

SHORT FORM ORDER

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

**P R E S E N T : HON. GEORGE R. PECK
JUSTICE**

-----X **TRIAL/IAS PART 20**
LAKEVILLE/PACE MECHANICAL INC.,

Plaintiff,

**INDEX #600241-2017
Motion Seq. 001
Motion Date 5-4-17**

-against-

WENGER CONSTRUCTION CO., INC.,

Defendants.

-----X

Plaintiff, Lakeville/Pace Mechanical Inc., moves for an order pursuant to CPLR§ 3212 for summary judgment.

Before this court is an action that arose from breach of a Final Settlement Letter Agreement which occurred in an action plaintiff commenced against defendant in the Suffolk County Supreme Court, Index No. 069399/2014, for breach of the commercial plumbing contracts for work performed in connection with the expansion of the Ice Rink Facility in Dix Hills Park in Dix Hills, New York, as well as a project at the Woodbury Commons shopping center in Woodbury, New York seeking monetary damages, attorneys' fees, cost and disbursements. The parties settled the action with Lakeville by agreeing to accept \$90,000.00 from defendant as payment for all outstanding sums due in both projects. The settlement was put into writing in a final settlement letter, a copy of which was submitted to the court with the motion papers.

The agreement required Lakeville to provide defendant all general and final releases...including a stipulation of discontinuance with prejudice prior to receiving payment. It is not disputed that the plaintiff provided the defendant the required stipulation of discontinuance on February 7, 2017. The payment obligation was not triggered until then, and therefore, no cause of action existed at the time the complaint was filed. The terms of the agreement have now been completed in full. The payment of \$90,000.00 is due to the plaintiff with interest from February 7, 2017.

“It is well settled that a the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient

evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; *Bhatti v Roche*, 140 AD2d 660, 528 N.Y.S.2d 1020 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 390 N.E.2d 298, 416 N.Y.S.2d 790 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092, 479 N.E.2d 229, 489 N.Y.S.2d 884 [1985]).

If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980], supra). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513, 529 N.Y.S.2d 134 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631, 595 N.Y.S.2d 236 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957], supra).” *Recine v. Margolis*, 24 Misc. 3d 1244A; 901 N.Y.S.2d 902

Here, in support of their motion for summary judgment, the plaintiff submitted much documentation in an attempt to establish their prima facie entitlement to judgment as a matter of law. In opposition, the defendant concurs with the plaintiff on factual issues.

The papers as a result demonstrate that there are no triable issues of fact that preclude the granting of summary judgment. The motion, therefore, is GRANTED.

The payment of \$90,000.00 is due to the plaintiff, with interest from February 7, 2017.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: May 12, 2017
Mineola, New York

ENTER:



HON. GEORGE R. PECK
J.S.C.

ENTERED

MAY 12 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE