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| Prime Contrs. Inc. v UTB-United Tech., Inc. |
| 2026 NY Slip Op 31882(U) |
| March 24, 2026 |
| Supreme Court, New York County |
| Docket Number: Index No. 653716/2023 |
| Judge: Gerald Lebovits |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART 07

Justice

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INDEX NO. 653716/2023

PRIME CONTRACTORS INC.,

MOTION SEQ. NO. 006

Plaintiff,

- v -

UTB-UNITED TECHNOLOGY, INC., MOHAN SHARMA,
QBE INSURANCE COMPANY, NEW YORK CITY SCHOOL
CONSTRUCTION AUTHORITY, MASON TENDERS
DISTRICT COUNSEL WELFARE FUND, and NEW YORK
CITY DISTRICT COUNCIL OF CARPENTERS AND
JOINERS BENEFIT FUNDS,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 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

were read on this motion for SUMMARY JUDGMENT.

Law Offices of Thomas J. Romans, Wyckoff, NJ (Thomas J. Romans of counsel), for plaintiff.
Camardo Law Firm, PC, Auburn, NY (Kevin M. Cox of counsel), for defendants UTB-United
Technology, Inc. and Mohan Sharma.

Gerald Lebovits, J.:

This action arises from a school construction project. Defendant, UTB-United
Technology, Inc. was the general contractor on the project. Plaintiff, Prime Contractors, Inc., was
one of its subcontractors. Prime brings this action against UTB and UTB's principal, Mohan
Sharma, for alleged trust diversion; lien foreclosure; breach of contract; and quantum meruit.

On this motion, UTB and Sharma move for summary judgment dismissing those claims
against it and for summary judgment on UTB's counterclaim for breach of contract. The motion
is granted in part and denied in part.

DISCUSSION

I. UTB's Motion to Dismiss Prime's Trust-Diversion Claim (First Cause of Action)

The UTB defendants move for summary judgment dismissing Prime's claim for trust
diversion. The UTB defendants argue that to maintain this cause of action, Prime must obtain
class certification but that Prime has not done so. Prime does not oppose dismissal of this claim.
Summary judgment dismissing the first cause of action is granted.

II. UTB's Motion to Dismiss Prime's Claims for Lien Foreclosure, Breach of Contract, and Quantum Meruit (Second, Third, and Fourth Causes of Action)

In its complaint, Prime seeks payment (both in breach of contract and in quantum meruit) for its provision of scaffolding to UTB from March 26, 2021, through January 23, 2023. (NYSCEF No. 3 at 2-3 [Prime's Feb. 2023 statement to UTB].) Prime's contention that it is entitled to further payment for scaffolding-related charges also underlies Prime's lien-foreclosure claim. The UTB defendants move for summary judgment dismissing these claims. The motion is denied.

Movants argue that Prime may not recoup the claimed scaffolding costs because those costs "are not part of the lump sum Subcontract amount or the result of approved change order(s) by the SCA." (NYSCEF No. 79 at ¶ 17 [Mohan Sharma aff.].) Movants represent that the total amount to which Prime is entitled (the subcontract amount, plus approved change orders, minus retainage withheld by UTB under the subcontract until completion of the project) is \$1,208,004.80; and that UTB paid \$1,480,625.15 to or for Prime (\$1,315,000 paid directly to Prime, and another \$165,625.15 to unions, suppliers, and the like on Prime's behalf). (*See id.* at ¶¶ 11-16.) Movants thus contend that, accounting for retainage, UTB does not owe Prime any money, but has instead *overpaid* Prime by \$145,461.95.¹ (*See id.* at ¶ 16.) Movants support this contention with a detailed account statement and ledger, along with invoices and copies of checks. (*See generally* NYSCEF No. 81.)

In opposition, Prime submits an affidavit from its bookkeeping company's owner, Jackie Nasta. (*See* NYSCEF No. 93.) Nasta represents (and UTB does not dispute) that on April 1, 2022, the parties entered into a contract modification, which provided that UTB would pay an additional \$446,584 to cover scaffolding rentals through December 2022, the anticipated completion date of the project.² (NYSCEF No. 92; *see also* NYSCEF No. 93 at ¶ 9 [Nasta affidavit].)

UTB, however, *agrees* that it owes Prime this \$446,584 payment, as an authorized change order. (*See* NYSCEF No. 94 at ¶ 8 [UTB reply memo].) And Prime's entitlement to the \$446,584 is included in the calculations of the account statement on which UTB relies. (*See* NYSCEF No. 92 at 2.) The April 2022 agreement thus creates no issue of fact with respect to the

¹ This \$145,461.95 figure appears to reflect an arithmetic error in *Prime's* favor. It is undisputed that Prime is ultimately entitled to receive back from UTB the amount withheld in retainage (\$63,579.20). UTB's calculation of the amount that it paid to Prime thus deducts the \$63,579.20 from the original total of \$1,480,625.15. But UTB appears then to have inadvertently deducted the retainage amount a second time. (*Compare* NYSCEF No. 79 at ¶ 16, *with* NYSCEF No. 81 at 1.) Thus, on the figures provided by UTB, the correct amount of the claimed overpayment would be \$209,041.15, not \$145,461.95.

² Although UTB comments that the "purported handwritten agreement is not signed by Jackie Nasta, nor does she claim to have signed it - or even drafted it" (NYSCEF No. 94 at 5), and that the agreement therefore presents "evidentiary issues" (*id.* at 6), UTB does *not* contend that the agreement is either inauthentic or inadmissible.

\$446,584 charge (as Prime contends), because that charge is already accounted for in UTB's evidence that it made an overpayment, rather than an underpayment.

The Nasta affidavit also states that “the payments [Sharma] states to Prime are not reflected in my account records” and that her records “do not agree with Mr. Sharma’s Affidavit and the debits and credits he attributes to UTB’s account with Prime.” (NYSCEF No. 93 at ¶ 5.) But she does not identify which payments identified by Sharma are not reflected in her records; nor how those records conflict with the account statement, ledger, and checks appended to Sharma’s affidavit.³ Absent any details or specifics, these statements by Nasta are insufficient to create a material dispute of fact.

Although it is not entirely clear from the papers, Prime may also be arguing that the April 2022 agreement makes UTB responsible for other pre-December 2022 charges beyond the \$446,584 (such as, perhaps, \$413,000 for the costs of renting scaffolding during a COVID-related construction delay. (*See* NYSCEF No. 92 [modification agreement]; NYSCEF No. 93 at ¶ 11 [Nasta affidavit].) But Prime identifies no language in the April 2022 agreement (or other evidence) that might reasonably be read to make UTB responsible for that sum. To the contrary, Nasta’s affidavit describes the April 2022 agreement as representing a meeting of the minds “that the compromised sum of \$446,584 represented everything owed to Prime, including monthly rental of \$59,050 up to December 31, 2022, when the parties contemplated the project would be completed.” (NYSCEF No. 93 at ¶ 9.)

All that said, this court concludes that issues of fact remain that preclude summary judgment to UTB (either dismissing Prime’s claims or awarding UTB judgment on its counterclaim).

First, a material dispute of fact exists about whether UTB is liable to Prime for the cost of scaffolding maintained by Prime in January 2023—*i.e.*, after the period encompassed by the April 1, 2022, agreement. A \$59,050 increment of Prime’s claimed damages in this action derives from the cost of scaffolding for the month of January 2023.⁴ And it is unclear from the record on this motion whether Prime is entitled to payment for that amount under the April 2022 agreement. The agreement states that “[a]s of 04/01/22,” UTB owes Prime an additional \$446,484, “including Rentals up to 12/31/22.” (NYSCEF No. 92.) This language does not directly address whether UTB must make additional payments to Prime, beyond the \$446,584,

³ This court’s own review indicates that the vast majority of the payments reflected in the materials provided by Sharma (all but perhaps \$60,000 or so) also appear in the *Prime* account statement attached as an exhibit to the complaint. (*Compare* NYSCEF No. 3 [Prime statement], *with* NYSCEF No. 92 [UTB payment-related materials].) Prime does not provide a reason to believe (whether through the Nasta affidavit or otherwise) that the remaining \$60,000 in claimed payments—for which UTB has supplied dates, checks, and explanations—were not made.

⁴ Nasta’s affidavit asserts that UTB owes Prime additional sums for continued rental of the scaffolding after January 2023. But Prime’s complaint does not seek, and the attached account statement does not reflect, damages accruing after January 2023. (*Compare* NYSCEF No. 1 at 11-14 [prayer for relief], *with* NYSCEF No. 3 at 3 [account statement].) Nor has Prime sought leave to amend its complaint or conform the pleadings to the proof.

should the scaffolding remain after December 31, 2022. (*See* NYSCEF No. 92.) One may reasonably read this agreement in two ways, as providing either (i) the \$446,584 constitutes a fixed additional fee owed by UTB to Prime for the scaffolding until the project is complete; or (ii) the \$446,584 covers only the fee owed by UTB to Prime for the scaffolding through December 31, 2022, leaving unaddressed any scaffold costs accruing after that date. In the latter scenario, Prime is entitled to claim an additional \$59,050 in quantum meruit from UTB, thereby reducing the amount of any overpayment by UTB by \$59,050. And the parties did not provide arguments or evidence with respect to how this court should resolve that contractual ambiguity. (*See* NYSCEF No. 3 at 3.)

Second, a material dispute of fact exists about whether \$150,000 paid from UTB to Prime may properly be included in UTB's claimed overpayment.

Part of the \$1,480,625.15 in payments claimed by UTB included a \$150,000 payment for scaffolding-dismantling services. UTB provides the check it made out to Prime for \$150,000 (*see* NYSCEF No. 81 at 10 [pdf pagination] [check #43048]), and Prime's own accounting reflects receipt of that check (*see* NYSCEF No. 3 at 3 [pdf pagination]).⁵ The difficulty is that UTB's account statement reflects that the total value of Prime's work (minus retainage), \$1,208,004.80, *did not include* the \$150,000 in scaffold-dismantling services. (*See* NYSCEF No. 81 at 2.) The statement reflects that the \$150,000 had instead been deducted from the total value of Prime's work pursuant to a change order. (*See* NYSCEF No. 81 at 2.)

Three possible scenarios exist, therefore, with respect to this \$150,000. Under the first scenario, the account statement is incorrect, and the \$150,000 was part of the total value of Prime's contractual work. In this scenario, the total value of Prime's contractual work (minus retainage) was \$1,358,004.80, not \$1,208,004.80. As a result, UTB's statement would underestimate the amount owed to Prime—and thereby overestimate the amount of any contractual overpayment by UTB—by \$150,000. The calculation of any damages owed by UTB to Prime (or by Prime to UTB) would have to be adjusted \$150,000 in Prime's favor from what UTB has claimed.

Under the second scenario, the account statement is correct, the \$150,000 was not part of the total value of Prime's contractual work, and Prime has not done \$150,000 worth of noncontractual work for UTB relating to the dismantling of the scaffolding. In this scenario, UTB's statement overestimates the amount of UTB's contractual overpayment to Prime by \$150,000 (because \$150,000 of the total amount paid by UTB did not represent payment for any of the \$1,208,004.80 worth of contractual work for which Prime is entitled to be paid); but also UTB paid \$150,000 to Prime to which Prime was not entitled. As a result, UTB's statement accurately reflects the amount of its overall overpayment to Prime (subject to correction of the arithmetic error discussed in note 2, *supra*). The net amount in damages owed by UTB to Prime (or by Prime to UTB) would remain the same as what UTB has claimed.

⁵ Nasta suggests in her affidavit that UTB did not pay the \$150,000. (*See* NYSCEF No. 93 at ¶ 7.) But this suggestion is belied by both UTB's check and Prime's own account statement.

Under the third scenario, the account statement is correct, the \$150,000 was not part of the total value of Prime's contractual work, and Prime *has* done \$150,000 worth of noncontractual work for UTB relating to the dismantling of the scaffolding. In this scenario, UTB's statement overestimates the amount of UTB's contractual overpayment to Prime by \$150,000 for the same reasons as in scenario (2); and Prime remains entitled to that \$150,000 payment. As in scenario (1), the calculation of damages would have to be adjusted \$150,000 in Prime's favor from what UTB has claimed.

The record on the current motion does not provide sufficient evidence to permit this court to choose among these three scenarios.

Thus, depending on how these two sets of factual disputes are resolved, the proper disposition of the claims and counterclaims in this action could range from awarding Prime \$8.85 (if both factual disputes are resolved favorably to Prime) to awarding UTB \$209,041.15 (if both factual disputes are resolved favorably to UTB).⁶ On this record, therefore, the UTB defendants have not established that they are entitled to summary judgment dismissing Prime's second, third, and fourth causes of action.⁷

III. Breach of Contract (First Counterclaim)

The UTB defendants' first counterclaim is for breach of subcontract. According to the UTB defendants, Prime breached the subcontract by refusing to deliver materials, disrupting the project, and failing to pay subcontractors and union dues. (NYSCEF No. 18 at ¶ 67.) UTB seeks the amount of its overpayment to Prime in damages. Given this court's conclusion that factual disputes about the amount of that overpayment remain, the branch of UTB's motion for summary judgment on its counterclaim is denied.

Accordingly, it is

ORDERED that the branch of UTB's motion for summary judgment dismissing the complaint (first, second, third, and fourth causes of action) is granted with respect to the first cause of action, and is otherwise denied; and it is further

⁶ The court's calculation here assumes that the arithmetical error identified in note 2, *supra*, has been corrected. If one goes solely on the figures provided by UTB on this motion, the possible outcomes would range from awarding \$63,588.05 to Prime through awarding \$145,461.95 to UTB.

⁷ UTB does not seek dismissal of Prime's lien-foreclosure claim (and vacatur of the lien) on the ground that the amount of the lien is willfully exaggerated. This court therefore does not consider that question.

ORDERED that the branch of UTB's motion for summary judgment on its first counterclaim for breach of contract is denied.


HON. GERALD LEBOVITZ
J.S.C.

3/24/2026
DATE

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