

**WDF Inc. v Arnell Constr. Corp.**

2024 NY Slip Op 34637(U)

May 28, 2024

Supreme Court, Westchester County

Docket Number: Index No. 63094/2022

Judge: Robert S. Ondrovic

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. ROBERT S. ONDROVIC, J.S.C.**

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WDF INC.,

Plaintiff,

Index No. 63094/2022

– against –

Motion Seq. 2

ARNELL CONSTRUCTION CORP.,

Defendant.

**DECISION & ORDER**

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In a breach of contract action, plaintiff moves to dismiss defendant’s eleventh affirmative defense and second counterclaim and twelfth affirmative defense and third counterclaim pursuant to CPLR 3211(a)(1) and (a)(7) and to impose sanctions, including attorneys’ fees, pursuant to 22 NYCRR 130-1.1(a) (Motion Seq. 2).

**Papers Considered**

**NYSCEF Doc. Nos. 48-78, 93, 95**

1. Notice of Motion/Affirmation of Michael J. McDermott, Esq./Exhibits 1-28/ Memorandum of Law
2. Affirmation of Joseph P. Asselta, Esq. in Opposition
3. Reply Affirmation of Michael J. McDermott, Esq. in Opposition

**Discussion**

This is a breach of contract action arising from a construction project at Public School 96 located at 2385 Olinville Avenue in the Bronx. Defendant Arnell Construction Corp. (Arnell) was the prime contractor on the project through a prime contract with nonparty New York City School Construction Authority (SCA) and plaintiff WDF Inc. (WDF) was Arnell’s subcontractor on the project. Plaintiff sued defendant for outstanding payments due under a subcontract between them and a purchase order.

Beyond the outstanding payments on the subcontract and the purchase order (collectively demanded in the amount of \$74,553.00), it is alleged that plaintiff suffered additional damages due to acts and/or omissions of SCA and Arnell resulting in increased costs and expenses incurred by plaintiff in the amount of \$700,094.65, which plaintiff demanded from SCA and Arnell (WDF’s Delay Claim). Plaintiff alleges that in April 2016 it submitted WDF’s Delay Claim to defendant and defendant informed plaintiff that it would incorporate same into its overall claim against SCA for damages suffered during the project. Upon plaintiff’s information and belief, defendant commenced an action in

Supreme Court, Queens County against SCA (SCA action),<sup>1</sup> but despite repeated requests from plaintiff, defendant has failed to provide updates or a copy of the claim encompassing WDF's Delay Claim. Plaintiff alleges that defendant failed to properly present, prosecute, and preserve WDF's Delay claim in Arnell's action against SCA.

The complaint asserts eight causes of action: (1) breach of contract (related to outstanding payments due on the subcontract and purchase order); (2) account stated (same); (3) quantum meruit (same); (4) breach of contract (related to increased costs/impacts/delays in performance of subcontract); (5) breach of contract (related to WDF's Delay Claim); (6) breach of implied covenant of good faith and fair dealing; (7) breach of fiduciary duty; and (8) unjust enrichment.

Previously, defendant moved pre-answer to dismiss the third, fourth, fifth, sixth, seventh, and eighth causes of action (Motion Seq. 1).

By Decision and Order dated January 11, 2024, the Court denied defendant's motion.

On January 31, 2024, defendant interposed an answer with twelve affirmative defenses and three counterclaims.

Plaintiff now moves to dismiss defendant's eleventh affirmative defense and second counterclaim and twelfth affirmative defense and third counterclaim pursuant to CPLR 3211(a)(1) and (a)(7) and to impose sanctions, including attorneys' fees, pursuant to 22 NYCRR 130-1.1(a).

The eleventh affirmative defense/second counterclaim seeks damages stemming from SCA's refusal to pay Arnell in full on the prime contract due to liquidated damages resulting from WDF's delays. The twelfth affirmative defense/third counterclaim seeks reimbursement, pursuant to the subcontract, from WDF for any liquidated damages on the prime contract caused by or contributed to by WDF.

Plaintiff contends that Arnell, in its answer and counterclaims in this action, mischaracterized SCA's counterclaims against Arnell in the SCA action in that Arnell alleged that SCA sought damages for delays in work performed by WDF, but SCA's counterclaims in that action did not mention WDF and Arnell's reply to SCA's counterclaims asserted that any damages SCA suffered were caused by SCA's "own breaches."

Plaintiff further contends that Arnell and SCA settled and discontinued with prejudice the SCA action two months before Arnell interposed its answer with counterclaims in this action and, as part of the settlement of the SCA action, SCA agreed to release its counterclaims for liquidated damages. Plaintiff argues that the documentary evidence related to the SCA action (i.e., SCA's answer with counterclaims, Arnell's reply,

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<sup>1</sup> *Arnell Construction Corporation v New York City School Construction Authority*, Supreme Court, Queens County, Index No. 717514/2017.

the settlement agreement, and the stipulation of discontinuance with prejudice) conclusively dispose of Arnell's counterclaims against plaintiff.

Plaintiff further argues that sanctions are warranted because Arnell and its counsel misrepresented what SCA counterclaimed against Arnell in the SCA action and Arnell pressed its instant counterclaims after SCA and Arnell settled and discontinued the SCA action.

In support, plaintiff submits, among other things, Arnell's verified answer with counterclaims, SCA's verified answer with counterclaims and Arnell's verified reply to the counterclaims in the SCA action, stipulation of discontinuance with prejudice in the SCA action, and the settlement agreement between Arnell and SCA.

Dismissal pursuant to CPLR 3211 (a)(1) is only appropriate "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings must be afforded a liberal construction and the Court must "accept the facts as alleged in the complaint as true, accord 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]; *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017]; *Bass v D. Ragno Realty Corp.*, 111 AD3d 863, 863 [2d Dept 2013]). "In assessing a motion under CPLR 3211 (a)(7) ... a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon*, 84 NY2d at 88 [internal quotation marks and citations omitted]).

Here, plaintiff has failed to demonstrate that either of the affirmative defenses and counterclaims in question should be dismissed. The instant subcontract recognizes that the prime contract "makes time of the essence and penalizes the Contractor [i.e., Arnell] for delay" (subcontract at 1 [NYSCEF Doc. 22]). The subcontract further states:

If the Subcontractor hinders or delays or damages the work of any other subcontractor and/or contractor, he agrees to be directly responsible to such others for damages they may suffer therefrom (*id.* at para. 12);

and

The Subcontractor hereby agrees that if any of his acts or omissions cause or contribute to any failure on the part of the Contractor to complete all his work within the time fixed by the liquidated damages, the Subcontractor shall, upon demand of the Contractor, promptly pay to and reimburse the Contractor for the amount of any such liquidated damages caused by or contributed to by the Subcontractor (*id.* at para. 21).

That Arnell and SCA may have resolved all SCA counterclaims for liquidated damages under the prime contract does not conclusively establish a defense to Arnell's counterclaim that it suffered liquidated damages allegedly attributed to plaintiff's delays in sums that Arnell did not receive from SCA under the prime contract or that Arnell is entitled to reimbursement for sums it paid SCA as part of the settlement of SCA's liquidated damages counterclaims. To be clear, the documentary evidence does not utterly refute Arnell's contentions that it suffered monetary damages due to plaintiff's alleged delays or that it is entitled to reimbursement for sums it paid (or did not receive) for liquidated damages under the prime contract that Arnell attributes to plaintiff's delays.

All other remaining contentions have been considered and are either without merit or rendered moot by the above determination.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion to dismiss defendant's eleventh affirmative defense and second counterclaim and twelfth affirmative defense and third counterclaim pursuant to CPLR 3211(a)(1) and (a)(7) and to impose sanctions, including attorneys' fees, pursuant to 22 NYCRR 130-1.1(a), is DENIED in its entirety; and it is further

ORDERED that plaintiff shall reply to defendant's counterclaims within twenty (20) days of entry of this Decision and Order.

Dated: White Plains, New York  
May 28, 2024



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HON. ROBERT S. ONDROVIC, J.S.C.