

**Builders Group 1 LLC v WY Mgt. LLC**

2016 NY Slip Op 31932(U)

October 13, 2016

Supreme Court, New York County

Docket Number: 652025/2014

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

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BUILDERS GROUP 1 LLC,  
Plaintiff,  
-against-

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WY MANAGEMENT LLC,  
Defendant.

DECISION AND ORDER

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JEFFREY K. OING, J.:

**Relief Sought**

Plaintiff, Builders Group 1 LLC ("Builders Group"), moves, pursuant to CPLR 3212, for an order granting it partial summary judgment on counts one, four, five, eight, and ten of the amended complaint.

**Parties' Contentions**

This action arises out of three construction projects: (1) the NYLO Nyack Hotel, located at 400 High Avenue, Nyack, New York ("NYLO Nyack"); (2) NYLO Bronxville located at 759 Palmer Road, Bronxville, New York ("NYLO Bronxville"); and (3) the NYLO Fishkill Hotel, located at 524 US Route 9, Fishkill, New York ("NYLO Fishkill") (NYLO Nyack, NYLO Fishkill, and NYLO Bronxville, collectively referred to as the "Development Projects") (Amended Compl. ¶ 3). Defendant, WY Management LLC ("WY"), was the developer of the Development Projects (Id.). Builders Group

provides construction-related services such as general contracting, construction management, and consulting.

On or about May 2, 2013, Builders Group and WY executed a letter agreement in which Builders Group agreed to provide certain construction-related services in connection with NYLO Nyack ("Nyack letter agreement"). That letter agreement is annexed as an exhibit to the affidavit George J. Figliolia, plaintiff's president (Figliolia Aff., 5/24/16, ¶ 7; Ex. 1). WY agreed to pay Builders Group \$14 million for its services (Id.). Builders Group claims that it promptly began performing pursuant to the Nyack letter agreement. WY did not, however, authorize any work "beyond certain limited plan review, constructability review, value engineering, subcontractor solicitations and subcontract bid analysis and some site work" (Figliolia Aff., 5/24/16, ¶ 9). Builders Group submitted an invoice to WY, dated May 13, 2013, in the amount of \$240,000 in connection with its "mobilization" costs at NYLO Nyack ("May 2013 invoice") (Id., ¶ 10; Ex. 2). Builders Group contends that WY accepted and retained the May 2013 invoice without objection (Figliolia Aff., 5/24/16, ¶ 11).

On July 11, 2013, Builders Group and WY entered into a revised Nyack letter agreement wherein WY agreed to pay Builders Group the revised sum of \$14.5 million for certain construction-

related services in connection with NYLO Nyack (Id., ¶ 12; Ex. 3). Builders Group submitted another invoice related to NYLO Nyack to WY, dated November 22, 2013, in the amount of \$852.39, for mobile field office costs at NYLO Nyack ("November 2013 invoice") (Id., Ex. 4). Builders Group claims that WY accepted the November 2013 invoice without objection (Id., ¶ 14).

Builders Group asserts that it routinely provided WY with account statements detailing the outstanding balance due for NYLO Nyack (Id., Ex. 5). At some point, WY abandoned its relationship with Builders Group and made other arrangements for construction of NYLO Nyack (Id., ¶ 17). Builders Group maintains, however, that WY never disputed the validity of the balances owed for NYLO Nyack, nor did it claim to have any defenses, setoffs, or counterclaims. The amount that allegedly remains due and owing to Builders Group based on the May 2013 invoice and the November 2013 invoice for NYLO Nyack is \$240,852.39 (Id., ¶ 20).

On July 3, 2016, the parties entered into a letter agreement ("Bronxville letter agreement") wherein Builders Group agreed to provide certain construction management services to WY in connection with NYLO Bronxville (Id., 21). Builders Group claims that it performed pursuant to the Bronxville letter agreement but, again, WY did not authorize Builders Group to perform any work beyond "certain limited plan review, constructability,

review, value engineering, subcontractor solicitations and subcontract bid analysis and some site work" (Id., ¶ 23). Similar to NYLO Nyack, Builders Group submitted an invoice, dated July 12, 2013, to WY in the amount of \$350,000 for "mobilization" costs ("July 2013 invoice") (Id., Ex. 7). Builders Group claims that WY accepted and retained the July 2013 invoice without objection (Id., ¶ 25). Further, WY never disputed the statements of account that Builders Group sent to WY nor claimed any defenses, setoffs, or counterclaims (Id., ¶ 27). Also similar to NYLO Nyack, WY abandoned the parties' contractual relationship relating to NYLO Bronxville (Id., ¶ 28). Builders Group maintains that there remains a balance of \$350,000 due and owing for the July 2013 invoice (Id., ¶ 31).

Lastly, Builders Group claims that on May 10, 2013 it submitted a fee proposal to WY to provide certain construction services on NYLO Fishkill (id., Ex. 8). Builders Group began to perform pursuant to the fee proposal, however, WY did not authorize Builders Group to perform "work at NYLO Fishkill beyond certain limited plan review and analysis" (Id., ¶ 34). Builders Group submitted an invoice to WY, dated June 10, 2013, in the amount "of \$7,500 in connection with [Builders Groups'] retainer for NYLO Fishkill" ("June 2013 invoice") (Id., ¶ 35; Ex. 9). Builders Group claims that WY retained the June 2013 invoice

without objection and that it routinely provided statements of account to WY detailing the amount owed for NYLO Fishkill (Id., ¶¶ 36-37; Ex. 5). Builders Group again claims that WY never disputed the validity of the balance owed for NYLO Fishkill, nor did it claim any defenses or offsets (Id., ¶ 38). Ultimately, WY made other arrangements for the construction work at NYLO Fishkill. Builders Group contends that it is still owed \$7,500 for NYLO Fishkill.

Based on the foregoing, Builders Group seeks summary judgment on: count one for breach of contract (NYLO Nyack); count four for an account stated (NYLO Nyack); count five for breach of contract (NYLO Bronxville); count eight for an account stated (NYLO Bronxville); and count ten for an account stated (NYLO Fishkill).

In opposition, WY proffers the affidavits of John Krupa, its director of construction. Krupa was formerly the vice president of construction and operations for plaintiff Builders Group. He worked for Builders Group from early 2001 up to, and including September 2013 (Krupa Aff., ¶ 3). WY also provides the affidavit of its president, Michael Yanko. Yanko was the president of WY during all relevant times in this action.

As a former vice president of plaintiff Builders Group, Krupa claims that he has first-hand knowledge about the Development Projects and claims the following:

(i) there was never any agreement between Plaintiff and Defendant for construction of the three Development Projects ...; (ii) Defendant never performed any construction work or mobilization work at any of the Development Projects (other than the installation of a site trailer and a Verizon Fios line, which was paid for in full by Defendant); and (iii) the invoices for Plaintiff's purported "mobilization" on ... NYLO Nyack and [NYLO Bronxville], the invoice for certain costs associated with the trailer and phone line at NYLO Nyack, and the NYLO Fishkill retainer invoice were never approved by Defendant, and in fact were expressly rejected by Defendant and Defendant's principal Michael Yanko.

(Krupa Aff., ¶ 2). While at Builders Group, Krupa claims he was involved in its "unsuccessful attempts to obtain agreements for construction work from [WY] in connection with the Development Projects" (Id., ¶ 8).

Regarding Builders Group's claims for NYLO Nyack (the May 2013 invoice in the amount of \$240,000 and the November 2013 invoice in the amount of \$852.39), Krupa claims that Builders Group merely provided a basic proposal, with limited proposed terms, as a basis for a potential agreement between Builders Group and WY (Id., ¶ 15). The letter agreement attached to Figliolia's affidavit is what Krupa claims is the "basic proposal" (Id., ¶ 15). Also, during the course of the parties' negotiations, WY's general counsel<sup>7 of 18</sup> made it clear to Builders

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Group that despite the exchange between the parties of proposals and term sheets there was no agreement until the parties executed an owner-contractor construction agreement (Krupa Aff., ¶ 16). Ultimately, WY decided not to accept Builders Group's bid and Krupa asserts that no agreement was ever consummated between the parties (Id., ¶ 18).

Krupa goes on to point out that Builders Group admits in the amended complaint that "[d]efendant did not authorize work to begin at NYLO Nyack by [p]laintiff beyond certain limited plan review, constructability review, value engineering, subcontractor solicitations and subcontract bid analysis and some site work" (Amended Compl., ¶ 7). Krupa asserts that these were "activities routinely undertaken by contractors in connection with preparing estimates and bid proposals to solicit work for a particular project" (Krupa Aff., ¶ 19). Krupa maintains that Builders Group is not entitled to any costs associated with these activities (Id.).

As for Builders Group's claim that it is entitled to payment for full mobilization on NYLO Nyack, Krupa claims that the "term 'mobilization' consists of various activities related to work required to prepare a job site for the commencement of construction operations" (Id., ¶ 22). These activities include the following:



assembling office staff for the project, assigning on-site staff and laborers, renting, purchasing and/or otherwise obtaining equipment and heavy machinery required in connection with project, setting up a physical on-site office, installing security fences and other security measures at the project site, performing grading and leveling work, and marking off lot lines and other guidelines on the project site in preparation for the commencement of actual construction operations.

(Krupa Aff., ¶ 22). Krupa claims that Builders Group did not perform any of these activities in relation to NYLO Nyack (Id.).

Krupa goes on to claim that despite the fact that Builders Group did not perform any of these mobilization activities, in May 2013, its principal, Figliolia, instructed Krupa to issue an invoice to WY for mobilization costs (Krupa Aff., ¶ 23). The invoice is attached to Figliolia's affidavit as Exhibit 2. Krupa maintains that the invoice was prepared before any such activities had been performed, and, in fact, Builders Group never did perform any such mobilization activities for WY (Krupa Aff., ¶ 23). Krupa claims that two weeks after submitting the invoice to WY he was informed by Builders Group's billing department that WY's president, Michael Yanko, had objected to the May 2013 invoice and was refusing to pay the invoice (Id., ¶ 24).

The November 2013 invoice Builders Group submitted to WY in connection with NYLO Nyack was for costs associated with a trailer rental and phone service (Figliolia Aff., Ex. 4). Krupa claims this work was performed by Builders Group without WY's

knowledge or approval and that he was informed by Builders Group's billing department that WY contacted Builders Group promptly after receipt of the November 2013 invoice to dispute the invoice (Krupa Aff., ¶ 26).

With respect to NYLO Bronxville, Krupa makes the same claims regarding Builders Group's proposal for NYLO Bronxville (see Figliolia Aff., 5/24/16, Ex. 6) and the July 2013 invoice in the amount of \$350,000 for mobilization costs associated with NYLO Bronxville (id., Ex. 7) (Krupa Aff., ¶¶ 29-40). Krupa again claims that in July 2013 Figliolia instructed him to issue an invoice to WY for mobilization costs associated with NYLO Bronxville even though the parties did not have an agreement and Builders Group did not perform the mobilization work (Krupa Aff., ¶ 41). Krupa claims that Yanko promptly objected to the July 2013 invoice as well (Id., ¶ 42).

Regarding NYLO Fishkill, Krupa claims that on May 10, 2013 Builders Group submitted a proposal letter in WY to provide construction services for NYLO Fishkill (see Figliolia Aff., 5/24/16, Ex. 8). The May 2013 proposal letter required an initial deposit of \$7,500 if accepted by WY. Again, Builders Group sent the June 2013 invoice to WY for the amount of \$7,500. Krupa claims that shortly thereafter, WY informed Builders Group

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that it had decided not to pursue NYLO Fishkill (Krupa Aff., ¶ 52).

Yanko, WY's president, claims that WY made it known to many contractors and construction companies that it was seeking certain services at each of the Development Projects and Builders Group was one such company that WY communicated with regarding the work and services it was seeking (Yanko Aff., ¶ 4).

Ultimately, Builders Group and WY were unable to reach an agreement on the work and services and Yanko maintains that no construction contracts were ever consummated between the parties (Yanko Aff., ¶¶ 4-5).

Yanko claims that plaintiff's motion should be denied because, other than installing a Verizon Fios line and a trailer at NYLO Nyack, Builders Group never performed any work or provided any services in connection with any of the Development Projects (Yanko Aff., ¶ 2). Yanko also claims that he objected to each invoice sent to WY from Builders Group, including the two invoices for mobilization services (Id.).

With regard to the two invoices submitted by Builders Group for mobilization costs associated with NYLO Nyack and NYLO Bronxville, and the invoice for trailer rental and phone services associated with NYLO Nyack, Yanko claims the following:

I contacted Plaintiff's billing department, and reached out to Plaintiff's principal George Figliolia, promptly

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upon Defendant's receipt of each such invoice and made it clear to Mr. Figliolia that there was no agreement between Plaintiff and Defendant with respect to any of the Development Projects, and that Plaintiff was not entitled to any compensation in connection with any of Defendant's Development Projects because Plaintiff had never performed any construction work, mobilization, or other work whatsoever in connection with any of the Development Projects, as set forth in the invoices.

(Yanko Aff., ¶ 6).

As for NYLO Fishkill and the June 2013 invoice, the \$7,500 invoice amount represented the amount of the retainer that WY would pay to Builders Group if WY decided to accept Builders Group's NYLO Fishkill proposal (Id.). Yanko points out that the NYLO Fishkill invoice did not reflect any work or services actually performed by Builders Group. Yanko claims that he objected to the NYLO Fishkill invoice promptly after receiving it and ultimately informed Builders Group that WY had decided not to pursue the NYLO Fishkill project (Yanko Aff., ¶¶ 25-26).

In reply Figliolia points out that Builders Group has proffered the written agreement between the parties concerning NYLO Nyack, i.e., the Nyack letter agreement, as Exhibit 1 to his moving affidavit. Figliolia also points out that the Nyack letter agreement provides that WY's "written acceptance will constitute an owner contingency contract between [the parties]." The Nyack letter agreement is signed by both parties. In addition, the July 10, 2013 revised Nyack letter agreement

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contains the same quoted sentence and is also signed by both parties (Figliolia Aff., 5/24/16, Ex. 3).

As for Yanko's claims that he objected to the NYLO Nyack invoices, Figliolia refers to an email he received from Yanko, dated August 1, 2013, wherein Yanko states:

George, we can't pay on deals before we get construction loans. Our precon budgets on both deals are set already. That's why I told you that the last payments will be the only ones until funding. With that, the good news is that we are very close. Let's see next week where we are with NYLO and hopefully we start anyway.

(Figliolia Aff., 7/15/16, Ex. 12). Figliolia claims that Yanko's "contemporaneous email makes it clear that he has 'deals' and indicates work will be proceeding" (Id., ¶ 28). Figliolia also refers to an email attached as an exhibit to an affidavit he submitted in opposition to defendant's prior motion to dismiss the complaint. In that email from Yanko to Figliolia, dated June 21, 2013, Yanko states "George, I need to wait to [sic] construction loan and then we'll pay the first invoice at closing. Also, as discussed same for precon on Bronxville" (Figliolia Aff., 12/3/14, Ex. N). Figliolia also refers to the meeting minutes from two meetings the parties had regarding NYLO Nyack on July 11, 2013 and July 18, 2013 to demonstrate that Builders Group was providing services to WY (Id., Exs., D and E). Figliolia further asserts that Builders Group provided WY with

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several construction schedules in connection with NYLO Nyack (id., Ex. G), a winter work estimate (id., Ex. I), and a total cost summary report for NYLO Nyack (Id., Ex. K). Figliolia asserts that these documents are evidence of Builders Group's "active participation at NYLO Nyack" (Figliolia Aff., 7/15/16, ¶¶ 31-33).

Regarding NYLO Bronxville, plaintiff argues that defendant has not provided any evidence, such as an email, letter, or other communications, to show that it rejected or disputed the July 2013 invoice and, in fact, Yanko's June 21, 2013 email shows that WY agreed to pay Builders Group for its work at NYLO Bronxville (Figliolia Aff., 12/3/14, Ex. N). Figliolia again claims that the cost summary report is "[u]nequivocal evidence of [p]laintiff's active participation at NYLO Bronxville" (Figliolia Aff., 7/15/16, ¶ 42; Figliolia Aff., 12/3/14, Ex. L).

As for NYLO Fishkill, again Builders Group claims that it submitted the June 2013 invoice to WY expecting to be paid for its work and WY has not provided any evidence that it rejected or disputed the invoice. Figliolia refers to the NYLO Fishkill cost summary report as "[u]equivocal evidence of [p]laintiff's active participation at NYLO Fishkill" (Figliolia Aff., 7/15/16, ¶ 48; Figliolia Aff., 12/3/14, Ex. M).

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### Discussion

The branch of Builders Group's motion for summary judgment based on the June 2013 invoice in the amount of \$7,500 representing a retainer for NYLO Fishkill is denied. The \$7,500 retainer payment is based upon an unsigned fee proposal annexed to Figliolia's moving affidavit which provides that "[u]pon acceptance of this contract, a retainer of \$7,500 is required" (Figliolia Aff., 5/24/16, Ex. 8). Because the May 10, 2013 fee proposal was never signed, the retainer never became due (Ryan Graphics, Inc. v Bailin, 39 AD3d 249 [1st Dept 2007])[A claim for an account stated "cannot be used to create liability where none otherwise exists"])). Thus, plaintiff fails to establish, prima facie, entitlement to summary judgment on its claim for an account stated based on the June 2013 invoice for a retainer for NYLO Fishkill.

As for the breach of contract and account stated claims based on the Nyack letter agreement, the May 2013 invoice in the amount of \$240,000 for mobilization, the Bronxville letter agreement, and the July 2013 invoice in the amount of \$350,000 for mobilization costs, issues of fact exist precluding summary judgment in plaintiff's favor on these claims. In that regard, Yanko, defendant's principal, asserts that:

[p]laintiff never actually performed any work or provided any services whatsoever in connection with any

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of the Development Projects (other than installing a Verizon Fios line and a trailer at the NYLO Nyack site, which was paid for in full by Defendant), and Plaintiff never mobilized at any of the Development Project sites ... I objected to each invoice sent by Plaintiff, including, without limitation, the two invoices sent for Plaintiff's purported "mobilization" -- which never occurred -- promptly upon my receipt of each such invoice.

(Yanko Aff., ¶ 2). Yanko further asserts that he:

contacted Plaintiff's billing department, and reached out to Plaintiff's principal George Figliolia, promptly upon Defendant's receipt of each such invoice and made it clear to Mr. Figliolia that there was no agreement between Plaintiff and Defendant with respect to any of the Development Projects, and that Plaintiff was not entitled to any compensation in connection with any of Defendant's Development Projects because Plaintiff had never performed any construction work, mobilization, or other work whatsoever in connection with any of the Development Projects, as set forth in the invoices.

(Yanko Aff., ¶ 6).

Based on these factual assertions, factual issues exist as to the breach of contract claims because Yanko disputes that Builders Group performed the work or services claimed in the invoices at issue. The documentary evidence Builders Group relies upon to show that it performed work at NYLO Nyack and NYLO Bronxville does not resolve this factual issue in its favor. That Builders Group provided work schedules and estimates, and the parties engaged in meetings is not dispositive on the issue of whether Builders Group did the work it is claiming in the invoices at issue in this motion. The emails from Yanko that



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Builders Group proffers are also not unequivocal documentary evidence that Builders Group performed mobilization work at NYLO Nyack or NYLO Bronxville. The emails do not identify which invoices are the subject of the email exchange or whether the parties are referring to the \$240,000 and \$350,000 mobilization costs.

As for the account stated claims, Figliolia argues that Yanko's claim that he objected to plaintiff's invoices "is belied by the documentary evidence" (Figliolia Aff., 7/15/16, ¶¶ 25-26) and that WY "has not provided a single specific email, letter or other communication rejecting or disputing the invoice" (Id., ¶ 40). While "self-serving, bald allegations of oral protests" are insufficient to raise a triable issue of fact in an account stated claim (Darby & Darby, P.C. v VSI International, Inc., 95 NY2d 308 [2000]), Figliolia does not deny Yanko's claim that he reached out to Figliolia, specifically, to dispute the invoices (cf. Levisohn, Lerner, Berger & Langsam v Gottlieb, 309 AD2d 668 [1st Dept 20013] [finding the defendant failed to identify the persons with whom he spoke or specify the substance of the conversations]). Thus, factual issues exist as to whether WY disputed the invoices in a timely manner.

Accordingly, it is hereby

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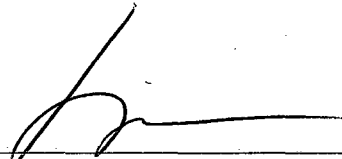
ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that counsel are directed to appear for a status conference on November 1, 2016 at 10:00 a.m. in Part 48, Room 242.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

10/13/16

  
HON. JEFFREY K. OING, J.S.C.

**JEFFREY K. OING**  
J.S.C.