

Turner Constr. Co. v Flight Ctr. Hotel, LLC

2024 NY Slip Op 33949(U)

November 6, 2024

Supreme Court, New York County

Docket Number: Index No. 651527/2020

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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TURNER CONSTRUCTION COMPANY	INDEX NO. <u>651527/2020</u>
Plaintiff,	MOTION DATE <u>06/17/2024</u>
- v -	MOTION SEQ. NO. <u>006</u>
FLIGHT CENTER HOTEL, LLC,	
Defendant.	DECISION + ORDER ON MOTION
-----X	

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 345, 346 were read on this motion to/for MODIFY.

Upon the foregoing documents and for the reasons set forth below, the motion to settle the record on appeal is GRANTED to the extent set forth below.

Reference is made to a Prior Decision of this Court (the **Prior Decision**; NYSCEF Doc. No. 297), dated August 30, 2023 which is incorporated herein in its entirety.

The Prior Decision indicates that certain documents submitted by the parties in connection with Mtn. Seq. Nos. 004 and 005 were read in connection with the Prior Decision (i.e., NYSCEF Doc. Nos. 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 248, 256, 257, 258, 259, 260, 261, 62, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 287, 288, 289, 290, 291, 292, 293, 294, 295 and 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 651527/2020 TURNER CONSTRUCTION COMPANY vs. FLIGHT CENTER HOTEL, LLC Motion No. 006 Page 1 of 4

235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 249, 250, 251, 252, 253, 254, 255, 283, 284, 285, 286, respectively). The document numbers listed are auto-generated in the e-decision program based on the documents that were filed by the parties to form the record that the parties developed (and which the Court reviewed) in connection with the prior motions.

Flight Center Hotel, LLC (**Flight**) has filed a notice of appeal of the Prior Decision and indicates in this order to show cause that attempts to settle the record for appeal with Turner Construction Company (**Turner**) have failed because according to Flight, Turner has failed to agree to include documents in the record for appeal that the Court considered but which were not adduced by either party in connection with the Prior Decision and were not specifically referenced in the Prior Decision but which Flight indicates were adduced in connection with prior motion practice and were considered by the Court and relied upon in issuing the Prior Decision. More specifically, in this motion, Flight seeks to have this Court settle the record for the purposes of appeal to expand the record to include NYSCEF Doc. Nos. 7, 17, 23, and 30.

In their opposition papers, Turner argues that the Prior Decision makes no specific mention of these documents and the Prior Decision does not indicate “for the reasons set forth on the record” or anything like that and does not otherwise indicate that the Court was relying on such other documents specifically in issuing its Prior Decision such that the motion should be denied. Turner is not exactly correct.

CPLR 5526 provides that “the record on appeal from an interlocutory judgment or order shall consist of a notice of appeal, the judgment or order appealed from, the transcript, if any, the

papers and other exhibits upon which the judgment was founded and any opinions in the case.”

The general rule is that it is the trial court that is authorized to settle the record absent manifest error or a clear abuse of discretion (*Will of Welhem*, 63 AD2d 1120 [4th Dept 1978]).

As relevant, the Prior Decision provides:

Turner is not entitled to summary judgment on its claim sounding in breach of contract. As discussed in this Court’s Decision and Order dated June 28, 2021 (NYSCEF Doc. No. 94), the parties had a billing procedure pursuant to which Turner would send an initial pencil payment application, Flight Center and its lender would review the application and, if necessary, request adjustments, and then Turner would send a final application which would come due within 30 days (*id.*, at 2). Flight Center argues among other things that Turner was in breach of the Agreement and that Flight Center withheld payments as it was permitted to do because a good faith dispute existed as to invoices 17-44 which they partially paid and as to Invoices 45-50 which were not paid at all. According to Flight Center, these disputes were discussed at meetings. Some such disputes are reflected in correspondences (NYSCEF Doc. No. 258-263) and Jason Garone testified that when the pencil applications came in and included items that he disagreed with, he indicated his disagreement (*tr* at 89-90, lines 6-13 [NYSCEF Doc. No. 239]). As such, material issues of fact exist as to whether a good faith dispute existed and whether Turner is in fact entitled to be paid in respect of those invoices and if so, how much.

(NYSCEF Doc. No. 297). In issuing the Decision and Order, dated June 28, 2021 (the **June 28th Decision**; NYSCEF Doc. No. 94) referred to in the Prior Decision, the Court considered NYSCEF Doc. Nos. 7, 17, 23, and 30. Indeed, many of these documents were in fact discussed at oral argument (*e.g.*, *tr.* 8.28.23; NYSCEF Doc. No. 298), and solely to the extent that those documents were discussed in connection with the Prior Decision, the documents were relied upon in finding that issues of fact exist precluding the award of summary judgment by this Court. As such, the documents adduced in connection with the June 28th Decision are properly included in the record for appeal solely to the extent that they were discussed at oral argument, and the motion is GRANTED solely to this extent.

11/6/2024
DATE


ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE