

<b>Response Elec., Inc. v Heritage Bldrs./Devs. Corp.</b>
2020 NY Slip Op 34291(U)
December 24, 2020
Supreme Court, New York County
Docket Number: 650931/2018
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

*Justice*

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RESPONSE ELECTRIC, INC.,

Plaintiff,

- v -

HERITAGE BUILDERS/DEVELOPERS CORP., JOHN  
BENNARDO, JOHN DOES 1-5,

Defendant.

-----X

HERITAGE BUILDERS/DEVELOPERS CORP., JOHN  
BENNARDO

Plaintiff,

-against-

ROBB DAVIDSON

Defendant.

-----X

INDEX NO. 650931/2018

MOTION DATE 09/02/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595970/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, plaintiff's motion for summary judgment is granted in part and denied in part, and defendants' cross-motion for partial summary judgment is granted, for the reasons set forth herein.

**Background**

On February 27, 2018, plaintiff, Response Electric, Inc. ("Plaintiff"), commenced this action against defendants, Heritage Builders/Developers Corp. ("Heritage"), John Bennardo ("Bennardo"), and John Does 1-5, to recover the sum of \$54,266.83 allegedly due pursuant to various construction agreements. The complaint states four causes of action, to wit, breach of contract against Heritage (first cause of action); account stated against Heritage (second cause of action); unjust enrichment against Heritage (third cause of action); and diversion of trust funds in violation of New York Lien Law against all defendants (fourth cause of action).

Plaintiff's complaint essentially alleges as follows. Various property owners contracted for Heritage to perform construction work at various locations in Manhattan and Brooklyn ("the Projects"). Beginning in July 2017, Heritage entered into agreements with Plaintiff for Plaintiff to perform certain work at the Projects as a subcontractor; the agreed-upon price for the labor to be performed was \$54,266.83. Between July and December 2017, Plaintiff completed the required work under the agreements, invoiced Heritage for the value of the work performed, and Heritage refused to pay.

On or about May 21, 2018, Heritage and Bennardo (collectively, "Defendants") filed an answer to the complaint, admitting that Bennardo owns Heritage and serves as an officer and/or shareholder and denying all other material allegations. The answer also sets forth eleven affirmative defenses.

Subsequently, on July 27, 2018, Plaintiff served Defendants with a request for production of documents and a deposition notice to take the deposition of Bennardo ("the Discovery Demands").

On or about November 20, 2018, Defendants commenced a third-party action against Robb Davidson, an individual who hired Heritage to renovate his apartment, located at 175 East 62<sup>nd</sup> Street, New York, NY (one of the Projects Plaintiff's claim is based upon). By Decision and Order dated May 21, 2019, this Court granted Mr. Davidson's motion to dismiss, finding "no basis for liability for this third-party claim." (NYSCEF Doc. No. 31).

Thereafter, due to Defendants' failure to comply with the Discovery Demands, Plaintiff and Defendants attended discovery conferences with the Court, which ultimately led to a Compliance Conference Order dated September 24, 2019, wherein this Court directed that "documents shall be produced within 30 days [October 24, 2019] and depositions shall be completed on November 14, 2019. NOI- December 6, 2019." (NYSCEF Doc. No. 36).

Although Defendants failed to comply with the Court's September 24, 2019 Compliance Conference Order, on or about December 20, 2019, Plaintiff filed a Note of Issue.

Plaintiff now moves for summary judgment on its first, second, and fourth causes of action against Defendants. Defendants oppose the motion and cross-move for partial summary judgment dismissing Plaintiff's fourth cause of action.

### Discussion

To obtain summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact, and entitlement to judgment in its favor as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Ayotte v Gervasio*, 81 NY2d 1062 (1993). Once the movant's initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *see generally American Sav. Bank v Imperato*, 159 AD2d 444, 444 (1<sup>st</sup> Dept 1990) ("The

presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”).

First and Second Causes of Action, for Breach of Contract and Account Stated

In support of Plaintiff’s motion for summary judgment on its first and second causes of action, Plaintiff argues that it was the regular practice of the parties to enter into verbal agreements whereby a representative of Heritage would verbally contact Plaintiff and identify the work it wanted Plaintiff to perform; Plaintiff would perform the work and then invoice Heritage for the agreed value of the work. Plaintiff alleges that Heritage paid several invoices on various Projects but then stopped paying, without objecting to the amounts shown on the invoices.

In opposition, Defendants contend that there was no contract between the parties. Defendants spend much time comparing Plaintiff’s invoices to Defendants’ own accounting statements to demonstrate that there was no meeting of the minds. Defendants also argue that there is a material issue of fact as to whether Plaintiff worked directly for Heritage or the Project’s owners.

Plaintiff has tendered sufficient evidence to demonstrate that it is entitled to summary judgment on its first and second causes of action against Heritage. Plaintiff has made out its case by submitting the affidavit of Gary Bielins, the former Director of Operations for Heritage, attesting to his role in hiring subcontractors to perform work for which Heritage was neither licensed nor qualified. Mr. Bielins states that between June and November 2017 he contacted Plaintiff to perform electrical work on certain projects for which Heritage was the general contractor; he also states that Plaintiff performed the required work, rendered invoices to Defendants, and he states that he does not recall objecting to the invoices rendered by Plaintiff on the four projects at issue. See Capital One Bank (USA) v Koralik, 51 Misc3d 74, 75 (App Term 1<sup>st</sup> Dept 2016) (“Plaintiff met its prima facie burden of establishing its entitlement to judgment as a matter of law, tendering evidence that it generated account statements for the defendant in the regular course of business, that it mailed those statements to defendant on a monthly basis, and that defendant accepted and retained the statements for a reasonable period of time without objection.”).

Defendants argue that Plaintiff cannot use the hearsay statements of Bielins to establish a contract when Defendants’ documentary evidence indicates that there was no meeting of the minds. Defendants’ arguments are unavailing, as this Court must disregard the affidavit of John Bennardo in support of Defendants’ cross-motion as well as Defendants’ documentary evidence submitted in support of Defendants’ cross-motion, due to Defendants’ failure to comply with this Court’s Compliance Conference Order dated September 24, 2019, wherein this Court directed that “documents shall be produced within 30 days [October 24, 2019] and depositions shall be completed on November 2019. NOI-December 6, 2019.” (NYSCEF Doc. No. 36). Thus, Defendants have failed to meet their burden to submit evidentiary proof sufficient to create a material issue of fact.

Furthermore, it appears that the documentary evidence submitted by Defendants contains statements dated December 31, 2020 and “job cost journals” dated May 19, 2020. Clearly, these documents were not created contemporaneously with the events they purport to reflect.

In any event, Plaintiff’s affidavits in support of the instant motion are specific about Plaintiff’s issuance of invoices to Defendants between July and December 2017. The affidavit of Michael Weiss, President of Plaintiff, specifically states that Plaintiff not only issued invoices during the time period in question but also sent periodic statements of account to Heritage setting forth the invoices that had not been paid. Plaintiff has also submitted the affidavit of Mr. Bielins, which states “[i]nvoices reflecting the value of the work performed were then issued by [Plaintiff] to Heritage.” (NYSCEF Doc. No, 70). Defendants’ affidavits in opposition to Plaintiff’s motion and in support of their own cross-motion lack any specific details about Defendants’ regular practice of opening mail and/or receiving invoices. More specifically, the affidavit of Bennardo merely states “[i]ndeed, Heritage did not receive any [Plaintiff] invoices on certain projects, or else they would have been entered into the account system.” This alone is insufficient to create a material issue of fact. Defendants’ affidavits also fails to deny that Bielins was the representative in charge of hiring and dealing with subcontractors, and thus would be the person with personal knowledge.

#### Fourth Cause of Action, for Diversion of Trust Funds in Violation of the Lien Law

Plaintiff’s fourth cause of action seeks to recover funds from Defendants, particularly Bennardo, for allegedly diverting funds from the trust established by Lien Law Article 3-A.

In opposition to Plaintiff’s motion for summary judgment and in support of their cross-motion, Defendants argue that this cause of action must be dismissed, as it is procedurally defective due to Plaintiff’s failure properly to commence a trust fund action pursuant to Lien Law § 77.

Defendants are correct that Lien Law § 77, titled “action to enforce trust,” requires that any action to enforce a trust be brought in a representative action for the benefit of all beneficiaries of the trust. Defendants are also correct that Plaintiff failed to comply with said statute. Thus, Defendants are granted summary judgment against Plaintiff’s fourth cause of action without prejudice to being brought in the proper form.

Plaintiff’s third cause of action for unjust enrichment is also dismissed without prejudice as duplicative.

#### Conclusion

Plaintiff’s motion for summary judgment is hereby granted on its first and second causes of action and denied as to its third and fourth cause of action, without prejudice. Defendants’ cross-motion is hereby granted. The Clerk is hereby directed to enter judgment in favor of plaintiff Response Electric, Inc. and against defendant Heritage Builders/Developers Corp. on its first and second causes of action, in the sum of \$54,266.83, plus statutory pre-

judgment interest from March 16, 2020 (30 days after Plaintiff's statement dated February 15, 2020), plus costs and disbursements, and dismissing the third and fourth causes of action without prejudice.

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12/24/2020  
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED  DENIED

GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE