

King Steel Iron Work Corp. v Xenon Constr. Corp.

2025 NY Slip Op 33965(U)

October 14, 2025

Supreme Court, New York County

Docket Number: Index No. 653409/2022

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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KING STEEL IRON WORK CORP., KING C STEEL
WORKS, LLC.

Plaintiff,

INDEX NO. 653409/2022

MOTION DATE 06/06/2025

MOTION SEQ. NO. 002

- v -

XENON CONSTRUCTION CORP.,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 91, 92, 93, 94, 95, 96, 97, 98, 99

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

This action arises out of allegations of breach of a subcontract as well as quasi contract causes of action. Defendant, Xenon Construction Corp., now moves for summary judgment seeking dismissal of the entire complaint. Plaintiffs, King Steel Iron Work Corp. and King C Steel Works LLC, oppose the instant motion. For the reasons set forth below the motion is granted.

Background

King Steel and Xenon entered into a written subcontract agreement, dated August 14, 2019, in which King Steel was to perform specified steel erection work on a construction project located at 735 Ninth Avenue, New York, New York.

King Steel contends that from about August 2019 through about June 2021, it provided labor and materials for which \$96,376.00 remains due and unpaid. Defendant, Xenon contends that King Steel did not perform any additional work at the site after March 2020 and abandoned the project.

Standard of Review

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Discussion

Defendant contends that King Steel's cause of action for breach of contract fails because King Steel materially breached its contract with Xenon and, as the materially breaching party, it cannot enforce same, the cause of action for account stated fails because Xenon objected to the invoices and the causes of action asserting quasi contract claims fails because there is an express contract governing the relationship of the parties. Defendant contends that the cause of action for damages pursuant to the New York Prompt Payment Act fails because it objected to King Steel's invoices and was never paid by the owner for King Steel's unperformed work. With respect to plaintiff King C, defendant contends that there was not a contract between it and King C, thus the sixth cause of action asserted by King C against defendant must fail.

First Cause of Action

To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages.

VisionChina Media Inc. v Shareholder Representative Servs., LLC, 109 AD3d 49, 58 [1st Dept 2013].

Defendant contends that it is entitled to summary judgment because there was not substantial performance of the contract. In support of this contention defendant cites to *Unloading Corp. v State of New York*, 132 AD2d 543 [2d Dept 1987], among other cases, that stand for the general contract principal that a party may not recover for a breach of contract unless they have performed pursuant to the contract. Defendant avers that plaintiff did not substantially perform under the subcontract and it is undisputed that only 34% of the work was completed.

In opposition, plaintiff contends that there is a material issue of fact that precludes summary judgment regarding the termination of the contract between the parties. Plaintiff contends that it did not abandon the project and argues that the parties were in discussion regarding a mutual termination of the contract and those discussions support plaintiff's position. The Court does not agree.

Here, it is undisputed through plaintiff's testimony and its submitted affirmation in opposition to the instant motion, that only 34% of the work was completed pursuant to the contract, thus establishing that plaintiff was in breach in failing to substantially perform. Further, it is also undisputed that plaintiff breached other obligations pursuant to the contract, for instance, maintaining daily reports of the work performed.

Defendant also asserts that plaintiff has not sustained any damages. In opposition, plaintiff asserts that its payment application that seeks payment for change orders, additional retainage and work performed pursuant to the subcontract, is sufficient to establish its damages. First, there has been un rebutted evidence that there were no approved change orders. Second,

based on the lack of substantial completion of the work, defendant has established, unrefutably, that plaintiff was not entitled to the retainage. The Court finds that defendant has established entitlement to dismissal of the plaintiff's breach of contract cause of action.

Second Cause of Action

Plaintiff may establish an account stated by any one of three alternative means: (1) the retention of bills without objection for a reasonable period of time, (2) partial payment, or (3) the plaintiff's acknowledgment of the debt. *See Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 [1st Dept 1983] (account stated established by receiving and retaining bills without any timely objection); *Liddle O'Connor, Finkelstein & Robinson v Koppelman*, 215 AD2d 204 [1st Dept 1995] (account stated based only on partial payment); *Bracken & Margolin, LLP v Schambra*, 270 AD2d 221 [2d Dept 2000] (account stated based on retention of invoices without objection and acknowledgment of obligation to pay).

The First Department has held that "a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012] quoting *Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 485 [1st Dept 1991]).

Here, the Court finds that defendant has established entitlement to dismissal of the account stated claim. Plaintiff's deposition testimony confirms that defendant objected to the payment request and admits to amending its invoice in response to defendant's objection. Although, plaintiff argued that after the amended payment request was sent no further objection was made and that is sufficient to establish entitlement, the account stated claim is not viable as an alternate means to collect pursuant to a contract between the parties. Accordingly, the portion of defendant's motion seeking dismissal of the account stated cause of action is granted.

Third and Fourth Causes of Action

Plaintiff's third and fourth causes of action assert quasi-contract claims, quantum meruit and unjust enrichment. It is well established that "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter . . ." (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]). Here, it is undisputed that there was a valid and enforceable contract governing the relationship between the parties. However, plaintiff contends that because defendant argues that it breached the agreement and cannot therefore seek to enforce the contract that it should be allowed to proceed to recover damages on a quasi-contract theory. Plaintiff cites not legal authority to support that proposition. Because there is no bona-fide dispute regarding the existence of a contract, plaintiff's quasi-contract causes of action are not viable, *see (Kramer v Greene*, 142 AD3d 438, 441-442 [1st Dept 2016]).

Fifth Cause of Action

Plaintiff's fifth cause of action alleges defendant violated the Prompt Payment Act. General Business Law § 756-a, known as the Prompt Payment Act (PPA) provides that "upon delivery of an invoice and all contractually required documentation, a contractor or subcontractor shall approve or approve or disapprove all or a portion of an invoice within 12 business days". Gen. Bus. Law § 756-a[2][a][ii].

Defendant contends that for the same reason the account stated claim fails, objection to the submitted invoices, this cause of action must also fail. Further, defendant avers that it never received payment from the owner for the amounts invoiced. In opposition, plaintiff simply states that this cause of action is viable based on the same allegations asserted in support of its account stated cause of action.

Here, again defendant has established with unrebutted testimony that the invoices were objected to, plaintiff does not rebut this testimony either at its deposition or in the affirmation in opposition to this motion. Accordingly, this cause of action is dismissed.

Sixth Cause of Action


Plaintiff asserts a breach of contract cause of action in favor of plaintiff King C, as against defendant. Defendant seeks summary judgment contending that there was no contract between the parties.

Defendant has established, and plaintiff’s deposition testimony confirms, that plaintiff King C had not entered into a contract. See NYSCEF Doc. 72, pp.111-112; 114:16-18. Further, Mr. Galapo’s affirmation submitted in opposition to the motion contends that the parties were still negotiating “closing notes”, with no definition of the term. See NYSCEF Doc. 95.

Defendant has established that there was no contract between it and plaintiff King C, plaintiff has failed to submit any evidence to raise a triable issue of fact. The Court has reviewed plaintiff’s remaining contentions and finds them unavailing. Accordingly, it is hereby

ORDERED that the complaint is dismissed.

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LYLE E. FRANK, J.S.C.

10/14/2025

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: