

D.S. Magic Tech, LLC v Stonegate Realty, LLC
2025 NY Slip Op 35608(U)
January 29, 2025
Supreme Court, Nassau County
Docket Number: Index No. 606621/2023
Judge: Ellen Tobin
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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: Hon. Ellen Tobin, A.J.S.C.

**D.S. MAGIC TECH, LLC d/b/a
THE WATER SCROOGE,**

Plaintiff,

- against -

**STONEGATE REALTY, LLC, 240 PATTERSON
AVENUE LLC., 1112 16TH ST. LLC, 33 66TH ST. LLC,
1 THIRD ST. LLC, 38 CENTRAL AVE. LLC,
5200 PALISADE AVE. LLC and 61 LINDEN ST. LLC,**

Defendants.

TRIAL/IAS PART 33

Index No. 606621/2023

Motion Seq. Nos. 003, 005

DECISION AND ORDER

The following papers were read on these motions:

NYSCEF Doc. Nos.

Notice of Motion, Affidavit and Affirmation in Support and Exhibits	35 - 43
Statement of Material Facts, Memo of Law, Affirmation in Opposition and Exhibits	46 - 52
Notice of Cross Motion, Affirmation in Support and Exhibits	65 - 70
Affirmation in Opposition to Cross Motion and Exhibits	72 - 77
Affirmation in Reply in Further Support of Cross Motion	78

Upon the foregoing papers, plaintiff D.S. Magic Tech, LLC d/b/a The Water Scrooge (“Plaintiff”) moves for an Order (1) pursuant to CPLR § 3212 granting summary judgment in its favor, and (2) pursuant to CPLR § 3211 [b] dismissing the affirmative defenses asserted by defendants Stonegate Realty, LLC, 240 Patterson Avenue LLC, 1112 16th St. LLC, 33 66th St. LLC, 1 Third St. LLC, 38 Central Ave. LLC, 5200 Palisade Ave. LLC and 61 Linden St. LLC (collectively, “Defendants”) (Motion Seq. No. 003). Also upon the foregoing papers, Defendants cross move for an Order pursuant to CPLR § 3025 [b] granting leave to amend their Verified Answer (Motion Seq. No. 005). Each side opposes the other side’s motion and Defendants filed

reply papers in further support of their motion to amend. The motions are decided as set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

In or about August 2022, the parties entered into sales agreements (the “Agreements”) where Defendants hired Plaintiff to install “a flow management device, shower adapters, fill cycle diverters, leak prevention devices, and tamper-resistant measures to the bathrooms and kitchens of several buildings managed/owned by Defendants” (Compl.¹ at ¶12). Under the Agreements, “[f]ifty (50%) of the Total Installation Cost ... [was] due upon the execution” thereof (Agreements² at 13).

On November 2, 2022, Nat Amsel of defendant Stonegate Realty sent an email introducing “Tani”³ to David Schwartz (Plaintiff’s managing member), stating that Nat had “h[i]red [sic] [Plaintiff] to install water conservation equipment in 6-7 different buildings if you can please help him with the access he will need. I.e.: notices and super info” (Exh. “B”⁴ to Defs.’ Motion; Compl. at ¶14). Following the exchange of additional emails, on December 14, 2024 Mr. Schwartz wrote that he “wanted to confirm that we are starting the water conservation project for the aforementioned properties in 2 weeks” (Exh. “B”). Defendants responded: “We don’t plan on going ahead with it” (*id.*)⁵ By letter dated March 2, 2023, counsel for Plaintiff asserted that Defendants had breached the parties’ Agreements by preventing Plaintiff from commencing work, and demanded payment under the Agreements in the amount of \$108,800 within 10 days (Exh. “C” to Defs.’ Motion).⁶

¹ NYSCEF Doc. No. 1.

² NYSCEF Doc. No. 19.

³ Tani’s full name and email address are not visible in Plaintiff’s Exhibit “B.”

⁴ NYSCEF Doc. No. 20.

⁵ The date, sender and recipient(s) of Defendant’s response email are not visible in Plaintiff’s Exh. “B.”

⁶ NYSCEF Doc. No. 21.

Plaintiff commenced this action in April 2023 by filing a summons and complaint asserting three causes of action against Defendants: account stated, breach of contract for failure to remit \$108,800 under the Agreements and recovery of attorneys' fees under the Agreements. In sum, Plaintiff alleges that under the Agreements, Plaintiff agreed to provide certain water conservation services to Defendants; Defendants agreed to remit payment for the services; Defendants prevented Plaintiff from performing the specified services; and Plaintiff charged Defendants consistent with the Agreement's fee structures in the total amount of \$108,800. Plaintiff further alleges that by letter dated March 2, 2023, Plaintiff demanded that Defendants remit payment in the amount of \$108,800 for the services under the Agreements.

By Decision and Order entered on March 15, 2024 ("MTD Decision"⁷), the Court granted Defendants' motion to dismiss as to the cause of action for account stated, and denied the motion as to the causes of action for breach of contract and attorneys' fees, finding that both were adequately pleaded in Plaintiff's Verified Complaint (MTD Decision at 6).

By Decision and Order entered on August 19, 2024,⁸ the Court denied Defendants' cross motion to amend their answer, with leave to re-file in accordance with CPLR § 3025 [b].

DISCUSSION AND ANALYSIS

A. Plaintiff's Motion For Summary Judgment

Summary judgment may only be granted when it is clear that no triable issue of fact exists (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A party seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make that showing requires the denial of the motion, regardless of

⁷ NYSCEF Doc. No. 27.

⁸ NYSCEF Doc. No. 63.

the adequacy of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, if the movant makes a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]).

“To recover damages for breach of contract, a plaintiff must demonstrate the existence of a contract, . . . [its] performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach” (*Vil. of Kiryas Joel v County of Orange*, 144 AD3d 895, 896 [2d Dept 2016]; *Ben Ciccone, Inc. v Naber Electric Corp.*, 214 AD3d 936, 937-38 [2d Dept 2023]).

Plaintiff does not establish the second element of its breach of contract claims – its performance under the Agreements. Plaintiff’s position is that it never performed under the Agreements because Defendants prevented Plaintiff from commencing the work. The documentation Plaintiff submits in support of the motion consists of unauthenticated portions of an email exchange between Plaintiff’s managing member and individuals who are not identified in the emails. As noted above, dates, times and other identifying information – including the names and email addresses of senders and recipients – are missing from the copy of the emails submitted as Plaintiff’s Exhibit “B.” Even if they were admissible, Plaintiff’s submissions do not show that Plaintiff was ready, willing and able to perform under the Agreements. Plaintiff fails to show the absence of issues of fact as to whether Plaintiff performed under the Agreements (*see Waldorf v Waldorf*, 222 AD3d 807, 808 [2d Dept 2023]; *Chem. Bank v Stahl*, 272 AD2d 1, 14-15 [1st Dept 2000]).

Plaintiff's other arguments are not availing. While in the MTD Decision the Court found that Plaintiff had sufficiently alleged the causes of action for breach of contract and legal fees, that is not dispositive of the issues now before the Court – whether Plaintiff is entitled to summary judgment on those claims (*see e.g. Zuckerman v City of New York*, 49 NY2d at 562). Also unavailing is Plaintiff's argument that the Agreements together with the parties' emails show the existence of the Agreement and Defendants' breach of the same, as there is no evidence showing Plaintiff's performance of its obligations under the Agreements (as discussed above).

Insofar as Plaintiff moves for summary judgment based on anticipatory breach, such relief is precluded under the election of remedies doctrine. “When one party to a contract commits an anticipatory breach, the nonbreaching party must choose one of two options: either treat the contract as terminated and seek damages, or ignore the breach and wait for the breaching party to perform” (*Contr. Pharmacal Corp. v Air Indus. Group*, 224 AD3d 873, 874 [2d Dept 2024]). “In determining which election the nonbreaching party has made, the operative factor ... is whether the non-breaching party has taken an action (or failed to take an action) that indicated to the breaching party that [it] had made an election” (*id.*, quoting *AG Props. of Kingston, LLC v Besicorp–Empire Dev. Co., LLC*, 14 AD3d 971, 973 [3d Dept 2005] [internal quotation marks omitted]; *see Bigda v Fischbach Corp.*, 898 F Supp 1004, 1013 [SD NY 1995], *affd* 101 F3d 108 [2d Cir 1996]). “Once the nonbreaching party has chosen a remedy, the choice becomes binding and cannot be altered” and “[a]ccordingly, asserting a cause of action alleging breach of contract precludes pleading a cause of action alleging anticipatory breach of contract” (*Contr. Pharmacal Corp. v Air Indus. Group*, 224 AD3d at 874). Here Plaintiff elected the first option – treating the Agreement as terminated, asserting causes of action against Defendants for breach of contract and seeking damages for the same. As a result, Plaintiff is precluded from pursuing a claim for

anticipatory breach of the Agreements (*see Contr. Pharmacal Corp. v Air Indus. Group*, 224 AD3d at 874).

**B. Plaintiff's Motion To Dismiss Affirmative Defenses
And Defendants' Motion To Amend**

Plaintiff also moves to dismiss Defendants' affirmative defenses. Under CPLR § 3211 [b], "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (*Bank of New York v Penalver*, 125 AD3d 796, 797 [2d Dept 2015] quoting CPLR § 3211 [b]). "When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law'" (*id.* quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]). "Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed" (*id.*).

Plaintiff argues that Defendants' 18 affirmative defenses are "single sentence, boilerplate, conclusion[s] of law" without any supporting facts. Defendants oppose the motion to dismiss and cross move for leave to amend their Answer to set forth additional factual allegations in support of their affirmative defenses. The proposed Amended Answer clearly showing the proposed changes and additions is attached as Exhibit "C" to the Cross Motion (NYSCEF Doc. No. 69).

"In the absence of prejudice or surprise to the opposing party, a motion for leave to amend the complaint pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is 'palpably insufficient' to state a cause of action or is patently devoid of merit" (*Scofield v DeGroodt*, 54 AD3d 1017, 1018 [2d Dept 2008], quoting *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). "The burden of establishing prejudice is on the party opposing the amendment"

(*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]) in the context of which the movant must demonstrate it “has been hindered in the preparation of . . . [its] case or has been prevented from taking some measure in support of . . . [its] position” (*R & G Brenner Income Tax Consultants v Gilmartin*, 166 AD3d 685, 687 [2d Dept 2018], quoting *Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 [1981]).

Plaintiff does not show it will suffer undue prejudice as a result of Defendants filing the Amended Answer. The Court has reviewed Defendants’ proposed Amended Answer, which is not palpably insufficient or devoid of merit (*see Scofield v DeGroodt*, 54 AD3d at 1018). Accordingly, Defendants’ motion to amend the Answer is GRANTED, and Plaintiff’s motion to dismiss the affirmative defenses is DENIED as moot.

Based upon the foregoing, it is hereby

ORDERED, that the branch of Plaintiff’s motion for an Order pursuant to CPLR § 3212 granting summary judgment in its favor is **DENIED**; and it is further

ORDERED, that Defendants’ cross motion pursuant to CPLR § 3025 [b] for leave to file and serve the Amended Answer is **GRANTED** and said Answer is deemed served; and it is further

ORDERED, that the branch of Plaintiff’s motion for an Order pursuant to CPLR § 3211 [b] dismissing Defendants’ affirmative defenses is **DENIED as moot**; and it is further

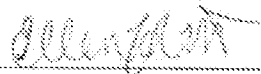
ORDERED, that all parties shall appear for a status and settlement conference on March 6, 2025, at 10:00 A.M., in Part 35, 100 Supreme Court Drive, Mineola, New York.

Any other relief sought herein and not addressed or ruled on is **DENIED**.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
January 29, 2025

ENTER:



HON. ELLEN TOBIN, A.J.S.C.

ENTERED

Feb 06 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE