

**Murphy Kennedy Group LLC v Board of Mgrs. of the  
St. Tropez Condominium**

2025 NY Slip Op 32957(U)

August 4, 2025

Supreme Court, New York County

Docket Number: Index No. 652913/2019

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART 14**

*Justice*

-----X

MURPHY KENNEDY GROUP LLC,  
  
Plaintiff,

**INDEX NO.** 652913/2019

**MOTION DATE** 07/30/2025

**MOTION SEQ. NO.** 012

- v -

BOARD OF MANAGERS OF THE ST. TROPEZ  
CONDOMINIUM, SYLVIE DURHAM, IN HER CAPACITY AS  
PRESIDENT OF THE BOARD OF MANAGERS OF THE ST.  
TROPEZ CONDOMINIUM,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

BOARD OF MANAGERS OF THE ST. TROPEZ  
CONDOMINIUM

Third-Party  
Index No. 595117/2024

Plaintiff,

-against-

FIRSTSERVICE RESIDENTIAL NEW YORK, INC., FS  
PROJECT MANAGEMENT, INC. D/B/A FS PROJECT  
MANAGEMENT, LLC

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 012) 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 325, 327, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment is granted on liability only and defendants' counterclaims are severed and dismissed. There shall be a trial on plaintiff's damages.

## Background

Plaintiff was hired to do a renovation at defendants' building. Plaintiff's position is that defendants paid the first 20 of its requisitions throughout the project before suddenly ceasing payment for the last three payment requisitions. It emphasizes that these final three requisitions were submitted after defendants certified that the work was substantially complete. Plaintiff speculates that defendants allocated the money for other priorities and have never identified a cognizable reason for its sudden decision to stop paying. Plaintiff seeks summary judgment on its breach of contract claim as well as its quasi-contract theories of recovery and to dismiss defendants' counterclaims for breach of contract, breach of the implied duty of good faith and fair dealing and unjust enrichment.

Defendants argue that plaintiff did not complete the job and the work it did perform was less than satisfactory. The letter defendants sent to plaintiff that officially terminated the parties' contract on April 17, 2019 complains about plaintiff's failure to send lien waivers (*see* NYSCEF Doc. No. 318). They attach the affirmation of Mark Ellis, a board member for defendants and a licensed architect, who insists that defendants paid the first 20 payment applications but that they rejected number 21 on the ground that plaintiff had failed to provide lien waivers. He adds that by the date of the termination letter, plaintiff had already abandoned the job.

Mr. Ellis also discusses what he characterizes as a complete lack of disclosure by plaintiff with respect to plaintiff's change orders. He argues that plaintiff did not produce any backup documentation in support of these change orders, which number almost 200, and so he insists that plaintiff cannot show what it is owed, if anything. Mr. Ellis points to an example, Change Order 3, in which plaintiff sought an additional \$29,100. He insists that plaintiff was restricted, pursuant to paragraph 13.2 of the contract, to 20 percent of the net increase in the change order

but that plaintiff instead demanded over \$10,000 for its fees, well over the 20 percent allowed in the contract. Defendants also submit a purported expert affidavit from Thornton Tomasetti, who contends that over \$400,000 in corrective work is required due to plaintiff's ineffective and incomplete work.

In reply, plaintiff contends that the evidence shows that defendants' architect of record approved for the work completed and refused to cite any reason to withhold payments. Plaintiff argues that the Thornton Tomasetti report is not persuasive and was drafted six years after plaintiff's termination from the job in 2019. Plaintiff argues that defendants did not point to any contractor hired to actually fix the work and that a current observation about the status of the building is immaterial to this case.

## **Discussion**

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a

summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

### *Plaintiff's Affirmative Claims*

The Court grants plaintiff's motion for summary judgment with respect to its affirmative claim for breach of contract but only as to liability. There is no dispute that defendants executed a certificate of substantial completion that was signed by Mr. Ellis on November 21, 2018 (NYSCEF Doc. No. 311). Critically, this certificate of substantial completion contains a line stating that "Cost estimate of Work that is incomplete or defective: \$" (NYSCEF Doc. No. 311). That is, there was a blank in a key document signed by defendants, defendants' architect and plaintiff for the cost to finish or remedy defective work.

Another certificate dated September 5, 2018 states that "The Work performed under this Contract has been reviewed and found, to the Architect's & General Contractor (see footnote 1 below) best knowledge, information and belief, as of the date of this certificate, to be substantially complete" (NYSCEF Doc. No. 313). This document is signed by defendants' architect and Mr. Ellis (*id.*). And the termination letter was not sent until April 17, 2019 (NYSCEF Doc. No. 318). That termination letter does not detail any issues with plaintiff's purportedly deficient work or that plaintiff failed to complete certain tasks. Rather, it raises issues with plaintiff's failure to turn over lien waivers.

Emails from defendants' architect to defendants also suggest that the work was completed and that plaintiff should be paid something for its efforts. "We signed Requisition #21 sometime ago and we continue to believe that MKG substantially completed the work in that requisition. We understand that the relationship with the contractor has soured and they have not demonstrated full knowledge of the work, but we fundamentally believe that the work was completed and they (and/or their subcontractors) are entitled to payment" (NYSCEF Doc. No. 307 at 4 of 5). The architect later added:

"We sympathize with that. We also think that the work is nearly complete and MKG hasn't been paid for work completed. We believe they should be paid for work completed, and you should part ways knowing that you are not liable to unknown subcontractors. We also think that you should be able to complete the work for the original contract sum. This could be accomplished by finishing the contract or termination for cause. We understand that termination for cause is your preferred course of action, but if you wish us to certify, we need some clear evidence of breach" (*id.* at 5 of 5).

This evidence compels the conclusion that plaintiff is entitled to something for the outstanding work for which it complains it was never paid. Defendants' own architect suggests that defendants failed to pay plaintiff for completed work and nothing in this record raises a material issue of fact to justify defendants' failure to pay.

Whether the lien waiver issue was a sufficient basis to fire plaintiff is not a justification to find that plaintiff should not be entitled to any further compensation for its work. As will be discussed in more detail below, defendants terminated plaintiff for convenience which means, under the terms of the parties' contract, that plaintiff is entitled to payment for work already done (NYSCEF Doc. No. 310, § 20.3). And defendants did not point to any contemporaneous assertion that they were unhappy with the substance of the work as a reason for not paying plaintiff the remaining amounts due.

However, the fact that plaintiff is entitled to something does not mean it should receive everything it claims it is due. Defendants are absolutely entitled to have plaintiff substantiate its claims for the more than \$400,000 it insists is due. That is, plaintiff will have to show support for the amounts asserted in payment requisitions 21 through 23 as well as the retainage. As defendants correctly pointed out in opposition, plaintiff did not include in this record any supporting documentation for the amounts identified in its change orders. That is, plaintiff did not include estimates or communications from the subcontractors hired to perform the tasks in the change orders. A fact finder will need to assess how much, if anything, plaintiff is able to show it is due.

Also compelling the conclusion that plaintiff is entitled to summary judgment on liability is the deposition transcript of defendant Sylvie Durham (NYSCEF Doc. No. 308 at 205-206). Ms. Durham contends that defendants fired plaintiff because of the lack of lien waivers but insisted that “I think I said that we were not disputing whether the work had been completed or not. That was not the reason for our delay in payment of requisition 21” (*id.* at 206). In this Court’s view this admission means that there is no dispute that the work was done; rather, it’s a question of how much plaintiff can show it is entitled to recover.

The Court also recognizes that defendants submitted an expert report from Thornton Tomasetti that purports to detail issues with plaintiff’s work (NYSCEF Doc. No. 343). That report fails to constitute an issue of fact for several reasons, the most critical of which is that the issues raised in this report are not mentioned in the termination letter. As stressed throughout this decision, the termination letter cites the failure to submit lien waivers. And now, more than six years after this termination, defendants are apparently claiming that there is nearly \$500,000 in repairs required to fix up plaintiff’s work although no one was ever hired to fix it and no

issues were identified in contemporaneous documents or communications from that time period.

An expert report drafted six years after plaintiff's termination for the purpose of a summary judgment motion does not compel the Court to ignore defendants' deposition testimony or architect's contemporaneous certifications.

### *Counterclaims*

The Court grants the portion of plaintiff's motion that seeks summary judgment dismissing defendants' counterclaims for breach of contract, unjust enrichment and breach of the duty of good faith and fair dealing.

With respect to the counterclaim for breach of contract, the Court observes that the contract provides two types of termination by the owner—termination for cause and termination for convenience (NYSCEF Doc. No. 310). Termination for cause is much more involved and requires, in part, that “When any of the above reasons exists, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may, without prejudice to any other remedy the Owner may have and after giving the Contractor seven days' written notice, terminate the Contract” (*id.* §20.2.2). No one disputes that defendants failed to obtain a certification from the architect prior to defendants' termination of the contract with plaintiff. Defendant Durham admitted this at her deposition (NYSCEF Doc. No. 308 at 204-05).

In fact, emails produced between defendants' architect and defendants suggest that the architect thought that plaintiff had, in fact, completed the work and there was no basis to justify a termination for cause. At one point defendants' architect stated that “Typically when a contractor is terminated for cause, the owner is obligated to ask the architect to prepare a certification of cause prior to termination. Since the termination has already occurred, the sequence of events is

now out of order. We consulted our lawyer and they advised that signing a certification of cause at this point would not be beneficial” (NYSCEF Doc. No. 307). Earlier in this email thread, defendants’ architect observed that “We also think that the work is nearly complete and MKG hasn’t been paid for work completed” (*id.*).

The takeaway from this evidence is that defendants did not terminate plaintiff for cause and instead ended their contractual relationship with plaintiff for convenience. The contract states that “The Owner may, at any time, terminate the Contract for the Owner’s convenience and without cause. The Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed” (NYSCEF Doc. No. 310 § 20.3). Defendants did not raise an issue of fact to show how they would be entitled to recover any damages against plaintiff for breach of contract where they fired plaintiff for convenience.

The second counterclaim, for unjust enrichment, is dismissed as duplicative as there is no dispute that there is a binding contract between the parties. In any event, it is unclear how defendants would be entitled to recover against plaintiff based on this theory. The record on this motion suggests that plaintiff is entitled to some amount of additional damages. Nothing points to a recovery by defendants especially where, as plaintiff correctly points out, there is no evidence that defendants had to expend any resources to fix plaintiff’s work. That is, defendants did not submit any evidence that defendants hired another contractor to address or remedy issues with the subject renovation project.

The Court also dismisses the third counterclaim for the breach of the duty of good faith and fair dealing on the ground that it is duplicative. “Where a cause of action for breach of the implied covenant of good faith and fair dealing is based on the same operative facts and seeks

the same damages as a cause of action for breach of contract, the good faith claim is duplicative and should be dismissed” (*AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgt., LLC*, 214 AD3d 111, 132-33, 185 N.Y.S.3d 73 [1st Dept 2023] [citation omitted]). This counterclaim covers the same exact ground as the breach of contract counterclaim and so it is dismissed.

### Summary

As best this Court can tell, after this renovation project was certified as substantially complete, defendants became frustrated with plaintiff’s communication and administrative work. At her deposition, defendant Durham explained that, initially, defendants wanted to get to “substantial completion” for the project as soon as possible and so defendants were willing to make payments without lien waivers (NYSCEF Doc. No. 308 at 153). However, Ms. Durham insists she made it known that as the project neared completion, she wanted lien waivers particularly after a specific subcontractor complained about not receiving payment from plaintiff (*id.* at 153-54).

That frustration is understandable. Yet it does not serve as a basis to deny plaintiff’s motion because, as noted above, defendants did not properly terminate the contract for cause under the specific procedures identified in the contract. And the contract expressly provides that in the event of a termination for convenience that plaintiff would be paid for work done. That is to be the focus of the trial on damages. Because plaintiff terminated the contract for its convenience, as it was entitled to do, “The Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed” (NYSCEF Doc. No. 310 § 20.3). That

necessarily includes reasonable attorneys' fees incurred in this lengthy litigation, which is also provided for in the contract (*id.* §15.03 of the Rider).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted to the extent that it is entitled to summary judgment as to liability only and defendants' counterclaims are severed and dismissed.

8/4/2025  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE