

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

<p>In the Matter of ENBE CONSTRUCTION GROUP, INC., etc., Plaintiff, - against - QUEENS COLLEGE POINT HOLDINGS, LLC, et al., Defendants.</p>	<p>x</p>	<p>Index Number <u>22790</u> 2010 Motion Date <u>October 13,</u> 2010 Motion Cal. Number <u>21</u> Motion Seq. No. <u>1</u></p>
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The following papers numbered 1 to 10 read on this motion by defendants Queens College Point Holdings LLC, Tom Cleveland, Rocky Meli, Jason Halpern, Rosa H. Lee, Jinah Sim, Hsiao Wei Lu, Julia Wang, Woo Sung Choi, Yan Ming Chen, Ho Hyun Lee, Suk Hyun Kim, and Hyo Sang Lee to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(1) and (a)(7) and for summary judgment dismissing the complaint against them pursuant to CPLR 3212; and on this cross motion by plaintiff to compel discovery from defendants pursuant to CPLR 3124.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1 - 5
Notice of Cross Motion - Affidavits - Exhibits.....	6 - 9
Reply Affidavits.....	10

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to foreclose a mechanic's lien filed by plaintiff on November 27, 2007, to recover damages for unlawful diversion of trust funds, a trust fund accounting, and to recover damages for fraudulent conveyances of certain real property. Defendant Queens College Point Holdings LLC (QCP) is the developer of a residential community known as Soundview Pointe located in College Point, Queens. Defendants Tom Cleveland and Jason Halpern are allegedly officers of QCP. Defendants Rosa H. Lee, Jinah Sim, Hsiao Wei Lu, Julia Wang, Woo Sung Choi, Yan Ming Chen, Ho Hyun Lee, Suk Hyun Kim, and Hyo Sang Lee purchased from QCP homes in Soundview Pointe. Plaintiff had a contract with non-party National Equities, LLC (National) to perform construction consulting services on the project. On November 7, 2007, plaintiff commenced an action against National and non-party JTR College Point, LLC (JTR) for breach of contract (*ENBE Construction Group, Inc. v National Equities, LLC*, Sup Ct, Queens County, index No. 27572/07). On November 17, 2008, a default judgment was entered against National and JTR, which has not been satisfied to date. On November 16, 2009, plaintiff commenced the within action against defendants.

Initially, the court notes that defendants' motion seeking dismissal of the complaint insofar as asserted against them is, in effect, one to dismiss the complaint pursuant to CPLR 3211 and, thus, will be treated as such herein.

Defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) is denied as untimely. The motion was not made on that ground within the time period in which defendants were required to serve an answer (CPLR 3211[e]), since, on January 13, 2010, defendants served their answer to plaintiff's complaint. Additionally, no extension of time to make the motion was previously requested by defendants or granted by the court (CPLR 2004).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*). Where evidence is submitted by the movant in support of a CPLR 3211(a)(7) motion, the court must determine whether the proponent of the pleading has a cause of action, not whether it has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

The first cause of action seeking foreclosure of plaintiff's mechanic's lien against defendants must be dismissed. In support of their motion, movants argue that the mechanic's lien is invalid and unenforceable because the construction consulting services provided by plaintiff are not lienable. Pursuant to Lien Law § 3, anyone "who performs labor or furnishes materials for the improvement of real property" may be entitled to a lien. The Lien Law

offers a general definition of “improvement” as “demolition, erection, alteration or repair of any structure upon, connected with, or beneath the surface of, any real property and any work done upon such property . . . for its permanent improvement” (Lien Law § 2[4]). Therefore, the plain meaning of Lien Law § 2(4) indicates that a contractor’s services, even if necessary to carry out a construction project, are lienable only if they directly produce a “permanent improvement” in the underlying real property. Although it has long been recognized that supervision is work which may form the basis of a lien, such supervision must be of construction work and not merely the procurement of bids and negotiation of contracts for the services of subcontractors (*see Goldberger-Raabin, Inc. v 74 Second Ave. Corp.*, 252 NY 336, 341-342 [1929]). In this case, the proposals dated August 10, 2006 and December 7, 2006 demonstrate that the scope of plaintiff’s services for which it was hired to perform was limited to accounting oversight on the project, including, among other things, verifying contracts, purchase orders, and payments to subcontractors as well as organizing the accounting structure to track payments against progress on the construction project. Significantly, the December 7, 2006 proposal also expressly stated that plaintiff would only provide the paperwork for work on the site and not assist in the supervision of the site work. As such, plaintiff’s construction consulting services did not directly contribute to the permanent improvement of the subject property within the meaning of the Lien Law and, thus, are not lienable.

As to the second cause of action for unlawful diversion of trust funds created under Article 3-A of the Lien Law and the third cause of action for a trust fund accounting pursuant to Lien Law § 77, the moving defendants primarily argue that said causes of action should be dismissed because plaintiff is not a trust beneficiary. To maintain a cause of action for a trust fund diversion and a trust fund accounting, one must necessarily be a beneficiary of the trust (Lien Law §§ 72, 76[1]). Lien Law § 71(4) provides that, “[p]ersons having claims for payment of amounts for which the trustee is authorized to use trust assets . . . are beneficiaries of the trust.” Where, as here, the owner is a trustee, trust claims include “claims of contractors, subcontractors, architects, engineers, surveyors, laborers, and materialmen arising out of the improvement, for which the owner is obligated . . .” (Lien Law § 71[3][a]). An owner’s obligation may be one either imposed by contract or as the result of a mechanic’s lien (*see Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 64 AD3d 565, 576 [2009]). In this case, plaintiff has failed to sufficiently allege a basis upon which it has standing as a trust beneficiary of the trust assets held by the owner in order to assert trust claims against defendants (*see e.g. Innovative Drywall v Crown Plastering Corp.*, 224 AD2d 664 [1996]; *Matter of ABJEN Props. v Crystal Run Sand & Gravel*, 168 AD2d 783 [1990]). Specifically, the complaint does not allege a claim for which the owner, QCP, was contractually obligated to plaintiff. The owner is also not obligated to plaintiff by virtue of a mechanic’s lien because, as previously discussed, plaintiff’s mechanic’s lien is invalid and unenforceable since plaintiff’s construction consulting services

are not lienable. Therefore, plaintiff's second cause of action for unlawful diversion of trust funds and third cause of action for a trust fund accounting are dismissed.

The complaint failed to state a cause of action to recover damages based on alleged fraudulent conveyances of certain real property under the Debtor and Creditor Law (*see e.g. Zanani v Meisels*, __ AD3d __, 2010 NY Slip Op 8097 [2d Dept 2010]). Debtor and Creditor Law § 273 provides that “[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent . . . without regard to his [or her] actual intent if the conveyance is made or the obligation is incurred without a fair consideration.” On the other hand, Debtor and Creditor Law § 276 requires proof that the transferor actually intended to “hinder, delay, or defraud” any present or future creditors. Although conveyances for no consideration are alleged in the complaint, plaintiff failed to allege that any fraudulent conveyance between defendants rendered the transferor, QCP, insolvent (Debtor and Creditor Law § 273). Additionally, with respect to Debtor and Creditor Law § 276, the complaint failed to allege with the requisite specificity a cause of action upon which relief could be granted sounding in fraud against defendants (CPLR 3016[b]; *see Galgano v Ortiz*, 287 AD2d 688, 689 [2001]), or that the conveyances were made with the actual intent to “hinder, delay, or defraud either present or future creditors.”

Inasmuch as the complaint has been dismissed against defendants, the cross motion by plaintiff to compel discovery from defendants pursuant to CPLR 3124 is denied as academic.

Accordingly, defendants' motion to dismiss the complaint insofar as asserted against them is granted in its entirety. The cross motion by plaintiff to compel discovery from defendants is denied.

Dated: February 10, 2011

J.S.C.