

Trident Structural Corp. v Asilis

2011 NY Slip Op 31131(U)

March 29, 2011

Supreme Court, Queens County

Docket Number: 19793/10

Judge: Orin R. Kitzes

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Short Form Order**NEW YORK SUPREME COURT -QUEENS COUNTY****PRESENT: ORIN R. KITZES****PART 17****Justice**

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TRIDENT STRUCTURAL CORP.,
Plaintiff,

Index No.: 19793/10
Motion Date: 3/23/11
Motion Cal. No.: 37

-against-

ARISTOTELIS DIAKOVASILIS, SOPHIA
DIAKOVASILIS, ANASTASIOS DIAKOVASILIS,
GEORGE RYCAR ARCHITECTS, P.C. a/k/a
GEORGE RYCAR PROFESSIONAL ARCHITECT, P.C.,
and MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.,

Defendant.

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The following papers numbered 1 to 14 read on this motion by plaintiff for summary judgment in favor of plaintiff against the defendant ARISTOTELIS DIAKOVASILIS (“Ari”) with respect to plaintiff’s fourth cause of action for breach of Work Completion and Payment Guarantee Agreement, dated May 29, 2009.

	PAPERS NUMBERED
Notice of Motion-Affidavit-Affirmation-Exhibits.....	1-4
Affirmation in Partial Opposition.....	5-6
Affidavit in Opposition-Exhibits.....	7-9
Memorandum of Law.....	10-11
Reply-Exhibits.....	12-14

Upon the foregoing papers it is ordered that the motion by Plaintiff for an order, pursuant to CPLR 3212, granting summary judgment in its favor, against the defendant Ari with respect to plaintiff’s fourth cause of action for breach of Work Completion and Payment Guarantee Agreement, dated May 29, 2009 is denied, for the following reasons:

According to the complaint and Plaintiff’s papers, this action to foreclose a mechanic’s lien filed by plaintiff and for damages due to plaintiff’s performance of work, labor, and services, and providing materials with respect to the premises located at 37-10 23rd Avenue, Astoria, New York, in the County of Queens, City and State of New York, Section, that are owned by defendant Ari. Trident was hired by the defendant Ari pursuant to a written contract, dated June 21, 2006, signed by both Ari and Trident, to convert Ari’s premises from a 1-family dwelling to a 2-family dwelling, wherein would pay plaintiff \$314,000.00 for the work. Although plaintiff performed its obligations pursuant to the agreements, defendants have failed to make full payment to plaintiff. Thereafter, plaintiff commenced this action to foreclose on

the mechanic's lien filed upon the property and causes of action for breach of contract, unjust enrichment, quantum meruit, account stated, fraud and punitive damages, and for attorney's fees, interest, and costs. Plaintiff now moves for summary judgment on its fourth cause of action against Ari for breach of Work Completion and Payment Guarantee Agreement, dated May 29, 2009. Defendant Ari has opposed this motion.

Plaintiff has submitted, amongst other things, the agreement between the parties, change orders, the mechanic's lien, a certificate of occupancy for the premises, and an affidavit of Stefan Bohdanowycz, its President ("Mr. B."). In the affidavit, Mr. B states that, Trident worked at the premises for almost 4 years and during the work, Ari was constantly requesting additional work and increasing the scope of work beyond the contract. This additional work is set forth in twenty-six (26) written Change Orders, which were agreed to by Ari and incorporated into the Payment Guarantee, which was signed by the defendant Ari. The Payment Guarantee specifically references both the contract and the 26 change orders, and states:

WHEREAS CONTRACTOR is a general contractor operating within the City of New York, that undertook certain construction and renovation work at the subject premises pursuant to contract incorporated herein by reference made between the parties hereto on 2007* as amended by twenty six change orders and supervised by an architect George Rycar, such work both past and future being hereafter at times described at times as "the subject project; and (emphasis added.) (*this is a typo since the contract is dated 2006)

Although work was being performed, Ari was not making payments and after several meetings between the parties, it was agreed that Trident would be paid \$180,000.00 in addition to sums already paid upon completion of the project and providing a certificate of occupancy. A Work Completion and Payment Guarantee Agreement was signed by Ari and Stefan Bohdanowycz, on June 23, 2009. The Payment Guarantee required Trident to finish the work and obtain a final certificate of occupancy to be entitled to its \$180,000.00 payment. The Payment Guarantee, in pertinent part, states:

IT IS THEREFORE AGREED AND ACKNOWLEDGED AS FOLLOWS:

1. CONTRACTOR shall proceed to complete the subject project which shall be defined as completing the punch list items attached hereto as Exhibit A and the items required to be performed by him (i.e. the contractor) on the NYC Department of Buildings B-SCAN List of required Items (Attached as Exhibit B) and assuming the Owner does what is Required of him, procuring a final (permanent) certificate of occupancy for the subject

premises as well as performing all painting finish work, installing the A.C. units, landscaping, and other items per plan, code, spec and the parties' original and subsequent agreements. The B-SCAN List of Required Items has been marked by the parties hereto such that next to each item required either the term owner or contractor is listed which designates who is responsible for completing same. The Contractor also agreed to the "leg work" or expediting work necessary to get such certificate of occupancy issued (either on its own or through an agent). In this instance the contractor shall be paid in full within one hundred twenty days (120) of the issuance of the certificate of occupancy. (emphasis added)

Mr. B. States that all of the work referred to in the Payment Agreement was performed and Trident provided to the defendant a Certificate of Occupancy on March 3, 2010, which was filed with the New York City Department of Buildings, under CO NUMBER 402222144F. In spite of the issuance of the Certificate of Occupancy, Ari has not paid plaintiff pursuant to the Payment Guarantee. Plaintiff only claims \$175,000.00 pursuant to the Payment Guarantee, and in its mechanic's lien and lien foreclosure action, and not the \$180,000.00, in that plaintiff is giving a credit to the defendant pursuant to paragraph "6" of the Payment Guarantee which required plaintiff to give a credit to the defendant in the amount of \$5,000.00 due to the work being completed forty eight days past the date set forth in the Guarantee.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." The Court finds that based on the above, Plaintiff has established prima facie entitlement to summary judgment. *See, Alvarez v Prospect Hospital*, 68 NY2d 320.) *Oakwood Realty Corp. v. HRH Constr. Corp.*, 19 A.D.3d 668 (2d Dept 2005.) Consequently, the burden shifted to Defendant to establish an issue of fact that needs to be resolved at trial.

In opposition, defendant Ari has submitted the AIA Document which sets forth the General Conditions of the Contract for Construction, his affidavit, and a list of work not

completed by Trident. In his affidavit, Ari states that, he is the owner of the premises and on or about June 2006, Trident was hired to perform construction and other work on the Premises, including its conversion from a one- to a two-family dwelling. The work was to be performed for \$314,000, pursuant to a written AIA contract dated June 21, 2006. Ari claims that from the outset, Trident was dilatory in performing its work and performed shoddy, defective, and non-conforming workmanship and materials. On one occasion Trident abandoned the project for six months with the walls and roofs open and exposed to the elements. After three years, Ari claims to have paid plaintiff about \$500,000.00, on the \$314,000 contract and then Trident demanded another \$180,000.00 to complete the project.

Defendant Ari claims that in the Spring of 2010, almost one year later, Trident again walked off the job, this time for good, leaving the project substantially incomplete, having failed to perform the work set forth in the Work Completion and Payment Guarantee Agreement. These incomplete items include unfinished painting throughout; unsealed and waterproofed skylights, tubs, and roofs; unfinished taping and wall and surface compounding and priming; missing moldings; incomplete and unrepaired exterior stucco work; and incomplete perimeter fencing. Defendant has submitted an Exhibit that lists and gives a detailed description of incomplete and unfinished work Trident agreed to perform. Ari also sets forth specific examples of defective work that Trident did actually perform before it walked off the job. Defendant Ari points out that his opinion is based upon the fact that he is a master plumber and knowledgeable about construction work. In essence, defendant Ari claims that plaintiff's motion should be denied because it was not entitled to payment since it failed to complete all of the items of work identified in the Guaranty Agreement for which it was responsible. Ari also claims that the motion should be denied since plaintiff failed to meet the AIA General Conditions, expressly incorporated by reference in the AIA Contract, which was likewise incorporated by reference in the Guaranty Agreement. Specifically, having to seek mediation of payment disputes prior to commencing a lawsuit.

The court's role on a motion for summary judgment is solely to determine whether there are triable issues of fact, with all reasonable inferences drawn in favor of the non-moving party. F. Garofalo Electric Co., Inc. v New York Univ., 300 A.D.2d 186, 754 N.Y.S.2d 227). Moreover, where there is any doubt as to substantial completion, the issue is one for the trier of fact. *Id.* In this case, given the conflicting affidavits, summary judgment must be denied. *Compare, Olori Crane Service, Inc. v. Rockland County Sewer Dist. No. 1*, 140 A.D.2d 500 (2d Dep't 1988.)

Dated: March 29, 2011

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ORIN R. KITZES, J.S.C.

