

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

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 602932/2008
NOVA DEVELOPMENT GROUP
vs
25 BROAD LLC
Sequence Number : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

^{is}
~~motion and cross motion~~ are decided in accordance
with accompanying memorandum decision.

FILED
SEP 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/10/10

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X
NOVA DEVELOPMENT GROUP, INC.,

Plaintiff,

Index No.: 602932/08

- against -

25 BROAD LLC and SEASONS INDUSTRIAL
CONTRACTING,

Defendants.

-----X

For Plaintiff:
The Law Offices of Ronald Steinvurzel, P.C.
34 South Broadway
White Plains, NY 10601

For Defendant Seasons Industrial Contracting:
Agovino & Asselta, LLP
170 Old Country Road, Suite 608
Mineola, New York 11501

Papers considered in review of this motion for partial summary judgment:

Notice of Motion 1
Affs in Support 2,3
Mem of Law in Support 4
Aff in Opp 5
Reply Memo of Law 6
Reply Affs 7,8

HON. SALIANN SCARPULLA, J.:

In this breach of contract action, plaintiff, Nova Development Group, Inc. (“Nova”), moves, pursuant to CPLR 3212, for partial summary judgment on the breach of contract claim as against defendant Seasons Industrial Contracting (“Seasons”) (third cause of action), and dismissing Seasons’ affirmative defenses.

For the reasons set forth below, the motion for summary judgment as to the breach of contract claim is granted.

Background

On April 30, 2008, Nova and Seasons entered into a contract concerning the performance of asbestos abatement services at a building located at 25 Broad Street, New York, New York.

Between February 18, 2008 and July 16, 2008, Nova performed the asbestos abatement work.

Pursuant to the contract, Nova was to be paid within 30 days from the submission of an invoice from Nova to Seasons. In addition, the contract provided that "Payment for the Work will be subject to retainage in the amount of ten percent (10%) for each payment/invoice The retainage will be held and will be paid to [Nova] once the conditions for Final Completion of the Work as documented in the Closeout Package have been achieved."

Final Completion of the Work is defined in the contract as the date when:

(a) the Work of this Contract is fully performed;

(b) the following have occurred: (i) all Work hereunder requiring inspection by municipal or other governmental bodies having or asserting jurisdiction, if any, has been inspected and approved by such bodies and by the rating board or the inspection organization, bureau, association or office having or asserting jurisdiction; (ii) [Nova] has delivered to Seasons copies of all permits, licenses and notices required pursuant to the Current Legal Requirements concerning the Work, together with original waste manifests; (iii) the Subcontractor has delivered to the Contractor the Subcontractor's affidavit of waiver of liens; (iv) the Subcontractor or the TPAM has delivered proof that all final air clearances have been obtained and the results of general air sampling; and (v) the

Subcontractor or the TPAM has delivered results of bulk samples which may have been taken during the Work; and

(c) the Subcontractor shall have removed all waste and rubbish and all of its tools, materials and equipment from the Site.

The Contract further provides that “[t]he foregoing certification and required documentation shall be referred to as the Closeout Package.”

Nova submitted four invoices totaling \$834,100 to Seasons dated March 31, 2008, May 31, 2008, June 30, 2008 and July 31, 2008. As of the date of the motion, Seasons has paid \$70,000 to Nova.

On September 19, 2008, Nova filed a lien on the property for \$764,100 (the “Lien”). The Lien has not been paid, cancelled or discharged.

On October 10, 2008, Nova filed this action against Seasons and 25 Broad LLC (“25 Broad”) as owner of the Property. In an order dated March 27, 2009, the Court (J. Lehner) dismissed the action as against 25 Broad.

Discussion

On a motion for summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Once the moving party has made this showing, the burden is on the opposing party to demonstrate “evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v. Metropolitan Museum of Art*, 27 A.D.3d 227, 228 (1st Dep’t 2006); *Zuckerman*, 49 N.Y.2d at 560. “If there is any doubt as to the existence of a triable issue, the motion should be denied.” *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 (1st Dep’t 2002).

In order to establish a prima facie case on a breach of contract claim, plaintiff must show proof of a contract, performance by one party on the contract, a breach by the other party and damages as a result. *Flomenbaum v. New York Univ.*, 71 A.D.3d 80 (1st Dept 2009), *aff’d* 14 N.Y.3d 901 (2010). Where the plain language of the contract establishes obligations on the other party that have not been met, summary judgment is warranted. *Bartfield v. RMTS Assocs., LLC*, 283 A.D.2d 240 (1st Dep’t 2001).

Here, there is no dispute that the parties had a contract.

Nova argues that it has fully satisfied all conditions of the contract and that defendant breached the contract by failing to pay for the work plaintiff performed. As such, it claims that it is entitled to summary judgment.

In opposition, Seasons argues that there are issues of fact concerning, among other things, whether Nova properly performed the work and met all conditions precedent, and whether 25 Broad approved that work. In support, Seasons submits the affidavit of its president, Daniel Margiotta.

More specifically, Seasons argues that Nova failed to comply with the express condition precedent to the final payment under the contract, namely those requirements as set forth in Article X, paragraph 28, regarding the Final Completion of the Work and provision of the Closeout Package. However, a review of Article IV of the contract, titled "Payment," indicates that payments for work shall be made within 30 days of submission by plaintiff to defendant of any invoice. Further, the contract provides that a 10% retainage for each invoice was to be held, and would be paid to plaintiff, once the "conditions for Final Completion of the Work as documented in the Closeout Package have been achieved." On its face, the contract makes provisions for Seasons to retain 10% of each payment/invoice until it is provided with the Closeout Package. There is nothing in the contract to indicate that final payment would be withheld, as Seasons now argues.

Seasons further argues that because 25 Broad has not approved or accepted the work performed by plaintiff, and not paid Seasons, it is likely that 25 Broad has not received the Closeout Package. Such suppositions are insufficient to defeat summary judgment. Regardless, there is nothing in the contract to indicate that the owner's payment to Seasons is required in order for Nova to be paid for the work it performed pursuant to its contract with Seasons. Moreover, there is nothing in the record to indicate that Seasons objected to the work performed by Nova.

In addition, the record indicates that Nova complied with the terms of Paragraph 28 (b), namely, (1) a third-party air monitoring (“TPAM”) company. Environmental Consulting and Management Services, Inc. (“ECMS”) was the TPAM at the property, conducted final air sampling in July 2008, and forwarded the negative air sample results directly to Phil Jones, of non-party Swig Equities, LLC, the sole member of 25 Broad. Any Closeout Package documentation that previously may not have been provided has since been provided to Seasons in discovery, and in support of this motion.

In light of the unambiguous language of the contract provision, Nova is entitled to summary judgment on its breach of contract claim. *See W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157 (1990); *Cellular Tel. Co. v. 210 E. 86th St. Corp.*, 44 A.D.3d 77 (1st Dep’t 2007); *Weintraub v. Grey Direct, Inc.*, 39 A.D.3d 400, 400 (1st Dep’t 2007) (holding “(s)ummary judgment was properly granted based upon the clear and unambiguous agreement pursuant to which plaintiff was employed by defendant”).

Nova also moves for summary judgment dismissing Seasons’ First through Ninth affirmative defenses. In its Answer, Seasons merely sets forth affirmative defenses which are entirely conclusory and unsupported by even a single factual allegation. Seasons has not properly stated any affirmative defenses and they therefor must be dismissed as insufficient. *See CPLR 3013; Commissioners of State Ins. Fund v. Ramos*, 63 A.D.3d 453 (1st Dep’t 2009) (bare legal conclusions are not sufficient to raise affirmative defenses).

Based on the foregoing, Nova's motion for summary judgment is granted and Seasons' cross claims and affirmative defenses are dismissed. In addition, damages are awarded to Nova in the amount of \$764,100.00.


In accordance with the foregoing, it is

ORDERED that the motion for summary judgment by plaintiff Nova Development Group, Inc. on the complaint herein is granted as against defendant Seasons Industrial Contracting in the amount of \$764,100.00, together with interest at the rate of 9 % per annum from the date of July 31, 2008 until the date of the service of a copy of this decision with notice of entry, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
~~August~~, 2010
September 10

ENTER:


Saliann Scarpulla, J.S.C.

FILED
SEP 14 2010
NEW YORK
COUNTY CLERK'S OFFICE