

**Senator Constr. Group Inc. v J Cos. LLC**

2021 NY Slip Op 32456(U)

November 24, 2021

Supreme Court, New York County

Docket Number: Index No. 653466/2019

Judge: Erika M. Edwards

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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. ERIKA EDWARDS**

**PART 11**

*Justice*

-----X

SENATOR CONSTRUCTION GROUP INC.,

Plaintiff,

- v -

THE J COMPANIES LLC and WESTCHESTER FIRE  
INSURANCE COMPANY,

Defendants.

-----X

INDEX NO. 653466/2019

MOTION DATE 05/28/2021,  
08/04/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for DISMISS.

Upon the foregoing documents and applicable law, the court grants Defendant Westchester Fire Insurance Company’s (“WFIC”) summary judgment motion filed under motion sequence 001 and grants in part Defendant The J Companies LLC’s (“J Co”) motion for summary judgment and dismissal of Plaintiff Senator Construction Group Inc.’s (“Senator”) complaint filed under motion sequence 002 to the extent that the court grants the portions of the motion seeking dismissal pursuant to CPLR 3211(a)(1) and seeking summary judgment dismissal, but denies the portions seeking dismissal under CPLR 3211(a)(5) and for attorney’s fees, costs and expenses, without opposition.

Senator brought this action against WFIC and J Co (collectively, “Defendants”) and alleged claims of foreclosure of a mechanics lien in the amount of \$84,653.64 against WFIC for the retainage which was withheld and breach of contract and unjust enrichment against J Co.

Senator had performed masonry and brick work on a construction site, owned by non-party 130 7<sup>th</sup> Ave South, LLC, as a sub-contractor retained by the non-party construction manager, T2G, LLC. The Letter of Intent entered into between Senator and T2G, LLC was dated September 22, 2015. Although it was printed on J Co's letterhead and transmitted on J Co's letterhead, J Co was not a party to this agreement.

Defendant WFIC now moves for summary judgment dismissal of Senator's complaint against it with prejudice under motion sequence 001. WFIC argues in substance that Senator voluntarily withdrew from the site in May 2017 because it was incapable of completing the project, that it failed to complete the scope of the agreed upon work and that much of the work it completed was deficient. WFIC further argues in substance that it required 11 change orders for back charges to repair or replace Senator's deficient work and required a new company to be retained to complete the project and repair the deficient work completed by Senator for a total amount of \$318,098.88. WFIC further argues in substance that Senator claimed that the amount of the contract was \$909,751.00 and that Senator admits to being paid \$796,968.43, for a remaining balance of \$84,653.64 allegedly due to Senator. However, WFIC argues that since the amount paid out to complete the project and repair Senator's deficient work was more than the amount Senator claims it is owed, there is no lien fund to which the lien may attach. Additionally, WFIC argues that Senator is not owed the amount it claims and WFIC submitted the Letter of Intent, emails, correspondence, change orders, an affidavit, portions of deposition testimony and other documents to support its arguments.

Defendant J Co now moves to dismiss Senator's complaint against it under motion sequence 002, pursuant to CPLR 3211(a)(1) and (a)(5) and, in the alternative, for summary judgment dismissal. J Co adopts the arguments raised by WFIC as they pertain to J Co's motion.

J Co argues in substance that it never entered into a contract with Senator and that Senator sued the incorrect party, since T2G, LLC signed the Letter of Intent and J Co has no legal or contractual relationship with T2G, LLC. J Co also argues in substance that even if Senator had sued the correct company, then it still would not prevail because it failed to abide by the conditions set forth in the agreement regarding a one-year time limitation for filing suit, which warrants dismissal pursuant to CPLR 3211(a)(5), and the condition precedent requirements.

Despite being granted an extension of time to file its opposition papers, Senator failed to oppose either motion.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his

failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

Dismissal based on documentary evidence is warranted only where such evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law (CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal is proper where the documents relied upon definitively disposed of a plaintiff’s claim (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]).

Here, the court finds that both Defendants demonstrated their entitlement to judgment in their favor as a matter of law and the absence of any material facts in dispute to be determined by a trier of fact. Based upon the uncontroverted evidence submitted, Defendants demonstrated that the amount paid to complete the work that Senator was supposed to have completed under the scope of work in the agreement and the amount spent to repair or correct Senator’s work was more than the amount Senator claimed it was owed under the terms of the agreement. Therefore, the court offsets this amount against the amount Senator claims it was owed and Senator failed to rebut the proof provided by WFIC. Additionally, the court finds that WFIC also demonstrated that Senator was not owed the claimed amount and that the retainage withheld from Senator was not due and owing as Senator was never provided final approval as required by the agreement.

The court also finds that J Co demonstrated that it was not a party to the Letter of Intent, nor any other contract or agreement with Senator, so it was not the correct entity to have been sued.

Senator failed to oppose the motions, so it did not present any evidence to dispute the evidence submitted by Defendants, nor any arguments raised in Defendants' motions. As such, the court grants both summary judgment motions and dismisses Senator's complaint against both defendants.

Additionally, in the alternative, the court grants the portion of J Co's motion to dismiss Senator's complaint based upon documentary evidence, pursuant to CPLR 3211(a)(1). However, the court denies the portion of J Co's motion seeking dismissal pursuant to CPLR 3211(a)(5) as J Co failed to demonstrate that Senator was bound by a contractual term limiting the time for which Senator could sue J Co. since there was no contract between the parties. Additionally, the court denies the portion of J Co's motion seeking attorney's fees and costs as J Co failed to demonstrate its entitlement to such relief. The court notes that the Letter of Intent and transmittal form appear to have been printed on J Co's letterhead, so it is not so outrageous that Senator sued J Co. because it mistakenly believed it was somehow legally associated with T2G, LLC.

The court has considered all remaining arguments not specifically discussed herein and denies all relief requested but not specifically granted herein.

As such, it is hereby

**ORDERED** that as to motion sequence number 001, the court grants Defendant Westchester Fire Insurance Company's summary judgment motion; and it is further


**ORDERED** that as to motion sequence 002, the court grants in part Defendant The J Companies LLC's motion for summary judgment and for dismissal of Plaintiff Senator Construction Group Inc.'s complaint to the extent that the court grants the portions of the motion seeking dismissal pursuant to CPLR 3211(a)(1) and for summary judgment dismissal, but denies

the portions seeking dismissal pursuant to CPLR 3211(a)(5) and for attorney's fees, costs and expenses; and it is further

ORDERED that the court dismisses Plaintiff Senator Construction Group Inc.'s complaint as against both defendants, Westchester Fire Insurance Company and The J Companies LLC, with prejudice and the court directs the Clerk of the Court to enter judgment in favor of both defendants as against Plaintiff without costs to any party.

This constitutes the decision and order of the court.

11/24/2021  
DATE

  
ERIKA EDWARDS, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLE ORDER  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE