

Greystone Bldg. & Dev. Corp. v Makro Gen. Contrs., Inc.
2021 NY Slip Op 32243(U)
November 10, 2021
Supreme Court, New York County
Docket Number: Index No. 450271/2016
Judge: David Benjamin Cohen
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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 450271/2016

GREYSTONE BUILDING & DEVELOPMENT CORP.,

MOTION SEQ. NO. 004

Plaintiff,

- v -

MAKRO GENERAL CONTRACTORS, INC., THE NEW
YORK CITY TRANSIT AUTHORITY, & HERCULES
ARGYRIOU,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

In an action to recover damages for, inter alia, breach of contract, defendants Makro General Contractors, Inc. (“Makro”) and Hercules Argyriou (collectively “the Makro Defendants”) move for an order pursuant to 22 NYCRR § 202.21(e), vacating the Note of Issue and Certificate of Readiness for trial, staying this matter, and removing it from the trial calendar; and pursuant to CPLR 3124, compelling plaintiff Greystone Building & Development Corp. (“Greystone”) and Greystone’s principal Theodore Melittas (“Melittas”) who is the additional defendant on counterclaim to comply with their discovery obligations by providing full and complete answers to the Makro Defendants’ First Set of Interrogatories, producing the documents requested in the Makro Defendants’ First Notice of Discovery and Inspection, and responding to Makro’s requests for dates on which to depose Melittas. Greystone and Melittas

oppose and cross-move for an order, pursuant to CPLR 3212, for partial summary judgment in the sum of \$ 433,967 on the First Cause of Action (contract claim) and Second Cause of Action (quantum merit). After a review of the motion papers as well as the relevant statutes and case law, the motions are decided as follows.

I. Procedural and Factual Background

Makro was the general contractor for the New York City Transit Authority (“NYCTA”) on a project for the structural rehabilitation of an elevated structure in Queens (the “Project”). In July 2011, Greystone, the subcontractor, began performing all demolition, lead abatement, painting, and related work as directed by NYCTA. However, in August 2013, Greystone stopped its work. Subsequently, the Makro Defendants hired a different subcontractor to complete Greystone’s work.

Greystone filed this action seeking payment under the subcontract and claiming (1) breach of contract, (2) *quantum meruit*, (3) foreclosure of its mechanic’s lien, (4) trust fund diversion, and (5) recovery of bond from surety (Doc 20). The Makro Defendants counterclaimed for breach of contract, seeking \$941,016 (Doc 30).

On May 25, 2018, Greystone moved for a partial summary judgment “in the sum of \$433,967.00 on the First or Second and Fifth Causes of Action, severing the balance of the action for trial” (Doc 34 [Seq 002]). The Makro Defendants opposed and cross-moved to dismiss the complaint. This Court denied Greystone’s motion for summary judgment on the first (breach of contract), second (quantum meruit) and fifth (recovery of bond from surety) causes of action, reasoning, in relevant part, that “[t]here remain[ed] significant material issues of fact in dispute regarding [Greystone’s] performance under the subcontract and whether [it] earned the fees it [sought]” (*Greystone Bldg. & Dev. Corp. v Makro Gen. Contractors, Inc.*, 2018 N.Y. Slip

Op. 33172[U], 2 [N.Y. Sup Ct, New York County 2018], *affd as mod*, 2020 N.Y. Slip Op. 01584 [1st Dept 2020]).

The Appellate Division, First Department affirmed this Court's denial of Greystone's motion for partial summary judgment, explaining that "[s]ummary judgment in plaintiff's favor on its claim for payment for work performed is precluded by issues of fact as to the portion of the contract that was performed and the portion that was deleted" (*Greystone Bldg. & Dev. Corp. v Makro Gen. Contractors, Inc.*, 181 AD3d 468 [1st Dept 2020]).

Subsequently, Greystone moved to reargue its motion, requesting that, upon reargument, this Court grant summary judgment for the sum of \$433,967.00. This Court denied Greystone's motion for reargument (Doc 157).

On May 24, 2021, Greystone filed and served the note of issue and certificate of readiness for trial.

II. The Parties' Contentions

In support of their motion to vacate the note of issue and compel production, Makro Defendants argue that (1) Greystone's note of issue is fatally deficient and should be vacated, and (2) Greystone should be compelled to comply with its discovery obligations, and produce Melittas for deposition. The Makro Defendants argue that the First Department remanded the case back to this Court on March 10, 2020; they sent a deficiency letter on March 16, 2020; and there has not been another status conference due to conditions arising from the COVID-19 pandemic.

In opposition to the Makro Defendants' motion and in support of their cross motion, Greystone and Melittas argue that they calculated the amount due from the Makro Defendants' admissions and that there is no genuine issue of material fact (Doc 184). Greystone and Melittas

acknowledge that their argument is “essentially the same motion made by [Greystone] three years ago [in 2018]” (*id.*).

In further support of their motion and in opposition to the cross motion,¹ the Makro Defendants reiterate that the cross motion is improper since Greystone does not offer any new evidence for the same motion that it brought three years ago, and that Greystone has failed to fully respond to seven deficiency letters from August 2016 through March 2020 (Doc 186).

III. Legal Conclusions

Greystone’s cross motion for partial summary judgment is barred by the law of the case doctrine. “The law of the case doctrine is part of a larger family of kindred concepts, which includes *res judicata* (claim preclusion) and collateral estoppel (issue preclusion)” (*People v Evans*, 94 NY2d 499, 502 [2000]). It “applies to various stages of the same action or proceeding and its purpose is to avoid the re-injection of issues already determined within it” (§ 448. Law of the Case, Siegel, N.Y. Prac. § 448 [6th ed.]). “The ‘law of the case’ [doctrine] operates to foreclose re-examination of the question absent a showing of subsequent evidence or change of law” (*Strujan v Glencord Bldg. Corp.*, 137 AD3d 1252, 1253 [2d Dept 2016]). Greystone admittedly has re-filed “the same motion [that it made] three years ago [in 2018]” (Doc 184 at 5) and fails to offer any new evidence. The First Department has affirmed this Court’s denial of Greystone’s 2018 motion on the grounds that it is precluded by issues of fact. Additionally, this Court denied Greystone’s motion to reargue its 2018 motion. Therefore, Greystone’s cross motion is denied (*see United States for Use & Benefit of Five Star Elec. Corp. v Liberty Mut. Ins. Co.*, 2020 WL 2530180, at *5 [SDNY May 19, 2020]; *Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301 [1st Dept 2004]).

¹ The reply papers are incorrectly submitted under Sequence Number 002 (*see* Docs 185, 186).

The Makro Defendants' motion is granted. The Makro Defendants timely moved to vacate the note of issue and demonstrated that the certificate of readiness erroneously indicated that discovery was complete (*see Rosen Aff ¶¶ 5-6, 10-11, Doc 168*). "A note of issue should be vacated when it is based upon a certificate of readiness which contains an erroneous fact, such as that discovery has been completed" (*Ruiz v Park Gramercy Owners Corp.*, 182 AD3d 471 [1st Dept 2020]).

Accordingly, it is hereby:

ORDERED that the motion by defendants Makro and Hercules Argyriou to vacate the note of issue and strike the case from the trial calendar and compel further discovery is granted, and it is further

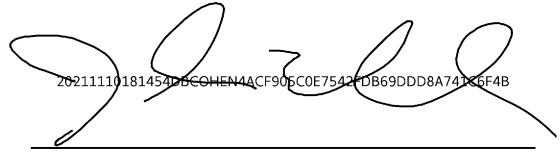
ORDERED that plaintiff Greystone Building & Development Corp. and Greystone's principal Theodore Melittas (the additional defendant on counterclaim) are to comply with their discovery obligations by providing full and complete answers to the Makro Defendants' First Set of Interrogatories by 12/1/2021, producing the documents requested in the Makro Defendants' First Notice of Discovery and Inspection by 12/1/2021, and responding to Makro's requests for dates on which to depose Melittas by 11/24/2021; and it is further

ORDERED that Melittas shall appear for a deposition on a date and at a time convenient to both sides on or before January 14, 2022; and it is further

ORDERED that the parties are to appear for a virtual status conference with the Court on January 25, 2022 at 10:00 AM to discuss any further post-Note of Issue discovery needed, with a link to the conference to be sent via a subsequent calendar invite unless, prior to that day, the parties complete a stipulation as to outstanding discovery and return the same by email to SFC-

Part58-Clerk@nycourts.gov at least two business days prior to the scheduled appearance, in which case the conference will be cancelled.

11/10/2021
DATE



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DAVID B. COHEN, 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