granted. Upon reargument the motion of plaintiffs seeking summary judgment is granted.

So ordered.

ENTER:

DATED: May 23, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC