

**Dean Bldrs. Group, Inc. v Crew Contr. of NJ Inc.**

2017 NY Slip Op 32122(U)

October 10, 2017

Supreme Court, Kings County

Docket Number: 506389/15

Judge: Lawrence S. Knipel

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At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28<sup>th</sup> day of September, 2017.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

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DEAN BUILDERS GROUP, INC.,  
  
Plaintiff,

- against -

CREW CONTRACTING OF NJ INC.,  
SYED K. AHMED,  
A.B.C.D. CONSTRUCTION CORP., and  
WESTCHESTER FIRE INSURANCE COMPANY,

Defendants.  
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DECISION AND ORDER

Index No. 506389/15

Mot. Seq. No. 2-5

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Cross Motion, Affirmation (Affidavit),  
Memorandum of Law, and Exhibits Annexed \_\_\_\_\_

44-48; 51-61; 74-83, 84;  
85-86, 87, 88-97, 98-100

Affirmation (Affidavit) in Opposition and Exhibits Annexed \_\_\_\_\_

62-71;

Reply Affirmation (Affidavit) and Exhibits Annexed \_\_\_\_\_

102-107; 109-110

In this action, inter alia, for breach of contract, the following motions and cross motions have been consolidated for disposition:

In Seq. No. 2, the defendants Crew Contracting of NJ Inc. (hereafter, Crew) and its principal Syed K. Ahmed (hereafter, Ahmed) jointly move for an order, pursuant to CPLR 5015 (a) (3), vacating the default judgment in the principal sum of \$191,543.14 that was entered against them on Jan. 11, 2016 (hereafter, the default judgment), and further vacating their default in answering the complaint in this action.

In Seq. No. 3, the plaintiff Dean Builders Group, Inc. (hereafter, the plaintiff) cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment against the defendants Crew and Ahmed.

In Seq. No. 4, the defendants A.B.C.D. Construction Corp. (ABCD) and Westchester Fire Insurance Company (Westchester) jointly cross-move for (1) an order, pursuant to CPLR 3212, granting them summary judgment dismissing the plaintiff's complaint as against them and discharging the plaintiff's mechanic's lien, and (2) leave, pursuant to CPLR 3025 (b), to amend their respective answers to assert a counterclaim for fraud and misrepresentation.

In Seq. No. 5, the plaintiff cross-moves for an order, pursuant to CPLR 3212 and State Finance Law § 137 (3), for summary judgment on its fourth cause of action against the defendants ABCD and Westchester for recovery on a payment bond.

### *Facts and Allegations*

In Oct. 2013, the plaintiff either sold or leased to the defendant Crew various parts for constructing a sidewalk shed, which is a type of scaffold. The transaction was allegedly reflected in a document, entitled Bill of Sale, dated Oct. 11, 2013 (hereafter, the bill of sale), in the principal sum of \$55,100.85.<sup>1</sup> The plaintiff and Crew's principal, the defendant Ahmed, allegedly signed the bill of sale. Crew used some of the parts it had obtained from

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<sup>1</sup> The principal sum of \$55,100.85 was due within 30 days from the date of the bill of sale. If the principal sum was paid within that time, the transaction would be characterized as a sale. On the other hand, if the principal sum was not paid within that time (and that's what actually occurred in this case), the sale was, by default, converted into a lease at a monthly (not annual) rental of 18% of the principal sum of \$55,100.85 until paid in full.

the plaintiff under the bill of sale to construct one or more of the sidewalk sheds at a public improvement project.(hereafter, the project). The defendant ABCD acted as the general contractor at the project for which the defendant Westchester issued a surety bond, dated Apr. 10, 2013, in the amount of \$2,361,860 (hereafter, the payment bond).

ABCD paid Crew a total of \$71,380 for the sidewalk sheds, with the last payment having been made on Dec. 23, 2013.<sup>2</sup> Although Crew received the entire amount due from ABCD, Crew paid nothing to the plaintiff under the bill of sale.

By letter, dated Apr. 2, 2014, the plaintiff advised ABCD that Crew had failed to pay the plaintiff under the bill of sale. Although the letter stated that the plaintiff “need[ed] to get paid . . . immediately,” it did not specify the amount Crew allegedly owed to the plaintiff.

On June 30, 2014, all (or almost all) of the sidewalk sheds at the project were removed.<sup>3</sup> The plaintiff alleges that it recovered most (but not all) of the parts of the sidewalk sheds, and that some of their parts are missing.

On Oct. 20, 2014, the plaintiff filed a Notice under Mechanic’s Lien Law for Account of Public Improvement in the principal sum of \$175,000 (hereafter, the notice of lien). The

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<sup>2</sup> \$71,380 is the sum of \$20,000 (check #9768, dated Sept. 17, 2013), \$10,000 (check #9948, dated Oct. 24, 2013), \$7,350 (check #9995, dated Nov. 7, 2013), \$12,500 (check #10017, undated), \$7,254 (check #10087, dated Nov. 29, 2013), and \$14,276 (check #10684, dated Dec. 23, 2013).

<sup>3</sup> See Exhibit G to the plaintiff’s cross motion for summary judgment against ABCD and Westchester, page 2, line starting with the date “3/12/2014.” On Dec. 19, 2014, the final sidewalk shed at the project – the sidewalk shed for “building 69” – was removed. The record is unclear whether any of the plaintiff’s materials were used for the sidewalk shed for building 69. See Exhibit G to the plaintiff’s cross motion for summary judgment against ABCD and Westchester, page 2, line starting with the date “5/21/2014.”

plaintiff, by way of the notice of lien, claimed that it was owed a sum certain (*i.e.*, \$175,000) which was due on Oct. 11, 2013. Although the acknowledgment accompanying the notice of lien references an affidavit of service, no such affidavit is in the record before the Court.

On Nov. 25, 2014, Westchester issued a Bond Discharging Mechanic's Lien -- Public Improvement in the amount of \$192,500 to discharge the plaintiff's notice of lien (hereafter, the discharge of lien bond).

On May 22, 2015, the plaintiff commenced the instant action against Crew, Ahmed, ABCD and Westchester. The plaintiff's complaint, dated May 21, 2015, alleges three categories of claims, depending on the identity of the defendant against whom the claim is advanced. The complaint alleges, as against Crew and Ahmed, claims sounding in breach of contract, account stated, unjust enrichment, and conversion (the first, second, fifth, and sixth causes of action, respectively). As against ABCD and Westchester, the complaint alleges claims under the discharge of lien bond and the payment bond (the third and fourth causes of action, respectively). As against ABCD alone, the complaint alleges claims under the theories of unjust enrichment and conversion (the fifth and sixth causes of action, respectively). All defendants were served with process, but Crew and Ahmed failed to answer the complaint, and the default judgment was entered against them on Jan. 11, 2016. ABCD and Westchester separately answered the complaint. After discovery was completed and a note of issue was filed, the instant motion and three cross motions ensued.

*Crew and Ahmed's Joint Motion to Vacate  
the Default Judgment and to Vacate Their Default*

CPLR 5015 (a) (3) permits the court that rendered a judgment to relieve a party from it on such terms as may be just on the ground of “fraud, misrepresentation, or other misconduct of an adverse party.” “A defendant moving to vacate a default based on intrinsic fraud, *i.e.*, on the basis that the allegations in the complaint are false, must establish both a reasonable excuse for the default and a potentially meritorious defense to the action” (*Pennymac Corp. v Weiss*, \_\_\_ AD3d \_\_\_, 2017 NY Slip Op 05746, at \*1 [2d Dept 2017]). Here, Crew and Ahmed have proffered no valid excuse for their default in answering the complaint. Consequently, the Court need not address whether they have a potentially meritorious defense (*see New Century Mtge. Corp. v Corriette*, 117 AD3d 1011; 1012 [2d Dept 2014]).

“In addition to the grounds set forth in section 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). That is, “a court may rely on its inherent authority to vacate [a judgment] in the interest of substantial justice, rather than its statutory authority under CPLR 5015 (a), as the “statutory grounds are subsumed by the court’s broader inherent authority” (*US Bank Natl. Assn. v Losner*, 145 AD3d 935, 938 [2d Dept 2016] [internal quotation marks omitted; alteration in the original]).

The plaintiff appears to have obtained the default judgment through an affirmative misrepresentation to the Court that Ahmed executed the bill of sale. Ahmed proffers an

affidavit of his handwriting expert opining, based on the comparisons of his signatures on other documents, that the signature in question is not his. Ahmed further proffers his foreign passport indicating that he could not have signed the bill of sale on the day in question. Moreover, the principal sum of the default judgment of \$191,543.14 is three times more than (1) the total invoiced amount of \$55,100.85 as reflected in the bill of sale, and (2) the amount of \$58,212.90 which the plaintiff, in its moving papers, has offered to ABCD and Westchester in return for their concession that the plaintiff may collect on the payment bond (see Affirmation in Support of Plaintiff's Cross Motion for Summary Judgment, dated July 7, 2017, ¶ 13). The questioned validity of the bill of sale, coupled with the plaintiff's apparent overstatement of the amount due under the bill of sale, is the type of circumstance warranting vacatur of the default judgment in the interests of justice (see *Hudson City Savings Bank v Cohen*, 120 AD3d 1304, 1305 [2d Dept 2014]; *Wells Fargo Bank v Hodge*, 92 AD3d 775, 776 [2d Dept 2012], *lv dismissed* 23 NY3d 1012 [2014]; *Nationscredit Financial Services Corp. v Atherley*, 91 AD3d 922 [2d Dept 2012]; *Stasiak v Forlenza*, 84 AD3d 1214, 1217 [2d Dept 2011]; *Lane v Lane*, 175 AD2d 103, 105 [2d Dept 1991]). Accordingly, the default judgment is vacated. Crew and Ahmed's default in answering the complaint is also vacated, and they are granted leave to serve a late answer (see *Harcztark v Drive Variety, Inc.*, 21 AD3d 876 [2d Dept 2005]). Inasmuch as Crew and Ahmed did not participate in discovery, it is incomplete, and the Court sua sponte vacates the note of issue and strikes this action from the trial calendar (see 22 NYCRR 202.21 [e]; *Jones v Lynch*, 298 AD2d 499, 500 [2d Dept 2002]).

*Plaintiff's Cross Motion for Summary Judgment Against Crew and Ahmed*

CPLR 3212 (a) permits “[a]ny party [to] move for summary judgment . . . after issue has been joined.” “[T]he requirement is strictly adhered to” (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). Considering that Crew and Ahmed have not joined issue, the Court may not entertain the plaintiff’s cross motion for summary judgment as against them, and the same is denied as premature.

*ABCD and Westchester’s Cross Motion for  
Summary Judgment and for Leave to Amend*

*Plaintiff’s Cross Motion for Summary Judgment  
Against ABCD and Westchester on the Payment Bond*

*Summary Judgment*

As stated, the plaintiff asserts claims against ABCD and Westchester under the discharge of lien bond and the payment bond (the third and fourth causes of action, respectively). In addition, the plaintiff asserts, as against ABCD alone, claims under the theories of unjust enrichment and conversion (the fifth and sixth causes of action, respectively).

*The Discharge of Lien Bond  
(Third Cause of Action Against ABCD and Westchester)*

Upon the filing of a discharge bond, “the public improvement lien previously filed attaches to the bond, which is substituted for the lien property” (*Tri-City Elec. Co., Inc. v People of State of NY*, 63 NY2d 969, 971 [1984], *rearg denied* 64 NY2d 755 [1984]). Lien Law § 4 (1) provides that a mechanic’s lien is valid to the extent of “the sum earned and



unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon.” In the case of a materialman to a subcontractor, the materialman’s lien is valid only as to any amount still due and unpaid to the subcontractor when the materialman files its notice of lien (*see Peri Formwork Systems, Inc. v Lumbermens Mut. Cas. Co.*, 65 AD3d 533, 535 [2d Dept 2009], *on subsequent appeal*, 112 AD3d 171, 177 [2d Dept 2013]).

ABCD has established, prima facie, that when the plaintiff filed its notice of lien, no “lien fund” existed to which its lien could attach because Crew had already been paid in full by ABCD.<sup>4</sup> In opposition, the plaintiff has failed to raise a triable issue of fact. Accordingly, the branch of ABCD and Westchester’s joint cross motion for summary judgment dismissing the plaintiff’s third cause of action for recovery on the discharge of lien bond is granted, and such cause of action is dismissed (*see Bryan’s Quality Plus, LLC v Dorime*, 112 AD3d 870 [2d Dept 2013]).

*The Payment Bond  
(Fourth Cause of Action Against ABCD and Westchester)*

State Finance Law § 137 (3) provides that “a person having a direct contractual relationship with a subcontractor of the contractor furnishing the payment bond but no contractual relationship express or implied with such contractor shall not have a right of action upon the bond unless he shall have given written notice to such contractor within one

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<sup>4</sup> *See* Affidavit of George Bouroudis, ABCD’s project manager, dated May 30, 2017, ¶ 11, and copies of ABCD’s checks made payable to Crew annexed thereto.

hundred twenty days from the date on which . . . the last of the material was furnished . . . for which his claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or for whom the labor was performed.” State Finance Law § 137 (5) (a) provides that the words “‘furnishes material’ or other similar expression . . . shall be deemed to include the reasonable rental value for the period of actual use of machinery, tools or equipment. . . .”

The evidence demonstrates that the plaintiff had a direct contractual relationship with Crew, but had no contractual relationship, either express or implied, with ABCD, the general contractor who furnished the payment bond. A condition precedent to asserting a claim under the payment bond was for the plaintiff to give ABCD written notice of its claim within 120 days from the date on which the sidewalk sheds were last used. The written notice to ABCD of the plaintiff’s claim came in two forms: the plaintiff’s Apr. 2, 2014 letter and the plaintiff’s notice of lien. The Apr. 2, 2014 letter failed to “state with substantial accuracy the amount claimed” and, therefore, did not comply with State Finance Law § 137 (3). On the other hand, the notice of lien could serve as a written notice under State Finance Law § 137(3). However, the Court, on the record before it, cannot determine whether (and, if so, when) the plaintiff served the notice of lien on ABCD because the notice of lien omits an affidavit of service. More fundamentally, it cannot be determined on the current record whether the transaction between the plaintiff and Crew was a *sale* of capital equipment in which case it would *not* be covered by the payment bond (*see Harsco Corp., Patent Constr.*

*Sys. Div. v Gripon Constr. Corp.*, 301 AD2d 90, 95 [2d Dept 2002]), or a lease in which case it would be covered by the payment bond (*id.* at 97; *Scaffold-Russ Dilworth Ltd. v Shared Mgt. Group, Ltd.*, 1 AD3d 951, 952 [4<sup>th</sup> Dept 2003], *rearg denied* 4 AD3d 899 [4<sup>th</sup> Dept 2004], *lv denied* 2 NY3d 705 [2004]). Thus, ABCD and Westchester have not established, prima facie, that the plaintiff failed to comply with State Finance Law § 137 (3). For the same reason, the plaintiff has not established that it complied with the statute. Moreover, the plaintiff's claim under the payment bond appears to be exaggerated, which constitutes another reason for denying summary judgment to the plaintiff on the payment bond. Accordingly, the branch of ABCD and Westchester's cross motion for summary judgment dismissing the plaintiff's claim on the payment bond is denied. Similarly, the plaintiff's cross motion for summary judgment against ABCD and Westchester on its claim on the payment bond is also denied.

*Unjust Enrichment  
(Fifth Cause of Action Against ABCD)*

The record contains no evidence that ABCD expressed a willingness to pay the plaintiff for the sidewalk sheds. More fundamentally, ABCD already paid Crew for the sidewalk sheds. Therefore, the plaintiff's fifth cause of action for unjust enrichment is dismissed against ABCD (*see DL Marble & Granite Inc. v Madison Park Owner, LLC*, 105 AD3d 479 [1<sup>st</sup> Dept 2013]; *Perma Pave Contr. Corp.*, 156 AD2d at 551; *Custer Bldrs. v Quaker Heritage*, 41 AD2d 448, 451 [3d Dept 1973]).

*Conversion*  
(Sixth Cause of Action Against ABCD)

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession. Two key elements of conversion are (1) plaintiff’s possessory right or interest in the property and (2) defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006] [internal citations omitted]).

ABCD has demonstrated, by way of the affidavit of its project manager, that “[t]he scaffolding at the Project [*i.e.*, the sidewalk sheds] was completely removed by Crew in 2014 to a location unknown to ABCD,” and that “ABCD is not in possession of any of the scaffolding allegedly sold by [the plaintiff] to Crew. . . .”<sup>5</sup> Where, as here, “the moving party has established prima facie that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, *not mere conjecture, suspicion, or speculation*” (*Leggio v Gearhart*, 294 AD2d 543, 544 [2d Dept 2002] [emphasis added]). The affidavits of the plaintiff’s president and project manager in opposition to this branch of the cross motion are speculative

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<sup>5</sup> See Affidavit of George Bouroudis, dated May 20, 2017, ¶ 14.

and conclusory.<sup>6</sup> Accordingly, the sixth cause of action for conversion is dismissed against ABCD.

*Leave to Amend ABCD's and Westchester's Respective Answers*

Both ABCD and Westchester seek leave to amend their respective answers. Only the proposed amended answer of ABCD is annexed to their moving papers. Notwithstanding CPLR 3025 (b) which requires that a motion for leave to amend be accompanied by the proposed pleading, CPLR 2001 permits a court, “[a]t any stage of an action,” to disregard “a party’s mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced” (*Avalon Gardens Rehabilitation & Health Care Center, LLC v Morsello*, 97 AD3d 611, 612 [2d Dept 2012]). Here, no substantial right of the plaintiff is prejudiced because the moving papers include the proposed amended answer for ABCD, which answer is identical to the one proposed for Westchester. The circumstances presented in this action are distinguishable from those in other cases, where the moving parties altogether failed to submit a copy of the proposed pleadings (*see Loehner v Simons*, 224 AD2d 591 [2d Dept 1996]; *Bridges v 725 Riverside Drive, Inc.*, 119 AD2d 789, 790 [2d Dept 1986]).

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<sup>6</sup> The July 10, 2017 affidavits of the plaintiff’s president Abid Mahmood and its project manager Ahmad Sony each state in identical language that “[i]t is *possible* that the Equipment [*i.e.*, the sidewalk sheds] remained at the Project from April 2014 until portions were returned to [the plaintiff] in January 2015, but I am *not* personally aware of where the Equipment was during this period. *If* the Equipment remained on site, [the plaintiff] is also entitled to payment from [ABCD] and Westchester . . . for the rental value of the Equipment during that time period” (¶ 9 [emphasis added]).

Accordingly, Westchester's failure to attach its proposed amended answer is disregarded (*see Wade v Knight Transp., Inc.*, \_\_\_ AD3d \_\_\_, 2017 NY Slip Op 05262, at \*1 [2d Dept 2017]).

The proposed amendment asserts a counterclaim against the plaintiff for misrepresentation and fraud. It is based on Ahmed's averments that he did not sign the bill of sale. The proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the plaintiff. Accordingly, ABCD and Westchester are each granted leave to amend their respective answers to assert a counterclaim for fraud and misrepresentation (*see Fox Paine & Co., LLC v Houston Cas. Co.*, \_\_\_ AD3d \_\_\_, 2017 NY Slip Op 06163, at \*1 [2d Dept 2017]).

#### *Conclusion*

Based on the foregoing and after oral argument, it is

ORDERED that in Seq. No. 2, the joint motion of the defendants Crew and Ahmed for an order, pursuant to CPLR 5015 (a) (3), vacating the default judgment and further vacating their default in answering the complaint in this action is granted; and it is further

ORDERED that the default judgment in the principal sum of \$191,543.14 that was entered against the defendants Crew and Ahmed on Jan. 11, 2016 is hereby vacated; and it is further

ORDERED that the defendants Crew and Ahmed shall have twenty days from the date of service of this decision and order with notice of entry on their counsel within which to answer the plaintiff's complaint; and it is further

ORDERED that in Seq. No. 3, the plaintiff's cross motion for summary judgment against the defendants Crew and Ahmed is denied as premature; and it is further

ORDERED that in Seq. No. 4, the branch of the joint cross motion of the defendants ABCD and Westchester for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the plaintiff's complaint as against them and discharging the plaintiff's mechanic's lien is granted to the extent that (1) the plaintiff's third cause of action against ABCD and Westchester on the discharge of lien bond, (2) the plaintiff's fifth cause of action against ABCD for unjust enrichment, and (3) the plaintiff's sixth cause of action against ABCD for conversion are each dismissed, and the remainder of this branch of their cross motion is denied with respect to plaintiff's fourth cause of action against ABCD and Westchester on the payment bond; and it is further

ORDERED that the remaining branch of the joint cross motion of the defendants ABCD and Westchester for leave, pursuant to CPLR 3025 (b), to amend their respective answers to assert a counterclaim for fraud and misrepresentation is granted, and the defendants ABCD and Westchester shall have ten days from the date of service of this decision and order with notice of entry on their joint counsel within which to serve and file their respective amended answers; and it is further

ORDERED that the plaintiff shall have ten days from the date of electronic service of ABCD's and Westchester's respective amended answers on its counsel within which to reply; and it is further

ORDERED that in Seq. No. 5, the plaintiff's cross motion, for an order, pursuant to CPLR 3212 and State Finance Law § 137 (3), for summary judgment on its fourth cause of action against ABCD and Westchester for recovery on the payment bond is denied; and it is further

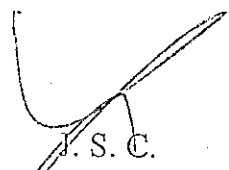
ORDERED that the note of issue is vacated, and the action is struck from the trial calendar; and it is further

ORDERED that the plaintiff's counsel shall serve a copy of this decision and order with notice of entry on counsel to the respective defendants and shall file an affidavit of said service with the County Clerk.

The parties are reminded of their next scheduled appearance on Oct. 13, 2017; said appearance shall be in Commercial *Part 4*, rather than in Commercial *Part Trial 4*.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



HON. LAWRENCE KNIPEL