

New Am. Constr. Inc. v VREX Constr. Inc.

2023 NY Slip Op 33886(U)

October 31, 2023

Supreme Court, New York County

Docket Number: Index No. 155109/2020

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

NEW AMERICAN CONSTRUCTION INC.

Plaintiff,

- v -

VREX CONSTRUCTION INC.,

Defendant.
-----X

INDEX NO. 155109/2020

MOTION DATE 10/26/2023

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 92, 93, 94, 95, 96, 97, 98, 99

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

Plaintiff’s motion for summary judgment and to dismiss defendant’s counterclaims is denied.

Background

Plaintiff is a scaffolding company and defendant is a general contractor. Plaintiff contends that it installed a sidewalk shed and scaffolding at a construction project located at 504 West 141st Street in Manhattan at defendant’s request. It claims that it did this work pursuant to a contract with defendant and performed all services under this agreement. Plaintiff observes that it discovered that defendant had a third-party remove the scaffolding instead of plaintiff and that the materials used for the scaffolding were never returned (plaintiff estimates the value of the materials to be \$39,800).

According to plaintiff, defendant emailed it on February 6, 2019 to remove the scaffolding but plaintiff refused to do so because it had not yet been paid by defendant. It claims that over \$70,000 is due, which includes the missing materials as well as other fees. Plaintiff now

moves for summary judgment on its account stated cause of action and insists that defendant's counterclaims are frivolous.

In opposition, defendant observes that plaintiff's motion is based, in part, on an alleged order of preclusion that is not, in fact, an order of preclusion. The order in question (a Court decision on a motion brought by plaintiff) only compelled defendant to provide discovery which defendant claims it has done. Defendant contends that plaintiff has willfully exaggerated the lien in question and is not entitled to recover.

Defendant attaches the affidavit of its president (Vedat Rexhepi) who claims that the scaffolding was up starting in December 2017 (NYSCEF Doc. No. 96, ¶ 8). Mr. Rexhepi claims he asked plaintiff to take down the scaffolding in December 2018 over the phone and that he made numerous requests over the ensuing months, but plaintiff initially did not respond (*id.* ¶¶ 10-12).

He explains that he wanted the scaffolding to be taken down before the weather warmed up to allow defendant to restart the construction project (*id.* ¶ 17). Mr. Rexhepi insists that because plaintiff refused to take down its scaffolding, it could not complete the work on the job site and the owner of the building got upset (*id.* ¶¶ 18, 19). He observes that the delays led to defendant not getting paid and defendant filing a lien on the property (*id.* ¶ 19). He emphasizes that defendant never dismantled or moved the scaffolding, that defendant was no longer on the project by the end of March/early April 2019 and that has no idea what happened to the scaffolding (*id.* ¶¶ 20, 22). Mr. Rexhepi admits that he previously admitted that defendant removed the scaffolding in a prior affidavit but that this was an error (*id.* ¶ 20).

In reply, plaintiff argues that defendant should be precluded from offering any evidence or testimony in opposition to the instant motion. It insists that the contract required that payment

be made in full before the sidewalk shed and scaffolding could be removed. Plaintiff argues that defendant only paid \$6,000 toward the contract balance, a 25% deposit for the initial contract price.

Discussion

“In order to establish a prima facie case to recover on an account stated, the plaintiff must establish that it submitted invoices and that the defendant received and retained the invoices without objection for an unreasonable period of time” (*Alliance Natl. Ins. Co. v Hagler*, 219 AD3d 1393, 2023 NY Slip Op 04648 [2d Dept 2023] [internal quotations and citations omitted]).

The Court finds that plaintiff failed to meet its prima facie burden on this motion. Nowhere in the moving papers does plaintiff allege that it sent invoices to defendant or, if it did, when these invoices were sent and received by defendant. Although the invoices themselves are attached to this motion, plaintiff did not satisfy the elements for an account stated cause of action. Instead, the email correspondence shows that defendant (not plaintiff) reached out to plaintiff in February 2019 and that plaintiff refused to take down the scaffolding until it got paid (NYSCEF Doc. No. 81). Although invoices were referenced in a responsive email from plaintiff, the attachments were not included in this exhibit. Defendant explained that it was trying to get paid for the job, so that it could pay plaintiff (*id.*).

The Court observes that the inclusion of invoices in NYSCEF Doc. No. 80 is of no moment as at least one of these invoices is dated in August 2019, well after this email conversation. The point is that the Court cannot assume that the invoices included in NYSCEF Doc. No. 80 were the ones attached to an email from February 2019. And the affidavit (NYSCEF Doc. No. 78) from plaintiff’s president does not specifically state that the invoices uploaded as

NYSCEF Doc. No. 80 were sent to defendant in February 2019. In fact, as noted above, this affidavit does not explain when or how the invoices were sent to defendant.

To the extent that plaintiff argues, bizarrely, that defendant should be barred from offering any evidence in this motion, that request is denied. Plaintiff asked for this relief for the first time in its reply. And the basis upon which plaintiff seeks this relief was not, contrary to plaintiff's assertion, an order of preclusion from this Court. The order in question, NYSCEF Doc. No. 72, was simply a decision granting plaintiff's motion to compel. It did not contain any language suggesting that defendant would be precluded if it did not comply. And plaintiff never made a subsequent motion for such relief.

The Court also finds that the contract between the parties does not compel a different conclusion. The contract states "Customer agrees to make no modifications or changes to the installation without prior written consent of New American Construction Inc." (NYSCEF Doc. No. 79, ¶ 8). Of course, the issue here is that plaintiff refused to take down the scaffolding when requested by defendant and defendant denies that it took it down.

Curiously, the agreement also claims that plaintiff "should be notified at least one week before the dismantling of the sidewalk shed" (*id.* ¶ 10) but it does not specifically state that plaintiff was tasked with taking down the sidewalk shed. Defendant maintains that it asked plaintiff to take down the scaffolding for months and months. And while the agreement clearly states that plaintiff should be paid when the installation is complete, plaintiff's motion seeks relief based upon an account stated cause of action, not some other theory (such as breach of contract).

Moreover, the Court declines to dismiss defendant's counterclaims. Although plaintiff claims that these counterclaims are frivolous and without merit, it did not offer any specific

arguments addressing the four counterclaims alleged by defendant. It is not this Court's role to examine each counterclaim and come up with arguments on behalf of plaintiff. It was plaintiff's role to explore each claim.

Summary

The issue on this motion is the precise relief sought by plaintiff. The moving papers focus exclusively on plaintiff's claim for account stated. And plaintiff failed to meet its burden for summary judgment for account stated on these papers. It did not establish that it sent the invoices to defendant or state when it sent them to defendant and it does not allege that defendant retained the invoices without objection. To the contrary, the email communications show that when plaintiff asked for payment defendant objected on the ground that it needed plaintiff to remove the scaffolding so it could get payment from the owner (and then pay defendant).

Moreover, part of the amount plaintiff seeks concerns lost materials, but defendant claims it simply left the job because it got into a disagreement with the owner (stemming, in large part, from plaintiff's refusal to take down the scaffolding) and it never took down the scaffolding. Therefore, even if plaintiff had met its prima facie burden, defendant raised a material issue of fact that it did not remove the materials for which plaintiff seeks damages. Under defendant's view, it simply left the job and has no idea what happened to the scaffolding.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment and to dismiss defendant's counterclaims is denied.

See NYSCEF Doc. No. 96 concerning the next conference.

The Court observes that this matter is still marked disposed as plaintiff has yet to properly serve the General Clerk’s office despite this Court’s specific instructions (NYSCEF Doc. No. 72).

10/31/2023

DATE



ARLENE P. BLUTH, 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