

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

KBC CONCRETE CONSTRUCTION CORP. x Index
Number 27421 2005

- against - Motion
Date July 2, 2008

NATIONAL ENVIRONMENTAL SAFETY CO., Motion
INC., et al. Cal. Number 31
x Motion Seq. No. 3

The following papers numbered 1 to 4 read on this motion by defendant National Environmental Safety Co., Inc. and defendant Fidelity and Deposit Company of Maryland for summary judgment dismissing the complaint against them.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1
Answering Affidavits - Exhibits.....	2
Reply Affidavits.....	3
Memorandum of Law	4

Upon the foregoing papers it is ordered that the motion is granted to the extent that the second, third, and fourth causes of action are dismissed. (See the accompanying memorandum.)

Dated: September 23, 2008

J.S.C.

cause whatsoever for its own or Owner's convenience, and Subcontractor shall immediately stop work. In such event, the Subcontractor shall have no claim against the Contractor for breach of Agreement and the Contractor shall be under no liability to the Subcontractor except for labor and materials furnished by the Subcontractor to the date of termination ..." Plaintiff KBC, whose sole officer and shareholder is Christopher Spirito, began to work on the project in May or June 2005.

The SCA had the right to approve or reject proposed subcontractors. By letter dated June 22, 2005 the SCA notified defendant National that it had disapproved of the use of plaintiff KBC as a subcontractor because the company had not "prequalified" or registered. By letter dated July 28, 2005 defendant National terminated plaintiff KBC as a subcontractor pursuant to paragraph 24 of the subcontract.

Defendant National paid plaintiff KBC \$14,250 which the former alleges was for "mobilization" costs and the work the latter had performed to the date of termination. On the other hand, plaintiff KBC alleges that the payment of \$14,250 covered only its mobilization costs. Christopher Spirito swears: "[T]he payment of \$14,250 was a payment for mobilization, that is, the costs associated with the assembling of materials and supplies, the movement of equipment, the retention of storage facilities, etc." The plaintiff alleges that its employees first arrived at the job

site on June 16, 2005, ten days after the defendant issued the check for \$14,250 and eight days after the plaintiff signed a partial release in return for the \$14,250.

Plaintiff KBC submitted an invoice dated July 8, 2005 to defendant National in the amount of \$82,157.22 for work allegedly performed before termination. On August 17, 2005, after the defendant refused to pay that sum, the plaintiff filed a mechanic's lien in the amount of \$82, 157.22. Defendant Fidelity issued a bond to discharge the lien. On December 23, 2005, the plaintiff began the instant action.

That branch of the motion which is for summary judgment dismissing the first cause of action, which is for breach of contract, is denied. Summary judgment is not warranted where, as in the case at bar, there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) It is true that defendant National had the right to terminate the subcontract pursuant to paragraph 24. "[W]hen a contract affords a party the unqualified right to limit its life by notice of termination that right is absolute and will be upheld in accordance with its clear and unambiguous terms." (Red Apple Child Development Center v Community School Districts Two, 303 AD2d 156, 157; see, Ying-Qi Yang v Shew-Foo Chin, 42 AD3d 320; Big Apple Car v City of New York, 204 AD2d 109.) However, paragraph 24 of the subcontract made defendant National liable for "labor and materials furnished

by the Subcontractor to the date of termination ...” The conflicting allegations of the parties have created an issue of fact concerning whether the payment of \$14,250 covered labor and materials furnished by the plaintiff to the date of termination.

That branch of the motion which is for summary judgment dismissing the second cause of action, which is for an account stated, is granted. The elements of a cause of action for an account stated are (1) the plaintiff’s sending of invoices to the defendant, (2) the defendant’s retention of the invoices without objecting to them within a reasonable time, and (3) the defendant’s failure to pay the invoices. (See, Star Video Entertainment, LP v J & I Video Distrib., 268 AD2d 423; Rona-Tech Corp. v LeaRonal, Inc., 254 AD2d 473; Werner v Nelkin, 206 AD2d 422.) In the case at bar, the defendant rejected the invoice dated July 8, 2005 in the amount of \$82,157.22. (See, M & A Const. Corp. v McTague, 21 AD3d 610.)

That branch of the motion which is for summary judgment dismissing the third cause of action, which is for unjust enrichment, is granted. The valid and enforceable agreement entered into by the parties precludes the cause of action for unjust enrichment. (See, Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382; State of New York v Industrial Site Services, Inc., 52 AD3d 1153; Kavner v Geller, 49 AD3d 281.)

That branch of the motion which is for summary judgment dismissing the fourth cause of action, which is to recover on the bond, is granted. Defendant Fidelity's liability upon the bond is limited to "any judgment which may be recovered in an action for the enforcement of [the mechanic's lien]." (See, Bat-Jac Contracting, Inc. v Italia Const. Co., 262 AD2d 314.) "Upon the posting of the [undertaking], a 'shifting' occurs and the lien detaches from its original adherence (appropriated funds or property) and attaches to the substitute, the bond." (Tri-City Elec. Co. v People, 96 AD2d 146, 150, affd 63 NY2d 969; see, Bat-Jac Contracting, Inc. v Italia Const. Co., supra.) Plaintiff KBC can no longer obtain a judgment on the mechanic's lien because it has been extinguished by the plaintiff's failure to commence an action to foreclose or to obtain an extension of the lien within the required time period. (See, Tri-City Elec. Co., Inc. v People, supra; D.A.G. Floors, Inc. v St. Paul Mercury Ins. Co., 35 AD3d 207; Bat-Jac Contracting, Inc. v Italia Const. Co., supra.)

Short form order signed herewith.

J.S.C