

**Creative Direction Constr. & Design, LLC v  
Westchester Fire Ins. Co.**

2022 NY Slip Op 32870(U)

August 22, 2022

Supreme Court, New York County

Docket Number: Index No. 653820/2020

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14**

*Justice*

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**INDEX NO. 653820/2020**

CREATIVE DIRECTION CONSTRUCTION & DESIGN, LLC,

**MOTION DATE 08/15/2022**

Plaintiff,

**MOTION SEQ. NO. 004**

- v -

WESTCHESTER FIRE INSURANCE COMPANY, NORTHE  
GROUP, INC., NEW YORK CITY DEPARTMENT OF  
PARKS AND RECREATION, NEW YORK CITY  
DEPARTMENT OF FINANCE, CITY OF NEW YORK

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136

were read on this motion to/for DISMISS.

The motion by plaintiff to dismiss the counterclaims alleged by defendant Northe Group, Inc. (“Northe”) is granted in part and denied in part.

**Background**

This action relates to a payment bond and plaintiff’s effort to foreclose on a Mechanic’s Lien in the amount of \$153,493.96 (although plaintiff now says it discovered the lien was never filed). Plaintiff contends that it was hired to do work on a construction project in a park in Brooklyn. It acknowledges that it entered into a subcontract with Northe but that Northe did not pay plaintiff for all of the labor and services it provided. Northe initially defaulted but later moved to vacate its default and it asserted four counterclaims against plaintiff for breach of contract, willful exaggeration of lien, unjust enrichment, and indemnification.

## Discussion

“On a motion to dismiss, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Besen v Farhadian*, 195 AD3d 548, 549, 151 NYS3d 31 [1st Dept 2021] [internal quotations and citations omitted]).

## Breach of Contract

Plaintiff claims that Northe did not state a valid counterclaim for breach of contract and that the allegations relating to this counterclaim did not include the required specificity. Plaintiff points out that Northe contends that plaintiff overcharged Northe “with intent to defraud” but did not allege enough details about this fraud to constitute a cognizable cause of action. It also argues that plaintiff’s allegation in the complaint that Northe breached the contract by not paying plaintiff cannot constitute a breach of contract by plaintiff.

Plaintiff argues that Northe was fully compensated for the project and therefore cannot allege that plaintiff breached the contract. Moreover, it points out that because Northe was paid, any claims about deficient work by plaintiff are inadequate.

In opposition, Northe contends it is not alleging a breach of contract based on fraud and maintains that the contract’s prohibition on an oral modification should not be ignored. Northe insists that plaintiff seeks additional compensation for overhead and profit based on a change order that is between Northe and the New York City Department of Parks and Recreation. It

claims that plaintiff was not a party to that change order and cannot seek compensation based on it. Northe says that it paid plaintiff nearly \$700,000. It also claims that plaintiff never got the insurance required in the contract.

The Court denies this branch of the motion. Northe stated a valid counterclaim. Plaintiff is correct to point out that Northe mentions fraud as part of these allegations but the rest of the allegations and the opposition (including the affidavit of Mr. Zihenni, owner of Northe) state a valid counterclaim. Northe insists it overpaid plaintiff and that plaintiff improperly pocketed tax withholdings from its laborers' paychecks. Northe need only state a valid counterclaim, it need not prove the counterclaim at this stage of the case.

Similarly, the Court cannot dismiss the breach of contract counterclaim on the ground that plaintiff's partial performance helps it overcome the no oral modification clause in the contract. The Court cannot reach a factual conclusion on a motion to dismiss.

Plaintiff's other contentions amount to just that—a request that this Court side with its view of the purported facts, something that is not proper on a motion to dismiss. Plaintiff's attempt in its reply to cast aspersions against Mr. Zihenni personally is also not a reason to grant this branch of the motion.

### **Willful Exaggeration of the Lien**

Plaintiff maintains that discovery revealed that the lien was never filed on the project. Northe correctly pointed out in opposition that the complaint alleged that there was a lien filed in connection with the project and plaintiff did not submit any evidence showing the absence of a lien.

However, the Court dismisses this counterclaim as plaintiff pointed out in reply that the lien docket for the New York City Department of Finance reveals that there is no lien for the

project. Because the lien was apparently never recorded, Northe cannot pursue a counterclaim for willful exaggeration of a lien.

### **Unjust Enrichment**

The Court dismisses this counterclaim because Northe did not address this counterclaim in its opposition.

### **Indemnification**

In this counterclaim, Northe alleges that if it ends up having to pay defendant Westchester Fire Insurance Company as a result of plaintiff's lawsuit, then plaintiff will be responsible due to plaintiff's breach of the contract. Westchester is the payment bond surety.

Plaintiff contends that it settled its claims with Westchester and that it has no obligation under any theory of indemnification to pay Northe for any payments made by Westchester. Plaintiff insists it was never a party to the surety bond under which Westchester made a settlement and that any obligation by Northe arises out of a separate agreement between Westchester and Northe.

In opposition, Northe says it has stated a valid counterclaim for common law indemnification. It claims that plaintiff wrongly induced Westchester to settle with plaintiff for money that plaintiff was not owed.


The Court denies this branch of the motion. Northe contends that Westchester is seeking indemnity from Northe based on the settlement payment it made to plaintiff. If Northe is right that plaintiff was not owed that payment, then it could conceivably seek indemnification from plaintiff should it have to pay Westchester. At this stage of the litigation, the Court cannot make a factual conclusion or find, as plaintiff argues in reply, that plaintiff's version of events is accurate.

Again, as stated above, Northe need not *prove* these allegations as a matter of law. It merely has to allege a cognizable counterclaim, which it has here.

Accordingly, it is hereby

ORDERED that the motion by plaintiff is granted only to the extent that the second and third counterclaims for willful exaggeration and unjust enrichment are severed and dismissed and denied with respect to the remaining relief requested.

Next Conference: Already scheduled for December 19, 2022 at 11 a.m. (NYSCEF Doc. No. 121 [directing the parties to upload a discovery update by December 12, 2022]).

<u>8/22/2022</u> DATE			 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE