

**Curtis Partition Corporation v Halpern Construction,
Inc.**

2005 NY Slip Op 30182(U)

February 3, 2005

Supreme Court, New York County

Docket Number: 0605923/2001

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK

PART 2

Justice

0605923/2001

CURTIS PARTITION
VS
HALPERN CONSTRUCTION

SEQ 2

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

FILED

PAPERS NUMBERED _____

FEB 10 2005

NEW YORK
COUNTY CLERKS OFFICE

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

RECEIVED
FEB 09 2005
IAS MOTION
SUPPORT OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2-3-05

Lly

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

LOUIS B. YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
CURTIS PARTITION CORPORATION,

Plaintiff,

-against-

Index No. 605923/01

HALPERN CONSTRUCTION, INC., 2 BROADWAY
LLC, 2 BROADWAY DEVELOPMENT LLC,
FREDERICK J. CONTINI, METROPOLITAN
TRANSPORTATION AUTHORITY, GENERAL
ACCIDENT INSURANCE COMPANY OF AMERICA,
CGU SURETY CLAIM, USI NORTHEAST
INCORPORATED, and XL SPECIALTY INSURANCE
COMPANY,

Defendants.

-----X

LOUIS B. YORK, J.:

Motion sequence number 001 and 002 are consolidated for disposition.

The plaintiff Curtis Partition Corporation (Curtis) moves, pursuant to CPLR 3212, for an order granting summary judgment (a) against the defendants Halpern Construction Co., Inc. (Halpern) and General Accident Insurance Company of America (General Accident), in the amount of \$295,491.23 , with interest and costs, for work performed pursuant to change orders, and purchase orders issued by Halpern; (b) against the defendants Halpern and General Accident, for damages in the amount of \$56,983.38 , with interest and costs, for work performed pursuant to field tickets signed by Halpern's construction superintendents on the job site; and (c) against the defendant General Accident, dismissing the statute of limitation defense, and other defenses, pleaded by General Accident in its answer.

FILED
FEB 10 2005
NEW YORK
COUNTY CLERK'S OFFICE

The defendants Metropolitan Transportation Authority (MTA) and 2 Broadway LLC (2 Broadway) move, pursuant to CPLR 3212, for an order granting summary judgment (1) against the plaintiff Curtis on its second cause of action contained in its complaint, and (2) against the defendant Halpern “on its second and third causes of action contained in its answer” (sic-cross claims).

The defendant Halpern cross-moves, pursuant to CPLR 305 (a) and 1003, for an order granting leave to add, as parties defendant to this action, the Triborough Bridge and Tunnel Authority (TBTA), the Long Island Railroad Company (LIRR), the New York City Transit Authority (NYCTA), and Metro North Commuter Rail Road (Metro North).

The defendant 2 Broadway, is the owner in fee, of the office building located at 2 Broadway in Manhattan. The non-moving co-defendant 2 Broadway Development LLC (Development), claims that it was the developer of a project to renovate the building. The building was to be occupied by the defendant MTA, and its related entities. In 1999, the defendant Halpern entered into two AIA owner/general contractor contracts with Development, to renovate the building’s bathrooms, and to build a mailroom. Halpern subcontracted with the plaintiff Curtis to perform the carpentry work. Halpern claims that it never received payment on its final application and certification for payment, and as a result Halpern has filed two separate mechanic’s liens against the premises, one in the amount of \$403,743.13 for the work performed under the bathroom agreement, and one in the amount of \$138,677.00 for the work performed under the mailroom agreement. Curtis claims that it fully performed under the subcontract, but that it never received payment on the final application and certification for payment.

The court will first dispose of Curtis’ motion for summary judgment, before turning to

the MTA and 2 Broadway's motion for summary judgment, and Halpern's cross motion to add parties.

In support of its motion for summary judgment the plaintiff Curtis makes the following arguments. Halpern and General Accident are liable to the plaintiff Curtis for the work performed pursuant to the purchase orders and change orders issued by Halpern. Halpern and General Accident are liable to the plaintiff Curtis for the field ticket work performed in reliance upon the express authorization of Halpern's representatives. The parties have been unable to locate a written subcontract between Halpern and Curtis. General Accident's assertion of the statute of limitations defense, is devoid of merit, because Curtis commenced suit within the time required.

In opposition to Curtis' motion for summary judgment, Halpern and General Accident make the following arguments in their memorandum of law. The instant dispute is simply about how much is owed to Curtis. Curtis' field tickets do not constitute approved change order work. There is no evidence that Halpern intended to waive the terms of the purchase order, requiring signed change orders for additional work.

In reply, Curtis makes the following arguments. General Accident fails to oppose Curtis' motion to dismiss defenses. Halpern's issuance of a change order constituted Halpern's acceptance that Curtis' work was properly done, and that the amount charged was reasonable. The owner/developer approved the full amount of Halpern's final requisition, including all of Halpern's change orders. Curtis is entitled to summary judgment in the full amount of all of the change orders, as revised in the reply, i.e. \$291,181.23. Curtis is also entitled to partial summary judgment for the field ticket work, because Halpern's project manager authorized the work, and

no written contract has been located which requires either a purchase order, or change order.

The 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 eliminate any material issue of fact from the case (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]).

Here, the plaintiff Curtis has met its burden on this summary judgment motion of demonstrating its prima facie entitlement to judgment as a matter of law and the absence of any material issue of fact (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Curtis submitted evidence sufficient to establish that a contract had been entered into between Curtis and the defendant Halpern, that the work and materials that were the subject of this lawsuit were supplied by Curtis to Halpern, and that no payment was tendered. In response, Halpern's argument, that the absence of a change order, from Halpern to Curtis, demonstrates that the parties had not agreed on a monetary amount for the work, did not meet Halpern's burden of demonstrating the existence of a triable issue of fact, because it is undisputed that the parties are unable to locate a written contract setting forth a requirement that Halpern issue a signed change order as a prerequisite to liability.

Furthermore, not only did Halpern never question the dollar amount due for Curtis' work, Halpern fully endorsed the amount due by including the subject additional work in Halpern's final payment requisition to the MTA and 2 Broadway. Thus, contrary to Halpern's assertion, the instant dispute is not simply about how much is owed to Curtis.

Finally, General Accident's payment bond guarantees that Halpern will be paid for the work performed and the materials provided to the project, and General Accident fails to oppose the motion to dismiss its statute of limitations defense.

Turning to the MTA and 2 Broadway's motion for summary judgment dismissing both Curtis' second cause of action, and Halpern's cross claims (second and third causes of action), the MTA and 2 Broadway make the following arguments. Halpern did not have a contract with either the MTA or 2 Broadway. Rather, Halpern had a contract with the co-defendant Development. A party to a construction contract cannot recover from an owner on a quasi-contractual theory, unless the owner has obligated itself to pay for the improvements. A claim for unjust enrichment, cannot be maintained in the face of a fully performed written contract that covers the dispute. Halpern did not have 2 Broadway's consent to the performance of the work, required under the Lien Law. The MTA directed the work only as agent for its related agencies, which were to be the tenants of the building.

In opposition to the motion, the plaintiff Curtis makes the following arguments. The MTA's participation in the construction process through its construction manager, approval of purchase orders and change orders, and withholding of payments due Curtis, entitles Curtis to pursue a quantum meruit claim against the MTA. Curtis has a claim against the MTA for unjust enrichment, to the extent that the MTA continues to hold retainage that would otherwise be paid

[* 7]
to Curtis.

Also in opposition to the motion, the defendant Halpern makes the following arguments. Halpern's work, under its bathroom and mailroom agreements with Development, was intended to be part of the scope of work delineated in a separate coordinating and monitoring agreement entered between the MTA and 2 Broadway. The coordinating and monitoring agreement was specifically referenced in Halpern's agreements with Development. Pursuant to well settled principles of agency law, the MTA is liable to Halpern, because it was the true party in interest to Halpern's agreements with Development. Equity imposes a duty to pay. 2 Broadway's consent under the Lien Law is implied. The MTA had the only say in whether Halpern got paid at all. Every single check that came to Halpern for the work, came from the MTA.

In reply, the MTA and 2 Broadway make the following arguments. The existence of a valid and enforceable contract precludes Halpern's and Curtis' recovery in quasi contract. The MTA never expressly consented to pay for Halpern's work. The MTA did not receive any benefit from either Halpern's or Curtis' work.

Here, Halpern's performance, pursuant to a valid written agreement between itself and Development, the scope of which clearly covers the dispute, precludes any recovery by Halpern in quasi contract (Clark-Fitzpatrick v Long Island Railroad Company, 70 NY2d 382 [1987]). Therefore, the MTA and 2 Broadway's motion to dismiss Halpern's second cause of action against them, must be granted.

However, the motion to dismiss Halpern's third cause of action, seeking to foreclose its mechanic's lien, must be denied. In order for a contractor, who performs labor, or furnishes materials for the improvement of real property, to have a lien for the value of such labor, it is

necessary that the owner consent to the furnishing of the labor and materials (Lien Law § 3). An owner may be deemed to have consented, where some affirmative act, or course of conduct, establishes confirmation (GCDM Ironworks, Inc. v GJF Construction Corp., 292 AD2d 495 [2d Dept 2002]). In the instant case there is a triable issue of material fact concerning whether 2 Broadway may be deemed to have consented to Halpern's work. The facts demonstrate a course of conduct and affirmative acts, including the existence of the coordinating and monitoring agreement, tending to establish confirmation. Therefore, the motion for summary judgment dismissing Halpern's third cause of action to foreclose the lien, must be denied.

The motion for summary judgment dismissing Curtis' second cause of action for quantum meruit and quasi contract must be granted. As stated above, the existence of the AIA owner/general contractor agreement, between Halpern and Development, precludes any recovery in quasi contract.

Finally, the defendant Halpern's cross motion, pursuant to CPLR 305 (a) and 1003, for an order granting leave to add, as parties defendant to this action, the TBTA, the LIRR, the NYCTA, and Metro North, is denied with leave to renew on proper papers, including a copy of the preliminary conference order, demonstrating that the motion to add parties was timely made (Brill v City of New York, 2 NY3d 648 [2004]).

Accordingly, it is

ORDERED that Curtis' motion is granted and the Clerk of the Court is directed to enter judgment in favor of the plaintiff Curtis Partition Corporation and against the defendants Halpern Construction Co., Inc. and General Accident Insurance Company of America in the total amount of \$348,164.61, together with interest as prayed for allowable by law at the rate of 4% per annum

(Public Authorities Law § 1276 [5]) from the date of May 5, 2000 until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that General Accident's affirmative defense of statute of limitations is dismissed; and it further

ORDERED that the defendants Metropolitan Transportation Authority and 2 Broadway LLC's motion for summary judgment is granted to the extent that Curtis' second cause of action, and Halpern's second cause of action, are severed and dismissed as against the defendants Metropolitan Transportation Authority and 2 Broadway LLC, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that Halpern's cross motion to add parties is denied with leave to renew on proper papers.

Dated: 2/3/05

Enter:

Ley
J.S.C.

LOUIS B. YORK

FILED
FEB 10 2005
NEW YORK
COUNTY CLERKS OFFICE