

**King Steel Iron Work Corp. v SDS Leonard, LLC**

2024 NY Slip Op 31312(U)

April 9, 2024

Supreme Court, Kings County

Docket Number: Index No. 517414/2021

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 9<sup>th</sup> day of April 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF  
NEW YORK COUNTY OF KINGS

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KING STEEL IRON WORK CORP.,  
Plaintiff(s)

-against-

Index No: 517414/2021  
Motion Seq. 5-6

**ORDER**

SDS LEONARD, LLC, BROOKLYN BUREAU OF COMMUNITY SERVICE d/b/a BROOKLYN COMMUNITY SERVICES f/k/a BROOKLYN BUREAU OF CHARITIES, 285 SCHERMERHORN, LLC, SWING STAGING LLC, INFINITE CONSULTING CORP., INFINITE SAFETY, QUALITY & CONSTRUCTION MANAGEMENT, INC., "ABC COMPANY No. 1" through "ABC COMPANY No. 100" and "JOHN DOE No. 1" through "JOHN DOE No. 100", said names being fictitious, true names being those unknown individuals and entities that may have an interest in the real property known as 285 Schermerhorn Street, Brooklyn, New York 11217, and designated on the Official Tax Map of the City of New York as Lots 1001 and 1002, Block 166,

Defendant(s)

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The following e-filed papers read herein:  
Notice of Motion/Petition/Affidavits Annexed  
Exhibits Annexed/Affirmation in Opposition.....  
Notice of Cross-Motion/Affirmation in Opposition  
Affidavits Annexed/Exhibits Annexed.....

NYSCEF Nos.:  
138-143; 164-176  
146-160

In this action, SDS Leonard, LLC ("SDS") and 285 Schermerhorn, LLC ("285 Schermerhorn") (Collectively "Defendants") move (Motion Seq. 5 for an order pursuant to CPLR 3211 dismissing Plaintiff's Third, Fourth, Fifth, and Sixth Causes of Action asserted in its Amended Complaint. Alternatively, Defendants move pursuant to CPLR 3004 extending the Defendants' time to file an Answer. Additionally, Plaintiff cross-moves (Motion Seq. 6) pursuant to CPLR 3124 and 3126 for an order directing the Defendants to provide complete responses to Plaintiff's December 2021 discovery demands and to authorize Plaintiff to make an application to strike the answers and counterclaims of the Defendants in the event they fail to comply. Defendants have opposed the motion.

This matter arises out of an alleged contractual agreement between Plaintiff and the Defendants.<sup>1</sup> By order dated September 25, 2023, the court granted Plaintiff's motion (Motion Seq. 3) to amend its complaint. On or about October 19, 2023, Plaintiff filed Notice of Entry for the September 25, 2023, order and its Amended Complaint. By email dated November 22, 2023, the parties agreed to extend the Defendants' time to file an answer or motion, to December 6, 2023. On or about December 6, 2023, Defendants filed this instant motion.

In support of its motion, Defendants argue that the Plaintiff's Third, Fourth, Fifth, and Sixth Causes of Action for an account stated, unjust enrichment, quantum meruit, and violation of the New York Prompt Payment Act should be dismissed because they are duplicative of the Plaintiff's Second Cause of Action for breach of contract. Defendants claim that these causes of action seek identical relief based upon the same facts and circumstances and are just alternative attempts to collect based on the alleged underlying contract. Additionally, Defendants states that General Business Law ("GBL") 756 requires that a contract equals or exceeds \$150,000.000 in order for there to be a violation of the New York Prompt Payment Act. In the alternative, Defendants request an extension of time to file an Answer to the Amended Complaint. Furthermore, Defendants argue that Plaintiff's cross-motion should be denied because a motion to dismiss stays discovery pursuant to CPLR 3214(b).

In opposition to Defendants' motion and in support of its cross-motion, Plaintiff argues that Defendants' motion is another attempt to delay discovery. Plaintiff states that Defendants have consistently refused to provide any responses or responsive materials to date as required by the Preliminary Conference Order. Plaintiff claims that its motion to amend the complaint was made solely to add as a party, the bond surety that Defendants engaged to bond Plaintiff's mechanic's lien. Plaintiff claims that all the causes of actions asserted were wholly identical to the claims asserted in the original complaint, which Defendants did not move to dismiss. Additionally, Plaintiff states that the Causes of Actions asserted are properly pled in the alternative, that there is no basis to dismiss them, and that because Defendants have failed to respond, that they have defaulted and waived any objections other than privilege or palpable impropriety of the demands.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a

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<sup>1</sup> Neither party has attached the alleged contractual agreement or letter of intent with their moving papers.

cause of action (*Leon v Martinez*, 84 N.Y.2d 83 88 [1994]; *Skefalidis v China Pagoda NY, Inc.*, 210 AD3d 925 [2d Dept. 2022]); *Oluwo v Sutton*, 206 AD3d 750 [2d Dept. 2022]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Eskridge v Diocese of Brooklyn*, 210 AD3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York*, 176 AD3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d [2005]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol v Leader*, 74 A.D.3d 1180 [2d Dept. 2010]; *Rovello v Orofino Realty Co. Inc.*, 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.*; *Sokol* at 1181). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*Id.*; *Rovello* at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boenheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due (*Michael B. Shulman & Associates, P.C. v Canzona*, 201 AD3d 716 [2d Dept. 2022]; *White Plains Cleaning Services, Inc. v 901 Properties, LLC*, 94 AD3d 1108 [2d Dept. 2012]; *Stephan B. Gleich & Associates v Gritsipis*, 87 AD3d 216 [2d Dept. 2011]). Although an account stated may be based on an express agreement between the parties as to the amount due, an agreement may be implied where a defendant retains bills without objecting to them within a reasonable period or makes partial payment on the account (*Canzona* at 717; *Citibank [South Dakota], N.A.*

*Abraham*, 138 AD3d [2d Dept. 2016]). An account stated is independent of the original obligation (*Citibank {S.D.} v Cutler*, 112 AD3d 573 [2d Dept. 2013]). A cause of action for an account stated may be plead in the alternative to a breach of contract claim, although the same damages cannot be recovered twice (*First Class Concrete Corp. v Rosenblum*, 167 AD3d 989 [2d Dept. 3018]; *Episcopal Health Servs., Inc. v POM Recoveries, Inc.*, 138 AD3d 917 [2d Dept. 2016]; *Nouveau El. Indus., Inc. v Glendale Condominium Town and Tower Corp.*, 107 AD3d 965 [2d Dept. 2013]). Thus, a claim for an account stated cannot be used to create liability where none otherwise exists nor may it be utilized simply as another means to attempt to collect under a disputed contract (see *M. Paladino, Inc. v J. Lucchese & Son Contr. Corp.*, 247 AD2d 515 [2d Dept. 1998; see also *Martin H. Bauman Assoc. v H & M Int. Transp.*, 171 AD2d [1st Dept. 1991]).

Here, the Plaintiff alleged, inter alia, that the Defendants retained and accepted, without objection, invoices setting forth the amounts owed for materials and services provided. Viewed in the light most favorable to the Plaintiff, the Amended Complaint sufficiently states a cause of action to recover on an account stated.

Accordingly, that branch of Defendants' motion to dismiss Plaintiff's Third Cause of Action for an account stated is denied.

To plead a cause of action for unjust enrichment, a plaintiff must allege that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Mobarak v Mowad*, 117 A.D.3d 998 [2d Dept. 2014]; *Mandarin Trading Ltd. v Wildenstein*, 16 N.Y.3d 173 [2011]). The elements of a cause of action for quantum meruit are (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefore, and (4) the reasonable value of the services (*Stephen B. Gleich & Associates v Grisipis*, 87 A.D.3d 216 [2d Dept. 2011]; *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 A.D.3d 6 [2d Dept. 2008]). In instances where the complaint contains two counts for the same services, one under contract and one under a theory of quasi-contract, the plaintiff is not compelled on motion in advance of the trial to elect upon which count he will proceed, since plaintiff is entitled to plead inconsistent causes of action in the alternative in instances where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute at issue (see generally CPLR § 3014; *Katcher v Browne*, 19 A.D.2d

744 [2d Dept. 1963]; *Gold v 29-15 Queens Plaza Realty, LLC*, 43 A.D. 3d 866 [2d Dept. 2007]; *Pickering v State*, 30 A.D.3d 393 [2d Dept. 2006]; *Perkins v Volpe*, 146 A.D.2d 617 [1989]; *Breslin Realty Dev. Corp. v 112 Leaseholds*, 270 A.D.2d 299 [2d Dept. 2000]; *Rubin v Cohen*, 129 A.D. 395 [1908]; see also *Joseph Sternberg, Inc. v Walber 36<sup>th</sup> Street Assoc.*, 187 AD2d 225 [1st Dept. 1993]). Additionally, in instances where a quasi-contract theory is used to seek recovery of the amount by which a defendant was enriched at a plaintiff's expense, rather than as an attempt to enforce an oral contract, it is not precluded by the statute of frauds (*Litvinoff v Wright*, 150 AD3d 714 [2d Dept. 2017]; *Kearns v Mino*, 83 AD2d 606 [2d Dept. 1981] citing *Friar v Vanguard Holding Corp.*, 78 AD2d 86 434 [2d Dept. 1981]; see also *Castellotti v Free*, 138 AD3d 198 [2d Dept. 2016]).

Accordingly, those branches of Defendants' motion to dismiss Plaintiff's Fourth and Fifth Causes of Action for unjust enrichment and quantum meruit are denied since there is a genuine dispute as to the existence of a contract and Plaintiff's Amended Complaint adequately states a cause of action for unjust enrichment, inter alia, paragraphs 43-51 and for quantum meruit quantum meruit, inter alia, paragraphs 52-62.

General Business Law 756-a states that it is the policy and purpose of this article to expedite payment of all monies owed to those who perform contracting services pursuant to construction contracts. Except as otherwise provided in this article, the terms and conditions of a construction contract shall supersede the provisions of this article and govern the conduct of the parties thereto (*Id.*; *In re Arbitration between Capital Siding & Constr., LLC*, 138 AD3d 1265 [3d Dept. 2016]). Under the statute, a construction contract is defined in part as "a written or oral agreement for the construction, reconstruction, alteration, maintenance, moving or demolition of any building, structure or improvement, or relating to the excavation of or other development or improvement to land, and where the aggregate cost of the construction project including all labor, services, materials and equipment to be furnished, equals or exceeds \$150,000.00 (GBL 785[1]).

The court notes that, while not addressed by the parties, the statute of frauds, which is codified in General Obligations Law 5-701, requires certain contracts to be in writing and signed by the parties bound by the agreement. Presently, because there are questions regarding the enforceability of the underlying contract in this matter, there is insufficient information before

the court to determine whether the alleged oral contract would be barred by the statute of frauds or other grounds at this time.

Accordingly, that branch of Defendants' motion to dismiss Plaintiff's Sixth Cause of Action for violation of General Business Law 756 is denied as Plaintiff's Amended Complaint adequately states a cause of action, inter alia, paragraphs 62-68.

Pursuant to CPLR 3124, if a party fails to respond or comply with any request, notice, interrogatory, demand or order under article 31 of the CPLR, the party seeking disclosure may move to compel compliance (see also CPLR 3126). Under CPLR 3214(b), Service of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise.

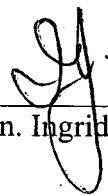
Accordingly, it is hereby,

ORDERED, that the Defendants' motion (Motion Seq. 5) to dismiss Plaintiff's Third, Fourth, Fifth, and Sixth causes of actions in its Amended Complaint, is denied, and it is further,

ORDERED, that Defendants shall file and serve an Amended Answer within 30 days of notice of entry of this order, and it is further,

ORDERED, that Plaintiff's motion (Motion Seq. 6) is granted to the extent that Defendants are to provide complete responses to Plaintiff's December 2021 discovery demands, including the production of all non-privileged materials responsive to the document requests, within 60 days, and Plaintiff may make an application to strike the answers and counterclaims of these Defendants in the event that they fail to comply.

This constitutes the decision and order of the court.



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Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**