

**160 17th St. LLC v Qualtec Env'tl. Inc.**

2021 NY Slip Op 32210(U)

November 8, 2021

Supreme Court, Kings County

Docket Number: Index No. 511808/2021

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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160 17th ST. LLC, LA MIRADA-SCHIPPERS, LLC,  
SECOND DEVELOPMENT SERVICES INC., and  
SDS LEONARD LLC,

Plaintiffs, Decision and order

- against -

Index No. 511808/2021

QUALTEC ENVIRONMENTAL INC.,

Defendant,

November 8, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement arguing there are no questions of fact the defendant breached a contract. The defendant has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

On July 19, 2019 the defendant forwarded an estimate for asbestos work to be performed on behalf of SDS Companies LLC. SDS Companies LLC executed the proposal and indeed the defendant performed work on behalf of SDS. On July 9, 2020 an inspector examining the site issued a stop work order upon discovering asbestos at the location. The plaintiff alleges they incurred additional costs to rectify the errors committed by the defendant. Specifically, the plaintiff asserts the defendant issued a false report indicating the asbestos was removed when in fact asbestos still remained. This lawsuit was commenced and now the plaintiff seeks summary judgement arguing there are no

questions of fact the defendant breached a contract by failing to remove all the asbestos and by filing a false report in that regard.

for testing and

removal of asbestos as well as for the filing of the required asbestos completion paperwork with the NYC Department of Environmental Protection, ("DEP"), and NYC Department of Buildings, ("DOB"). Affirmation in Support 38.

#### Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1<sup>st</sup> Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a

matter of law in the absence of any showing that a specific provision of the contract was breached" (id).

First, there are questions whether a contract was entered into between the parties. While SDS did sign the estimate, the accompanying email questioned whether the terms of the estimate could be changed. Specifically, SDS noted that while the estimate asked for half the fee up front, approximately \$8,000 SDS requested if they could pay only \$4,000 and the balance at a later date. There are thus questions whether that request amounted to a counteroffer and there is no indication in the papers whether such counteroffer was accepted. Therefore, notwithstanding the fact the defendant performed work there are outstanding questions of fact whether a contract was ever entered into between the parties.

Further, even if a contract was entered into between the parties there are questions concerning the scope of the duties incumbent upon the defendant. The contract in the form of the estimate describes the duties and lists "NYC DEP Notification DEP Filing Fee" and "NYS DOL Notification NYS Filing Fee" (see, "Estimate"). It is unclear from the papers submitted what those duties entailed. The plaintiff asserts the duties included the submission of certain documents and an Asbestos Assessment Report which the plaintiff claims contained false information prompting this lawsuit. The plaintiff claims the contract included

"testing and removal of asbestos as well as for the filing of the required asbestos completion paperwork with the NYC Department of Environmental Protection, ("DEP"), and NYC Department of Buildings, ("DOB") (see, Affirmation in Support, ¶ 38). However, there has been no evidence presented the notations in the estimate include the filing of any reports. Indeed, it is entirely unclear precisely what those duties entailed other than filing fees. It may certainly be true the duties included the preparation of such report, however, there are questions of fact in this regard. Of course, if true that false documents were submitted on behalf of plaintiff then a tort was surely committed, however, without specific contract language requiring the truthful submission of such reports, there are questions whether a breach of contract occurred. In addition, there are questions whether a breach occurred concerning the work actually performed. The mere fact a state official required additional work to be performed does not mean a breach occurred and in any event does not delineate the extent of any breach. These are facts which must be explored through discovery.

Moreover, there are surely questions whether the damages sought is proper. The plaintiff alleges the defendant's conduct caused a sixty-eight day delay which resulted in damages of \$744,924.05. This number includes hiring another asbestos removal company, additional licensing and access fees, interest

on loans, late penalties and taxes. The precise amounts of these alleged damages must surely be scrutinized and questioned. The calculations presented in the moving papers are insufficient to eliminate all questions concerning their accuracy.

Therefore, the motion seeking summary judgement on the breach of contract cause of action is denied.

So ordered.

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DATED: November 8, 2021  
Brooklyn N.Y.



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Hon. Leon Ruchelsman  
JSC