

Extech Bldg. Materials, Inc. v Pizzarotti, LLC
2025 NY Slip Op 32687(U)
July 29, 2025
Supreme Court, New York County
Docket Number: Index No. 156030/2019
Judge: Nicholas W. Moyne
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 41M

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EXTECH BUILDING MATERIALS, INC., Plaintiff, - v - PIZZAROTTI, LLC, SENATOR CONSTRUCTION GROUP, INC., FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND ZURICH AMERICAN INSURANCE COMPANY, BPRT CONSTRUCTION CORP. Defendant.	<table border="0"> <tr> <td style="width: 150px;">INDEX NO.</td> <td><u>156030/2019</u></td> </tr> <tr> <td>MOTION DATE</td> <td><u>05/17/2023, 06/01/2023</u></td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td><u>001 002</u></td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	INDEX NO.	<u>156030/2019</u>	MOTION DATE	<u>05/17/2023, 06/01/2023</u>	MOTION SEQ. NO.	<u>001 002</u>
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HON. NICHOLAS W. MOYNE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 91, 92, 94, 96, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 93, 95, 97, 98, 99, 122 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is

Motion sequences 001 and 002 are consolidated herein for decision. This action was commenced by the plaintiff Extech Building Materials, Inc. (“Extech”) in June 2019, seeking to foreclose on a Mechanic’s Lien filed against the project located at 161 Maiden Lane, New York, New York (the “Project”). Extech is a material supplier to the construction trade.

In motion sequence 001, defendant Pizzarotti, LLC ("Pizzarotti"), the construction manager, moves for summary judgment dismissing all claims and cross-claims asserted against Pizzarotti by Senator Construction Group, Inc. ("Senator"), BPRT Construction Corp. ("BPRT"), and Extech. In motion sequence 002, defendant BPRT, a masonry contractor and assignee of Senator, moves for summary judgment on its cross-claim against Pizzarotti for breach of contract.

Pizzarotti entered into a written agreement with FPG, the owner of the Project, on or about December 2, 2015, to perform certain construction work as the construction manager. Subsequently, Senator, as a subcontractor, entered into two written trade contracts with Pizzarotti on March 1, 2016, agreeing to perform masonry, roofing, and waterproofing services.

On July 30, 2018, Senator fully assigned all its rights, responsibilities, obligations, and interests under these contracts to BPRT ("the Assignments"). Hassan Bajwa, President of BPRT, confirmed that BPRT assumed all liabilities towards Senator's vendors and sub-tier suppliers. Both Senator and BPRT, through the assignments, represented and warranted that all prior work was paid in full. Pizzarotti asserts that Senator and BPRT provided specific and notarized waivers certifying that their subcontractors and suppliers had been duly paid for all work, labor, and materials.

Extech, a material supplier, alleges that Pizzarotti and Senator failed to pay it \$67,513.56 for materials supplied and incorporated into the Project as of February 1, 2019. Consequently, Extech filed a Notice Under Mechanic's Lien Law against the Project on February 25, 2019. This lien was discharged on March 5, 2019, by a lien discharge bond issued by Fidelity and Deposit Company of Maryland and Zurich American Insurance Company (the "Sureties"). Extech commenced this action on June 18, 2019.

BPRT formally terminated its work on the Project via a letter dated March 21, 2019, citing Pizzarotti's failure to pay BPRT and a lack of a safety plan as reasons, which BPRT claims constituted a breach of contract and entitled it to retainage and other payments. BPRT seeks judgment against Pizzarotti for not less than \$120,728.77, plus interest and costs, for unpaid requisitions 13 and 14 (\$34,875.35 and \$23,160.42, respectively) and earned retainage (\$62,693.00).

Pizzarotti contends that Senator's claims are barred by executed releases and assignments, asserting Senator was paid in full and even overpaid. Pizzarotti also argues BPRT's claims are barred by releases executed up to payment application number 12 and by BPRT's termination for cause, claiming the outstanding \$120,728.77 was properly withheld to correct and complete BPRT's work. Pizzarotti further argues that Extech's lien must be dismissed because no money was due and owing from Pizzarotti to Senator or BPRT at the time the lien was filed, therefore, no lien fund exists

Summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party (CPLR § 3212[b]). The proponent of a summary judgment motion, herein "moving party", must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate an absence of any material issues of fact (*see Pullman v Silverman*, 28 NY3d 1060, 1062-1063 [2016]). The moving party's failure to make a prima facie showing of entitlement requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Conclusory allegations, expressions of hope, or mere denials are insufficient to either warrant or defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *McGahee v Kennedy*, 48 NY2d 832, 834 [1979]).

When reviewing a motion for summary judgment, the non-moving party's facts must be accepted as true and the benefit all favorable inferences which may be drawn therefrom (*Asabor v Archdiocese of New York*, 102 AD3d 524, 527 [1st Dept 2013]; *Demshick v Community Hous. Mgt. Corp.*, 34 AD3d 518, 520 [2d Dept 2006]). Accordingly, a motion should not be granted where there is any doubt as to the existence of a factual issue, conflicting inferences may be drawn, or where there are issues of credibility, as those are the functions of a jury (*Id.*).

DISCUSSION

1. Pizzarotti's Motion for Summary Judgment Against Senator

Pizzarotti seeks to dismiss Senator's crossclaims primarily based on executed written releases and the full payment made to Senator. Pizzarotti contends that by signing the Releases and Assignments, Senator knowingly released all claims through the date of payment, expressly acknowledging full payment for work performed and warranting that its subcontractors and materialmen were paid. Pizzarotti highlights that Senator had requisitioned \$407,269.46 by July 30, 2018, and asserts that Senator was paid in full, and even overpaid.

Senator, through the deposition testimony of its partner Usman Ghumman, alleges that Pizzarotti's failure to pay them on time prevented Senator from completing work, leading to the filing of a lien and lawsuit. Ghumman claims over \$500,000 is still outstanding to Senator. Ghumman's testimony is vague and conclusory and is insufficient to counter Pizzarotti's prima facie showing of entitlement to summary judgment Senator. Ghumman's testimony indicates his general lack of understanding of the legal terminology used in the contracts and his lack of knowledge concerning the legal implications of the various contracts and waivers. The assignments themselves, signed by Senator, explicitly state that all prior work was paid for in full. Moreover, Pizzarotti correctly notes that Senator's related mechanic's liens were canceled by court order due to Senator's failure to comply with N.Y. Lien Law Section 38, which requires a sworn statement itemizing the labor and materials and their corresponding values.

The signed releases and assignments clearly bar Senator from pursuing any claims in addition to any outstanding contract balance. Under New York law, releases are contracts that, if unambiguous, must be interpreted to give effect to the intent of the parties as indicated by the plain meaning of the language employed. (*see Miller v Brunner*, 164 AD3d 1228, 1231 [2d Dept 2018]). A valid release constitutes a complete bar to an action on any claim which is the subject of the release and arose prior to the execution of the release (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]; *Hack v United Capital Corp.*, 247 AD2d 300, 301 [1st Dept 1998]; *Murray-Gardner Management, Inc. v Iroquois Gas Transmission System, L.P.*, 229 AD2d 852, 854 [3d Dept 1996]). In the context of construction-related disputes, contractual releases operate to bar any claims that may have accrued prior to the execution of the release (*see Diontech Consulting, Inc. v New York City Hous. Auth.*, 78 AD3d 527, 528 [1st Dept 2010]). Where the language of a waiver is clear and unambiguous, a party's claim that it intended something else is insufficient to vitiate its force and effect. (*see L&K Holding Corp. v Tropical Aquarium at Hicksville, Inc.*, 192 AD2d 643, 645 468 [2d Dept 1993]; *see also Cont'l Ins. Co. v. 115-123 West 29th St. Owners Corp.*, 275 AD2d 604, 605 [1st Dept 2000]).

Senator has failed to present concrete, admissible evidence to counter the unambiguous language of the releases and assignments it executed, which explicitly acknowledge full payment for prior work. Ghumman's general assertions of non-payment and lack of understanding of legal terms are insufficient to raise a triable issue of fact against the clear documentary evidence of waiver and release. The cancellation of Senator's liens for non-compliance with the Lien Law further weakens its position. Therefore, Pizzarotti's motion for an order granting it summary judgment against Senator and dismissing Senator's cross-claims against it should be granted.

2. BPRT's Motion for Summary Judgment and Pizzarotti's Motion to Dismiss BPRT's Claims

BPRT seeks summary judgment on its breach of contract crossclaim against Pizzarotti for \$120,728.77, representing unpaid amounts for requisitions 13 and 14, plus earned retainage. BPRT asserts that Pizzarotti has not disputed the completion of work for these requisitions or the retainage amount. BPRT argues that any waivers are unenforceable because the promised payments were never made for these requisitions. Hassan Bajwa, President of BPRT, confirms that Pizzarotti owed BPRT \$150,000 and that BPRT was not asked to resubmit corrected requisitions.

Pizzarotti counters that BPRT's claims are barred by written releases BPRT executed, specifically up to payment application number 12, and by the termination for cause. Pizzarotti claims that the amount BPRT seeks (\$120,728.77) was properly withheld to correct, remedy, and complete BPRT's work.

However, a critical factual dispute arises from the deposition testimony of Pizzarotti's own Project Manager, Francesco Cavarretta, who stated he was not aware of any attempt by Pizzarotti to calculate alleged damages or offsets due to Bayport or Senator. This directly contradicts Pizzarotti's assertion that it properly withheld funds for corrective work. BPRT emphasizes that Pizzarotti's claims of offsets and back-charges are insufficient to raise issues of fact as Pizzarotti's deposition witness admitted that no such charges existed, and no evidence of them has been produced. Pizzarotti's affirmation by Alfredo Vinci states that the amount was properly withheld in accordance with the contracts to correct, remedy, and complete the work of BPRT. This creates a direct contradiction with the testimony of Mr. Cavarretta, raising a clear issue of fact regarding the legitimacy of Pizzarotti's withholding of funds.

While it is true, as set forth above, that New York Courts regularly enforce clear and unequivocal waivers and releases, such releases or waivers are only enforceable when the payments promised therewith are actually paid. Here it is undisputed that BPRT was never paid on requisitions 13 and 14. Pizzarotti's own project manager testified that he had no knowledge of any calculations for offsets or any justifications for withholding payments. There is a material issue of fact as to whether the withholding of funds was justified or if BPRT is indeed owed the claimed amount. The law is clear that a waiver or release treated as a mere receipt or a precondition to payment, where the payment was never made, is unenforceable and creates a triable issue of fact. Given that BPRT asserts it was not paid on requisitions 13 and 14, and Pizzarotti's own witness lacks knowledge of calculations for offsets, there is a material issue of fact as to whether the withholding of funds was justified or if BPRT is indeed owed the claimed

amount. Under settled case law that has arisen in the construction context, where the terms of the waiver and the contract between the parties expressly provide for partial payments upon execution of the waiver, the waiver is construed as merely a receipt for the monies referenced in the waiver and where a waiver purports to acknowledge that no further payments are owed, but the parties' conduct indicates otherwise, the instrument will not be construed as a release. (*see Int'l Asbestos Removal, Inc. v. Beys Specialty Inc.*, 2013 NY Slip Op 31884, p. 4 [N.Y. Sup. Ct. 2013]); [citing *E-JElec. Installation Co. v. Brooklyn Historical Society*, 43 A.D.3d 642 [1st Dept 2007]]. Put differently, under such circumstances, the parties' course of conduct is relevant to determining whether the document is a receipt rather than a release (*see Diontech*, 78 AD3d at 528). BPRT did not sign any waivers with respect to requisitions 13 and 14 and waivers signed on previous requisitions may, depending on the parties' course of conduct and other factual issues that would need to be resolved at trial, constitute nothing more than mere receipts that were preconditions to payment. Therefore, both BPRT's motion for summary judgment on its crossclaims against Pizzarotti and Pizzarotti's motion for summary judgment dismissing BPRT's claims are denied. The conflicting evidence precludes summary judgment for either party on these claims, necessitating a trial to resolve the factual dispute regarding BPRT's entitlement to the claimed amount owed.

3. Pizzarotti's Motion for Summary Judgment Against Extech

Pizzarotti seeks to dismiss Extech's complaint for foreclosure of its Mechanic's Lien by arguing that no lien fund exists because Pizzarotti did not owe any money to Senator and/or BPRT at the time Extech's lien was filed. Pizzarotti cites N.Y. Lien Law § 4, which stipulates that a mechanic's lien is valid only to the extent of "the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon." Pizzarotti asserts that since it paid Senator and BPRT in full, no lien fund remains for Extech to attach to.

Extech refutes this by pointing to Pizzarotti's own evidence. Extech notes that Alfredo Vinci, Pizzarotti's CFO, admitted in his affidavit that BPRT was owed money T the time its contract was terminated. Extech further argues that the existence of BPRT's competing motion for summary judgment on its breach of contract claim clearly raise issues of fact regarding the approximately \$120,000 outstanding to BPRT at the time of its termination. If these sums are ultimately found to be due to BPRT, then a lien fund would exist to which Extech's lien could attach. As determined above, there is a triable issue of fact regarding whether Pizzarotti owes BPRT \$120,728.77. The existence of a lien fund for Extech is directly contingent upon monies owed by Pizzarotti to its direct subcontractors (Senator and/or BPRT). Since the question of whether Pizzarotti owes money to BPRT remains unresolved and requires a trial, Pizzarotti cannot definitively establish that no lien fund exists. The purpose of summary judgment is to avoid trials where no issues of fact exist. Here, a material issue of fact directly relevant to the existence of Extech's lien remains disputed. Therefore, Pizzarotti's motion for summary judgment dismissing Extech's claims is denied.

In motion sequence 001, Pizzarotti's motion for summary judgment is granted to the extent that the crossclaims by Senator against Pizzarotti are hereby dismissed. The motion is otherwise denied. In motion sequence 002, BPRT's motion for summary judgment on its

