

Shiny Constr. Inc. v 261 Fifth Ave., LLC

2007 NY Slip Op 30670(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0113576/2005

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 113576/2005
SHINY CONSTRUCTION
vs
261 FIFTH AVENUE
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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


**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION**

FILED

APR 12 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/5/07



J.S.C.
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

-----X
SHINY CONSTRUCTION INC.,

Plaintiff,

-against-

Index № 113576/05

261 FIFTH AVENUE, LLC, MICHAEL KUO CORP.
and POWERS CHANG,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

FILED
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This is a motion by defendant 261 Fifth Avenue, LLC (261 Fifth LLC) for an order
pursuant to CPLR 3212, dismissing the action as against it.

Plaintiff Shiny Construction Inc. (Shiny) commenced an action to recover sums it claims
it is owed as a result of a Subway sandwich shop build-out construction project it was involved
with at 261 Fifth Avenue, New York, New York (the Building). The relevant facts, as previously
stated by this court, are that defendant Powers Chang (Chang) sublet space for his Subway
sandwich shop from non-party Subway Real Estate Corp. which leased the premises from then
Building owner, non-party SMII Fifth Avenue LLC (SMII).

The space needed to be renovated, or "built-out," to accommodate the shop, and in or
about November 2002, Chang contracted with defendant Michael Kuo Corp. (Kuo) to be the
general contractor for his Subway build-out. However, Chang's sublease mandates the use of
union labor and Kuo was not a union employer. Consequently, Shiny, a union employer, was
brought in, in or about March of 2003, to perform much of the construction work in Kuo's stead.
According to Shiny, Kuo assumed the position of construction manager and Shiny agreed to
finish the build-out project for an initial contract price of \$185,080.00, plus two change orders in

the amounts of \$38,115.00 and \$3,720.00 respectively. According to Shiny, it performed the general construction work, providing labor and materials as agreed, but has only been paid \$158,000.00, leaving a balance due and owing in the amount of \$68,915.00.

Consequently, in or about September 2004, Shiny commenced the instant action sounding in breach of contract, unjust enrichment, and for lien foreclosure in its attempt to recoup moneys allegedly owed. Shiny named movant, Kuo, Chang as defendants in the action. 261 Fifth LLC's involvement stems from its purchase of the Building in 2004. More precisely, SMII conveyed title to the Building pursuant to a bargain and sale deed, dated February 11, 2004, to 261 Fifth LLC.

Prior motion practice in this action resulted in this court's prior order, dated August 18, 2006, which, among other things, dismissed plaintiff's cause of action for lien foreclosure and vacated the Notice of Pendency.

Currently before this court is the motion by 261 Fifth LLC for an order dismissing the only cause of action against it, that of unjust enrichment. Plaintiff's theory of liability against this defendant is that, regardless of whether it requested the work (and materials), 261 Fifth LLC had constructive notice of the build-out and has reaped the benefits accruing from plaintiff's work.

However, Shiny's cause of action for unjust enrichment/quasi contract lacks merit and must be dismissed.

[T]o recover under a theory of quasi contract, a plaintiff must demonstrate that services were performed *for the defendant* resulting in its unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery

(Kagen v K-Tel Entertainment, Inc., 172 AD2d 375, 376 [1st Dept 1991] [internal citations omitted; emphasis in the original]). It is undisputed that 261 Fifth LLC was not the owner of the Building on the date that the last work was completed, and contrary to Shiny's argument, any due diligence conducted by 261 Fifth LLC would not have necessarily revealed notice of Shiny's claim because the lien was filed some seven months after title had passed from SMII to 261 Fifth LLC. Moreover, there is no evidence that plaintiff either entered into a contract with 261 Fifth LLC, or performed any of the work *for* 261 Fifth LLC. Nor has plaintiff established that it was a third party beneficiary of the deed covenant with respect to compliance with Section 13 of the Lien Law which addresses lien priorities, but which does not create liability where no liability previously existed (see Wildman & Bernhardt Constr., Inc., 273 AD2d 38 [1st Dept 2000]); Ellis Chingos Constr. Corp. v Carlton Properties, Inc., 30 Misc2d 883 [Special Term, Queens County 1961]).

Defendant has, accordingly, demonstrated its entitlement to summary judgment, thereby shifting the burden to plaintiff to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). To this end, plaintiff offers only "mere conclusions, expressions of hope and unsubstantiated allegations" which are insufficient to defeat the motion (id.).

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is severed and dismissed as against defendant 261 Fifth Avenue, LLC, and the Clerk is directed to enter judgment in favor of this defendant with costs and disbursements as taxed by the Clerk; and

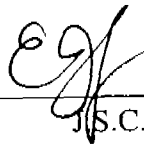
it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: April 4, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
APR 12 2007
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