

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
C OUNTY OF WESTCHESTER  
PRESENT: HON. SAM D. WALKER, J.S.C.

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CREATIVE DIRECTION CONSTRUCTION &  
DESIGN, LLC,

Plaintiff,

**DECISION AND ORDER**  
Index No. 52337/2016  
Motion Sequence 2

-against-

CITY OF MOUNT VERNON

Defendant.  
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The following papers were considered on the plaintiff's motion seeking summary

judgment against the defendant:

Notice of Motion/Affidavit/Exhibits A-C	1-5
Affirmation in Support/Exhibits A-H	6-14
Affirmation in Opposition/Affidavit/Exhibit A-G	15-23
Reply Affirmation	24

Factual and Procedural Background

The plaintiff, Creative Direction Construction & Design, LLC, commenced this action on February 25, 2016, by filing a summons and complaint seeking to recover \$236,338.80 plus interest and costs, pursuant to a written contract with the plaintiff for work, labor, services and materials for construction on the Mount Vernon Emergency Operations Center.

The plaintiff alleged that, at the request of the City, it performed additional construction and/or change order work at the project, in the additional sum of

\$187,545.69. and to date, the sum of \$234,065.09 (Change Order \$187,545.69 + Retainage \$46,519.40) remains outstanding and due from the City.

The plaintiff alleged causes of action in breach of contract, account stated, and unjust enrichment/quantum meruit. The defendant filed an answer with a counterclaim alleging breach of contract, in that, the work required to be performed under the contract was not completed and/or the work and material provided was not in accordance with contract specifications, was defective and/or deficient and as a result, the defendant would be required to retain a third party to complete the work and/or to correct deficient work and is entitled to recover the costs and expenses for such.

This Court previously granted the plaintiff's motion for summary judgment in the sum of \$234,065.09, plus interest, but denied that part of the plaintiff's motion seeking dismissal of the defendant's counterclaim. The Court required that payment of the amount granted be held in abeyance pending a hearing and determination on the counterclaim. The parties proceeded with discovery, the court (Lefkowitz, J.) issued a trial readiness order and the plaintiff<sup>1</sup> filed a note of issue on the counterclaim.

The plaintiff now files another summary judgment motion seeking dismissal of the defendant's counterclaim. The plaintiff argues that discovery is not complete and the City has failed to produce any evidence to support their counterclaim and that a final walk-through and inspection of its work on the project did not find that the work was defective, deficient and incomplete. In opposition, the defendant argues that the work performed by the plaintiff was, and is defective, deficient, unacceptable, and not in accordance with local building and fire code requirements.

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<sup>1</sup> The court's trial readiness order required the plaintiff to serve and file a note of issue and certificate of readiness on the defendant's counterclaim.

In support of the motion, the plaintiff submits a copy of the contract and other documentation with regard to the change order approval, excerpts from the plaintiff's president, Andre Wallace's deposition transcript, and copies of the pleadings and orders. In opposition, the defendant submits an inspection report for the project, an estimated repairs budget report, a draft fiscal monitoring report, a copy of the contract, a copy of the contract, Andre Wallace's deposition transcript, the plaintiff's applications for payment, and an affidavit of Michael R. Gianatasio, P.E., a licensed civil engineer.

#### Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof, in admissible form, establishing the existence of a material issue of fact, (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The plaintiff argues that the City failed to produce any evidence support its counterclaim that the work was defective and that a third party will be needed to complete the project. The plaintiff asserts, through its president, Andre Wallace, that on August 14, 2015, the City's Building Commissioner, Mark A. Warren, performed a walk through and inspection of the plaintiff's work at the project and did not find the work to be defective, but instead wrote a letter to the council members requesting legislation to pay for the change order. The plaintiff contends that Comptroller, Maureen Walker, also wrote a letter opining that appropriate legislation be enacted to allow for proper payment for all work completed under the open contract and that the change order appears to be

proper. Next, as per the plaintiff, Steve Lawrence, of the Department of Homeland Security, performed a final walk-through and inspection of the plaintiff's work and did not find that the work performed was defective, deficient or incomplete. The plaintiff has established a prima facie showing of entitlement to judgment as a matter of law. The burden now shifts to the defendant to rebut that showing.

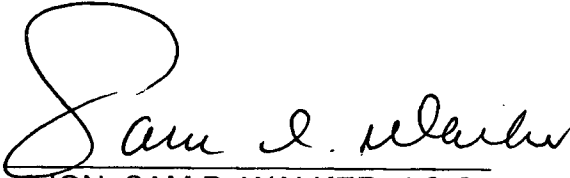
The defendant's engineer submitted a detailed report and opines that the contract work was not completed; that the work which was performed was not performed in accordance with the contract specifications as set forth in the contract; that the work performed was defective and deficient; that the work performed is not in compliance with Federal and State handicapped accessibility requirements and the New York State Building Code and with the Building Code of the City of Mount Vernon. The report sets forth the specific defects discovered. The defendant avers that the work performed by the plaintiff was so defective that the Emergency Operations Center was never opened and is not usable in its present state. The Court finds that the defendant's engineer and the report submitted create sufficient issues of fact to require a hearing on the defendant's counterclaim.

Accordingly, the plaintiff's application for an Order pursuant to CPLR 3212, granting summary judgment to dismiss the City's counterclaim for breach of contract is denied. The plaintiff's application seeking an award of reasonable attorneys' fees is also denied.

The parties are directed to appear before the settlement conference part on January 23, 2018 at 9:15 a.m. in Courtroom 1600. To the extent any relief requested in

motion sequence 2 was not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the court.

Dated: White Plains, New York  
December 18, 2017

A handwritten signature in cursive script that reads "Sam D. Walker". The signature is written in black ink and is positioned above the printed name.

HON. SAM D. WALKER, J.S.C.