

**Borough Constr. Group, LLC. v Red Hook 160 LLC**

2022 NY Slip Op 33198(U)

September 19, 2022

Supreme Court, Kings County

Docket Number: Index No. 500308/19

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

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

BOROUGH CONSTRUCTION GROUP, LLC.,  
Plaintiff, Decision and order

- against - Index No. 500308/19

RED HOOK 160 LLC, PHILADELPHIA INDEMNITY  
INSURANCE COMPANY, ACREFI MORTGAGE  
LENDING, LLC, TRI STATE LUMBER, AF SUPPLY  
CORP, UNITED RENTALS (NORTH AMERICA), INC.,  
WORLDWIDE PLUMBING SUPPLY, INC., CASTLE  
MASONRY, INC., WOODBURY CONSTRUCTION, INC.,  
GO GREENER PLUMBING, INC., PREMIUM BUILDING  
MATERIALS, INC., UNIVERSAL MARBLE AND GRANITE  
OF QUEENS AND TPG CONTRACTING, CORP.,  
Defendants, September 19, 2022

-----X  
Red Hook 160 LLC,  
Third Party Plaintiff,

- against -

BOROUGH EQUITIES LLC, MICHAEL BAUER &  
EMANUEL KANARIS,  
Third-Party Defendants,

-----X  
UNITED RENTALS (NORTH AMERICA) INC.,  
Third Party Plaintiff,

- against -

ATLANTIC SPECIALTY INSURANCE COMPANY,  
a/k/a ATLANTIC SPECIALTY INSURANCE INC.,  
D/b/a ASIC INSURANCE,  
Third-Party Defendants,

-----X  
UNIVERSAL MARBLE & GRANITE OF QUEENS INC.,  
Third-Party Plaintiff,

-against-

BOROUGH EQUITIES LLC and ATLANTIC  
SPECIALTY INSURANCE COMPANY,  
Third-Party Defendants,

-----X  
PRESENT: HON. LEON RUCHELSMAN

The plaintiff/third party defendant Borough Construction Group LLC and the other third party defendants have moved seeking summary judgement dismissing the third party complaint on the grounds there are no questions of fact no liability can be established. Further, they move seeking summary judgement on certain of the claims contained in the complaint. Red Hook 160 LLC has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in prior decisions Borough Construction Group LLC entered into a contract with Red Hook 160 LLC concerning the construction and renovation of a project located at 160 Imlay Street in Kings County. Borough Construction sued alleging it is owed over two and a half million dollars. Red Hook 160 LLC asserted various counterclaims. Borough Construction has now moved seeking summary judgement, essentially arguing there are no questions of fact the Borough parties cannot be liable for any of the third party claims and should be awarded judgement for some of its claims.

#### 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 (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1<sup>st</sup> Dept., 1996]). 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 (Derdarian v. Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

First, on December 27, 2019 Red Hook 160 LLC entered into an agreement whereby Red Hook 160 LLC collaterally assigned "all of the assignable right, title and interest of assignor, to and under the following documents" to Churchill 160 Imlay Lender LLC (see, ASSIGNMENT OF AGREEMENTS, LICENSES, PERMITS AND CONTRACTS, ¶2 [NYSCEF Doc. #524]). However, the assignee only had the ability to exercise its rights if an event of default occurred (¶3(c)). Further, the agreement provides that "this Assignment is made for collateral purposes only and the duties and obligations of Assignor under this Assignment shall terminate upon the payment in full of the Debt" (see, ¶8). Thus, the assignment was only provided to secure the outstanding debt. Thus, it was not an "absolute" assignment (see, Matter of Coastal Nursing Center Inc., 164 B.R. 788 [Southern District of Georgia, Savannah Division, 1993]). In addition, there is no evidence the assignee ever exercised any of its rights pursuant to this agreement which would thereby preempt Red Hook 160 LLC from

maintaining ownership and standing over its agreement.

Therefore, since no assignment took place Red Hook 160 LLC maintains standing to pursue its counterclaims.

Moreover, Section 4(d) of the assignment which states that "assignor is not in default under the Documents, and, to the best of Assignor's knowledge, no other party to the Documents is in default thereunder" is not an admission at all that Borough was not in default of its agreement.

Turning to substantive issues, a side agreement was entered between the parties on October 25, 2016. Article 3 of the agreement states that "notwithstanding any provision on the Contract to the contrary, the Owner, and not the Construction Manager, shall be responsible for the entire cost of performing the Work, without reimbursement by Construction Manager or any deduction in any amounts owed to Construction Manager, including without limitation any costs in excess of the Guaranteed Maximum Price. Without limiting the foregoing, Owner shall be responsible for the cost of all insurance required to be maintained by the Construction Manager in connection with the Project. Further, Construction Manager's liability with respect to any costs of correcting any errors, omissions or other deficiencies in the Work; costs arising out of or relating to any extensions in the Project Schedule; and any costs associated with changes required to be made to the Work because of site

conditions at the Project, irrespective of whether the same were or should have been reasonably foreseeable to Construction Manager, shall be expressly limited to the insurance proceeds actually recovered under Construction Manager's insurance policies maintained by Construction Manager pursuant to 11.5.1 of the General Conditions to the Contract pursuant to claim(s) made in connection therewith" (see, Side Letter Agreement [NYSCEF #102]). The Borough parties argue that "this provision of the Side Agreement makes clear that whatever damages Defendant is claiming as a result of the alleged breaches of contract are to be borne by Defendant, not BCG" (see, Memorandum of Law, page 6 [NYSCEF #525]). However, that provision only requires the owner to be responsible for all costs "of performing the work" (*id*) and does not act as a waiver absolving Borough from omissions or for conduct that had nothing to do with the work and in fact is contrary to the work to be performed. Further, implicit within that article, the owner is only responsible for all costs whereby Borough acts to further the goals of the agreement, not where Borough possibly breaches the agreement. There is no reasonable reading of that article that permits Borough to actually breach the agreement and then shield itself from any liability on the grounds the owner is responsible for all costs of work performed at the site. Of course, pursuant to the side agreement the owner is responsible for all costs associated with the work, however,

again, the allegations raised do not concern the performance of the work at all. Indeed, Borough does not raise any questions of fact challenging the allegations of the first counterclaim. Rather, Borough makes the curious argument that "the allegations in RH160's BOC counterclaim fall within the definition of 'Work'" (see, Memorandum in Reply, Page 3 [NYSCEF Doc. #576]). A review of that counterclaim is therefore necessary. It accuses Borough of (i) failing to act in the best interest of Red Hook 160; (ii) failing to plan, prosecute and manage the work in an cost effective and economical manner; (iii) failing to properly issue bid packages to subcontractors and enter into written subcontracts that complied with the CM Agreement; (iv) failing to perform cost-control management; (v) failing to coordinate subcontractors work; (vi) failing to protect work in place from damage during construction; (vii) failing to provide required back-up documentation in support of payment applications; (viii) performing defective work; and (ix) failing to comply with Red Hook 160's demand for an audit" (see, Amended Counterclaim and Third Party Complaint, ¶ 147 [NYSCEF #196]). These allegations, if true, frustrated rather than supported the work to be performed. The side agreement does not shift the costs of such frustration of the work upon the owner. Therefore, the side agreement does not act as a bar to pursue any counterclaims. Borough next argues that in any event any liability is limited to

the insurance proceeds actually recovered. However, again, that limitation only applies to "costs of correcting any errors, omissions or other deficiencies in the Work; costs arising out of or relating to any extensions in the Project Schedule; and any costs associated with changes required to be made to the Work because of site conditions at the Project" (supra). That limitation cannot be read to confine the liability based upon tortious conduct alleged that is not included within the express provisions of the side agreement at all. Thus, the allegations contained in the counterclaim allege far more than the discrete reasons enumerated in the side agreement. Surely, there are questions of fact in this regard. Consequently, the motion seeking summary judgement dismissing the first counterclaim is denied.

Turning to the motion seeking to dismiss the counterclaim of a breach of implied covenant of good faith and fair dealing, in an order dated June 1, 2020 the court denied the dismissal of such counterclaim. It is true the court did not analyze whether this claim is duplicative of a breach of contract claim. A claim of a breach of an implied covenant of good faith and fair dealing will not be duplicative where the allegations are based upon facts that are distinct from the breach of contract claim (LePatner and Associates, LLP v. RSUI Group Inc., 2021 WL 4555761 [S.D.N.Y. 2021]). The counterclaim supporting this allegation is



contained in one paragraph of the Amended Counterclaim and Third Party Complaint. Paragraph 151 asserts that Borough committed this tort by "purposely slowing down the work, not implementing any cost controls for the Project and acting arbitrarily and unreasonably in the amounts invoiced for work Borough Construction claims was performed at the Project and in carrying out its work at the Project" (supra, ¶151). The allegation that Borough purposely slowed down the work is virtually indistinguishable and surely duplicative of "failing to plan, prosecute and manage the work in a cost effective and economical manner" (supra, ¶147). Further, the allegation Borough failed to implement any cost controls is duplicative of the breach of contract allegation of "failing to perform cost-control management" (supra, ¶147). Again, the allegation that Borough arbitrarily and unreasonably invoiced amounts for work at the site is duplicative of the allegation Borough breached the contract by "failing to provide required back-up documentation in support of payment applications" (supra, ¶147). Thus, all the allegations of the breach of the covenant of good faith and fair dealing are already covered by the breach of contract claim. Therefore, the motion seeking to dismiss the counterclaim alleging the breach of the covenant is granted.

Turning to the motion seeking to dismiss the fraud counterclaim, the court has already held certain of the fraud

counterclaims are not duplicative of the breach of contract counterclaim. Specifically, the counterclaim alleged that certain Borough employees created false manpower logs which caused Red Hook 160 LLC to make unwarranted payments. Thus, any arguments this fraud claim is duplicative of the breach of contract claim is rejected. Borough now argues that substantively the fraud claim must be dismissed because Red Hook 160 LLC cannot prove reliance upon any fraud. This is true argues Borough because Red Hook 160 LLC had an opportunity to review the logs and could have easily discovered the true number of workers at the site. Indeed, Red Hook 160 LLC maintained various supervisors at the site yet none of them "nor anybody on behalf of Defendant counted the number of laborers on the Project and compared that to the number of people who signed the labor sign-in sheets" (Memorandum in Support, page 14).

It is true that where a misrepresentation could be discovered with due diligence then no reliance upon such fraud is possible (KNK Enterprises Inc., v. Harriman Enterprises Inc., 33 AD3d 872, 824 NYS2d 307 [2d Dept., 2006]). However, in this case the number of workers presented were within the exclusive knowledge of Borough. Thus, there were no documents to review wherein such fraud could then have been discovered (see, Anhui Konka Green Lighting Co., Ltd., v. Green Logic LED Electrical Supply Inc., 2019 WL 6498094 [S.D.N.Y. 2019]). Moreover, there

were no transactions here that could have been investigated to discovery any possible misrepresentations. Rather, the sole basis asserting there can be no reliance is the fact Red Hook 160 LLC should have taken a head count of workers present and compared them with the manpower logs presented. There are surely questions of fact whether Red Hook 160 LLC maintained such a duty. It cannot be said as a matter of law that such a duty affirmatively existed foreclosing any reliance upon any misrepresentations. Therefore, the motion for summary judgement seeking to dismiss the fraud claim is denied.

Next, the conversion counterclaim is based upon allegations that Borough took materials from the Red Hook site to use at other sites where they were engaged. However, there is no evidence at all substantiating those allegations. The affidavit of Jama Simon an employee of Borough does not raise any questions of fact. While he does state that he was told to order materials for another project "through the Borough employees that ordered materials for the 160 Imlay Project" (see, Affidavit of Jama Simon, ¶ 15) there is no evidence of any conversion of any materials. Therefore, the motion seeking summary judgement dismissing this cause of action is granted.

Concerning the motion to dismiss the alter ego counterclaim, Red Hook 160 LLC points to an affidavit of James Miller an expert in construction operations management. Mr. Miller states in his

affidavit that "Borough and its principals disregarded any corporate distinctions between Borough Construction and Borough Equities. The Project documents clearly establish that Mr. Bauer and Mr. Kanaris (the principals and co-founders of Borough Equities and Borough Construction) operated Borough Construction and Borough Equities as a single entity building the Project. Borough Construction was the construction manager for the Project. Therefore, if Borough Equities was truly a distinct entity, its name should not be found on any project documents after its short stint as a consultant prior to Borough Construction being engaged as the construction manager. But that is not at all the case" (see, Affidavit of James Miller, ¶¶19-21 [NYSCEF Doc. #129]). That expert testimony raises questions of fact which must be determined by a trier of fact. The mere fact Mr. Miller was not disclosed as a witness does not alter this analysis at all. Further, the court already addressed these issues in a decision dated October 23, 2019. The court stated in that decision that "Red Hook has submitted two subcontracts between Borough and other entities wherein the entity contained in those contracts is Borough Equities. Thus, an agreement with City Glass regarding the subject property is made with Borough Equities as the construction manager. Likewise, an agreement with Vitroni regarding the subject property is with Borough Equities. Moreover, Red Hook submitted the title page of

Borough's website which highlights both companies by stating in large print: "BOROUGH EQUITIES, BOROUGH CONSTRUCTION GROUP" and by further stating that "Borough Equities and Borough Construction Group is a privately held full service development firm. We oversee every aspect of a project from conception to acquisition to completion. We also act as the construction manager for certain projects. We are a full service construction company that provides a full range of Construction Management and General Contracting Services" (see, [Boroughequities.com](http://Boroughequities.com) submitted within Exhibit B of James Miller's affidavit). These documents surely raise questions whether Borough Equities is the alter-ego of Borough Construction" (see, Decision dated October 23, 2019). Borough has failed to eliminate all questions of fact in this regard and the motion seeking to dismiss the alter ego claims is denied.

Turning to the request seeking indemnification, the side agreement specifically states that indemnification is available for Borough for all claims "other than those matters which are the direct and sole result of the negligent acts or omissions or willful misconduct of the Construction Manager Parties" (see, Side Agreement Letter, ¶ 6(b)). Indeed, on pages 24 and 25 of Borough's Memorandum of Law this section is quoted, although the provisions immediately preceding it and following it are highlighted. In any event, as noted there are questions of fact

whether Borough committed any acts which would preclude any indemnification at this time. If no determination of wrongdoing is found then Borough may seek indemnification (FSI Architecture P.C., v. Acheson Doyle Partners Architecture P.C., 2022 WL 170646 [S.D.N.Y. 2022]). Thus, the motion seeking indemnification is held in abeyance pending the outcome of the trial.

Turning to the motion seeking to foreclose the mechanic's lien, it is well settled that no such foreclosure can take place if there are questions of fact whether the party seeking to foreclose, Borough in this case, owes money to the owner Red Hook 160 LLC (see, Tomaselli v. Oneida County Industrial Development Agency, 77 AD3d 1315, 908 NYS2d 477 [4<sup>th</sup> Dept., 2010]). Since there are significant questions of fact whether Borough breached its contract the motion seeking summary judgement to foreclose the mechanic's lien is denied. Likewise, Borough's motion seeking summary judgement on it's claim for breach of contract is denied. There are significant factual issues whether Borough's conduct constituted a breach of its contract absolving Red Hook 160 LLC from fulfilling its obligations. These issues cannot be summarily decided.

Thus, all of Borough's motions are denied except the motions seeking summary judgement dismissing the counterclaim of a breach of the covenant of good faith and fair dealing and the counterclaim of conversion. The motion seeking indemnification

is held in abeyance. As noted, the remainder of Borough's motion is denied.

So ordered.

ENTER:

DATED: September 19, 2022  
Brooklyn, NY

  
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Hon. Leon Ruchelsman  
JSC