

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

STUART C. IRBY COMPANY,

Plaintiff,

v.

Case No: 2:16-cv-211-FtM-99CM

WESTERN SURETY COMPANY,
BROOKS & FREUND, L.L.C., and
BC POWER, INC.,

Defendants.

OPINION AND ORDER

This matter comes before the Court on defendant BC Power, Inc.'s Emergency¹ Motion to Set Aside Assignment (Doc. #51) filed on November 29, 2016. Plaintiff Stuart C. Irby Company and defendant Western Surety Company filed responses in opposition (Docs. ##52, 53). For the reasons set forth below, the motion is denied.

I.

The Second Amended Complaint (Doc. #17) filed by Stuart C. Irby, Company (Irby or plaintiff) on July 8, 2016, alleges that it furnished electrical materials to defendant BC Power, Inc. (BC Power) as the electrical subcontractor under a Credit Agreement. BC Power was not fully paid by defendant Brooks & Freund, LLC

¹ The Court previously took the motion under advisement, finding no emergency. (Doc. #52.)

(Brooks), the general contractor on the construction project, and BC Power is owed a principal amount of \$685,967.42. BC Power in turn did not fully pay Irby the unpaid principal amount for materials in the amount of \$46,145.05. BC Power assigned to Irby its accounts receivables for the principal amount of \$685,967.42 through an Assignment of Accounts Receivable. (Doc. #17, ¶¶ 2, 11-14, 19-22, 26.) Although referenced and attached to the Second Amended Complaint, Doc. #17-6, Exh. 6, plaintiff's claims against BC Power are not based on a breach of the Assignment. Plaintiff's first and third claims are against Brooks only, and the second claim is against Western Surety Company (Western) and Brooks only. Under the second and third claims, plaintiff alleges that it was assigned BC Power's accounts receivables representing the BC Power principal amount owed by Brooks to BC Power; plaintiff is therefore asserting claims two and three against Western and Brooks on behalf of BC Power as assignee to recover all amounts owed to BC Power under the subcontract. (Doc. #17, ¶¶ 39-40, 46-47.) The fourth claim asserts a breach of the Credit Agreement by BC Power for failing to fully pay for the materials received. Brooks has also filed a Crossclaim against BC Power for breach of a subcontract agreement. (Doc. #25)². BC Power failed to answer the allegations

² Plaintiff is not named as the assignee of BC Power's accounts receivable in the Crossclaim.

in claims one through three as it is "not a named party," and none of the affirmative defenses address the Assignment. (Doc. #39.)

II.

BC Power seeks to set aside as void or voidable the Assignment of Accounts Receivable based upon lack of consideration, unconscionability, fraud in the inducement, and mistake. Irby and Western respond that BC Power's motion is an improperly supported quasi-motion for summary judgment and that BC Power has waived these arguments by failing to assert them as affirmative defenses in its Answer and has not otherwise raised them as claims against Irby in this case. The Assignment of Accounts Receivable (Doc. #17-6) is governed and construed under Mississippi law according to its terms.

The Court agrees that procedurally BC Power's arguments are improperly raised and out of time. Rather than file a counterclaim against Irby or state its defenses as affirmative defenses in its Answer, BC Power filed a motion to rescind the Assignment and set it aside. By failing to assert their defenses to Irby's claim for relief in their Answer, BC Power waived these affirmative defenses and the time to amend pleadings has long since passed. See Fed. R. Civ. P. 8(c), 12(b). The Court declines to construe the filing as a motion to dismiss as BC Power submits matters outside the pleadings for the Court's consideration and otherwise

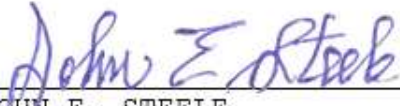
the motion was not made before BC Power filed its Answer. See
Fed. R. Civ. P. 12(b).

Accordingly, it is hereby

ORDERED AND ADJUDGED:

Defendant BC Power, Inc.'s Emergency Motion to Set Aside
Assignment (Doc. #51) is **DENIED**.

DONE and ORDERED at Fort Myers, Florida, this 9th day of
January, 2017.



JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

Copies:
Counsel of Record