

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

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PAVARINI MCGOVERN, LLC,
Plaintiff,

Index No.: 20249/07
Motion Date: 12 /19/07
Motion Cal. No.: 31

-against-

TAG COURT SQUARE, LLC,
Defendant.

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TAG COURT SQUARE, LLC,
Defendant-Counter-Claimant,

-against-

STRUCTURE-TONE, INC.,
Additional Counter Claim Defendant.

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The following papers numbered 1 to 13 read on this motion by plaintiff **PAVARINI MCGOVERN, LLC** (“PMG”) and additional Counter-Claim Defendant, **STRUCTURE-TONE, INC.** (“STI”) to dismiss the counterclaims of **TAG COURT SQUARE, LLC** (“TAG”) which seek to hold STI liable for breach of contract and assert a wilful exaggeration of mechanic’s lien claim against PMG, pursuant to CPLR 3211 (a) (1) & (7).

| | PAPERS NUMBERED |
|---|----------------------------|
| Notice of Motion-Affirmations-Exhibits..... | 1-4 |
| Certification..... | 5-6 |
| Memorandum of Law..... | 6 |
| Affidavit in Opposition-Exhibits..... | 7-9 |
| Memorandum of Law..... | 10-11 |
| Reply Memorandum of Law..... | 9-10 |

Upon the foregoing papers it is ordered that the motion by plaintiff PMG and additional Counter-Claim Defendant, STI to dismiss the counterclaims of TAG which seek to hold STI liable for breach of contract and assert a wilful exaggeration of mechanic’s lien claim against PMG, pursuant to CPLR 3211 (a) (1) & (7) is decided as follows:

This action arises from a construction project of a 500,000 square foot industrial building located at 45-31 Court Square in Long Island City, New York. It involved the

conversion of the building into a luxury mixed-use condominium apartment complex, known as the Arris Lofts Project, on the site of the former Eagle Electric Building. TAG is the developer-owner of the Project and in December of 2005, it entered into a construction management agreement with PMG (the "CM Contract") providing for PMG to act as construction manager for the Project. STI, a majority stock owner of PMG, provided to TAG a guaranty of PMG's performance under the CM Contract. This guaranty stated that "STI guarantees the performance of all of the Construction Manager's obligations under this agreement in the event that the Construction Manager ceases business operations either formally or informally. The Construction Manager and STI acknowledge and understand that this guaranty is a material condition of the Owner entering into this Agreement related to this Project."

During the course of the Project, disputes arose between TAG and PMG regarding PMG's managing and supervising the work. These resulted in TAG issuing a Notice of Termination to PMG in February 2007. This Notice was contested by PMG and to resolve the dispute and to prevent further delays in completion of the Project, TAG, STI, and PMG entered into an agreement providing for PMG's work to continue with STI becoming more involved by providing employees as project management resources. The Completion Agreement incorporated the CM contract and set forth that "notwithstanding anything set forth herein or which may occur at or in connection with the Project, the Parties agree that in no event shall STI have any greater liability than STI may have under the STI Guaranty and the Owner agrees to defend, indemnify and hold STI harmless from any claim by any person or entity that STI may have any liability in connection with the Project other than as may be provided by the STI Guaranty."

Work continued after the Completion Agreement, however problems continued to arise and on August 14, 2007, PMG commenced the instant action to recover \$18,000,000 for breach of the CM Contract and Completion Agreement, for unjust enrichment and for *quantum meruit*. PMG also filed a mechanic's lien in the amount of \$13,145,629.30. In its answer, TAG has asserted counterclaims against PMG and against STI for breach of contract and wilful exaggeration of the lien claim. TAG claims it incurred damages and expenses due to PMG and STI's poor performance and abandonment of the work on the Project.

PMG and STI now move to dismiss the counterclaims based upon the following grounds: The Completion Agreement limits STI's liability to the limited guaranty and precludes TAG's breach of contract claim against STI as a matter of law. They argue that this guaranty is triggered only if PMG ceases doing business and since the counterclaim does not make any such claim, TAG cannot invoke the guaranty. The wilful exaggeration of lien claim against PMG must be dismissed since there has been no lien foreclosure action instituted. TAG has opposed the dismissal of its breach of contract claim and has not opposed the claim

regarding the Lien.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence" In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim" (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminde n v Vanderminde n, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

The signed documents submitted by the defendant on this motion qualify as "documentary evidence" within the meaning of CPLR 3211(a)(1). This evidence suggests that STI's liability is limited to the terms of the Limited Guaranty and those terms have not been satisfied in a manner to allow the breach of contract claim against STI. However, TAG has set forth sufficient evidence to explain that STI's liability on its breach of contract action is not so limited. First, TAG argues it is not claiming STI is liable to it under the guaranty. Rather, TAG is seeking liability under the Completion Agreement. Also, TAG has shown that STI's assertions are too broad and do not make sense given the circumstances of the CM Agreement and the Completion Agreement. TAG argues that PMG and STI's interpretation of the clause would result in TAG defending and indemnifying STI against claims TAG were to bring against STI. Finally, TAG claims that STI replaced PMG as manager of the project, thereby, informally ceasing business for purposes of the Project and therefore, the terms of the guaranty have been met and STI is liable. Accordingly, the documentary evidence submitted is not sufficient to resolve all issues as a matter of law regarding the breach of contract counterclaim as there are issues regarding the meaning of certain clauses within the agreements. However, the documentary evidence has sufficiently resolved all issues regarding the counterclaim for wilful exaggeration of the lien and, accordingly, that counterclaim is dismissed.

Regarding the claims that the breach of contract counterclaim fails to state a cause of action, the allegations, as contained in the counterclaim, must be accepted as true for the purpose of this CPLR 3211(a)(7) motion (see, 1455 Washington Ave. Assocs. v Rose & Kiernan, 260 AD2d 770). Those allegations are that, in essence, the parties entered into the CM and Completion Agreement regarding the Project and PMG failed to adhere to the agreements. TAG alleges that STI's liability stems from its guaranty under the CM Agreement and any limitation of liability in the Completion Agreement is the same as that in the CM Agreement. Consequently, STI is liable for PMG's nonperformance and/or breach of the aforesaid contract, and the delay, and TAG having to spend additional money that as yet cannot be fully ascertained, but it is believed will exceed \$30, 000, 000.

"It is well-settled that on a motion to dismiss a complaint 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 alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., *supra*; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, *supra*, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

It is clear that defendants' cause of action is for breach of contract. The elements of a cause of action for breach of contract include: "(1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages..." Rexnord Holdings, Inc. v Bidermann, 21 F3d 522, 525; First Investors Corp. V Liberty Mutual Ins. Co., 152 F3d 162. The Court finds that TAG has sufficiently stated a cause of action for breach of contract and set forth sufficient facts concerning this cause of action. Accordingly, the branch of the motion seeking to dismiss the breach of contract counterclaim pursuant to CPLR 3211 (a) (7) is denied.

Dated: December 20, 2007

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ORIN R. KITZES, J.S.C.