

**Joseph L. Balkan, Inc. v Loguidice**

2024 NY Slip Op 33989(U)

November 7, 2024

Supreme Court, New York County

Docket Number: Index No. 650017/2022

Judge: Lyle E. Frank

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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**

<p><b>PRESENT:</b> <u>HON. LYLE E. FRANK</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>JOSEPH L. BALKAN, INC.,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>DOMINICK LOGUIDICE, XINOS CONSTRUCTION CORP.</p> <p align="center">Defendant.</p> <p>-----X</p>	<p><b>PART</b> <span style="float: right;"><b>11M</b></span></p> <p><b>INDEX NO.</b> <u>650017/2022</u></p> <p><b>MOTION DATE</b> <u>07/16/2024</u></p> <p><b>MOTION SEQ. NO.</b> <u>003</u></p> <p><b>DECISION + ORDER ON MOTION</b></p>
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The following e-filed documents, listed by NYSCEF document number (Motion 003) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121 were read on this motion to/for DISMISS.

This case arises out of an alleged non-payment of monies owed under a contract. Defendants, Dominick Logudice and Xinos Construction Corp. (collectively, “Defendants”), now move pursuant to CPLR § 3211 (a)(1), (5), and (7) to dismiss the Amended Complaint to the extent it asserts a claim for attorneys' fees<sup>1</sup>. Upon the foregoing documents, following oral argument, and for the reasons indicated below, Defendants’ motion to dismiss is denied.

Background

Plaintiff and defendants entered into a contract on September 24, 2018, wherein plaintiff was to provide plumbing services outside of defendants’ property, located at 236 East 74th Street, New York, NY 1002 (the "Property"), specifically for the replacement and modification of a sewer pipe.

On August 2, 2019, defendants revised the scope of work, and on August 20, 2019, entered into another agreement (“Change Order 1”) in which plaintiff was to install a sewer line

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<sup>1</sup> The Court would like to thank Sophia Hartman, Hailee Stangeby and Zachary Hoffman for their assistance in this matter.

inside the basement of the property. On August 26, 2019, the parties entered into a further agreement stemming from the original contract (“Change Order 2”) whereby the parties acknowledged that more workers were required for the rock breaking than the original estimate contained in Change Order 1. Change Order 2 stated that the work described therein was in “[a]ddition to proposal number 44188 [the Contract] due to client request to lower sewer requiring additional rock breaking.” *See* NYSCEF DOC. 108.

#### Motion to Dismiss Standard

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011].

Under CPLR § 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d 83, 88 [1994]. “[S]uch motion may be appropriately granted only where the documentary evidence utterly refutes plaintiffs factual allegations.” *Goshen v Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 [2022]. A paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable”. *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019].

#### Discussion

In the Amended Complaint, plaintiff alleges that defendants failed to pay \$92,700 for the work performed at the Property, and thus, defendants' motion to dismiss should be denied in its entirety. Further, Plaintiff argues the Contract provided an enforceable attorney fees provision for an unpaid amount of \$92,700, of which plaintiff would recover \$30,900 based on the 30% attorney fees provision in the proposal, and that this term of the Contract was transferable to and governed the terms of Change Order 1 and Change Order 2 (collectively, the Change Orders).


Defendants assert that the Amended Complaint should be dismissed pursuant to CPLR § 3211 (a)(1), arguing that the documentary evidence establishes that Plaintiff has been paid in full under the Contract and Change Order 1, the only agreements between the parties that provide for awards of attorneys' fees. Defendants also move to dismiss pursuant to CPLR § 3211 (a)(7), alleging that the Amended Complaint fails to state a cause of action for attorneys' fees.

Defendants argues that Change Order 2 should not be read as to incorporate the attorney's fee provision from the original Contract, and that because the Contract and Change Order 1 stated that "[a]ll work performed by Balkans normal work force at their usual rate of pay," this would negate the revised fee structure for Plaintiff's workers contained in Change Order 2. *See* NYSCEF DOC. 121.

As discussed, a motion to dismiss based on documentary evidence must utterly refute the plaintiff's factual allegations. The original Contract, as well as Change Order 1, contained a provision that stated: "Client reneging on payment terms will be responsible for lawyer fees in the sum of 30% of the amount unpaid." *See* NYSCEF DOC. 36. Change Order 2 clearly stated the proposal was an "[a]ddition to proposal number 44188 [the Contract]," which Plaintiff argues would include the provision within the original agreement that concerned attorney's fees. *See* NYSCEF DOC. 108 [emphasis added].

At the very least, there is a question of fact in this case at this stage of the litigation. While Defendants assert that this provision does not incorporate the original Contract in its entirety, this is hardly “essentially undeniable” just by viewing the documentary evidence. Relying on the language of the Contract and accompanying agreements, plaintiff has adequately stated a cause of action, and the documentary evidence fails to so refute the plaintiff’s allegations that dismissal is appropriate. Accordingly, it is hereby

ADJUDGED that the motion to dismiss is DENIED.

  
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11/7/2024  
 DATE

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 LYLE E. FRANK, J.S.C.

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