

Cibani v Shawmut Woodworking & Supply, Inc.

2025 NY Slip Op 34582(U)

November 28, 2025

Supreme Court, New York County

Docket Number: Index No. 159161/2022

Judge: Arthur F. Engoron

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

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

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FIONA M. CIBANI,	INDEX NO. <u>159161/2022</u>
Plaintiff,	MOTION DATE <u>05/23/2025</u>
- v -	MOTION SEQ. NO. <u>003</u>

SHAWMUT WOODWORKING & SUPPLY, INC. D/B/A
SHAWMUT DESIGN AND CONSTRUCTION,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 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, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136,

were read on this motion for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, and for the reasons stated hereinbelow, defendant/counterclaim plaintiff Shawmut Woodworking & Supply, Inc.'s motion for partial summary judgment is denied.

Background

In a contract dated October 24, 2017 (the "Agreement"), plaintiff/counterclaim defendant, Fiona M. Cibani, and counterclaim defendant Alfred K. T. Chan, hired defendant/counterclaim plaintiff, Shawmut Woodworking & Supply, Inc. d/b/a Shawmut Design and Construction, ("Shawmut), to be the contractor on a gut-renovation of a residence located at 116 East 78th Street, New York, New York (the "Property"). NYSCEF Doc. No. 64. The work, which included converting an 11-unit apartment building into a single-family residence, did not, apparently, go smoothly.

Pursuant to § 16.2 and Article 4 of Rider C of the Agreement, plaintiff could terminate defendant for cause if, inter alia, Shawmut repeatedly refused or failed to supply enough properly skilled workers or materials, failed to pay subcontractors, disregarded laws, or otherwise substantially breached. NYSCEF Doc. No. 64.

On October 7, 2021, the Department of Buildings found inadequate roof protection, which threatened the adjoining property, and issued a partial stop work order for all work on the roof and exterior near the western exposure. NYSCEF Doc. No. 65. In order to lift the stop work order, plaintiff needed to renegotiate access with a neighbor.

On May 9, 2022, plaintiff commenced a special proceeding against her neighbor for access, pursuant to Real Property Actions and Proceedings Law § 881 (“RPAPL Proceeding”), to vacate the stop work order. NYSCEF Doc. No. 67.

On May 12, 2022, Shawmut issued to plaintiff a Notice of Suspension that offered a resumption of work on six conditions, including that the stop work order be lifted and that an “Agreement is in place for general conditions through completion.” NYSCEF Doc. No. 69.

In a May 18, 2022 letter, dated March 18, 2022, plaintiff’s counsel responded, without waiver and reserving her rights, inter alia: that Shawmut had “once again breached the express terms of the parties’ Agreement, must return to work immediately, and diligently prosecute the Work through completion”; that “Shawmut is not entitled to payment of any General Conditions costs beyond the agreed 12% of the Cost of the Work” and that its “attempt to strongarm Cibani into paying additional funds that are not earned or otherwise due under the Agreement will fail”; and directing Shawmut to participate in a court appearance in the RPAPL Proceeding on June 23, 2022 NYSCEF Doc. No. 70.

As part of the RPPAL Proceeding, Jay Quackenbush, Shawmut’s Senior director of Construction Operations, assisted plaintiff, including by submitting two affidavits. NYSCEF Doc. Nos. 101, 106.

On September 16, 2022, plaintiff issued a Notice of Termination “for cause” to defendant, alleging that Shawmut:

breached its material obligations under the Agreement by, among other things, ... refusing or failing to supply enough skilled workers or materials, fail[ing] to make timely payments to subcontractors and disregarding the laws, rules and regulations applicable to the Project, which resulted in several instances of violations and Stop Work Orders ... suspend[ing] the Work at the Project without warning or justification and ... to this day, almost four months later, has failed to abide by requests for Shawmut to restart the Work so that [plaintiff] finally can occupy her home.

NYSCEF Doc. No. 77.

On December 20, 2022, Justice Paul A. Goetz granted the petition in the RPAPL Proceeding. NYSCEF Doc. No. 87.

On March 14, 2023, plaintiff commenced the instant action against Shawmut, alleging breach of contract and seeking no less than \$500,000 in damages. NYSCEF Doc. No. 84.

On August 2, 2023, Shawmut filed an Answer with a general denial, 17 affirmative defenses, and three counterclaims against plaintiff and Mr. Chan: (1) breach of contract; (2) quantum meruit; and (3) foreclosure of a mechanic’s lien. NYSCEF Doc. No. 86.

Shawmut now moves, pursuant to CPLR 3212, for partial summary judgment on its breach of contract and foreclosure counterclaims. NYSCEF Doc. No. 62. Shawmut argues it is entitled to summary judgment based on the election of remedies doctrine, essentially that “if a non-breaching party does not terminate the contract upon a material breach, then that party does not get to terminate it after-the-fact later, after the contract has continued to be performed based on that earlier alleged breach.” NYSCEF Doc. No. 89.

Discussion

In order to obtain summary judgment, the

movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests.’ [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ for this purpose.

Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

“Election of remedies is a harsh doctrine and should only be applied where there has clearly been an irrevocable election. The doctrine is intended to prevent vexatious litigation.” Stoetzel v Wappingers Cent. Sch. Dist., 118 AD2d 636, 636 (2d Dept 1986). Under the doctrine,

when one party breaches a bilateral contract, the other party “must make an election between declaring a breach and terminating the contract or, alternatively, ignoring the breach and continuing to perform under the contract.” On learning of the breach, the other party “has a reasonable time” to elect its remedy.

Todd English Enters. LLC v Hudson Home Group, LLC, 206 AD3d 585, 587 (1st Dept 2022) (internal citation omitted).


Here, Shawmut’s reliance on the election of remedies doctrine is misplaced. As an initial matter, “[g]ood faith attempts to realize contractual benefits by negotiating with a counterparty, rather than immediately filing suit, do not constitute an election of remedies.” MBIA Ins. Corp. v Patriarch Partners VIII, LLC, 842 F Supp 2d 682, 711 (SD NY 2012). Triable issues of fact remain as to whether, years into a complex construction project, it was an election for plaintiff to try to work out a resolution with Shawmut after its Notice of Suspension rather than terminate the Agreement. Second, the election of remedies doctrine “permits parties to wait a ‘reasonable time’ after learning of the alleged breaches before terminating the contract,” Bigda v Fischbach Corp., 898 F Supp 1004, 1012 (SD NY 1995), and the Court cannot say that plaintiff here waited an unreasonable amount of time to terminate the Agreement, as she tried to understand her options and the state of the Property. Further, “[t]here can be an election of remedies only when a choice is made between inconsistent, alternative, or mutually exclusive remedies, not between consistent or cumulative remedies, so long as there has been no satisfaction of the claim under

the first remedy.” 1 NY Jur 2d Actions § 11. Here, the Court finds that it was not inconsistent for plaintiff to request and accept Shawmut’s assistance in the RPAPL Proceeding, which arose out of Shawmut’s work, and terminating the Agreement months later.

Thus, that part of Shawmut’s motion for partial summary judgment on its breach of contract counterclaim must be denied and, accordingly, as any amount due or not due Shawmut is therefore in dispute, that part of the motion seeking partial summary judgment foreclosing on the mechanic’s lien must also be denied.

This Court has considered defendant’s other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion
Motion denied.


HON. ARTHUR F. ENGORON

11/28/2025
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE